Federal Court  Cour fédérale

Date: 20221014

Docket: T-860-21

Citation: 2022 FC 1404

Toronto, Ontario, October 14, 2022

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

IRIS TECHNOLOGIES INC.

Applicant

and

THE MINISTER OF NATIONAL REVENUE AND THE OFFICE OF THE INFORMATION COMMISSIONER OF CANADA

Respondents

JUDGMENT AND REASONS

[1] This decision relates to two motions, one brought by each Respondent, to strike the application of Iris Technologies Inc [Iristel].

[2] The underlying application involves a request for disclosure made by Iristel pursuant to the *Access to Information Act*, RSC, 1985, c A-1 [ATIA], for all of the Canada Revenue Agency's [CRA's] GST/HST audit, assessment, reassessment and collections records relating to

Iristel for the period between January 1, 2017 and May 31, 2020, and the alleged failure of the Office of the Information Commissioner of Canada [OIC] to advance or conclude its investigation into Iristel's complaint in relation thereto. The application seeks an order requiring the Minister of National Revenue [Minister] to produce the requested disclosure and for the OIC to order production thereof.

[3] For the reasons that follow, I find that it is plain and obvious that the application cannot succeed as it is premature and requests relief that is beyond the jurisdiction of the Court. As such, the motions will be granted and the application struck.

I. **Background**

[4] On April 21, 2020, Iristel filed requests for disclosure under the ATIA for its GST/HST returns, audit, assessment, reassessment and collection records for the cumulative reporting period spanning from January 1, 2017 to March 31, 2020. Four requests were filed, each covering a different portion of the cumulative reporting period as follows: 1) (A-2020-119232), 2017/2018 reporting period; 2) (A-2020-119229), January 1, 2019 – November 30, 2019 reporting period; 3) (A-2020-119228), December 1, 2019 – December 31, 2019 reporting period; and 4) (A-2020-119227), January 1, 2020 – March 31, 2020 reporting period.

[5] On August 10, 2020, Iristel filed a complaint with the OIC as at the time it had not received any responses to its requests for disclosure. The nature of the complaint was described as "delayed response to [the Applicant's] request". In response to the question of what would

resolve the complaint, the Applicant stated that "[i]f disclosure cannot be compelled within a reasonable time, an application to the Federal Court will be made."

[6] On April 12, 2021, Iristel received a response and production from the Minister relating to the A-2020-119232 disclosure request for the audits of the 2017 and 2018 taxation years.

[7] On May 26, 2021, Iristel filed the present application.

[8] Between August and September 2021, Iristel received responses and production from the Minister relating to the remainder of the disclosure requests.

II. **Preliminary Issue**

[9] As a preliminary matter, both the Applicant and OIC seek to file evidence on the motions relating to background facts and exchanges between the parties that have occurred since the notice of application and motions were filed.

[10] Iristel's evidence includes an affidavit from Samer Bishay, Founder and Chief Executive Officer of Iristel. Mr. Bishay seeks to attach: a copy of a disclosure received from the Minister for the January 1, 2020 to March 31, 2020 reporting period; an alleged "T2020 memoranda" it asserts was omitted from the Minister's disclosure for the 2017 and 2018 reporting periods; and copies of Iristel's four disclosure requests, the August 10, 2020 complaint, and email exchanges between the OIC and Iristel's counsel from March, 2021 and April 2021.

[11] On March 30, 2022, Iristel was granted leave through case management to introduce a second affidavit from Mr. Bishay as evidence on this motion. The second affidavit included copies of the records received from the CRA to what was described at the hearing of the motion as a further access to information and privacy request [ATIP request] for documents from the directorate's files relating to Iritsel's original disclosure requests. The records produced in response to this second ATIP request included responses to the remaining disclosure requests.

[12] As it is clear that the facts set out in the notice of application have evolved since the document was filed, I see no prejudice in allowing the first Bishay affidavit into evidence for the same reason as the second Bishay affidavit was allowed; to allow a full documentary record to be before the Court. In particular, at the time the motions were brought, the Minister had only responded to one of the Applicant's disclosure requests. However, at the time of the hearing of the motion, the Applicant had received responses from the Minister to all four requests as noted above. Both affidavits append documents that provide additional background and updates with respect to the surrounding facts relevant to the issues on the motion.

