Federal Court Cour fédérale

Date: 20240808

Docket: T-1725-23

Citation: 2024 FC 1237

Toronto, Ontario, August 8, 2024

PRESENT: Case Management Judge John C. Cotter

BETWEEN:

MOBILE TELESYSTEMS PUBLIC JOINT STOCK COMPANY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

UPON MOTION by the respondent, The Attorney General of Canada, for:

a) an order striking out the notice of application of the applicant dated August 18, 2023;

b) an order requiring the applicant, Mobile TeleSystems Public Joint Stock Company ("MTS"), to pay the respondent's costs of this motion; and

c) such further relief that counsel may advise and this Honourable Court may permit.

AND UPON reading the motion record of the respondent, moving party, dated December 15, 2023, and the responding motion record of the applicant dated December 22, 2023;

AND UPON hearing and considering the submissions of counsel for the parties made at the hearing of this motion on January 17, 2024;

AND UPON considering:

[1] The respondent seeks to strike out the notice of application on the basis that it is premature in that there is an adequate alternative remedy that the applicant has not pursued. For the reasons set out below, I agree. The motion is granted and the notice of application struck out.

[2] As per the notice of application, this proceeding is an application for judicial review of the decision ("July 19 Decision") of the Governor General in Council ("GIC"), on the recommendation of the Minister of Foreign Affairs ("Minister"), made on July 19, 2023, to add the applicant to Schedule 1 ("Sanctions List") of the *Special Economic Measures (Russia) Regulations*, SOR/2014-58 ("Regulations"), pursuant to the *Regulations Amending the Special Economic Measures (Russia) Regulations*, SOR/2023-163. The Regulations are pursuant to the *Special Economic Measures Act*, SC 1992, c-17 ("Act").

[3] The provisions of the Regulations that are most significant for present purposes are sections 2 and 8 (unless otherwise indicated, all references in these reasons to sections are to those in the Regulations). In summary, under section 2 a person (defined to mean an individual or entity) can be named on the Sanctions List if the GIC, on the recommendation of the Minister,

is satisfied that there are reasonable grounds to believe that the person falls into one of the categories listed in that section. Neither the Act nor the Regulations provide a person with a right to advance notice that they will be put on the Sanctions List, or an opportunity to make submissions prior to the decision to put them on the Sanctions List. Instead, section 8 sets out the process ("Section 8 Application Process") by which a person may apply to have their name removed from the Sanctions List. Sections 2 and 8 provide as follows:

2 A person whose name is listed in Schedule 1 is a person in respect of whom the Governor in Council, on the recommendation of the Minister, is satisfied that there are reasonable grounds to believe is	2 Figure sur la liste établie à l'annexe 1 le nom de personnes à l'égard desquelles le gouverneur en conseil est convaincu, sur recommandation du ministre, qu'il existe des motifs raisonnables de croire qu'elles sont l'une des personnes suivantes :
(a) a person engaged in activities that directly or indirectly facilitate, support, provide funding for or contribute to a violation or attempted violation of the sovereignty or territorial integrity of Ukraine or that obstruct the work of international organizations in Ukraine;	a) une personne s'adonnant à des activités qui, directement ou indirectement, facilitent une violation ou une tentative de violation de la souveraineté ou de l'intégrité territoriale de l'Ukraine ou procurent un soutien ou du financement ou contribuent à une telle violation ou tentative ou qui entravent le travail d'organisations internationales en Ukraine;
(a.1) a person who has participated in gross and systematic human rights violations in Russia;	a.1) une personne ayant participé à des violations graves et systématiques des droits de la personne en Russie;

(b) a former or current senior official of the Government of Russia;

b) un cadre supérieur ou un ancien cadre supérieur du gouvernement de la Russie;

(c) an associate of a person referred to in any of paragraphs (a) to (b);

c) un associé d’une personne visée à l’un des alinéas a) à b);

(d) a family member of a person referred to in any of paragraphs (a) to (c) and (g);

d) un membre de la famille

d’une personne visée à l’un des alinéas a) à c) et g);

(e) an entity owned, held or controlled, directly or indirectly, by a person referred to in any of paragraphs (a) to (d) or acting on behalf of or at the direction of such a person;

e) une entité appartenant à une

personne visée à l’un des alinéas a) à d) ou détenue ou contrôlée, même indirectement, par elle ou pour son compte ou suivant ses instructions;

(f) an entity owned, held or controlled, directly or indirectly, by Russia or acting on behalf of or at the direction of Russia; or

f) une entité appartenant à la Russie ou détenue ou contrôlée, même indirectement, par elle ou pour son compte ou suivant ses instructions;

(g) a senior official of an entity referred to in paragraph (e) or (f).

g) un cadre supérieur d’une entité visée aux alinéas e) ou f).

