Federal Court of Appeal  Cour d'appel fédérale

Date: 20211221

Docket: A-163-21

Citation: 2021 FCA 244

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 December 21, 2021.

REASONS FOR JUDGMENT BY: LASKIN J.A.

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

Federal Court of Appeal | Cour d'appel fédérale

Date: 20211221

Docket: A-163-21

Citation: 2021 FCA 244

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

IRIS TECHNOLOGIES INC.

Respondent

REASONS FOR JUDGMENT

LASKIN J.A.

I. Overview

[1] The Attorney General of Canada appeals from an order of the Federal Court (2021 FC 528, Southcott J.). That order dismissed an appeal by way of motion under rule 51 of the *Federal Courts Rules*, S.O.R./98-106, from an order of Prothonotary Aalto, the case management judge. In his order, the prothonotary required the Minister of National Revenue to transmit to the

respondent (Iris) and to the registry a certified tribunal record, as Iris requested under rule 317 in its notice of application for judicial review.

[2] The Attorney General submits that the motion judge erred in failing to set aside the prothonotary's order. I agree. In my view, he erred at a minimum in failing to recognize that Iris's application for judicial review sought only *mandamus*, a category of judicial review to which, this Court has held and the parties agree, rule 317 does not apply.

[3] I would accordingly set aside the motion judge's order and allow the appeal from the prothonotary's order.

II. Background

A. *Rule 317*

[4] Rule 317(1) allows a party to an application for judicial review to request relevant material in the possession of the administrative decision-maker whose order (a term defined in rule 2 to include a decision) is the subject of the application:

Material from tribunal	**Matériel en la possession de l'office fédéral**
317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.	**317 (1)** Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la

déposant. La requête précise les documents ou les éléments matériels demandés.

[5] In *Alberta Wilderness Association v. Canada (Attorney General)*, 2013 FCA 190 at paras. 34, 38-40, this Court held that rule 317 does not apply in an application for an order of *mandamus*. That is because the purpose of an order of *mandamus* is to compel the decision-maker to make a decision that it has failed or refused to make. *Mandamus* thus lies only if no decision has yet been made. And if no decision has yet been made, there can be no decision that is "the subject of the application."

[6] An applicant seeking an order of *mandamus* must, therefore, rely on affidavit or other evidence to show that it meets the test set out in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, 1993 CanLII 3004 (F.C.A.), affirmed, [1994] 3 S.C.R. 1100.

B. *Iris's application for judicial review*

[7] Iris is a Canadian telecommunications company. It filed HST/GST returns with the Minister of National Revenue claiming net tax refunds for reporting periods commencing September 1, 2019.

[8] Subsection 229(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, requires the Minister, where a refund is payable, to pay the refund to the claimant "with all due dispatch after the return is filed." However, this duty does not "displace the Minister's obligation to verify that the refund

is in fact payable": *Iris Technologies Inc. v. Canada (National Revenue)*, 2020 FCA 117 at paras. 38-43, citing *Express Gold Refining Ltd. v. Canada (National Revenue),* 2020 FC 614.

[9] When the Minister withheld payment of the refunds claimed by Iris pending completion of an audit, Iris brought an application for judicial review.

[10] Rule 301 of the *Federal Courts Rules* prescribes the contents of a notice of application for judicial review. It states, among other things, that the notice of application shall include "the date and details of any order in respect of which judicial review is sought" (rule 301(c)(ii)), "a precise statement of the relief sought" (rule 301(d)), and "a complete and concise statement of the grounds intended to be argued" (rule 301(e)).

[11] The text of rule 301 is as follows:

Contents of application	**Avis de demande — forme et contenu**
301 An application shall be commenced by a notice of application in Form 301, setting out	**301** La demande est introduite par un avis de demande, établi selon la formule 301, qui contient les renseignements suivants :
(a) the name of the court to which the application is addressed;	**a)** le nom de la cour à laquelle la demande est adressée
(b) the names of the applicant and respondent;	**b)** les noms du demandeur et du défendeur;
(c) where the application is an application for judicial review,	**c)** s'il s'agit d'une demande de contrôle judiciaire :

(i) the tribunal in respect of which the application is made, and	**(i)** le nom de l'office fédéral visé par la demande,
(ii) the date and details of any order in respect of which judicial review is sought and the date on which it was first communicated to the applicant;	**(ii)** le cas échéant, la date et les particularités de l'ordonnance qui fait l'objet de la demande ainsi que la date de la première communication de l'ordonnance au demandeur;
(d) a precise statement of the relief sought;	**d)** un énoncé précis de la réparation demandée;
(e) a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on; and	**e)** un énoncé complet et concis des motifs invoqués, avec mention de toute disposition législative ou règle applicable;
(f) a list of the documentary evidence to be used at the hearing of the application.	**f)** la liste des documents qui seront utilisés en preuve à l'audition de la demande.