[13] The evidence submitted by the OIC includes an affidavit from Mylène Smith, Manager and temporary Lead of a team of investigators in the Investigations and Governance Sectors at the OIC handling the Applicant's complaint. This evidence seeks to provide additional background on certain follow-up correspondence between the parties arising from the disclosure made in April 2021. The affidavit also seeks to confirm that there were no additional formal complaints received from Iristel in addition to the complaint made in August 2020. While I do not consider this affidavit to add anything significant to the factual context already established, I

will nonetheless admit the evidence (whose admissions does not appear to be disputed by Iristel) as background information in the same vein as the Bishay affidavits.

III. **Analysis**

[14] The legal test on a motion to strike an application is well established. The threshold for striking a notice of application is high: the Court will strike a notice of application for judicial review only in exceptional circumstances where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA), at 600.

[15] As summarized in *JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 [*JP Morgan*] at paragraph 47, "[t]here must be a "show stopper" or a "knockout punch" an obvious, fatal flaw striking at the root of the Court's power to entertain the application: *Rahman v Public Service Labour Relations Board*, 2013 FCA 117 at para 7; *Donaldson v Western Grain Storage By-Products*, 2012 FCA 286 at para 6; *Hunt v Carey Canada Inc*, [1990] 2 SCR. 959." In applying this standard, a court is to read the application holistically and realistically with a view to determining the real essence of the application: *JP Morgan* at para 50; *Canada (Attorney General) v Iris Technologies Inc*, 2022 FCA 101 at para 2.

[16] In this case, the essential character of the underlying application as against the Minister is for disclosure of the requested information and as against the OIC *mandamus*, requiring the OIC to order the disclosure of the information requested by the Applicant.

[17] The overriding issue on these motions is whether it is plain and obvious that these requests cannot succeed.

[18] Both the Minister and the OIC argue that the application is premature because it seeks to bypass the administrative process under the ATIA that governs the handling of access to information complaints to the OIC. The OIC contends that the Applicant has only complained about the Minister's failure to respond to its access requests and not about the content of the Minister's responses, and it is only the latter that enables the OIC to investigate the disclosure made. Similarly, the Minister argues that any request for disclosure from the Court can only arise from judicial review of a report from the OIC, where the OIC has investigated a complaint of alleged insufficiency of disclosure, or improper refusal to disclose. The Respondents further assert that Iristel cannot obtain an order of *mandamus* that dictates the OIC to exercise its discretion in a particular way.

[19] The Applicant contends that the Minister has a duty to provide access to the requested information within statutory timelines. Where it has not done so, an applicant may raise a complaint with the OIC to investigate and obtain disclosure. The Applicant asserts that the OIC has failed to investigate its complaint and, as such, the Court may compel the OIC to exercise its duty and to require that full disclosure be made by the Minster through judicial review. It further argues that as significant portions of the requested disclosure was not produced, effectively there has been no disclosure.

[20] The arguments raised by the parties boil down to the following sub-issues: a) is the application premature? and b) is the relief requested outside the jurisdiction of the court?

A. *Is Iristel's application premature?*

[21] Subsection 4(1) of the ATIA provides for the right of Canadians to be given access, on request, to any record under the control of a government institution, subject to certain exemptions which are set out in sections 13-26.

[22] Where a request for access to government records is made, section 7 of the ATIA requires the head of the government institution to, within 30 days of the request, and subject to conditions where transfer of a request or an extension of the time limit applies: (a) give written notice to the person who made the request as to whether or not access to the record, or part of the record, will be given; and (b) if access is to be given, give the person who made the request access to the record, or the part to be provided.

[23] The failure of the head of a government institution to respond to a request for disclosure within the time limit prescribed, constitutes a deemed refusal by the head of the institution to give access: ATIA s 10(3).

[24] Where production has been refused either by notice or by deemed refusal, the person who made the request may make a complaint to the OIC: ATIA s 30.

[25] In this case, a complaint was filed by Iristel because no response had been provided to its disclosure requests. As the time limit prescribed by section 7 of the ATIA had passed, there was a deemed refusal under subsection 10(3).

[26] Iristel argues that the complaint it filed on August 10, 2020 included both a complaint based on the deemed refusal to respond to the disclosure requests, as well as a complaint based on inadequacy of disclosure.

[27] However, at the time of the complaint, no disclosure had been made by the Minister. I agree with the Respondent, the only basis for the complaint could have been the deemed refusal as actual refusal of the documents had not occurred. Indeed, this was the sole reason given in the complaint document.