[…]

[…]

8 (1) A person may apply in writing to the Minister to have their name removed from Schedule 1, 2 or 3.

8 (1) Toute personne dont le nom figure sur la liste établie aux annexes 1, 2 ou 3 peut demander par écrit au ministre d’en radier son nom.

[4] The Regulations set out the economic sanctions if a person is on the Sanctions List. It does this by prohibiting any person in Canada, and any Canadian outside Canada, from engaging in certain transactions and activities with a person on the Sanctions List (for example, see section 3).

[5] The July 19 Decision in respect of which MTS is seeking judicial review is a decision made under section 2. It is common ground between the parties that MTS has not applied under section 8(1) to the Minister to have its name removed from the Sanctions List.

[6] As noted above, the respondent brought the current motion seeking to strike out the notice of application on the basis that it is premature as MTS has not exhausted the remedies available to it under the Regulations, specifically, MTS has not applied under the Section 8 Application Process. MTS's position is that it is not an adequate alternative remedy and that it should be permitted to proceed with the present application for judicial review.

I. Affidavit Evidence

[7] Affidavit evidence was filed by both parties on this motion. Three affidavits were filed:

a) The Affidavit of Rabia Chauhan affirmed October 31, 2023, was filed by the respondent in support of the motion ("Chauhan Affidavit"). The affiant is a legal assistant with the Department of Justice. The affidavit simply attaches, as Exhibits, copies of the following two letters. A letter from applicant's counsel, Mr. Greg Kanargelidis, to Global Affairs Canada dated September 6, 2023; and

the letter in response from Global Affairs Canada to Mr. Kanargelidis dated October 13, 2023. These two letters are also Exhibits “D” and “E” to the MTS Lawyer’s Affidavit (defined below).

b) In support of its position on the motion, MTS filed the affidavit of Greg Kanargelidis sworn November 24, 2023 (“MTS Lawyer’s Affidavit”). He is one of the lawyers for MTS in this proceeding (see paragraph 2 of that affidavit). Because he swore the affidavit, someone else appeared as counsel on this motion.

c) The respondent’s position is that the MTS Lawyer’s Affidavit is inadmissible and/or irrelevant, but sought leave to file a reply affidavit to provide facts regarding the current status of other judicial review proceedings discussed in the MTS Lawyer’s Affidavit. MTS consented to leave being granted to file that affidavit, and leave was granted by Order dated December 12, 2023. The affidavit is that of Antonella Gullia, affirmed December 1, 2023 (“Respondent’s Reply Affidavit”). The affiant is a paralegal with the Department of Justice.

[8] As a general rule, affidavits are not admissible in support of motions to strike applications for judicial review (*JP Morgan Asset Management (Canada) Inc. v Canada (National Revenue)*, 2013 FCA 250 (“*JP Morgan”*), at paragraphs 51 and 52). Exceptions to the rule should be permitted only where the justifications for the general rule of inadmissibility are not undercut, and the exception is in the interests of justice (*JP Morgan*, at paragraph 53). Exceptions have been permitted where the issue on the motion was prematurity (*Picard v Canada (Attorney General) (“Picard”)*, 2019 CanLII 97266 (FC), at paragraphs 17 and 18; *Tait*

v Canada (Royal Canadian Mounted Police), 2024 FC 217, at paragraph 27). However, the evidence in the affidavit must be relevant (*Picard*, at paragraph 19). The evidence must also be admissible and proper affidavit evidence on a motion.

[9] The central issue with the affidavit evidence concerns the MTS Lawyer’s Affidavit. The respondent argues that it is anecdotal and opinion evidence of the applicant’s own lawyer and solicitor of record in this proceeding and is both irrelevant and inadmissible. The applicant’s arguments on this affidavit include that it is factual and “does not provide any personal opinions”.

