Federal Court Cour fédérale

Date: 20210602

Docket: T-425-20

Citation: 2021 FC 528

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 Court Rules,* SOR/98-106 [the Rules], appealing and setting aside an Order of Prothonotary Kevin R. Aalto [the Prothonotary] dated February 15, 2021, which required the Minister to produce a certified tribunal record pursuant to Rule 317 [the Order].

[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 Judicial Review*

[3] The Applicant, Iris Technologies Inc. [Iris], is a Canadian company that provides long distance telecommunications services to individuals and companies in Canada and abroad. On March 26, 2020, Iris filed a Notice of Application for judicial review [the Notice of Application] in respect of the failure of the Minister to issue its net tax refunds for the reporting period of September 1, 2019 to February 29, 2020, and failure to assess or continue to audit its GST/HST returns for reporting periods from September 1, 2019 onward [the Application].

[4] In the Notice of Application, Iris seeks an order:

A. directing the Minister to assess Iris' GST/HST returns for the reporting period from September 1, 2019 to February 29, 2020; and

B. directing the Minister to pay Iris' net tax refunds for the reporting period September 1, 2019 to February 29, 2020 and any subsequent periods until the conclusion of the Minister's audit.

[5] The Notice of Application also includes a request, pursuant to Rule 317, that the Minister provide certified copies of the following materials that are in the possession of the Canada Revenue Agency [CRA]:

A. all documents relating to the examination of the periods commencing January 1, 2017 to date;

B. a list of particulars for the CRA employees who participated in the examination or review of these reporting periods; and

C. all diary notes, internal correspondence and reports relating to the periods commencing January 1, 2017 to date.

[6] The Minister objected to production of a Rule 317 record on the basis that: (a) Rule 317 is not applicable to the Application because Iris seeks to compel the Minister to act rather than challenging a decision; and (b) the Rule 317 request is overly broad, amounting to documentary discovery.

[7] On September 11, 2020, Iris filed a motion to compel production of the Rule 317 record, arguing that the Minister had made a decision not to make payments of Iris' net tax refunds.

B. *Order Under Appeal*

[8] In the Order under appeal in this motion, the Prothonotary granted Iris its requested relief in part.

[9] In arriving at this decision, the Prothonotary referred to Iris' position that it is implicit, if not explicit, in the Application that there was a decision made by the Minister not to make payment of Iris' net tax refunds that were payable for certain reporting periods. In support of this position, Iris relied on the transcript of cross-examination of the Minister's witness in an earlier motion for interim relief in this matter, indicating that the witness agreed that the Minister made an express decision to withhold the refunds. In addition, Iris relied on a letter from Ted Gallivan, CRA's Assistant Commissioner, Compliance Programs Branch sent on or around March 18, 2020 [the Gallivan Letter], indicating that the Minister had decided to withhold Iris' refunds pending an audit. Finally, the Prothonotary referred to the grounds for the Application, in which Iris referred to a "decision" of the Minister to withhold refunds.

[10] The Prothonotary concluded that, while it might have been clearer to refer to the Minister's decision in the heads of relief in the Notice of Application, there was sufficient evidence to demonstrate that a decision was in issue in the Application in addition to the request for an order of *mandamus*.

[11] Turning to applicable jurisprudence, the Prothonotary considered *Alberta Wilderness Association v Canada* (*Attorney General*), 2013 FCA 190 [*Alberta Wilderness*], in which the Federal Court of Appeal held that Rule 317 does not apply to an application for *mandamus*, because such an application does not involve a decision that is subject to judicial review. The Prothonotary distinguished *Alberta Wilderness* because, although the present Application sought *mandamus*, there was also clearly a decision that is subject to judicial review.

[12] The Prothonotary held that the Application was on all fours with *McNally v Canada (National Revenue)* (April 23, 2014), Ottawa, T-1282-13 (FC) [*McNally*], a decision where the applicant sought both an order of *mandamus* and an order declaring that a decision to delay an assessment of the applicant's tax return was illegal. In that decision, Justice Gagné upheld a prothonotary's order compelling production of a Rule 317 record in relation to that decision.

