Federal Court of Appeal | Cour d'appel fédérale

Date: 20211122

Docket: A-164-21

Citation: 2021 FCA 223

CORAM: **RENNIE J.A.**
LASKIN J.A.
MACTAVISH J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

IRIS TECHNOLOGIES INC.

Respondent

Heard by online video conference hosted by the Registry on October 21, 2021.

Judgment delivered at Ottawa, Ontario, on November 22, 2021.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: LASKIN J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] Iris Technologies Inc. filed a notice of application for judicial review of the decision of the Minister of National Revenue refusing its application for a payment under the Canada Emergency Wage Subsidy (CEWS), an element of the Government of Canada's response to COVID-19. The Minister moved to strike the application for judicial review. The Prothonotary dismissed the motion (*per* Prothonotary Aalto, Federal Court docket T-1010-20, 5 March 2021),

a decision which was upheld on appeal to the Federal Court (Southcott J., 2021 FC 526). The Minister now appeals to this Court.

[2] The basis of the motion to strike is the Minister's contention that as the determination that Iris did not qualify for the CEWS was made pursuant to section 125.7 of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (ITA), section 18.5 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, mandates that the Tax Court, and not the Federal Court, had the jurisdiction to review the validity of the determination. The Minister also contends that Iris had an adequate alternative remedy available through the statutory objection and appeals process of the ITA and, further, that the application was moot because the notice of determination has been issued.

[3] In response, Iris contends that the application targets the conduct of the Minister in exercising a discretion granted under the CEWS, a proposition that found favour with both the Prothonotary and the Federal Court. Iris asserts that the decision is procedurally unfair, an abuse of process and that the Minister improperly considered related proceedings between it and the Minister involving GST/HST rebates. Only the Federal Court, and not the Tax Court, has the jurisdiction to consider these allegations.

[4] I am of the view that the appeal ought to be allowed and that the notice of application should be struck.

I. **Facts**

[5] The CEWS was a critical component of the Government of Canada's response to the economic consequences of COVID-19. It was established through amendments to the ITA (amended by Bill C-14, *A second Act respecting certain measures in response to COVID-19*, 1st Sess., 43rd Parl., 2020 (assented to 11 April 2020), S.C. 2020, c. 6).

[6] In general terms, the CEWS deems a qualifying Canadian entity or corporation to have overpaid tax, which in turn triggers a Ministerial discretion to refund the amount of the overpayment. The "deemed" overpayment is based on a formula set out in the legislation and is predicated on the amount of the decline in year over year revenues in various qualifying periods, which again, generally, are the pre-pandemic (2019) and post-pandemic (2020-21) fiscal years (ss. 125.7(1), (2)).

[7] Subsection 152(3.4) of the ITA permits the Minister to "determine" the amount deemed by subsection 125.7(2) to be an overpayment of tax that would otherwise be payable for the qualifying periods and to send a notice of the determination to the employer. The subsection also provides that the Minister may at any time determine that there is no amount payable. Subsection 164(1.6) authorizes the Minister to refund the overpayment, and given its centrality to the issues in this appeal, it is set out in full:

COVID-19 refunds	**COVID-19 — remboursement**
(1.6) Notwithstanding subsection (2.01), at any time after the beginning of a taxation year of a taxpayer in which an overpayment is deemed to have arisen under any of subsections	**(1.6)** Malgré le paragraphe (2.01), le ministre peut rembourser au contribuable, à tout moment après le début de l'année d'imposition de ce dernier, tout ou partie d'un paiement

125.7(2) to (2.2), the Minister may refund to the taxpayer all or any part of the overpayment.	en trop en vertu de l'un des paragraphes 125.7(2) à (2.2) réputé s'être produit au cours de l'année.