[10] As stated by Justice McHaffie in *Subway IP LLC v Budway, Cannabis & Wellness Store*, 2021 FC 583, at paragraph 15: “The use of evidence on matters of substance from a member of the applicant’s law firm raises concerns”. Leaving aside the issue of whether it is appropriate for one of the lawyers representing the applicant in this proceeding to provide an affidavit of this type even if someone else is arguing the motion, the affidavit is so problematic that with one exception, it should be struck. If it did not strike it, I would give it no weight. As discussed below, the affidavit is replete with opinion, argument and irrelevant information and with one exception, the content is impermissible and inadmissible. The one exception is letters that are Exhibits “D” and “E” to the MTS Lawyer’s Affidavit. As noted above, these are also the exhibits to the Chauhan Affidavit. These letters are relevant as they are part of the procedural history of the underlying matter.

[11] The MTS Lawyer's Affidavit reads like an expert's affidavit (without the Code of Conduct provided for in Rule 52.2 of the *Federal Courts Rules*, SOR/98-106). It begins in paragraphs 1 and 3 with information on the lawyer's qualifications and experience. This is the type of information that is typically seen in an expert's affidavit. Simply by way of example, paragraph 1 includes the following statement: "I was named the 2023, 2018 and 2016 Toronto "Lawyer of the Year" for International Trade and Finance Law by Best Lawyers and have been recognized as a leader in the following publications, among others […]". Also by way of example, paragraph 3 includes the following: "A significant focus of my practice includes advising clients on the applicability of the Canadian sanctions regime" and "I have been retained on multiple occasions to assist clients sanctioned pursuant to regulations enacted under the *Special Economic Measures Act*". After setting out the lawyer's experience and expertise, the affidavit goes on to provide opinion and argument based on that experience. However, that affidavit was not tendered as an expert's affidavit (nor could it be without the Code of Conduct). As a result, the opinion evidence is not admissible. Neither is argument. On the foregoing points regarding inadmissible affidavit evidence, see the decision of Associate Judge Benoit Duchesne in *Akme Poultry Butter & Eggs Distributors Inc. v Canada (Public Safety and Emergency Preparedness)*, 2024 CanLII 30068 (FC), at paragraphs 22 to 26. The MTS Lawyer's Affidavit is replete with impermissible opinion, argument and irrelevant information.

[12] A non-exhaustive list of examples of the lawyer's opinion and argument in the MTS Lawyer's Affidavit are set out below to illustrate the point:

a) "In my experience" (paragraph 8); "Consistent with this view" (paragraph 13); "Also problematic is that", "I am not aware of", "nor am I aware of" and "Based

on my experience" (paragraph 16); "To date, my experience" (paragraph 22); "to my knowledge" (paragraph 23); "it is my understanding" and "to my knowledge" (paragraph 25); "This is consistent with my personal experience" and "I am not aware of" (paragraph 30); and "In my experience, GAC and/or the Minister has engaged (and continues to engage) in a practice of delaying its decisions on delisting applications"(paragraph 33).

b) In paragraph 15 the lawyer provides an opinion on the adequacy of the remedy under the Regulations, one of the very issues that the Court is to decide on this motion. That paragraph states:

> As noted above, based on my years of experience, it is not possible to legitimately challenge a sanction where, like here, the bases for the sanction are unknown.

c) Other examples of opinion and argument on the Section 8 Application Process are seen in paragraphs 11 and 12.

d) Paragraphs 4 to 7, and 9 to 10 describe and discuss the Act and the Regulations. Discussion of legislation is a matter for argument, not evidence.

e) In paragraphs 13 and 14 after introducing the letters that are Exhibits "D" and "E" (as noted above, there is no issue with these letters), there is argument in paragraph 14 about the letter that is Exhibit "E" stating: "No particulars or specificity was provided to support this bald accusation".

f) Paragraphs 17 to 25 are a section entitled "Ineffectiveness of the Sanctions Policy and Operations Coordination Division". That heading is a telltale that the section

> is opinion and argument. This is reflected in paragraph 17, the first sentence of which starts with "It is my understanding that". Then the second sentence begins with "It is my experience that" and purports to give evidence about "the principles observed by other government agencies, such as the Canada Border Services Agency" (second sentence of paragraph 17 and all of 18 to 21). Even if the activities of the Canadian Border Services Agency are relevant, which they are not, they are merely the basis for the inadmissible opinions expressed by the lawyer.