[12] "A 'complete' statement of grounds means all the legal bases and material facts that, if taken as true, will support granting the relief sought," while "[a] 'concise' statement of grounds must include the material facts necessary to show that the Court can and should grant the relief sought": *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at paras. 38-40.

[13] The "application" portion of Iris's notice of application begins with a statement that the application is in respect of the Minister's failure to act:

> THIS IS AN APPLICATION for judicial review in respect of the failure of the Minister of National Revenue (the "Minister") to issue net tax refunds for the reporting period commencing September 1, 2019 and ending February 29, 2020

> and failure to assess or continue to audit the applicant's GST/HST returns for its reporting periods commencing September 1, 2019 to date.

Accordingly, no "date and details of any order in respect of which judicial review is sought" are provided.

[14] The relief sought, apart from costs, is solely *mandamus* relief. The notice specifies the relief sought as follows:

> THE APPLICANT MAKES APPLICATION FOR an Order:
>
> 1. directing the Minister to assess the applicant's GST/HST returns for its reporting periods commencing September 1, 2019 and ending February 29, 2020;
>
> 2. directing the Minister to pay the applicant's net tax refunds payable for the reporting periods commencing September 1, 2019 and ending February 29, 2020 and any subsequent refunds for following periods until the conclusion of the Minister's audit; and
>
> 3. awarding costs plus HST.

[15] The only reference to a decision in the grounds set out in the notice of application relates to a decision about a prior reporting period, in respect of which the Minister had initially withheld refunds but ultimately released them to Iris:

> 8. The Minister considered the financial impact of a GST/HST audit and the decision to withhold refunds during the audit in the Minister's previous audit of the applicant, which concluded 2 days before the commencement of the current audit, and determined that the held refunds should be released and were released.

[16] The notice of application concludes with a request under rule 317 for the following material in the possession of the Canada Revenue Agency:

> 1. all documents relating to the examination of the periods commencing January 1, 2017 to date;
>
> 2. a list of contact particulars for the Agency's employees who participated in the examination or review of these reporting periods; and
>
> 3. all diary notes, internal correspondence and reports relating to the periods commencing January 1, 2017 to date.

C. *The prothonotary's decision*

[17] The Minister objected to the rule 317 request on the ground that Iris is seeking in its application to compel the Minister to act – in other words, is seeking *mandamus* – rather than to challenge a decision, so that based on *Alberta Wilderness* the rule does not apply. The Minister also asserted that the request was overbroad.

[18] In response, Iris brought a motion before the prothonotary for an order requiring compliance with the rule 317 request. It submitted that the Minister made a reviewable decision when she chose to withhold payment pending the completion of the audit.

[19] The prothonotary granted the order, though he limited the scope of the documents to be transmitted based on overbreadth. He accepted that where no decision has been made, rule 317 cannot apply. But while he observed that the heads of relief in the notice of application might have been clearer, he agreed with Iris that there is a decision of the Minister in issue in the

application – the decision to withhold payment pending an audit – as well as a request for *mandamus*.

[20] In support of his conclusion on this point, the prothonotary relied on two pieces of evidence, as well as the reference to a decision in paragraph 8 of the grounds for the decision (set out in paragraph 15 above).

[21] The first piece of evidence was the transcript of Iris's cross-examination of the deponent of an affidavit filed by the Minister in a motion by Iris for interim relief. In that cross-examination, the Minister's deponent agreed with the proposition that the Minister "had the choice to assess and pay refunds for the fiscal periods ending September 2019, October 2019, November 2019, December 2019, January 2020 and February 2020, but elected not to do so."

[22] The second was a letter to Iris from Ted Gallivan, Assistant Commissioner in the Canada Revenue Agency. The letter included the following statements:

> Based on a review of Iristel's account, the CRA decided to audit the net tax refunds for the periods January 1, 2019 to December 31, 2019, before releasing the payments.
>
> […]
>
> Based on a review of your file, the CRA's audit evidence indicates that a significant assessment is likely to be issued on your account. The CRA determined that it would be inappropriate to release the refunds claimed until the audit is complete.