[28] It was only after responses were received to the production requests that specific deficiencies in the production could form a complaint.

[29] As noted by the OIC, where a complaint is made to the OIC in respect of a deemed refusal, the OIC is required to investigate why there has been no response. The OIC is not in a position to investigate whether requested documents should be disclosed or to order disclosure because the content of the institution's response to the access request is not yet known: *Canada (Information Commissioner) v Canada (National Defence)*, (1999) 166 FTR 277 (FCA) at paras 24-28.

[30] In *Statham v Canadian Broadcasting Corporation*, 2010 FCA 315 [*Statham*], the Federal Court of Appeal considered the OIC's duty to investigate in the context of a deemed refusal. It held that the OIC was entitled to use its discretion to limit its investigation relating to a deemed refusal to recommending a time-frame in which a government institution is to respond to the access request. As stated at paragraphs 39-41 of *Statham*:

> [39] In my view, the Judge was correct in his view that the Commissioner was entitled in her discretion to limit her investigation. Section 34 of the Act confers upon the Commissioner the power to "determine the procedure to be followed in the performance of any duty or function of the Commissioner under this Act." While this power is expressed to be "[s]ubject to this Act," there is nothing in the Act that suggests the Commissioner is required in every case to investigate and assess a government institution's claimed exemptions or exclusions before the Commissioner can report that in her view the government institution is deemed to have refused access. As the Commissioner points out, such a requirement would have significant resource implications for her office.
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> [40] Support for the view that the Commissioner may limit her investigation is found in the reasons of this Court in Minister of National Defence. There, the Commissioner had received a complaint with respect to a deemed refusal of access and proceeded to investigate the complaint in the same manner as in the present case. At paragraph 21 of its reasons, the Court wrote:
>
> > 21. In the instant case, as soon as the institution failed to comply with the time limit, the Commissioner could have initiated his investigation as if there had been a true refusal. He does have powers to investigate including, at the beginning of an investigation, the power to compel the institution to explain the reasons for its refusal. The Commissioner, who is master of his procedure pursuant to section 34 of the Act, chose another approach. He hoped to persuade the institution to voluntarily give the notice required under sections 7 and 10. He tried to transform, as it were, what was then a deemed refusal into a true refusal. For all practical purposes, he split his investigation into two parts, initially trying to get an answer from the

> institution, so he could then consider the merits of whatever answer might be provided.
>
> [Emphasis added.]
>
> [41] Implicit in this passage, and in the reasons of the Court in their entirety, is the affirmation of the right of the Commissioner to limit her investigation of a deemed refusal. The Commissioner may confine her investigation to recommending a time frame in which a government institution is to respond to the access request. Such an approach will result, at the end of the day, in the government institution giving the notice required under sections 7 and 10 of the Act. If at that time access is not provided, the institution's response will enable the access requester to consider whether to lodge a further complaint with the Commissioner.

[31] In this case, the OIC has not formally responded to Iristel's complaint. However, the Minister provided responses to the Applicant's requests subsequent to the complaint being filed. In doing so, in my view, it rendered the Applicant's complaint, which was premised on there being no response by the Minister, moot: *Sheldon v Canada (Health)*, 2015 FC 1385 [*Sheldon*] at para 20.

[32] In each of the four responses provided by the Minister, the responding letter indicated that some information had been removed or redacted from the production made pursuant to one or more of subsections 16(2), 19(1), 24(1) and paragraph 16(1)(c) of the ATIA. It further advised that if Iristel was dissatisfied with a response, it could file a complaint with the OIC within 60 days and it provided information as to how to submit such a complaint. The OIC was copied with the responses.

[33] No further complaint was filed by the Applicant as to the content of the Minister's responses.

[34] As a general rule, absent exceptional circumstances, a Court should refuse to hear a judicial review application unless all administrative processes have been exhausted: *Peters First Nation Band Council v Peters*, 2019 FCA 197 [*Peters*] at para 37.

[35] The Court has discretion to refuse to hear an application for judicial review if it is satisfied that adequate alternative relief is available through the administrative process: *Strickland v Canada (AG)*, 2015 SCC 37 [*Strickland*] at para 40. A number of factors are relevant to determining whether an alternative remedy or forum is adequate, including (*Strickland* at para 42):

> …These considerations include the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost.

[36] Neither the process nor the remedy need be identical for it to be adequate, provided that the alternative remedy is "adequate in all the circumstances to address the applicant's grievance": *Strickland* at para 42.