[13] To the extent that the MTS Lawyer's Affidavit deals with purported delays in applications in other cases under the Section 8 Application Process, even if such evidence was not opinion or argument, it is not relevant. As illustrated in *Xanthopoulos v Canada (Attorney General)*, 2020 FC 401 ("*Xanthopoulos"*), at paragraphs 20 and 21; affirmed 2022 FCA 79, delay may undermine the effectiveness of a remedy, but the relevant evidence relates to delay in the particular case before the Court, not delay that has occurred in other cases. This point was also made by Justice McDonald in *Fortin v Canada (Attorney General)*, 2021 FC 1061 ("*Fortin"*), at paragraph 45 (see also paragraphs 43 and 44; and *Alam v. Matsqui Institution*, 2023 FC 134, at paragraph 48):

> […] as MGen Fortin has not yet filed a grievance and there is no direct evidence as to the timeliness of the process available for his particular circumstances. Accordingly, his complaints about the process are at this point, purely speculative. As noted by the Court in *Moodie*, "[i]t is simply premature to assume that a remedy could not be provided through the administrative processes when the applicant has failed to take advantage of them" (at para 38).

[14] Beginning at paragraph 26 of the MTS Lawyer's Affidavit, there is a section entitled "Senate Foreign Affairs Committee's Report on Canada's Sanction Process" which discusses a report entitled "Strengthening Canada's Autonomous Sanctions Architecture" that was released by the Canadian Senate's Standing Committee on Foreign Affairs and International Trade in May 2023 ("Senate Committee Report"). A copy of that report is attached as an exhibit (Exhibit "I"), as well as a document referred to in that report (Exhibit "J"). In part, the Senate Committee Report is used to support the lawyer's opinion expressed later in the affidavit. The applicant also seeks to rely on the report to criticize the current legislative regime. Applicant's counsel was not able to point the Court to any authority which supported the use of a parliamentary committee report in this type of situation. Notably, this is not a situation where the Court is being asked to consider, in interpreting legislation, the proceedings of a parliamentary committee that led to the enactment of legislation. The following statement by the Federal Court of Appeal regarding committee proceedings is instructive even though the context is different (*Mohr v National Hockey League*, 2022 FCA 145; application for leave to appeal to refused, 2023 CanLII 31588 (SCC)):

> [63] I accept that legislative history may be used on a motion to strike as it may inform the purpose of the legislation (*Alberta (Attorney General) v. British Columbia (Attorney General)*, 2021 FCA 84, [2021] 2 F.C.R. 426, 41 C.E.L.R. (4th) 157, at paragraph 127). But even here, care must be taken not to confuse the evolution of the legislation, which is law, with what individual politicians or regulators think or hope the legislation says. ***There is a substantive difference between committee proceedings that shed light on the evolution and legislative history of a law on the one hand and on the other hand the testimony of academics and public servants which may be aspirational, disputable or of arguable relevance.*** While perhaps self-evident, if it is necessary to resort to Hansard to discern the meaning of a statute, it is difficult to conclude that it is plain and obvious that a plaintiff's case has no reasonable prospect of success. [emphasis added]

[15] As a result, the Senate Committee Report, and the document referred to in it, are irrelevant and inadmissible.

[16] As the MTS Lawyer's Affidavit is replete with opinions, argument and irrelevant information, it is impermissible and inadmissible and should be struck. The one exception as noted above is the two letters that are Exhibits "D" and "E" to that affidavit, which are also Exhibits to the Chauhan Affidavit. As the Respondent's Reply Affidavit was filed in reply to the MTS Lawyer's Affidavit, it is not necessary to consider it further and I give it no weight.

II. General Principles – Motion to Strike a Notice of Application

[17] Although there is no specific rule in the *Federal Courts Rules* providing for a motion to strike a notice of application, the Federal Court has jurisdiction to do so. As stated in *JP Morgan*, at paragraph 48, the jurisdiction "is founded not in the rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes".

[18] The test on a motion to strike a notice of application for judicial review was described as follows by the Federal Court of Appeal in *JP Morgan*:

> [47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success" [footnote omitted]: *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, 1994 CanLII 3529 (FCA), [1995] 1 F.C. 588 (C.A.), at page 600. There must be a "show stopper" or a "knockout punch"—an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117, at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286, at paragraph 6; *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959.

[19] As recently stated by the Supreme Court of Canada in *Iris Technologies Inc. v Canada*, 2024 SCC 24 ("*Iris Technologies*") (see also paragraph 62):

> [26] There is no dispute on the proper test to be applied on a motion to strike in this context. A court seized of a motion to strike assumes the allegations of fact set forth in the application to be true and an application for judicial review will be struck where it is bereft of any possibility of success (*JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557, at para. 47). It is understood to be a high threshold and will only be granted in the "clearest of cases" (*Ghazi v. Canada (National Revenue)*, 2019 FC 860, 70 Admin L.R. (6th) 216, at para. 10).

