Federal Court  Cour fédérale

Date: 20210602

Docket: T-1010-20

Citation: 2021 FC 526

Ottawa, Ontario, June 2, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

IRIS TECHNOLOGIES INC.

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

ORDER AND REASONS

I. Overview

[1] In this motion, the Respondent, the Minister of National Revenue [the Minister], seeks an order pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 [the Rules], appealing and setting aside a decision of Prothonotary Aalto, dated March 5, 2021 [the Decision]. The Decision dismissed the Minister's motion to strike out a judicial review application [the Application] filed by the Applicant, Iris Technologies Inc. [Iris], on August 28, 2020 in the within Court file.

[2] As explained in more detail below, this motion and the Minister's appeal are dismissed, because, applying the applicable principles of standard of review, I have found no error on the part of the Prothonotary.

II. **Background**

A. *Application for the Canadian Emergency Wage Subsidy*

[3] The *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA] was amended, effective April 11, 2020, to introduce an emergency wage subsidy as part of the response to the COVID-19 pandemic. This Canadian Emergency Wage Subsidy [CEWS] regime works by deeming qualifying entities to have overpaid tax and then giving the Minister discretion to refund them the deemed amount. Under s 125.7(1) of the ITA, to be a qualifying entity, a Canadian employer must experience a reduction in revenues from the average of its revenues in January and February 2020 or from the revenues for the same month in the prior year. Deemed overpayment is based on a formula set out in s 125.7(2) of the ITA that takes into account decline in revenues. Subsection 152(3.4) of the ITA permits the Minister to, at any time, determine the amount deemed by s 125.7(2) to be an overpayment for the purposes of the CEWS and send a notice of the determination to the employer. Subsection 164(1.6) of the ITA gives the Minister the discretion to refund all or part of the deemed overpayment.

[4] Iris is a Canadian company that provides long distance telecommunications services to individuals and companies in Canada and abroad. It filed applications for the CEWS for the period commencing March 15, 2020 and ending April 11, 2020 [Period 1], the period

commencing April 12, 2020 and ending May 9, 2020 [Period 2], and the period commencing May 10, 2020 and ending June 6, 2020 [Period 3]. Iris reported that its revenues declined in Period 1, Period 2 and Period 3 by 95.92 per cent, 88.57 per cent and 97.08 per cent, respectively, compared to the average revenue earned in January and February and more than the requisite threshold reduction for the same month in 2019.

B. *Application for Judicial Review*

[5] On August 28, 2020, Iris filed a Notice of Application, commencing the within application for judicial review, pursuant to ss 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [the FCA], of a decision dated June 19, 2020, in which the Minister denied Iris' claims for the CEWS for Period 1 and Period 2, and a decision dated July 10, 2020 in which the Minister denied Iris' claim for the CEWS for Period 3 [the Notice of Application].

[6] The Notice of Application indicates that, on June 1, 2020, an officer of the Minister left Iris a voicemail message, the substantive content of which was as follows:

> … it looks like what happened was the auditor that's currently working on the GST/HST audit was contacted and she provided a revenue reconciliation and based on her revenue reconciliation, that is where the 15 per cent reduction did not occur and apparently she reconciled her revenue to remove revenue that she felt was being generated or her audit findings indicated were being generated from an accommodation invoicing scheme. …

[7] The Notice of Application further pleads that the Minister's emergency subsidy program office subsequently provided Iris with a working paper summarizing information provided by the Minister's GST/HST audit program. The Notice of Application states that the records from the

emergency subsidy review confirm that the involvement of the GST/HST audit of Iris was the sole reason for the disallowance of the CEWS and states that, “Other than the AGP High Risk indicator, there were no other fail reasons found with the application.”

[8] The Notice of Application requests an order granting the following substantive relief:

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.

C. *Motion to Strike Application*

[9] On October 2, 2020, the Minister brought a motion seeking to strike the Application, without leave to amend. The motion also sought leave to enter and rely upon an affidavit of Marie Lusson, dated October 2, 2020 [the Lusson Affidavit]. The Lusson Affidavit attached a document entitled “Notice of Determination of the Canada Emergency Wage Subsidy” dated September 21, 2020 [the Notice of Determination], in which the Minister determined that Iris’ CEWS for each of Period 1, Period 2, and Period 3 was $0.