[13] As previously noted, the Prothonotary granted Iris' requested relief only in part, as he agreed that the request was in some respects too broad. In the result, the Prothonotary ordered production on terms he considered consistent with applicable limitations on the scope of production. The precise terms of the production ordered will be canvassed later in these Reasons.

[14] The Minister has appealed the Order in the motion now before the Court, seeking to set aside the Order or, in the alternative, to further limit the scope of the Rule 317 production ordered by the Prothonotary.

III. **Issues**

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

A. Whether the Prothonotary erred in ordering production of a Rule 317 record; and

B. In the alternative, whether the Rule 317 production ordered by the Prothonotary was overly broad.

IV. **Analysis**

A. *Standard of Review*

[16] 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.

[17] The parties agree on these principles but disagree on their application to this motion. Iris submits that the Prothonotary's analysis involves findings of mixed fact and law. The Minister argues that the analysis includes engagement, or required engagement, with an extricable question of law, upon which the Minister submits the Prothonotary erred.

[18] In advancing its position on the standard of review, the Minister relies on the explanation in *Alberta Wilderness* that Rule 317 does not apply to an application for an order of *mandamus* (at paras 38-40). The Minister argues that the Prothonotary erred in law in failing to follow *Alberta Wilderness*, in failing to follow previous decisions of the Federal Court and Federal Court of Appeal in the present litigation, and in failing to recognize that there is a legal distinction between a decision and a refusal to make a decision. The Minister's submits in particular that this legal distinction represents an extricable question of law, which must be addressed correctly, independent of its application to the particular facts of this case.

[19] I disagree with the Minister's position on the standard of review. The outcome of the motion before the Prothonotary turned on his application of the law, including consideration of *Alberta Wilderness*, to facts identified through consideration of the Notice of Application and other evidence adduced on the motion. While I agree with the Minister that there is a distinction between a decision and the refusal to make a decision, the significance of that distinction in the present case again turns on consideration of the applicable facts, representing findings of mixed fact and law.

[20] I will therefore employ the standard of palpable and overriding error in considering the errors alleged by the Minister. However, as explained below, my analysis would generate the same result if I applied the standard of correctness to the distinction that the Minister would characterize as an extricable question of law.

B. *Whether the Prothonotary erred in ordering production of a Rule 317 record*

[21] As previously noted, the Minister relies on *Alberta Wilderness* to support an argument that the Prothonotary erred in finding that Rule 317 applies where the remedy sought is *mandamus*. I agree that *Alberta Wilderness* stands for the principle that, where no decision has been made by a decision-maker, there is no order which can be the subject of an application for judicial review and, therefore, Rule 317 does not apply (at para 39). However, I do not understand *Alberta Wilderness* to 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 such a case, Rule 317 does apply to that decision.

[22] This is the reasoning underlying *McNally*, an authority upon which the Prothonotary relied. The Prothonotary noted that Prothonotary Milczynski (in *McNally v Canada (National Revenue)* (February 12, 2014), Ottawa T-1282-13 (FC) [*McNally (Protho)*]) had ordered production of a Rule 317 record, even though the applicant in that matter was seeking *mandamus*, and that Justice Gagné found no error in that decision. Justice Gagné noted that the application for judicial review not only sought a *mandamus* order but also asserted that the Minister had made an improper decision to delay the assessment of the applicant's return. Justice Gagné therefore upheld Prothonotary Milczynski's decision to compel production of a Rule 317 record in relation to that decision.