III. Prematurity / The principle of judicial non-interference with ongoing administrative processes

[20] The basis upon which the respondent seeks to strike this application is that the applicant has not yet exhausted its adequate alternative remedy, namely, applying to the Minister to have its name removed from the Sanctions List pursuant to subsection 8(1).

[21] The principle of judicial non-interference with ongoing administrative processes was explained by the Federal Court of Appeal in *C.B. Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61 ("*C.B. Powell*"):

> *The principle of judicial non-interference with ongoing administrative processes*
>
> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561*; Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at

paragraphs 38-43; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44 at paragraph 14-15, 58 and 74*; Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14; *Vaughan v. Canada*, [2005] 1 S.C.R. 146, 2005 SCC 11 at paragraphs 1-2*; Okwuobi v. Lester B. Pearson School Board*, [2005] 1 S.C.R. 257, 2005 SCC 16 at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 at paragraph 96.

[31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, e.g., *Consolidated Maybrun, supra* at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, e.g.*, Consolidated Maybrun, supra* at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 119 D.L.R. (4th) 136 (B.C.S.C.), aff'd (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 5

> O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 48.
>
> [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see *Harelkin, supra; Okwuobi, supra* at paragraphs 38-55*; University of Toronto v. C.U.E.W, Local 2* (1988), 55 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

[22] The applicable test on a motion to strike an application for judicial review on the basis of an adequate alternative was succinctly stated by Associate Judge Kathleen Ring in *Picard* (see also, *Fortin*, at paragraph 22; *Jones v. Canada (Chief of Defence Staff)*, 2022 FC 1106, at paragraph 18):

> [24] Consistent with the test in *David Bull*, however, which requires an obvious, fatal flaw, the Court cannot strike an application for judicial review on the basis of the availability of an adequate alternative remedy unless the Court is certain that: (i)

> there is recourse elsewhere, now or later; (ii) the recourse is adequate and effective; and (iii) the circumstances pleaded are not the sort of unusual or exceptional circumstances recognized by the case law or analogous thereto: *JP Morgan* at para 91.

[23] Each of these three criteria are discussed below.

A. ***Is there recourse elsewhere, now or later?***

[24] There is recourse both now and later under the Section 8 Application Process. Specifically, the applicant can "apply in writing to the Minister to have their name removed from Schedule 1" i.e., the Sanctions List (subsection (1)). There is no time limit on when such an application can be made. Subsections (2) to (4) detail what happens after an application has been made. Namely, within 90 days of receiving an application, the Minister must make a decision as to whether there are reasonable grounds to recommend to the GIC that the applicant's name be removed from Sanctions List. The Minister must give notice without delay to the applicant of that decision.

[25] As noted above, it is common ground among the parties that the applicant has not made an application under the Section 8 Application Process.

B. ***Is the recourse adequate and effective?***

[26] This question is the focus of the applicant's argument.

[27] A stated in *JP Morgan* "in considering a motion to strike, the Court must read the notice of application with a view to understanding the real essence of the application" and the "Court must gain 'a realistic appreciation' of the application's 'essential character' by reading it holistically and practically without fastening onto matters of form" (see paragraphs 49 and 50). The essence of the application is reflected in paragraph 31 of the notice of application:

> 31. As a result of the deficiency of the Decision, including its lack of justiciability and reasonableness, as well as the significant breaches of MTS PJSC's right to natural justice and procedural fairness, the only proper and appropriate outcome in this case is to quash the Decision and remove MTS PJSC from Schedule 1 of the Regulations on an immediate basis.

[28] Put succinctly, the essence of the applicant's complaint is that it should not be on the Sanctions List. The procedure provided for in section 8 addresses that issue. As a result, and for the reasons set out below, it is an adequate and effective remedy.