[10] The Minister raised the following grounds for the motion to strike:

A. The essential character of the Notice of Application is a challenge to the validity of the determination made by the Minister that Iris did not qualify for the CEWS pursuant to s 125.7 of the ITA;

B. In accordance with s 18.5 of the FCA, this Court has no jurisdiction to review the validity of assessments or determinations under the ITA; and

C. The Application is bereft of any possible success because:

i. Iris has an adequate alternative remedy available to it through the statutory objection and appeals process under the ITA; and

ii. the Application is moot because the Notice of Determination has been issued.

D. *Decision Under Appeal*

[11] Prothonotary Kevin Aalto [the Prothonotary] considered and dismissed the Minister's motion to strike, in the Decision that is under appeal in this motion. He excluded the Lusson Affidavit, finding it frail and not within any exception to the general rule that evidence is not allowed on a motion to strike.

[12] The Prothonotary also held that, even if the Notice of Determination was properly before the Court, the Application would not be moot, as the Application seeks relief against the conduct of the Minister, alleged by Iris to be an abuse of process and procedurally unfair. The

Prothonotary identified that a decision by the Minister under s 164(1.6) of the ITA, to refund all or part of an overpayment, is a discretionary action. He reasoned that, if all of the facts as pleaded by Iris in the Notice of Application were taken as true for the purposes of the motion to strike, Iris is a qualifying entity to which s 164(1.6) applies. The Prothonotary therefore held that, as the facts as pleaded identify an improper purpose for the Minister's decisions, it could not be said that the Application is bereft of any chance of success.

III. **Issues**

[13] Based on the arguments advanced by the parties in this appeal, I would characterize the issues for the Court's consideration to be as follows:

A. Whether the Prothonotary erred in refusing to admit the Lusson Affidavit; and

B. Whether the Prothonotary erred in refusing to strike the Application.

IV. **Analysis**

A. *Standard of Review*

[14] The Federal Court of Appeal in *Hospira Healthcare Corp v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 64-65 established that the standard of review from *Housen v Nikolaisen*, 2002 SCC 33 applies when judges review orders of prothonotaries pursuant to Rule 51. Therefore, the Prothonotary's conclusions of law are reviewable on a standard of correctness, and his findings of fact or mixed fact and law are reviewable on the standard of palpable and overriding error.

[15] The parties agree on these principles but, in some respects, disagree on their application to this motion. Iris submits that the Prothonotary's analysis involves only findings of mixed fact and law. The Minister argues that the question of whether the Prothonotary properly determined the essential nature of the Application and, therefore, whether the remedy sought is available and within this Court's jurisdiction, is reviewable on the standard of correctness. Otherwise, subject to one point surrounding the admissibility of the Lusson Affidavit (which I will address later in these Reasons), I understand the Minister to agree with Iris that the Prothonotary's analysis involves findings of mixed fact and law reviewable on the palpable and overriding error standard.

[16] On the standard of review applicable to the question surrounding the essential nature of the Application, I agree with the Minister. The Minister relies on *McCain Foods Limited v JR Simplot Company*, 2021 FCA 4 [*McCain Foods*] at para 65, which considered the question of the Federal Court's jurisdiction in relation to a third party claim in the context of a piece of patent litigation. The Federal Court of Appeal held that this assessment required determining the essential nature of the claim and that the standard of review for the determination of that essential nature was correctness.

[17] While the question in the case at hand arises in a different factual context, and in the context of a different type of proceeding, I find no basis to distinguish the reasoning in *McCain Foods.* The motion before the Prothonotary required him to determine the essential nature of the Application, in order to assess whether it falls within the Federal Court's jurisdiction. Applying the reasoning in *McCain Foods*, this determination is reviewable on the correctness standard.

[18] Otherwise, subject to the aforementioned point about the admissibility of the Lusson Affidavit, I will apply the standard of palpable and overriding error in my review of the Order.

B. *Admissibility of Lusson Affidavit*

[19] The Minister seeks to rely on the Lusson Affidavit in support of the Minister's position that the Application is moot. Based on the Notice of Determination attached as an exhibit to the Lusson Affidavit, the Minister argues that the determination that Iris' CEWS entitlement is $0 is deemed to be final and binding, under s 152(8) of the ITA, subject only to a variation on an objection or an appeal to the Tax Court.