[23] I do note that, in *Alberta Wilderness*, Justice Pelletier was critical of the practice of including more than one decision or possible decision within the scope of a single application for judicial review. This practice is inconsistent with Rule 302 which provides that, unless otherwise ordered, an application for judicial review should be limited to a single order in respect of which relief is sought (see para 32). Justice Pelletier also commented that it is inconsistent to allege both that a decision has not been made and that it has been made, seeking *mandamus* in relation to the former and other remedies in judicial review in relation to the latter (at para 34). Based on these concerns, Justice Pelletier directed the parties and the case management judge or prothonotary to work to tailor the notice of application to the status of the administrative decision-making process in that case (at paras 37 and 57).

[24] However, it is apparent that Justice Pelletier did not regard these concerns as fatal flaws but rather as matters to be rectified through the case management process. Moreover, following

the analysis to the effect that Rule 317 does not apply where no decision has yet been made, *Alberta Wilderness* held that the applicants' Rule 317 request remained in effect with respect to other orders identified in the notice of application as it was presently drafted (paras 39-40). I therefore find nothing inconsistent between the reasoning in *Alberta Wilderness* and that in *McNally*. Subject to a potential Rule 302 concern, if an application for judicial review challenges a decision that has already been made, Rule 317 is engaged, notwithstanding that the application may also seek *mandamus* in relation to a decision not yet made.

[25] This brings me to consideration of the Minister's argument that there is an extricable question of law, surrounding the distinction between a decision and a refusal to make a decision. In advancing this argument, the Minister relies on the explanation in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (FCA), that the preconditions to the remedy of *mandamus* include a refusal, either express or implied, to perform a public legal duty (at 19-20). The Minister argues that, as such a refusal represents a precondition to the availability of *mandamus*, and as *Alberta Wilderness* explains that *mandamus* relates to a decision not yet made, it logically follows that the refusal is not itself a decision which is subject to judicial review and the application of Rule 317.

[26] I accept the logic of this submission but find that it does not particularly assist the Minister on the facts of this case. After considering *Alberta Wilderness*, the Prothonotary found, on the basis of the record before him, that there was clearly a decision that was subject to judicial review. I will consider shortly the contents of the record upon which the Prothonotary relies and the Minister's arguments in relation thereto. However, the Prothonotary's conclusion was that, in

addition to seeking *mandamus*, the Application challenged a decision that had already been made by the Minister, not to make payment of Iris' net tax refunds that were payable for certain reporting periods. As found by the Prothonotary, this is a decision, not a refusal to make a decision. Even if I were to treat the distinction between a refusal and a decision as an extricable question of law, reviewable on a correctness standard, I would find no basis to conclude that the Prothonotary erred by failing to appreciate that distinction.

[27] I therefore turn to the Minister's arguments surrounding the record upon which the Prothonotary relied in arriving at his conclusion that the Application challenged a decision that had already been made. The Prothonotary referred to: (a) evidence in the transcript of the cross-examination of the Minister's witness on an earlier motion by Iris seeking interim relief; (b) the Gallivan Letter; and (c) the contents of the Notice of Application itself.

[28] The Minister has raised no arguments specific to the cross-examination evidence, other than arguing that the obligation to produce documents under Rule 317 must be determined according to the grounds of review in the Notice of Application. In support of this submission, the Minister relies on *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 [*Tsleil-Waututh*] at paras 109-110. I do not necessarily understand the Minister to be arguing that it was an error for the Prothonotary to rely on evidence, in addition to the Notice of Application itself, in arriving at his decision. To the extent that the Minister may be advancing such a position, I do not consider it to have merit.

[29] *Tsleil-Waututh* relies on and quotes from *Canada (Human Rights Commission) v Pathak,* [1995] 2 FC 455 (FCA) [Pathak] at 460, in which the Federal Court of Appeal explained that the relevance of documents requested must be determined in relation to the grounds of review set forth in the originating notice and the affidavit filed by the party seeking review. I do not read *Tsleil-Waututh* as intending to depart from *Pathak.* As such, it is not solely the Notice of Application that governs the scope of production required under Rule 317. In *Pathak,* the Court took into account not only the originating notice but also the affidavit filed by the applicant for judicial review and other material that was before the Court in assessing relevance for purposes of the production motion (at pp 460-461). This is consistent with the approach taken in *McNally (Protho)* (affirmed in *McNally*), in which Prothonotary Milczynski relied substantially on the material filed in support of the application for judicial review and the Rule 317 motion in arriving at her decision.