[29] It is useful to note some features of the Section 8 Application Process in addition to those described earlier:

a) The opportunity to apply directly to the Minister for removal from the Sanctions List provides individuals with procedural rights that are appropriately tailored to the statutory sanctions scheme. The Applicant has the opportunity to make submissions on its own behalf or through counsel. Apart from the requirement that an application to the Minister be in writing, there are no limitations on what individuals may include in an application under section 8(1). Persons are therefore

free to determine for themselves the nature, timing, scope, form, and particularity of the information and evidence they include in an application to the Minister.

b) If as a result of making an application under the Section 8 Application Process, the applicant's name is removed from the Sanctions List, that process will have addressed the essence of the applicant's complaint in this application, namely that it should not be on the Sanctions List. Should the Minister decide there are no reasonable grounds to make such a recommendation, all adequate alternative remedies will have been exhausted at that point and the decision can be judicially reviewed on the record that was before the Minister. In any such judicial review, the Court would have the benefit of all of the material submitted to the Minister by the applicant, any additional material provided by the Department of Foreign Affairs to the Minister for consideration, as well as the Minister's decision on the application. In the event that the Minister does not make a decision within the 90 days mandated by section 8(3), the applicant can seek an order for *mandamus*.

[30] The applicant argues that the remedy available under the Section 8 Application Process is not the remedy it seeks in this application. As stated in the applicant's written representations (see paragraph 6, see also paragraphs 18 and 62, 69):

> The remedy MTS seeks is to have the decision to list it quashed, along with a declaration that the Russia Regulations (defined below) are *ultra vires* insofar as they apply to it. These are the remedies what would vindicate MTS' reputation. If MTS is merely removed from the list, the reputational harm caused by its original listing will linger.

[31] Pointing to the request for declaratory relief (or other relief) does not assist the applicant. There are several reasons for this:

a) As noted above, the "Court must gain 'a realistic appreciation' of the application's 'essential character'" (*JP Morgan*, paragraphs 49 and 50). The essence of the applicant's complaint is that it should not be on the Sanctions List. The procedure provided for in section 8 addresses that issue.

b) To state the obvious, an adequate alternative remedy is not necessarily an identical remedy. Even if the remedy under the Section 8 Application Process is not identical to that sought by the applicant on this judicial review, it does not mean that it is not adequate. The issue is not whether it is an identical remedy, but whether it is an adequate alternative remedy.

c) Relying on declaratory relief to argue that section 8 does not provide an adequate alternative remedy is essentially a circular argument in the context of this case. This is because a declaration will not be issued where there exists an adequate alternative remedy (*Iris Technologies*, at paragraph 58).

[32] The applicant also argues that the power of an administrative decision maker to reconsider its own decision is, generally, not an adequate alternative remedy to judicial review. However, the typical power of an administrative decision maker to reconsider its own decision is different from the process available under section 8. As stated in one of the cases relied on by the applicant, the reconsideration power of the administrative tribunal, in that case the Canada Labour Relations Board, "is to be exercised with restraint, so that reconsideration is the

exception rather than the norm" (*Buenaventura v Telecommunications Workers Union*, 2012 FCA 69, at paragraph 31). This is quite different from the process available under section 8 for the following reasons. First, under sections 8(2) and (3) the Minister "***must decide*** whether there are reasonable grounds to recommend to the Governor in Council that the applicant's name be removed" from the Sanctions List, and "***must make a decision*** on the application within 90 days" (emphasis added), and as a result, it is quite different from an option that is the exception that is to be exercised with restraint. Second, on an application under section 8(1) the applicant can submit whatever evidence, information and submissions it wishes. Third, the Minister is not reconsidering the original decision to place the person on the Sanctions List. Rather, having received the application and whatever information, evidence and submissions the person provides, the Minister is deciding "whether there are reasonable grounds" at that point to recommend that the person be removed from the Sanctions List. Fourth, the decision maker under section 8 is somewhat different. The initial decision under section 2 to add a person to the Sanctions List is made by the GIC on the recommendation of the Minister. Under section 8(2) it is the Minister that must make the decision, being "whether there are reasonable grounds to recommend to the Governor in Council that the applicant's name be removed from" the Sanctions List.

[33] The applicant argues that the Section 8 Review Process will take too long. As the applicant has not pursued the process provided for in section 8, there is no evidence of delay in this case. This is not a situation such as in *Almrei v Canada (Citizenship and Immigration)*, 2014 FC 1002, where the delay in question was delay actually experienced by the applicant and the delay was exceptional, the applicant having been detained under strict custody for over seven

years (see paragraphs 57 and 58). Rather, it is potential delay that the applicant in the present case argues will occur if it pursues the Section 8 Application Process. This is based on the MTS Lawyer's Affidavit and the statements in it about the applications of other persons under the Section 8 Application Process. As discussed above, that evidence has been struck and in any event, evidence about other cases is not relevant. I pause to note that the respondent argues that the Respondent's Reply Affidavit refutes the applicant's evidence of purported delays in other cases. As noted earlier, in light of my conclusions on the MTS Lawyer's Affidavit, it was not necessary to consider the Respondent's Reply Affidavit.