[37] In this case, a process exists under the ATIA to file a complaint in respect of the disclosure now made. However, Iristel has not properly engaged that process for the complaint it now has.

[38] Subsection 41(1) of the ATIA provides for a right of judicial review of the OIC's report to a complaint where three conditions are met: 1) the applicant has been refused access to a

requested record; 2) the applicant complained to the OIC about the refusal; and 3) the applicant received a report of the OIC under subsection 37(2) of the ATIA. Judicial review can only be brought after the OIC has investigated and reported on the relevant complaint: *Whitty v Canada (Attorney General)*, 2014 FCA 30 at para 8. The ATIA does not provide a right of judicial review where an investigation into a complaint has not been sought as there would, in that case, be no decision or report to review: see *Canada (Public Safety and Emergency Preparedness) v Gregory*, 2021 FCA 33 at para 8 with respect to the corresponding provision of the *Privacy Act*, RSC, 1985, c P-21.

[39] As stated at paragraph 22 of *Sheldon*:

> ...In a review proceeding initiated under section 41 of the Act on the basis of a complaint of a deemed refusal, the Court cannot rule upon the application of any exemption or exclusion claimed under the Act if the Commissioner has not investigated and reported on the claim to the exemption or exclusion (*Statham*, above at para 55; *Whitty*, above, at paras 8 and 9, *Lukàcs v Natural Sciences and Engineering Research Council of Canada)*, 2015 FC 627, at para 31).

[40] The role of the Court is one of last resort (*Peters* at para 37); its purpose is not to engage in a merits-based determination of the veracity of the disclosure made, nor does it have the same expertise as the OIC to do so.

[41] Iristel contends that the time for response of its initial requests has been lengthy. It pleads that its initial complaint remains outstanding. It asserts that this inordinate delay creates the type of exceptional circumstance that justifies its judicial review.

[42] However, as noted by the Minister, the time needed to respond to the original requests was complicated by the CRA's ongoing audit of Iristel. There is insufficient evidence before me to draw any conclusions as to the time it would take for investigation of a further complaint of the disclosure, as the process in respect of that type of complaint has not been engaged.

[43] As stated in *Fortin v Canada (Attorney General)*, 2021 FC 1061, it is premature to assume that a remedy cannot be provided through the administrative process when the Applicant has not taken advantage of it (at para 45).

[44] In my view, the present application is a premature request to short-circuit the administrative process. The remedies sought by the Applicant are available through the ATIA and would benefit from the process available.

B. *Is the relief requested on the application beyond the jurisdiction of the Court?*

[45] Further, I agree with the Respondents that the Court cannot grant the relief requested as *mandamus* cannot be sought to compel the exercise of discretion in a particular way: *Canada (Chief Electoral Officer) v Callaghan*, 2011 FCA 74 at para 126. As summarized by my colleague Justice Grammond in *Doshi v Canada (Attorney General)*, 2018 FC 710 at paragraphs 92-93:

> [92] Mandamus is only available in specific circumstances. Typically, mandamus will issue only if the respondent has a non-discretionary duty to act (*Apotex Inc v Canada (Attorney General)*, 1993 CanLII 3004 (FCA), [1994] 1 FC 742 (CA) at 766-769 [Apotex], affirmed 1994 CanLII 47 (SCC), [1994] 3 SCR 1100). Where the power involved is discretionary, respect for the autonomy of the executive branch of government normally

> requires that the reviewing court limit itself to quashing the impugned decision. As Justice Yves de Montigny of the Federal Court of Appeal said in *Canada (Citizenship and Immigration) v Yansané*, 2017 FCA 48 at para 15 [*Yansané*]:
>
> > In general, the role of a superior court in a judicial review of an administrative decision is not to replace the administrative decision-maker's decision with its own decision; rather, its role is limited to verifying the legality and reasonableness of the decision rendered, and to returning the file to the same decision-maker or another decision-maker in the same organization if it finds that an error was made and that the decision was illegal or not within the range of possible, acceptable outcomes in respect of the facts and the law […].
>
> [93] Thus, *mandamus* cannot be used to force the exercise of discretion in a particular way (*Apotex* at 768; *Canada (Health) v The Winning Combination Inc.*, 2017 FCA 101 [*Winning Combination*]). Nevertheless, courts have issued mandamus where there is only one reasonable outcome (see, for example, *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at paras 150-151, [2011] 3 SCR 134; see also, *a contrario*, *Winning Combination* at para 75).