[20] The Minister acknowledges that motions to strike are generally brought without evidence. However, the Minister submits that there are exceptions to this rule, including where the moving party seeks to strike on the basis of mootness, given that questions of mootness will generally arise as a result of intervening developments in relation to the underlying facts giving rise to the application for judicial review (see, e.g., *Louis v Ts'kw'aylaxw First Nation*, 2018 CanLII 116818 (FC) at paras 18-19).

[21] I agree with this submission and concur with the Minister that the purpose for which she sought to introduce the Lussen Affidavit falls within the mootness exception advanced. However, I do not read the Order as failing to recognize this principle. The Prothonotary noted the applicable exception and ultimately found that the Lussen Affidavit did not fall within the exception because of what he described as the frailty of the affidavit. In other words, the

Prothonotary's conclusion on this issue turned on his assessment of the shortcomings of the Lussen Affidavit.

[22] Turning to the Prothonotary's decision not to admit the Lussen Affidavit, the Minister argues that the affidavit is admissible under s 244(9) of the ITA, which provides as follows:

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.

[23] The Minister argues that the Prothonotary did not find any failure of the affiant to comply with the requirements of s 244(9) and that the Prothonotary erred in concluding that certain issues surrounding the decision reflected in the Notice of Determination, or the affiant's knowledge of that decision, were relevant to the admissibility of the affidavit.

[24] In finding the Lussen Affidavit inadmissible, the Prothonotary concluded that Ms. Lusson was a “straw” affiant with no direct knowledge of anything other than identifying a document she located in Canada Revenue Agency [CRA] files. The Prothonotary relied on Iris’ cross-examination of Ms. Lusson, in which it obtained admissions that she had no personal knowledge of the decision; was not involved in the decision; could not identify who was involved in the decision; could not explain why the decision was not communicated on the date she affirmed it was made; and did not assess any of Iris’ revenue in any of the qualifying periods.

[25] Most fundamentally, s 244(9) requires that the affiant “has charge” of the appropriate records. The Lusson Affidavit contains no express statement to that effect. Nor do I read the affidavit as implicitly establishing that requirement. Ms. Lusson deposes that her role with CRA is primarily to work with data, web applications and systems. Her personal knowledge of the matters to which she deposes is based on that role. She explains that she examined CRA records relating to Iris’ CEWS applications and identified the Notice of Determination in Integras, an electronic case management system used by CRA’s audit department to maintain records.

[26] I note that the Prothonotary made no express reference to s 244(9) of the ITA or its requirements. However, in considering his analysis against those requirements, I find no palpable and overriding error. The Prothonotary concluded that Ms. Lusson had no direct knowledge of anything other than identifying a document as located in CRA’s files. I consider that conclusion to be supported by the evidence and to be consistent with the analysis required under s 244(9). It would be difficult to conclude, based on the Lusson Affidavit, that she has charge of the relevant

records. Certainly, I find no palpable and overriding error in the fact that the Prothonotary did not arrive at such a conclusion.

[27] In making this determination, I have considered the Minister's argument that the Prothonotary erred in holding that the Notice of Determination was communicated on a date different from the date of the document in the exhibit to the Lusson Affidavit. The Minister submits that, in so concluding, the Prothonotary erred by treating as evidence various questions that Iris put to Ms. Lusson in cross-examination without entering the documentary foundation for those questions into evidence. Indeed, the Minister argues that it is a mistake of law, reviewable on the correctness standard, for a court to rely on evidence that was not before it, but submits in the alternative that this aspect of the Prothonotary's analysis also represents a palpable and overriding error.

[28] Regardless of which standard of review is applied to this point, I find no error. I do not read the Prothonotary's analysis as turning on the discrepancy in dates that was the subject of Iris' counsel's questioning. Rather, it was the fact that Ms. Lusson's knowledge of the Notice of Determination, including its date, was confined to having identified the document in the Integras system.