Iris received this letter more than a week before it commenced its application for judicial review.

[23] The prothonotary also found the facts before him to be substantially similar to those in *McNally v. Canada (National Revenue)* (23 April 2014), T-1282-13, appeal dismissed as moot, 2015 FCA 23. In *McNally*, a motion judge upheld a prothonotary's order to compel a rule 317 record, despite a request for *mandamus*. However, in that case the applicant was expressly seeking, in the alternative to *mandamus* relief, a declaration that that the Minister's decision to delay the assessment was illegal.

D. *The motion judge's decision*

[24] On the rule 51 appeal, the motion judge found that the prothonotary had committed no reviewable error. According to the motion judge, the prothonotary's decision turned on the application of the law to the facts. Therefore, the palpable and overriding error standard of review applied, though the result would be the same if he applied the correctness standard.

[25] Addressing the Minister's submission that the prothonotary's decision was inconsistent with *Alberta Wilderness*, the motion judge stated that *Alberta Wilderness* did not "preclude the possibility that an application which seeks *mandamus* to compel an administrative act may also challenge a decision that has already been made." In those circumstances, he went on, rule 317 would apply to that decision. Therefore, there was also nothing inconsistent between this Court's reasoning in *Alberta Wilderness* and the Federal Court's decision in *McNally*.

[26] The motion judge proceeded to find that the prothonotary had committed no reviewable error on either standard when he determined that in withholding payment of Iris's net tax refund, the Minister made, rather than refused to make, a decision.

[27] Turning to the record on which the prothonotary based his order, the motion judge held that it was not an error for the prothonotary to rely on evidence in addition to the notice of application in concluding that a decision had already been made. He also rejected the submission that the Gallivan letter could not be a decision subject to judicial review because it did not affect Iris's legal rights, which flowed solely from section 229 of the *Excise Tax Act*.

[28] The motion judge next considered the Minister's submission that the prothonotary erred in failing to take into account the previous decisions of the Federal Court and this Court in this proceeding, in which Iris had sought interim mandatory relief. In those decisions, Iris's application had been characterized and treated as a proceeding seeking *mandamus*, and no mention had been made of any challenge by Iris to a past decision. The motion judge saw the prothonotary's decision as not incompatible with the earlier decisions: the issue whether Iris was seeking judicial review of a past decision had not been raised in them, and it was to be expected, given the remedy Iris was seeking, that principles relevant to the availability of interim mandatory relief would be considered.

[29] Finally, the motion judge found the prothonotary's reference to paragraph 8 of the notice of application (the paragraph relating to an earlier reporting quoted above at paragraph 15) to disclose no palpable and overriding error. This was so even though it was not clear whether the prothonotary misunderstood which decision – the decision to release the net refunds for the earlier reporting period or the alleged decision to withhold payment now in issue – that paragraph addresses. The motion judge stated that he read the paragraph to refer to the earlier decision, as context. "This reading," he continued, "supports a conclusion that the Application

challenges a decision, albeit not expressly referenced, which is comparable to the expressly referenced decision related to the previous withholding."

[30] The motion judge also considered the scope of the prothonotary's order, but this element of the order was not raised before us and is no longer in issue.

E. *Subsequent developments*

[31] The motion judge rendered his decision on June 2, 2021. On June 18, 2021, Iris filed a motion for leave to amend its notice of application. The motion was argued before the prothonotary on July 22, 2021. It remains under reserve.

[32] Shortly after the oral hearing in this appeal, the Court issued a direction requesting written submissions from the parties "concerning the impact, if any, on this appeal of any non-compliance by the respondent's notice of application for judicial review with rule 301, and in particular subrules 301(c)(ii), (d) and (e)." Neither party had referred to rule 301 in either written or oral submissions. Nor had either the prothonotary or the motion judge referred to it. I have considered the submissions provided by the parties on rule 301 in response to the Court's direction in coming to the disposition of the appeal that I propose.