[8] Importantly, for the purposes of the adjudication of the issues in this appeal, subsection 152(1.2) renders the recourse and appeal provisions of Divisions I and J of the ITA applicable to disputes with respect to the CEWS. As with notices of assessments, notices of determination are deemed to be correct unless varied or set aside following objection or appeal (s. 152(8)). Unlike appeals in respect of income tax, however, notices of determination may be challenged immediately, without waiting for the filing of the annual return and assessment (ss. 152(3), (4)).

[9] Iris filed applications for the CEWS for three periods of time: March 15, 2020 to April 11, 2020; April 12, 2020 to May 9, 2020; and May 10, 2020 to June 6, 2020, reporting that its revenues declined by 95.92 percent, 88.57 percent and 97.08 percent, respectively, from the same months in 2019. The decline in revenue reported by Iris exceeded the threshold reductions required under subsection 125.7(2).

[10] The Minister denied the application, precipitating the Federal Court proceedings. In its notice of application Iris sought an order:

> A. requiring the Minister to pay Iris' CEWS in the amounts claimed, for a total of $605,714;
>
> B. declaring the amount of the revenues to be considered in the calculation of the CEWS are the revenues reported by Iris; and
>
> C. requiring the Minister to issue notice(s) of assessment or notice(s) of determination in respect of the periods commencing March 15, 2020 and ending June 6, 2020.

[11] The grounds for application describe the basis for the alleged improper exercise of discretion and abuse of process:

- The reason identified by the Minister in failing to issue the emergency wage subsidy was that the applicant's business "ha[d] not experienced the reduction in revenue needed to be eligible for the CEWS";
- When Iris requested particulars of the decision, the Minister stated in a voicemail message that the reason that Iris' claim was denied was because the Minister contacted the auditor who was conducting a separate audit regarding GST/HST. The auditor provided a revenue reconciliation and, based on her revenue reconciliation, the Minister concluded the 15 percent reduction in revenues needed to apply for CEWS did not occur. The Minister advised Iris that it would receive a letter shortly advising it of this and the procedures to take if it wished to request a second review;
- Iris then requested particulars from the Minister's GST/HST audit division on the information provided to the emergency subsidy program but the Minister declined to provide the information provided to the emergency subsidy program;
- Iris then requested the particulars from the Minister's emergency subsidy program on the information provided by the GST/HST audit division;
- The emergency subsidy program provided a working paper summarizing the information provided by the Minister's GST/HST audit program which advised, *inter alia*,

> As a result of this Federal Court case, in an effort to protect CRA from revenue loss, a (re)assessment was raised based on the audit evidence and findings to date. An affidavit of Vance Smith,

> Manager of AGP has been included in the audit to outline the evidence and high risk of this audit file;

- The records from the emergency subsidy review confirm that this involvement of GST/HST Audit division was the sole reason for the disallowance of the wage subsidy, finding, "[o]ther than the AGP High Risk indicator, there were no other fail reasons found with the application";
- The records indicate that the sole factual consideration for the denial was the affidavit of Vance Smith, which indicated suspicions, not findings, and there appears to be no consideration of Mr. Smith's confirmation under oath that the Minister was not prepared to make an allegation or issue a proposal to reassess in respect of those suspicions.

[12] At the time of the application, no notice of determination had been issued. As subsection 152(1.2) stipulates that objection and appeal rights arise only when a notice of determination has been issued, Iris had no recourse to any forum other than the Federal Court in respect of the Minister's decision not to refund the overpayment.

[13] As noted, the Minister moved to strike the application and also sought leave to enter an affidavit in support of her motion. The affidavit attached a notice of determination of the Canada Emergency Wage Subsidy dated September 21, 2020, advising that the Minister had determined that Iris' CEWS for each period of time was $0.

II. Decisions below

The Prothonotary's decision

[14] Applying the test in *J.P. Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557 (*J.P. Morgan*), the Prothonotary dismissed the Minister's motion to strike. After reviewing the case law on the admissibility of evidence on a motion to strike, the Prothonotary ruled the affidavit to be inadmissible, finding it to be so significantly wanting in detail to be of little probative value. The Prothonotary also held that even if the notice of determination exhibited to the affidavit was properly before the Court, the application would not be moot. This was because the application sought relief against the conduct of the Minister in respect of a discretion conferred by the statute.