[34] The applicant argues that the Section 8 Review Process does not address the procedural fairness issues raised by the applicant. Procedural fairness issues are considered under the exceptional circumstances criteria (see *C.B. Powell*, at paragraph 33; *Gupta v Canada (Attorney General)*, 2021 FCA 202 ("*Gupta*"), at paragraph 7), and are discussed below.

[35] The applicant argues that there is not an adequate alternative remedy and that *Strickland v Canada (Attorney General)*, 2015 SCC 37 ("*Strickland"*) outlines the approach to be applied to the adequate alternative remedy analysis. In *Strickland* an application for judicial review had been brought in Federal Court challenging the *Federal Child Support Guidelines*, SOR/97-175. The Federal Court exercised the discretion to decline to undertake judicial review primarily on the greater expertise of provincial superior courts in family law. The Supreme Court held that one of the discretionary grounds for refusing to undertake judicial review is that there is an adequate alternative (paragraph 40) and then set out the considerations relevant to deciding whether an alternative remedy or forum is adequate so as to justify a discretionary refusal to hear

a judicial review application. The respondent argues in response that the adequate alternative remedy analysis arose in a different context, was not dealing with prematurity/exhaustion of remedies, and does not apply.

[36] A similar issue arose in *Gupta*. In that case the Federal Court had dismissed the appellant's application for judicial review of the employer's decision to adopt an administrative investigation report, with the result that a request for a retroactive promotion was denied. The Federal Court decision was based on the appellant not having exhausted the alternate remedies, namely the grievance procedure under the applicable legislation. On appeal the appellant argued that the Federal Court failed to consider the inadequacy of the grievance procedure in light of the particular circumstances of that case, and that the Court was required to consider whether the grievance procedure provided a suitable and appropriate remedy in accordance with the principles set out in paragraphs 43 to 45 of *Strickland*. The Federal Court of Appeal concluded:

> [7] Rather, the principles governing whether the Federal Court ought to have deferred to the grievance procedure are set out in *Canada (Border Services Agency) v. C.B. Powell Ltd*, 2010 FCA 61, [2010] F.C.J. No. 274 [*C.B. Powell*]. It holds that a party may not commence an application for judicial review prior to exhausting alternate administrative remedies – like the grievance procedure – unless exceptional circumstances exist. In addition, as noted by this Court in paragraph 33 of *C.B. Powell*, the threshold for exceptionality is high and typically does not include denials of procedural fairness committed prior to the final administrative decision. (See also, to similar effect, *Harelkin v. University of Regina,* [1979] 2 S.C.R. 561, (1979), 96 D.L.R. (3d) 14, at pp. 584-585, and *Nosistel v. Canada (Attorney General),* 2018 FC 618, 2018 CarswellNat 10225 [*Nosistel*], at para. 41, upon which the Federal Court relied in the instant case).

[37] In any event, having regard to the considerations set out in paragraphs 42 and 43 of *Strickland*, the Section 8 Application Process is an adequate alternative remedy for all of the reasons discussed above and below. In *Strickland* the Supreme Court stated:

> [42] The cases identify a number of considerations relevant to deciding whether an alternative remedy or forum is adequate so as to justify a discretionary refusal to hear a judicial review application. These considerations include the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost: *Matsqui*, at para. 37; *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61, [2011] 2 F.C.R. 332, at para. 31; Mullan, at pp. 430-31; Brown and Evans, at topics 3:2110 and 3:2330; *Harelkin*, at p. 588. In order for an alternative forum or remedy to be adequate, neither the process nor the remedy need be identical to those available on judicial review. As Brown and Evans put it, "in each context the reviewing court applies the same basic test: is the alternative remedy adequate <u>in all the circumstances</u> to address the applicant's grievance?": topic 3:2100 (emphasis added).
>
> [43] The categories of relevant factors are not closed, as it is for courts to identify and balance the relevant factors in the context of a particular case: *Matsqui*, at paras. 36-37, citing *Canada (Auditor General)*, at p. 96. Assessing whether there is an adequate alternative remedy, therefore, is not a matter of following a checklist focused on the similarities and differences between the potentially available remedies. The inquiry is broader than that. The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis: *Khosa*, at para. 36; *TeleZone*, at para. 56. As Dickson C.J. put it on behalf of the Court: "Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant . . ." (*Canada (Auditor General)*, at p. 96).