III. Standard of review

[33] Decisions of prothonotaries are subject to the appellate standard of review set out in *Housen v. Nikolaisen*, 2002 SCC 33: *Hospira Healthcare Corp v. Kennedy Institute of*

Rheumatology, 2016 FCA 215 at paras. 64-65, leave to appeal refused, [2017] 1 S.C.R. xi. Under *Housen*, the correctness standard applies to decisions on questions of law, while questions of fact or mixed fact and law (absent an extricable error of law) are reviewable only on the deferential standard of palpable and overriding error. Where the Federal Court has upheld the prothonotary's decision, this Court must look to the prothonotary's decision to determine "whether the Federal Court judge erred in law or made a palpable and overriding error in refusing to intervene": *Sikes v. Encana Corp.*, 2017 FCA 37 at para. 12, leave to appeal refused, [2017] 2 S.C.R. x; *Hospira* at paras. 83-84.

IV. The errors alleged

[34] The Attorney General submits that the motion judge committed a series of reversible errors in coming to the conclusion that Iris is entitled to production of a rule 317 record because its application seeks to review a decision of the Minister, and thus seeks more than *mandamus*. He alleges errors

(1) in determining that the Minister made a reviewable decision when her withholding of payment pending the audit did not affect Iris's legal rights;

(2) in considering evidence outside the notice of application in finding that Iris's application for judicial review seeks more than *mandamus*;

(3) in failing to find that issue estoppel arising from an earlier motion and appeal bars Iris from asserting that its application seeks more than *mandamus*;

(4) in wrongly interpreting and applying *Alberta Wilderness*;

(5) in wrongly interpreting and applying *McNally*; and

(6) (in his submissions in response to the Court's direction), in failing to find that Iris's non-compliance with rule 301 precluded it from obtaining production under rule 317.

[35] In my view, it is necessary to consider only the last of these alleged errors to resolve this appeal. I would conclude that the motion judge erred in law in refusing to intervene to correct the prothonotary's failure to take account of Iris's non-compliance with rule 301.

V. Analysis

[36] This appeal thus turns on the relationship between rule 317 and rule 301. That relationship can be expressed in three propositions. First, a party may use rule 317 to obtain production only of material that is relevant to an application, in that it may affect the Court's decision on the application. Second, by rule 301, the Court's decision on an application for judicial review will be limited to the grounds of review and the relief set out in the notice of application. And third, production under rule 317 is therefore not available in relation to grounds and relief the notice of application fails, contrary to rule 301, to set out.

[37] The first proposition flows directly from the text of rule 317(1), which allows a party to request only material "relevant to an application." As this Court explained in *Canada (Human Rights Commission) v. Pathak*, [1995] 2 F.C. 455 at 460, 1995 CanLII 3591 (F.C.A.), leave to appeal refused, [1995] S.C.C.A. No. 306, "[a] document is relevant to an application for judicial review if it may affect the decision that the Court will make on the application." See also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras. 106-108.

[38] The second proposition is also well established. Subject to limited exceptions, rule 301 is a mandatory provision.

[39] In *Pathak*, for example, this Court went on to state that

> [a]s the decision of the Court will deal only with the grounds of review invoked by the respondent [in that case the party seeking judicial review], the relevance of the documents requested must necessarily be determined in relation to the grounds of review set forth in the originating notice of motion and the affidavit filed by the respondent.

(The reference to "the affidavit filed by the respondent" is an artifact of the former *Federal Court Rules*, C.R.C., c. 663. Under the former rules 1602 and 1603, an application for judicial review was commenced by serving and filing an originating notice of motion, together with "one or more affidavits verifying the facts relied on by the applicant." Under the current rules, the application is commenced by a notice of application, and by rule 306, the applicant's supporting affidavits are to be served within 30 days of the issuance of the notice of application.)

[40] Other decisions of this Court since *Pathak* limiting judicial review to the grounds of review and the relief set out in the notice of application include *SC Prodal 94 SRL v. Spirits International B.V.*, 2009 FCA 88 at paras. 11-12; *Republic of Cyprus (Commerce and Industry) v. International Cheese Council of Canada*, 2011 FCA 201 at paras. 12-13, leave to appeal refused 34430 (April 12, 2012), citing with approval *Astrazeneca AB v. Apotex Inc.*, 2006 FC 7, affirmed 2007 FCA 327; *Apotex Inc. v. Canada (Health)*, 2019 FCA 97 at paras. 7-9; and *Makivik Corporation v. Canada (Attorney General)*, 2021 FCA 184 at para. 53.