[15] The Prothonotary referred to *Iris Technologies Inc. v. Canada (National Revenue)*, 2020 FCA 117, [2020] G.S.T.C. 25 (*Iris Technologies*), where this Court confirmed that the Federal Court has jurisdiction in respect of Ministerial conduct under the ITA. The Prothonotary noted that, notwithstanding section 18.5 of the *Federal Courts Act*, the Federal Court retains jurisdiction to consider the application of administrative law principles to review the exercise of discretion by the Minister. Examples of this include allegations of acting for an ulterior purpose or in bad faith, taking improper considerations into account, abuse of power or not proceeding in a reasonable time frame.

[16] After reviewing the allegations in the application and assessing them against the nature of the Minister's powers under the CEWS, the Prothonotary concluded that the essential character

of Iris' application was a challenge to the conduct of the Minister in exercising the discretion granted under the CEWS to refund an overpayment of taxes. Proceeding in the Tax Court would not be an adequate alternate remedy as the Tax Court does not have judicial review jurisdiction and scrutiny of the refusal to refund the overpayment would be evaded if the application were struck.

The Federal Court decision

[17] The Federal Court held that the Prothonotary made no error in his review of the statutory scheme supporting the CEWS, nor in the conclusion that the decision to refund the overpayment under subsection 164(1.6) was a discretionary action of the Minister and subject to judicial review.

[18] The judge reviewed the question of the essential nature of the application on a standard of correctness. He found that reading the notice of application holistically, it was clear that it pled a sequence of events in support of an assertion that the Minister had failed to pay the CEWS for improper reasons. The judge appreciated that while there were elements of the relief claimed in the notice of application that might engage determinations outside the jurisdiction of the Federal Court, this did not detract from the conclusion that the essential nature of the application was to review the discretionary administrative decision-making power of the Minister.

[19] The judge also rejected the Minister's appeal of the decision to exclude the affidavit. The judge held that as the purpose of the affidavit was to establish that the application was moot, it fell within the mootness exception to the rule precluding the admission of evidence on a motion

to strike. Nevertheless, he found no palpable and overriding error in the Prothonotary's finding that the affidavit was inadmissible.

III. **Issues**

The admissibility of the affidavit

[20] The admissibility of an affidavit is a question of law and reviewable on a standard of correctness (*O'Grady v. Canada (Attorney General),* 2016 FCA 221, 270 A.C.W.S. (3d) 648 at para. 2; *Collins v. Canada*, 2015 FCA 281, [2015] G.S.T.C. 138 at paras. 49, 57 (*Collins*); see also, *Cabral v. Canada (Citizenship and Immigration),* 2018 FCA 4, 287 A.C.W.S. (3d) 144). Collateral factual findings related to the admissibility of the evidence are entitled to deference (*Collins* at para. 51).

[21] The Federal Court therefore erred in applying the palpable and overriding error standard of review to the Prothonotary's decision whether to admit the affidavit.

[22] In rejecting the affidavit, the Prothonotary considered that the affiant had no personal knowledge of the decision, could not identify who was involved in the decision, could not explain why the decision was not communicated on the date it was made and did not personally assess any of Iris' revenue in any of the qualifying periods. The Prothonotary concluded the affiant was a straw affiant with no direct knowledge of anything other than identifying a document located in Canada Revenue Agency (CRA) files. I note, in passing, that no mention

was made of rule 81(1) of the *Federal Courts Rules*, which permits the filing of an affidavit on information and belief on a motion.