[29] The Minister also argues that the Prothonotary's analysis is inconsistent with the guidance in *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 [*JP Morgan*], at paras 53-64, to the effect that an affidavit attaching documents referenced in a judicial review application should contain no editorial commentary or

supplementary information. In other words, the Minister submits that the Lusson Affidavit should be admissible precisely because it adduced no evidence on the process leading to, or substance of, the Notice of Determination. I find little merit in this submission. The Prothonotary declined to admit the Lusson Affidavit not because it failed to provide commentary surrounding the Notice of Determination but because it failed to establish that Ms. Lusson had sufficient knowledge of the document to support its introduction into evidence.

[30] Finally, I have considered an argument advanced by the Minister at the hearing of this appeal motion, to the effect that the Prothonotary's decision fails to take into account, or is inconsistent with, s 244(13) of the ITA, which provides as follows:

Proof of documents	**Preuve de documents**
(13) Every document purporting to have been executed under, or in the course of the administration or enforcement of, this Act over the name in writing of the Minister, the Deputy Minister of National Revenue, the Commissioner of Customs and Revenue, the Commissioner of Revenue or an officer authorized to exercise a power or perform a duty of the Minister under this Act is deemed to have been signed, made and issued by the Minister, the Deputy Minister, the Commissioner of Customs and Revenue, the Commissioner of Revenue or the officer unless it has been called in question by the Minister or by a person	**(13)** Tout document paraissant avoir été établi en vertu de la présente loi, ou dans le cadre de son application ou de sa mise à exécution, au nom ou sous l'autorité du ministre, du sous-ministre du Revenu national, du commissaire des douanes et du revenu, du commissaire du revenu ou d'un fonctionnaire autorisé à exercer des pouvoirs ou fonctions conférés au ministre par la présente loi est réputé avoir été signé, fait et délivré par le ministre, le sous-ministre, le commissaire des douanes et du revenu, le commissaire du revenu ou le fonctionnaire, à moins qu'il n'ait été contesté par le ministre ou par une

acting for the Minister or Her Majesty.	personne agissant pour lui ou pour Sa Majesté.

[31] Again, I find little merit to the Minister's position. Section 244(13) sets out circumstances where documents are deemed to be signed, made and issued by the Minister. However, I do not read that section as a detracting from the requirements of s 244(9). Once the s 244(9) requirements are met, including the affiant who attaches a document establishing that he or she has charge of the appropriate records, the document is admissible into evidence to establish its nature and contents. Section 244(13) may then serve additional useful purposes surrounding the evidentiary value of the document. However, in my view, s 244(13) cannot have been intended to allow introduction of a document into evidence without the benefit of an appropriate supporting affidavit.

[32] In conclusion on this issue, I find no palpable and overriding error in the Prothonotary's decision not to admit the Lusson Affidavit into evidence. I note that, notwithstanding that decision, the Prothonotary went on to consider the Minister's mootness argument and concluded that, even if the Notice of Determination were properly before the Court, the Application would not be moot. I will return to this portion of the Prothonotary's analysis later in these Reasons.

C. *Whether the Prothonotary erred in refusing to strike the Application*

[33] In support of her position that the Prothonotary erred in refusing to strike the Application, the Minister raises the following principal arguments. The Minister submits that the Prothonotary erred in:

A. failing to appreciate the essential nature of the Application;

B. erroneously finding that the Application engages a discretionary power on the part of the Minister;

C. failing to find that Iris has an adequate alternative remedy; and

D. failing to find that the Application is moot.

[34] While there is some overlap in these arguments and the analysis required to consider them, I will structure the next portion of my Reasons in accordance with the above framework.

D. *Essential Nature of the Application*

[35] As previously noted, I agree with the Minister that the Prothonotary's analysis as to the essential nature of the Application is reviewable on a standard of correctness. In arguing that the Prothonotary erred in this analysis, the Minister focuses upon the following extracts from the Order:

> 29. … Iris argues that taken together these facts point to an abuse of powers by the Minister and substantive procedural unfairness and unacceptable conduct of the Minister. Therefore, the Application is not bereft of any chance of success, as issues of procedural fairness and abuse of powers do not fall within the jurisdiction of the TCC.
>
> ….
>
> 35. … This Application concerns the conduct of the Minister in exercising the discretion granted under the COVID-19 measures. The exercise is alleged to be both procedurally unfair and an abuse of process. …

[36] The Minister submits that the Prothonotary erred in holding that the Application might succeed because it alleged that the Minister had been unfair and abusive. The Minister argues that the Prothonotary was required to carefully review the Application, to determine its essential character based on a realistic appreciation of the results sought by Iris (see *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 at para 26; *JP Morgan* at paras 49-50). If the Prothonotary had done so, says the Minister, he would have found that Iris is challenging the substantive determination of the Minister regarding the CEWS and is seeking as relief a direction that the Minister pay money, which is not within the jurisdiction of the Federal Court.