[38] In conclusion, the recourse available to the applicant under the Section 8 Application Process is adequate and effective.

C. ***Are the circumstances pleaded the sort of unusual or exceptional circumstances?***

[39] As stated in *C.B. Powell* at paragraph 33, quoted above, “very few circumstances qualify as “exceptional” and the threshold for exceptionality is high”, and that “[c]oncerns about procedural fairness or bias, the presence of an important legal or constitutional issue […] are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted”.

[40] More recently, in *Dugré v Canada (Attorney General)*, 2021 FCA 8 (“*Dugré”*), the Federal Court of Appeal stated the following after quoting from *C.B. Powell*:

> [35] As it is clear from the above passage, an application for judicial review against an interlocutory administrative decision can be brought only in “exceptional circumstances.” ***Such circumstances are very rare and require that the consequences of an interlocutory decision be so “immediate and radical” that they call into question the rule of law*** (*Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, [2015] 4 F.C.R. 467 [*Wilson*], at paras. 31-33, set aside on a different point, 2016 SCC 29, [2016] 1 S.C.R. 770; *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139, 473 N.R. 283, at paras. 56-60 [*Budlakoti*]).
>
> [36] This Court has analogized these circumstances to those that can justify the issuance of a writ of prohibition; absent of such circumstances, the application must be subject to summary dismissal (*Wilson*, at para. 33; *Forner v. Professional Institute of the Public Service of Canada*, 2016 FCA 35, at paras. 14-15). No exception is made: even constitutional questions or questions qualified as “jurisdictional” cannot attract interlocutory relief (C.B. Powell, at paras. 39-46; *Black v. Canada (Attorney General)*, 2013 FCA 201, 448 N.R. 196, at paras. 18-19).

> [37] ***In short, the non-availability of interlocutory relief is next to absolute. A less stringent criterion would only encourage premature forays into courts and a resurgence of the ills identified in C.B. Powell.*** Hence, certain recent attempts by the Federal Court to restate the settled test by refining criteria for exceptions are ill-advised and should not be viewed as authoritative (see *Whalen v. Fort McMurray No. 468 First Nation*, 2019 FC 732, [2019] 4 F.C.R. 217, at paras. 20-21 and subsequent Federal Court cases). Although well-intentioned, these attempted restatements only serve to muddy the waters and compromise the rigour of the principle of non-interference.
>
> [emphasis added]

[41] Regarding the applicant's concerns regarding procedural fairness, these do not constitute exceptional circumstances. As stated in *Gupta*, "the threshold for exceptionality is high and typically does not include denials of procedural fairness committed prior to the final administrative decision" (paragraph 7; see also *C.B. Powell*, at paragraph 33).

[42] If the applicant utilizes the Section 8 Application Process and is unhappy with the result, it can seek judicial review at that time and any issues regarding procedural fairness, delay and natural justice can be addressed in that proceeding. As stated by Justice Lafrenière in *Xanthopoulos*:

> [22] The general rule that applications for judicial review can be brought only after the administrative decision-maker has made its final decision articulated in *Forner* and *CB Powell* exists for good reason. If courts short-circuit administrative decision-making, they risk depriving reviewing courts of a full record bearing on the issue, an inefficient multiplicity of proceedings, and compromising comprehensive legislative regimes: see *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 [*Halifax*] at para 36; see *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 [*JP Morgan*] at paras 85-86.

[43] In summary, the type of exceptional circumstances contemplated in *Dugré* are not present in this case.

IV. Conclusion

[44] For the reasons discussed above, the respondent's motion to strike the notice of application is granted.

[45] On the matter of costs, counsel indicated at the hearing that the parties had agreed on the amount of $3,500 to be awarded to the successful party on the motion.

JUDGMENT in T-1725-23

THIS COURT'S JUDGMENT is that:

1. The notice of application dated August 18, 2023, is struck out, without leave to amend, and the application for judicial review is dismissed.

2. Costs are fixed in the amount of $3,500, to be paid by the applicant to the respondent forthwith.

"John C. Cotter"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1725-23
STYLE OF CAUSE:	MOBILE TELESYSTEMS PUBLIC JOINT STOCK COMPANY v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 17, 2024
JUDGMENT AND REASONS:	CASE MANAGEMENT JUDGE JOHN C. COTTER
DATED:	AUGUST 8, 2024

APPEARANCES:

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Sonja Pavic Margaret Cormack	FOR THE RESPONDENT

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