[23] These reasons alone do not justify the exclusion of the affidavit. The affidavit was tendered in support of the argument that the application was moot, and its probative value was limited to establishing the fact that a notice of determination had been issued. The affidavit was not offered to establish the correctness of the determination as to whether a refund was due under the CEWS. While I agree with the Prothonotary's concerns about the frailty of the affidavit, the affiant's knowledge of the underlying tax considerations was irrelevant to the question of admissibility.

[24] This is not, however, conclusive of the question of whether the affidavit is admissible. The notice of determination is hearsay evidence and is only admissible if it falls under any one of the statutory or common law exceptions to the hearsay rule.

[25] The first is the exception established by *Ares v. Venner*, [1970] S.C.R. 608, 1970 CanLII 5 (SCC). This exception is engaged where three criteria are met; the creator of the record had personal knowledge of the information in the records, the records were made contemporaneously with the act, and the creator had a duty to record the information. For the reasons given by the Prothonotary, the affidavit does not meet the *Ares v. Venner* criteria.

[26] The second route, and the route followed by the Minister in this case, is subsection 244(9) of the ITA. This is a narrower provision which contains a restriction – for a document to be admissible under this exception the CRA officer must have charge of the appropriate records:

Proof of documents	**Preuve de documents**
(9) An affidavit of an officer of the Canada Revenue Agency, sworn before a commissioner or other person authorized to take affidavits, setting out that the officer has charge of the appropriate records and that a document annexed to the affidavit is a document or true copy of a document, or a print-out of an electronic document, made by or on behalf of the Minister or a person exercising a power of the Minister or by or on behalf of a taxpayer, is evidence of the nature and contents of the document.	(9) L'affidavit d'un fonctionnaire de l'Agence du revenu du Canada — souscrit en présence d'un commissaire ou d'une autre personne autorisée à le recevoir — indiquant qu'il a la charge des registres pertinents et qu'un document qui y est annexé est un document, la copie conforme d'un document ou l'imprimé d'un document électronique, fait par ou pour le ministre ou une autre personne exerçant les pouvoirs de celui-ci, ou par ou pour un contribuable, fait preuve de la nature et du contenu du document.

[27] The Federal Court judge interpreted subsection 244(9) as requiring the affiant to have charge of the records. The judge found that the affidavit contained no express statement to that effect nor did it implicitly establish that requirement (Reasons at para. 25). Based on the affidavit, the judge found it would be difficult to conclude that the affiant had charge of the relevant records. I agree with this analysis. The affidavit does not meet the requirements of subsection 244(9).

[28] The third path to admissibility of the notice of determination is under the business records provisions of the *Canada Evidence Act*, R.S.C., 1985, c. C-5 (s. 30(6)). Documents tendered under this section are admissible without an affidavit. Yet here again, the pre-conditions to

admissibility were not met. The appellant did not provide the required seven days' notice of intention to admit documents under subsection 30(7) of the *Canada Evidence Act*.

[29] The fourth path to admissibility is the common law exception to the hearsay rule. The general exclusionary rule may be overcome if the evidence can be shown to be reliable and necessary. The reliability criteria is satisfied only if the contents of the document sought to be admitted into evidence are trustworthy by reason of the way the document came into existence and the circumstances allow the judge to assess its reliability (*R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787 at paras. 2-3).

[30] In considering whether hearsay evidence is admissible under the common law exception, a court must balance reliability, necessity, and fairness. In this case, factors that suggest reliability include the fact that the notice was generated in accordance with a statutory requirement as well as the evidence in the affidavit as to the origin of the document. It is also undisputed that Iris had received the notice of determination prior to the hearing of the application and had an opportunity to cross-examine the affiant. There is no suggestion by Iris that the document is not what it purports to be.

[31] Factors relevant to necessity include the purpose for which the affidavit was tendered, which is to establish mootness and, as a general rule, courts should not entertain moot proceedings. The evidence is also necessary because it is, for the reasons that I will explain, critical to the question of jurisdiction. The answer to the question of which court, the Federal

Court or the Tax Court, is to adjudicate the failure to refund the overpayment pivots on the admissibility of the affidavit.