[46] Subsections 36.1(1) and (3) of the ATIA, outline the OIC's discretion to make any order, with any conditions it considers appropriate, in respect of a complaint for production of records where it considers the complaint to be well-founded:

Power to make order	**Pouvoir de rendre des ordonnances**
36.1 (1) If, after investigating a complaint described in any of paragraphs 30(1)(a) to (e), the Commissioner finds that the complaint is well-founded, he or she may make any order in respect of a record to which this Part applies that he or she considers appropriate, including requiring the head of the government institution	**36.1 (1)** À l'issue d'une enquête sur une plainte visée à l'un des alinéas 30(1)a) à e), le Commissaire à l'information peut, s'il conclut au bien-fondé de la plainte, rendre toute ordonnance qu'il juge indiquée à l'égard d'un document auquel la présente partie s'applique, notamment ordonner au responsable de

that has control of the record in respect of which the complaint is made	l'institution fédérale dont relève le document :
(a) to disclose the record or a part of the record; and	**a)** d'en donner communication totale ou partielle;
(b) to reconsider their decision to refuse access to the record or a part of the record.	**b)** de revoir sa décision de refuser la communication totale ou partielle du document.
[…]	[…]
Condition	**Conditions**
(3) The order may include any condition that the Information Commissioner considers appropriate	**(3)** L'ordonnance peut être assortie des conditions que le Commissaire à l'information juge indiquées.

[47] Iristel asserts that despite the language of subsections 36.1(1) and (3), there is only one reasonable exercise of the OIC's discretion in this case. It further asserts that *mandamus* is available where the OIC refuses to carry out an investigation in response to a complaint or unreasonably delays in doing so. It cites *Coderre v Canada (Information Commissioner)*, 2015 FC 776 [*Coderre*] as support of its argument. However, I do not find *Coderre* supportive.

[48] In *Coderre*, the applicants were seeking a writ of *mandamus* to order the OIC to disclose the report of its findings from investigations into the applicants' complaints under the ATIA after the CRA refused to disclose certain records that were requested. The request involved section 37 of the ATIA and the OIC's reporting duty. The applicants were not seeking, as in this case, to

compel the OIC to order a specific result of their complaint under section 36 of the ATIA. Thus, *Coderre* did not involve an order of *mandamus* to compel an exercise of discretion.

[49] Further, while *Coderre* discussed the issue of delay, it did so in the context of the relief requested in that application –*i.e*., a request for disclosure of the OIC's report on its investigations of the applicants' complaints to the Minister's disclosure – and on the basis of evidence from the parties as to timing. There is no such evidence before the Court in this case.

[50] Further, the facts alleged do not support the Applicant's argument as the order of *mandamus* requested is broader than the complaint made.

[51] As set out earlier, the complaint made by the Applicant was in respect of a failure to respond to its requests for disclosure. This complaint was effectively rendered moot by the responses later provided. As there was never any formal complaint relating to the nature of the disclosures made, there can be no outstanding investigation relating to such a complaint pending.

[52] Even if the complaint could be viewed as something broader, the circumstances of this matter do not support that there is only one reasonable exercise of the OIC's discretion.

[53] The records in issue include tens of thousands of documents. It cannot be concluded that the OIC would find the complaint to be well-founded or that it would order, as a result, that blanket disclosure should be made.

[54] Indeed, it is inconceivable that the Court could grant the relief requested without any knowledge of the documents requested and without the benefit of the expertise of the Minister, and in turn the OIC's review, as to the scope and content of the available records.

[55] As there is no foundation for the relief requested, it is plain and obvious that the application cannot succeed.

[56] For all of these reasons, the motions are granted and the application shall be struck in its entirety.

IV. **Costs**

[57] Iristel asserted that if it did not succeed on the motions, there should be no costs awarded.

[58] The Respondents asserted that costs should be awarded under the normal course, at the middle of column III of Tariff B. As each responding party filed their own motion, they asserted that this would amount to $2,500 each.

[60] I agree that the Respondents' request is appropriate in the circumstances and accordingly, such an award shall follow.

JUDGMENT IN T-860-21

THIS COURT'S JUDGMENT is that:

1. The motions are granted and the notice of application is struck in its entirety.

2. The Respondents are each granted costs in the amount of $2,500.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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