[37] I accept the application of the jurisprudence upon which the Minister relies, although I note also the guidance of the Federal Court of Appeal in *JP Morgan* that, in gaining a realistic appreciation of an application's essential character, the Court must read the application holistically and practically without fastening onto matters of form (at para 50).

[38] I also take the Minister's point that the relief sought by Iris in the Notice of Application includes an order requiring the Minister to pay Iris CEWS benefits in the amount claimed, which necessarily engages the question of quantification of those benefits. This point dovetails in some respects with the Minister's arguments, to be canvassed shortly, that such quantification occurs on a non-discretionary basis under the provisions of the ITA and is subject to the objection process under the ITA and the right of appeal to the Tax Court. As such, that quantification is not within the jurisdiction of the Federal Court.

[39] However, reading the Notice of Application holistically, it is clear that its focus is not an effort to have the Federal Court quantify its entitlement to a particular level of CEWS benefits. Rather, it is pleading a sequence of events in support of an assertion that the Minister has failed to pay such benefits for improper reasons. This is evident from the following components of the Notice of Application:

A. the allegations in paragraphs 9 to 11, surrounding the reasons that have been advanced by representatives of the Minister for the failure to pay CEWS benefits;

B. the pleading in paragraphs 18 that s 164(1.6) of the ITA confers upon the Minister a discretion to refund all or any part of a deemed overpayment of tax (the mechanism by which CEWS benefits are established); and

C. in particular, the assertion in paragraph 19 that the Federal Court has the inherent jurisdiction to control abuses of process by the Minister.

[40] Again, I appreciate that there are elements of the particular relief claimed in the NOA that may engage determinations that are outside the jurisdiction of this Court to provide. It is common ground that s 18.5 of the FCA deprives the Federal Court of jurisdiction to conduct judicial review of decisions that are the subject of a statutory right of appeal to the Tax Court. However, as Iris submits and as the Prothonotary noted in the Order, for purposes of a motion to strike, the facts contained in the pleading that are capable of proof are deemed to be true (see, e.g., *Pelletier v Canada*, 2020 FC 1019 at para 45). Therefore, for purposes of the motion to strike, I consider it appropriate to assume to be true Iris' factual assertions surrounding the

decline in its revenues and its resulting entitlement to CEWS benefits in a particular amount, even though some of those assertions may require proof outside this Federal Court proceeding for Iris to ultimately receive the particular relief it seeks in the Application.

[41] In my view, these considerations do not detract from the conclusion that the essential nature of the Application is an effort to invoke this Court's jurisdiction to sit in judicial review of discretionary administrative decision-making, including that of the Minister. This jurisdiction is recognized by various authorities cited by the parties, including the recent decision in *Iris Technologies Inc v Canada (Minister of National Revenue)*, 2020 FCA 117, which upheld a Federal Court decision dismissing a motion by Iris seeking interim relief in a proceeding in Federal Court file number T-425-20 involving the *Excise Tax Act*, RSC, 1985, c E-15. In dismissing Iris' appeal, the Federal Court of Appeal provided the following explanation of the jurisdiction retained by the Federal Court in tax matters (at paras 49-51):

> 49. In dismissing this appeal, I do not wish to be taken as endorsing the Minister's arguments that the issuing of the notices of assessment deprives the Federal Court of jurisdiction to consider the Minister's exercise of discretion under the ETA.
>
> 50. The assessments are legally conclusive and binding of the appellant's tax liability unless and until set aside by the Tax Court. It is also true that subsection 18.5 of the *Federal Courts Act* deprives the Federal Court of its administrative law jurisdiction for any matter that can be resolved by an appeal to the Tax Court. Section 306 of the ETA provides for an appeal to the Tax Court from assessments issued by the Minister.
>
> 51. That said, the Federal Court retains jurisdiction to consider the application of administrative law principles and obligations to the exercise of discretion by the Minister in the application of the ETA. Examples of this include allegations of acting for an ulterior purpose or in bad faith, abuse of his or her powers or not proceeding in a reasonable time frame. Where the line is drawn between the respective jurisdictions of the two Courts is a highly