[32] The rules of evidence, both substantive and procedural, matter. They matter because they are the foundation of the truth-seeking role of the courts. They are also the foundation of fairness in the adjudicative process. They are not to be overlooked, and there are consequences if they are. Here, the affidavit was wafer thin. It did not comply with the *Ares v. Venner* exception to the hearsay rule, it did not measure up to the statutory exception specifically designed to facilitate the introduction of documents in the possession of the CRA and no notice was given under the *Canada Evidence Act* of an intention to rely on business records. Quite apart from the question of the admissibility of evidence in any individual case, courts have an over-arching concern to ensure that proceedings unfold in accordance with established laws of evidence and procedure. This is the foundation of fairness. This factor militates against admission of the affidavit.

[33] Balancing all these considerations, I find that the reliability and necessity exception to the hearsay requirement are met and allow the affidavit into evidence. There is no doubt as to authenticity of the notice of determination, the limited purpose for which it was tendered, and the importance of it to the disposition of the issues on appeal. Also, a court has the discretion to dispense with the seven day notice requirement under section 30 of the *Canada Evidence Act* (*Boroumand v. Canada*, 2016 FCA 313, 274 A.C.W.S. (3d) 206).

The essential nature of the application

[34] Judicial review is a potent mechanism to control exercises of Ministerial discretion under the ITA (*Canada (National Revenue) v. Sifto Canada Corp.*, 2014 FCA 140, [2014] 5 C.T.C. 26 (*Sifto*)). Challenges to the exercise of discretion, allegations of abuse of power, refusals to make decisions and prerogative relief are outside the jurisdiction of the Tax Court, which is focused on the correct application of the ITA. There is a well-reasoned and principled basis why Parliament has channelled the review of the few instances of discretionary power by the Minister into the Federal Court. The correctness of an assessment under the ITA and lawfulness of exercises of discretion engage entirely discrete legal regimes. With a few exceptions, there is no discretion in the application of the ITA.

[35] Assessments are legally conclusive of the appellant's tax liability unless they are set aside by the Tax Court. Nevertheless, where the conduct of the Minister, as opposed to the correctness of an assessment, is in play, a notice of assessment does not deprive the Federal Court of jurisdiction to consider the Minister's exercise of discretion (*Iris Technologies* at para. 49). The Federal Court retains jurisdiction to consider the exercise of discretion by the Minister in the application of the Act, including review of allegations of bad faith, abuse of power and unreasonable delay (para. 51).

[36] The demarcation between the jurisdiction of the Tax Court and a judicial review in the Federal Court is not always clear. At times there is no bright line. A court must always be cautious of artful pleading and attempts to cloak challenges to notices of assessments in administrative law language. In determining which court has the jurisdiction to entertain the application, the question of the essential nature of the dispute must be based on a realistic

appreciation of the practical result sought (*Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617 at para. 26; *Canada v. Domtar Inc.*, 2009 FCA 218, [2009] 6 C.T.C. 61 at para. 28; *Canada v. Roitman*, 2006 FCA 266, [2006] 5 C.T.C. 142 at para. 16).

[37] Two decisions of this Court – *J.P. Morgan* and *Sifto* – are instructive in characterizing the true nature of the application in this case.

[38] The application in *J.P. Morgan* was, ostensibly, a challenge to the conduct of the Minister in deciding to reassess the applicant, in circumstances alleged by the applicant to constitute an abuse of discretion. J.P. Morgan sought to vacate the assessments, a remedy the Federal Court cannot grant, and the application was struck. In contrast, in *Sifto*, the Minister sought to reassess Sifto following a comprehensive settlement of the issues between the Minister and Sifto. This Court held that the application was directed to the exercise of the Minister's statutory power to waive or cancel a penalty under subsection 220(3.1) of the ITA, and not to the correctness of the assessment itself.