[30] The transcript, upon which the Prothonotary relied in his analysis, relates to the cross-examination of Mr. Vance Smith, the deponent of the affidavit the Minister filed in this proceeding in response to a motion for interim relief brought by Iris. In cross-examination, Mr. Vance confirmed that the material he reviewed in preparing for being the Minister's affiant included documentation related to a prior audit of Iris. In relation to that audit, he confirmed that there was no resulting adjustments to Iris' returns for the 2017 and 2018 calendar years, and that the Minister had recognized that the withholding of refunds up to March 2019 was causing sufficient hardship to Iris to warrant the release of the refunds. In relation to the returns that I understand to be the subject of this Application, Mr. Vance testified that the Minister held the returns without assessing them, while CRA conducted certain audit work. He testified that there

was a choice whether to assess and pay refunds for the fiscal periods under consideration, but an election was made not to do so.

[31] As I interpret the Order, the Prothonotary relied upon this evidence by Mr. Vance in finding that the Minister made an express decision to withhold Iris' refunds. The Minister has raised no basis, and I find no basis, to conclude that the Prothonotary erred in this portion of his analysis.

[32] The second piece of evidence that the Prothonotary relied upon is the Gallivan Letter. This letter states that CRA decided to audit Iris' net tax refunds for the periods January 1, 2019 to December 31, 2019 before releasing the payments; it documents that Mr. Vance informed the President and Chief Executive Officer of Iris by telephone on February 24, 2020, that the refund for the reporting period of January 2020 would be held until the audit work was completed; and it states that CRA had determined that it would be inappropriate to release the refunds claimed until the audit was complete. Again, there is no basis for a conclusion that the Prothonotary erred in relying on this evidence to find that the Minister had made a decision to withhold Iris' refunds pending an audit.

[33] In so finding, I have considered the Minister's argument that the Gallivan Letter does not affect Iris' legal rights, which flow only from s 229 of the *Excise Tax Act*, RSC, 1985, c E-15. Section 229 requires the Minister, subject to certain conditions and restrictions, to pay net tax refunds to a person claiming a refund in a return with all due dispatch after the return is filed. The Minister relies on *Nautica Motors Inc v Canada (Minister of National Revenue)*, 2002 FCT

422 (FCTD) and *Express Gold Refining Ltd v Canada (Minister of National Revenue)*, 2020 FC 614, in support of its position that the Gallivan Letter does not reflect or communicate an exercise of discretion and is not entitled to deference on review. While this jurisprudence speaks to the interpretation and operation of s 229, I do not read it as inconsistent with a conclusion that the Gallivan Letter constitutes an administrative decision that can be the subject of an application for judicial review.

[34] I have also considered the Minister's argument that the Prothonotary erred in failing to consider previous decisions by this Court, and by the Federal Court of Appeal, in the within proceeding, which characterized the Application as a proceeding seeking *mandamus*. The Minister is referring to *Iris Technologies Inc v Canada (National Revenue)*, 2020 FC 532 at para 52; the dismissal of the appeal therefrom in *Iris Technologies Inc v Canada (Minister of National Revenue)*, 2020 FCA 117 at paras 17-18; and *Iris Technologies Inc v Canada (Minister of National Revenue)*, 2020 FC 1133 at para 47. These decisions all involved motions by Iris for interim relief, i.e. seeking orders requiring the Minister to make payments to Iris pending the outcome of this Application. The Minister submits that, in analysing Iris' requests for interim relief, these decisions all characterized the Application as seeking *mandamus*, applied jurisprudential principles relevant to requests for mandatory injunctive relief, and made no mention of Iris seeking to quash an existing decision to which the reasonableness standard of review applied.