[41] As this Court has recognized, the requirements of rule 301 are not merely technical; they ensure among other things that respondents have adequate notice of the case being brought against them so that they can meaningfully respond. They also leave it open to an applicant

seeking *mandamus* relief to include in its notice of application a claim for alternative or supplementary non-*mandamus* relief, provided that the claim as pleaded complies with rule 301. If an applicant finds its initial description of the grounds and relief claimed in the notice of application too narrow, it may move for leave to amend under rule 75: *SC Prodal* at para. 15; *Astrazeneca* at para. 19. In these scenarios, rule 317 will apply in respect of any non-*mandamus* claim that challenges an administrative decision.

[42] It has been stated in decisions of the Federal Court that "there is some room for discretion [in applying the requirements of rule 301] where, for example, relevant matters have arisen after the notice was filed; the new issues have some merit, are related to those set out in the notice, and are supported by the evidentiary record; the respondent would not be prejudiced, and no undue delay would result": see, for instance, *Tl 'azt'en Nation v. Sam*, 2013 FC 226 at paras. 6-7. But this Court has resisted expanding the availability of an exception beyond cases in which the notice of application contains a "basket clause," and the applicant seeks declaratory relief that is necessarily ancillary to the relief expressly requested: *SC Prodal* at paras. 11-12.

[43] As for the third proposition, it follows from the first two. It is, again, that production under rule 317 is not available in relation to grounds and relief the notice of application fails, contrary to rule 301, to set out.

[44] Here, Iris submits that its application for judicial review not only seeks *mandamus*, but also challenges a decision of the Minister. However, its notice of application fails to set out a challenge to the Minister's decision in a manner that complies with rule 301. Contrary to rule

301(c)(ii), it does not set out "the date and details of any [decision of the Minister] in respect of which judicial review is sought." Contrary to rule 301(d), the only "precise statement of the relief sought" is in relation to *mandamus* and costs, and not any decision of the Minister, and the only "basket clause" is in relation to the grounds for the application, not the relief sought. Contrary to rule 301(e), there is no "statement of the grounds intended to be argued" in relation to a decision of the Minister, let alone a statement that is "complete and concise."

[45] Iris makes two further main submissions in response to the Court's direction. First, it submits that, as occurred in *Alberta Wilderness*, this Court should direct the parties and the case management judge "to work to [tailor] the notice of application to the status of the administrative decision-making process." But as the Attorney General points out, this Court in *Alberta Wilderness* found the question of rule 317 production to be premature and unnecessary to address. That characterization of the issue also applies here pending disposition of Iris's motion for leave to amend.

[46] Iris also submits that the "basket clause" in its notice of application provides a basis for finding its application includes a challenge to a decision of the Minister. But as already noted, the "basket clause" here is in relation to the grounds on which Iris relies in seeking the relief the notice of application sets out, not the relief itself. In any event, a challenge to a decision of the Minister cannot be regarded as necessarily ancillary to the claim for *mandamus* relief.

[47] In my view, the prothonotary should have concluded that the notice of application does not set out a challenge to a decision of the Minister that complies with rule 301, that the

application seeks only *mandamus* relief and costs, and that there is accordingly no basis for a rule 317 request. The motion judge in turn erred in law in failing to intervene.

VI. Disposition

[48] I would allow the appeal with costs, set aside the order of the Federal Court dated June 2, 2021, and, giving the judgment the Federal Court should have given, allow the appellant's appeal under rule 51 of the *Federal Courts Rules* with costs, set aside the order of Prothonotary Aalto dated February 15, 2021, and dismiss with costs the respondent's motion filed September 11, 2020 for an order under rule 318(4) requiring transmission of the material requested under rule 317 in the respondent's notice of application for judicial review.

[49] 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 as appellant.

"J.B. Laskin"
J.A.

"I agree.
Donald J. Rennie J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-163-21

(APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE SOUTHCOTT OF THE FEDERAL COURT DATED JUNE 2, 2021, DOCKET NUMBER T-425-20)

STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. IRIS TECHNOLOGIES INC.
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	OCTOBER 21, 2021
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	RENNIE J.A. MACTAVISH J.A.
DATED:	DECEMBER 21, 2021

APPEARANCES:

Andrea Jackett Katie Beahen Christopher Ware Natanz Bergeron Elizabeth Chasson	FOR THE APPELLANT
Leigh Somerville Taylor Mireille Dahab	FOR THE RESPONDENT

SOLICITORS OF RECORD:

A. François Daigle Deputy Attorney General of Canada	FOR THE APPELLANT
Leigh Somerville Taylor Professional Corporation Toronto, Ontario	FOR THE RESPONDENT
Dahab Law Markham, Ontario	