[39] In sum, each case will require a careful and realistic assessment of the true nature of the application. The Federal Court will have to determine whether the Minister's conduct is in issue, or whether it is, in essence, an attack on the correctness of the assessment itself. As a starting point, in light of the clear language of section 18.5 of the *Federal Courts Act*, the Federal Court should be cautious in authorizing judicial review in the face of an outstanding notice of assessment (*J.P. Morgan* at paras. 30, 32; *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793 at paras. 10-11).

[40] I agree with the Federal Court judge that the amendments to the ITA in respect of the CEWS include discretionary language which presumptively invites judicial review in the Federal Court. Subsection 164(1.6) of the ITA states that the Minister "may" refund all or part of an overpayment deemed to have arisen under subsection 125.7(2) of the ITA. There are other provisions of the CEWS which grant a discretionary power (see, *e.g.*, ITA, ss. 152(3.4), 164(1.6)). However, for the reason that I will explain, I have concluded that the judicial review is in essence a challenge to the correctness of the Minister's application of the CEWS provisions of the ITA.

[41] The amount that is "deemed" to be an overpayment is an amount calculated in accordance with the provisions of the ITA. Whether there is an "amount" that is "deemed" to be an overpayment is not discretionary. It is determined according to the statutory formula, and it is for the Tax Court to ensure that the formula was correctly applied. If, following the Tax Court determination there is, in fact, an overpayment which the Minister refuses to refund, the Federal Court has jurisdiction to review the refusal to refund the overpayment. Iris' application is, in this sense, premature. The Minister has a discretion to refund, but it is contingent on the existence of an overpayment under the ITA. Whether the Minister erred in determining that there was no overpayment is to be adjudicated in the Tax Court; whether the Minister erred in refusing to refund an overpayment is for the Federal Court to decide.

IV. **Conclusion**

[42] I conclude by returning to the relief claimed in the notice of application. Iris seeks an order:

A. requiring the Minister to pay Iris' CEWS in the amounts claimed, for a total of $605,714;

B. declaring the amount of the revenues to be considered in the calculation of the CEWS are the revenues reported by Iris; and

C. requiring the Minister to issue notice(s) of assessment or notice(s) of determination in respect of the periods commencing March 15, 2020 and ending June 6, 2020.

[43] The relief sought makes clear that the essential character of the notice of application is a challenge to the correctness of the finding that no "amount" is payable by way of a refund under subsection 125.7(2) and to vacate the notice of determination. Claims for relief A and B are also remedies that cannot be granted by the Federal Court. Subsection 152(1.2) of the ITA provides for objection and appeal rights following a notice of determination, and Parliament has directed that those proceedings are to be in the Tax Court of Canada (ITA, ss. 169(1), 171; *Tax Court of Canada Act*, R.S.C., 1985, c. T-2, s. 12(1)).

[44] The effect of the admission into evidence of the affidavit, and its exhibit, the notice of determination, is to render claim for relief C moot. The notice of determination has been issued.

[45] Iris argues, in the alternative, that if the application is struck on the basis that it is moot, the Court should nonetheless exercise its discretion to allow the application to proceed. It stresses that the purpose of the CEWS is to provide emergency funding, funding which it requires in light of its asserted reduction of revenues. The lengthy delays associated with a proceeding in the Tax Court would defeat the purpose of the CEWS and cause financial damage to Iris.

[46] The solution to this concern lies in requesting the Tax Court to hold an expedited hearing, not in allowing a proceeding to unfold in a court that does not have the jurisdiction to grant the relief requested.

[47] I would allow the appeal, set aside the order of the Federal Court judge and, making the order that the Prothonotary ought to have made, strike the application for judicial review with costs. At the request of the appellant and with the consent of the respondent, the style of cause in this appeal is amended to substitute the Attorney General of Canada for the Minister of National Revenue.

"Donald J. Rennie"
J.A.

"I agree.
J.B. Laskin J.A."

"I agree.
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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