[35] I agree with the Minister's characterization of the previous decisions in this matter, but I disagree that they are particularly instructive on the issue presently before the Court on this

motion. The fact that the Application seeks relief in the nature of *mandamus* is not controversial and, as Iris' previous motions sought mandatory injunctive relief on an interim basis, it is of course to be expected that this Court, and the Federal Court of Appeal, applied principles relevant to requests for such relief in arriving at their decisions. The particular issue now before the Court, i.e. whether there is a decision that has already been made, of which Iris is seeking judicial review, was not raised in the earlier motions or the appeal. To the extent the Minister is arguing that the Prothonotary erred in failing either to consider or to follow those decisions, in arriving at his own conclusion on the issue raised in the motion before him, I find no palpable and overriding error.

[36] Finally, I turn to the Prothonotary's consideration of the Notice of Application. In arriving at his conclusion that, in addition to seeking *mandamus* in the Application, Iris seeks judicial review of a decision, the Prothonotary indicates that the evidence relied upon by Iris is stronger than the facts relied upon in to the same effect in *McNally*. I find no basis to disagree with that characterization of the evidence. However, in my view, the question of whether the notice of application itself disclosed a request for judicial review of a decision that had already been made was clearer in *McNally* than it is in the case at hand.

[37] The precise drafting of the notice of application under consideration in *McNally* is not set out in the decisions of Prothonotary Milczynski or Justice Gagné. However, Justice Gagné described the application as seeking (a) an order compelling the Minister to assess a particular income tax return; and (b) in the alternative, an order declaring that the Minister had no authority to delay his assessment for particular purposes. Therefore, there was a particular head of relief

claimed in the notice of application upon which the Court relied in concluding that the applicant was challenging a decision that had already been made.

[38] The same cannot be said of the Notice of Application in the case at hand. Both heads of substantive relief sought in the Notice of Application claim an order directing the Minister to perform a particular act. Neither expressly seeks to set aside a decision already made. However, the Prothonotary considered the Notice of Application and referred in particular to its reference to a "decision" of the Minister to withhold refunds. This reference is in paragraph 8 of the Notice of Application:

> 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 two days before the commencement of the current audit, and determined that the held refunds should be released and were released.

[39] The "decision" referenced in this paragraph is not the decision to withhold refunds that Iris argues the Application seeks to challenge. Rather, it is the similar decision that was made in relation to the previous audit, until the Minister subsequently decided to pay those previously withheld refunds, as canvassed in the cross-examination testimony of Mr. Vance noted earlier in these Reasons. While I do not understand the Minister to have argued that the Prothonotary misinterpreted this paragraph of the Notice of Application, I have nevertheless considered whether the Prothonotary's analysis of the Notice of Application could represent an error.

[40] However, the Prothonotary expressly noted that it might have been clearer for Iris to refer to the decision under review in the heads of relief of the Notice of Application. Therefore, the

Prothonotary clearly adverted to the absence of such a reference. Also, when considered in conjunction with the evidence upon which the Prothonotary relied, I do not necessarily read his analysis in the Order as suggesting a misunderstanding of which "decision" was referenced in paragraph 8 of the Notice of Application. I read the Notice of Application as raising that previous decision, which was ultimately reversed, as context which assists Iris' assertion that the current withholding of refunds is unreasonable. This reading 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. Applying the palpable and overriding error standard, I find no error in the Prothonotary's consideration of the Notice of Application in ordering production of a Rule 317 record.

C. *Whether the Rule 317 production ordered by the Prothonotary was overly broad*

[41] In the alternative, the Minister argues that the scope of production ordered by the Prothonotary is too broad. The Minister submits, first, that the Prothonotary ordered production beyond the reporting periods in dispute and, second, that he failed to limit production to documents that were before the decision-maker.