> fact specific exercise. The Federal Court must always be alert to artful pleading, in which an administrative law challenge is a disguised attack on the assessments (see *Canada (Attorney General) v. British Columbia Investment Management Corp*., 2019 SCC 63 at paras. 36-38, 441 D.L.R. (4th) 197; *Canada v. Addison & Leyen* Ltd., 2007 SCC 33 at paras. 10-11, [2007] 2 S.C.R. 793). At the same time, the mere fact that the Minister has issued an assessment does not oust the Federal Court's jurisdiction under section 18.1 or 18.2 (see *Canada (National Revenue) v. Sifto Canada Corp*., 2014 FCA 140 at para. 25, 461 N.R. 184; *Prince* at para. 16).

[42] I do not regard the essential character of the Application as a disguised attack on a matter that is outside Federal Court jurisdiction. Rather, as found by the Prothonotary, the Application concerns the conduct of the Minister in exercising the discretion granted under the COVID-19 measures incorporated into the ITA, which conduct Iris asserts to be procedurally unfair and an abuse of process. Applying the correctness standard, I agree with the Prothonotary's characterization of the Application and his conclusion that this characterization places the Application within the Federal Court's administrative law jurisdiction.

E. *The Minister's Discretionary Power*

[43] The Minister submits that the Prothonotary has overstated the scope of the Minister's discretion under the provisions of the ITA relevant to the CEWS program and has erroneously found that the Application engages a discretionary power on the part of the Minister.

[44] The Minister explains that s 125.7 of the ITA provides for CEWS payments by deeming qualified employers to have overpaid tax. The deemed overpayment is based on a formula that takes into account declines in revenue. Section 152(3.4) of the ITA permits the Minister to

determine the deemed overpayment for purposes of the CEWS payments provided by s 125.7 and to send out appropriate notices of determination at any time. Section 164(1.6) then confers upon the Minister a discretion to refund all or part of a deemed overpayment.

[45] The Minister argues that the Prothonotary misconstrued the statutory provisions as conferring upon the Minister a discretion to quantify the deemed overpayment, when the only discretionary component of the statutory regime is the discretion to refund a deemed overpayment when it is found to exist. I agree with the Minister's explanation of the interaction of the statutory provisions, and her characterization of where the discretion does and does not lie. However, I do not agree that the Order demonstrates any misunderstanding on the part of the Prothonotary. I do not read the Order as contemplating the Federal Court compelling the Minister to make findings that are non-discretionary.

[46] Rather, the Prothonotary expressly notes (in paragraph 30 of the Order) Iris' argument that it is the decision to pay CEWS benefits under s 164(1.6) which is a discretionary action of the Minister. In paragraph 31 of the Order, the Prothonotary concludes that the discretionary nature of this decision is reinforced by s 7 of Bill C-14, *A Second Act respecting certain measures in response to COVID-19*. From there, in responding to the Minister's arguments that s 164(1.6) does not apply to Iris because it is not a qualifying entity and is ineligible to receive CEWS payments, the Prothonotary merely notes that this argument runs counter to the facts pleaded by Iris, which must be taken to be true for purposes of a motion to strike.

[47] I find no palpable and overriding error in this part of the Prothonotary's analysis.

F. *Adequate Alternative Remedy*

[48] The Minister submits that the Prothonotary erred in failing to strike the Application, because it offends the administrative law principle that a court should not usually entertain an application for judicial review where an adequate alternative remedy exists (see, e.g., *JP Morgan* at paras 84-85). The Minister also relies on s 18.5 of the FCA, which operates to similar, indeed stronger, effect by depriving the Federal Court of its judicial review jurisdiction in relation to certain categories of decisions where a statutory right of appeal exists.