[42] I note that the Prothonotary did agree, in part, with the Minister's position on the motion below, that Iris' Rule 317 request was too broad and overreaching and amounted to documentary discovery. The second category of Iris' production requests sought a list of particulars for the CRA employees who participated in the review of the relevant reporting periods. The Prothonotary found that this request required CRA to create a document containing particulars,

which would not have been before the decision-maker and therefore was not appropriate for Rule 317 production. The Prothonotary also found Iris' third category of requests, for diary notes, internal resource correspondence and reports relating to the periods commencing January 1, 2017 to date, to be relevant only if the decision-maker had them available when making the decision.

[43] Based on these considerations, the Prothonotary fashioned the operative paragraph of the Order as follows:

> The Minister of National Revenue shall send a certified copy of the following materials to the Applicant and to the Registry:
>
> > All materials in the possession of the Minister of National Revenue and the Canada Revenue Agency relating to the decision made not to make payment of the Applicant's net tax refunds that were payable for the enumerated reporting periods pursuant to Rule 318(4) on or before March 1, 2021, which materials are described above.

[44] The Minister is concerned that the Order requires production of documents relating to reporting periods beginning in January 2017. The Minister submits that, to obtain such production, Iris was required to establish the actual relevance of these documents and that the Prothonotary failed to provide a rationale for ordering production of that scope. The Minister requests that this Court address this issue and exercise its discretion to limit production to documents relating to the September 2019 and subsequent reporting periods.

[45] I agree that the Order does not expressly set out an analysis as to why documents relating to the earlier reporting periods are relevant. However, taking into account the record before the Prothonotary, I consider the relevance to be apparent. The Prothonotary expressly relied upon the

evidence from Mr. Vance's cross-examination transcript, and the pleading in paragraph 8 of the Notice of Application, surrounding the decision to withhold refunds during the Minister's prior audit of Iris. As previously noted, Mr. Vance confirmed that the material he reviewed in preparing to be the Minister's affiant in this Application included documentation related to the prior audit. Moreover, as I have construed the Notice of Application and the Prothonotary's interpretation thereof, it seeks to rely on the Minister's decision-making surrounding the previous audit and refunds to support its arguments challenging the decision to withhold the refunds now under consideration. This analysis supports the relevance of the material from earlier reporting periods. In my view, the Minister's argument does not raise a basis to interfere with the scope of the Order.

[46] The Minister also argues that, while the Prothonotary limited the third class of production (i.e., diary notes, internal correspondence and reports relating to the periods commencing January 1, 2017 to date) to documents that were before the decision-maker, he failed to explain why he did not apply a similar restriction to the first class of production (i.e., all documents relating to the examination of the periods commencing January 1, 2017 to date). In relation to this point, the Minister seeks revised production language, which expressly restricts all production to materials that were before the decision-maker.

[47] Again, I find no basis to alter the Order in the manner proposed by the Minister. The Prothonotary was clearly aware of the point that documents are only relevant and subject to production if the decision-maker had them available when making the decision. While his reasons expressly make that point only in relation to the third class of production, the operative

portion of his Order is contained in one paragraph, which necessarily applies to all production. As I read that paragraph, the restriction to material that was before the decision-maker is intended by the language “All materials in the possession of the Minister of National Revenue and the Canada Revenue Agency relating to the decision…”.

[48] Finally, I note that the Minister’s alternative position requests an extension to serve a certified tribunal record 60 days after the Court issues its decision on this appeal. Iris objects to this request, noting that the Order required production within 15 days of its date. Iris also refers to the lengthy period of time that has passed since it initially requested Rule 317 production in its March 26, 2020 Notice of Application. Iris requests that the Court order production within 15 days or less.

[49] There is no evidence before the Court supporting the Minister’s request for 60 days, or indeed supporting any variation of the time period selected by the Prothonotary. I will therefore order production within 15 days of the date of my decision. If the Minister requires an extension of time, she may seek an extension from the Prothonotary acting as case management judge.

V. **Costs**

[50] 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-425-20

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 February 15, 2021, is dismissed.

2. The time for the Respondent's compliance with the Order of the Prothonotary is fixed at 15 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

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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