[49] The Minister's principal position on this argument is that Iris has adequate remedies as alternatives to proceeding with its Application, i.e. pursuing the statutory objection process under the ITA and, subsequently, an appeal to the Tax Court. The Minister notes that, in dismissing this argument, the Prothonotary found that the Application concerns the conduct of the Minister in exercising her discretion. The Minister repeats her submission that the discretion relates only to the decision under s 164(1.6) to refund an overpayment and not to the determination of whether an overpayment exists. The Minister also repeats her submission that abusive conduct was not alleged in the Notice of Application.

[50] While framed in terms of the availability of adequate alternative remedies, or the effect of the jurisdictional provision in s 18.5 of the FCA, these submissions merely repeat arguments that I have rejected earlier in these Reasons.

[51] I also note an argument in the Minister's written representations to the effect that Iris has an effective alternative recourse open to it, to address severe and deliberate abuses of authority, by pursuing a tort claim. The Minister relies on *JP Morgan*, at para 89, as authority that tort claims can be adequate alternative remedies. However, that authority notes that whether such a proceeding actually constitutes an adequate, effective recourse depends upon the circumstances of the particular case. I agree with Iris' position that, consistent with the statutory purpose of the CEWS program, which is to enable Canadian employers to retain employees while coping with the commercial impacts of the COVID-19 pandemic, Iris should not be deprived of an opportunity to have its requests for relief considered in an expeditious manner. The availability of a tort claim does not represent such an opportunity.

[52] These arguments concerning adequate alternative remedy raise no palpable and overriding error on the part of the Prothonotary.

G. *Mootness*

[53] The Minister argues that the Prothonotary erred in concluding that the Application was not moot. Of course, the mootness argument relies upon the Minister's efforts to introduce the Notice of Determination into evidence through the Lusson Affidavit. Having found no error by the Prothonotary in declining to admit that evidence, there is no evidentiary foundation for the mootness argument. However, as previously noted, the Order includes an alternative analysis that, even if the Notice of Determination were properly before the Court, the Application would not be moot. I will therefore consider whether the Minister's arguments raise any palpable and overriding error surrounding that alternative analysis.

[54] The Minister submits that the Prothonotary's finding that the Application was not moot did not turn only on the Prothonotary's refusal to admit the Notice of Determination. The Minister submits that the finding was also the consequence of what the Minister argues was the Prothonotary's error in law in characterizing the essential nature of the Application. Again, this submission turns on an argument that I have rejected earlier in these Reasons and therefore raises no palpable and overriding error.

H. *Alternative Position*

[55] As an alternative position in this appeal, if the Court does not set aside the Order, the Minister requests that the Court grant the Minister 30 days from the date of the order disposing of the appeal to complete the next step in this proceeding, which is responding to Iris' Rule 317 request. The Minister explains that the amount of time requested is based on the Minister's best estimate of the time required to produce the materials sought.

[56] In response to this position, Iris asks that the Minister be ordered to produce the Rule 317 record within 5 days.

[57] Neither party has provided any evidence in support of the time period it proposes. I also note that the Prothonotary's Order does not set a time period for this next step in the proceeding. However, both parties request that the Court set a deadline for this step, and I accept that they will benefit from the certainty of a deadline being set at this juncture. In the absence of any better basis on which to select the deadline, the 30 days proposed by the Minister appears reasonable, and my Order will so provide.

V. **Costs**

[58] Each of the parties sought costs in this motion in the event its position was successful. As Iris has prevailed, it shall have its costs.

ORDER IN T-1010-20

THIS COURT'S ORDER is that:

1. The Respondent's motion for an order pursuant to Rule 51, appealing and setting aside the Order of Prothonotary Alto dated March 5, 2021, is dismissed.

2. The time for the Respondent's production of its Rule 317 record is fixed at 30 days from the date of the present Order.

3. The Applicant shall have its costs of this motion.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1010-20
STYLE OF CAUSE:	IRIS TECHNOLOGIES INC V THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	HEARD VIA VIDEOCONFERENCE
DATE OF HEARING:	MAY 17, 2021
ORDER AND REASONS:	SOUTHCOTT J.
DATED:	JUNE 2, 2021

APPEARANCES:

Leigh Somerville Taylor Mirielle Dahab	FOR THE APPLICANT
Darren Prevost Andrea Jackett Michael Ezri Sandra Tsui Katie Beahen John Chapman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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