Federal Court  Cour fédérale

Date: 20160302

Docket: T-812-15

Citation: 2016 FC 275

Toronto, Ontario, March 2, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

R & S INDUSTRIES INC

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [the FC Act], of a decision [the Decision] by Ms. Jeannie Mah of the Audit Division of the Canada Revenue Agency [the CRA]. In the Decision, Ms. Mah rejected an amended T2059 election pursuant to subsections 96(5.1) and 97(2) of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [the Act].

[2] The Applicant, R&S Industries [R&S] argues that the Decision was both procedurally unfair and unreasonable. The Respondent rejects both arguments, further suggesting that this application should be dismissed for late filing and for failure to meet the Court's criteria for an extension of time. For reasons that follow, I agree with the Respondent.

II. Background

[3] The Applicant is an Alberta corporation with its principal place of business in Edmonton. It is controlled by Roger Stokowski. On September 1, 2005, the Applicant transferred its assets, including goodwill, to Big Eagle Limited Partnership [BELP] through an Acquisition and Investment Agreement [the Transfer Agreement]. BELP, like R&S, was controlled by Roger Stokowski at the time. The Applicant states that it transferred the business to a partnership structure to grow that business and to attract new investors. Article 4.1(a) of the Transfer Agreement states that the Applicant and BELP shall:

> Jointly elect and file in the prescribed form and within the prescribed time period under subsection 97(2) of the [Act] that the elected amounts that shall be deemed to be R&S' proceeds of disposition and [BELP's] cost of each property (in respect of which such election is made) at the minimum agreed amounts under the [Act], which shall be the basis on which the Purchase Price is allocated to the Assets, provided however that in respect of the Goodwill, the elected amount shall, unless otherwise agreed, be equal to $2,502,600. (Applicant's Record [AR], p 42)

[4] Subsection 97(2) of the Act permits parties to a transfer to a partnership to rollover the tax consequences of that transfer to a future date by jointly electing that, for income tax purposes, a transferred asset was sold for an amount other than the actual consideration exchanged. The amount the parties elect, which is established per asset, rather than in the

aggregate, is the "agreed amount", and the Act contains rules on what this amount may be. Taxpayers make this election by filing a T2059 (Election on Disposition of Property) form with the Respondent.

[5] As reproduced above, article 4.1(a) of the Transfer Agreement states that the agreed amount for each asset would be the minimum amount permitted by the Act, except for goodwill, which would be $2,502,600, unless otherwise agreed. R&S claims that this figure was chosen because the parties to the Transfer Agreement did not know the precise extent of the assets and debts it was transferring to BELP. In other words, according to R&S, the goodwill amount of $2,502,600 reflected an estimate of the amount by which non-share consideration exceeded the costs of the assets transferred.

[6] R&S also asserts that the intention of the parties was always to adjust the agreed amount for the goodwill if it had been found to be inaccurately valued when the Transfer Agreement was signed because full information was not available at that time.

[7] R&S and BELP made a joint election per the terms of the Transfer Agreement by filing a T2059 [the Original T2059]. R&S now asserts, however, that the Original T2059 contained errors. Specifically, the non-share consideration allocated to the assets being transferred – other than goodwill – was in excess of the agreed amounts (i.e. the minimum amount permitted under the Act for each asset), contrary to the intention of the parties as expressed in article 4.1(a).

[8] On January 19, 2010, the Respondent reassessed R&S's 2006 taxation year, the year that transfer took place. R&S's tax payable was increased to $490,270 from $5,120. R&S suggests that the majority of this increase was based on the erroneous figures in the Original T2059, though the Respondent claims that only "$1,982,126 pertained to correcting the tax consequences of the agreed amounts submitted with the [Original] T2059 Election" (Respondent's Record, [RR], p 5). A subsequent reassessment by the Respondent dated August 17, 2010 allowed the Applicant to carry back $2,027,605 in losses from its 2009 taxation year and reduce its tax payable accordingly.

[9] On November 12, 2010, R&S filed a Notice of Objection to the Respondent's reassessment on the basis that the amounts given in the Original T2059 were mistakenly identified (RR, p 57).

[10] On March 12, 2012, Lori Tymchuk, Appeals Officer with the CRA Appeal Division, was appointed to review the Applicant's objection (RR, p 6).

[11] On January 17, 2013, Ms. Tymchuk explained that she would not have any basis to consider changing the assessment on appeal without a properly filed subsection 97(2) amendment, namely through the filing of an amended T2059 [the New T2059] (AR, p 87).

[12] R&S thereafter submitted a New T2059, pursuant to subsection 96(5.1) of the Act, which allows a subsection 97(2) rollover election to be amended where "in the opinion of the Minister, the circumstances of a case are such that it would be just and equitable". According to R&S, the

New T2059 clarified that (a) the non-share consideration for every asset being transferred (except for goodwill) was equal to the amount stated for that asset in the Transfer Agreement and (b) that the agreed amount for the transfer of the goodwill was equal to the remainder of the total non-share consideration.

[13] Ms. Tymchuk, who lacked the authority to approve the amended rollover election, forwarded the amended election to Jeannie Mah, Team Leader in the Audit Division at the CRA, who had the delegated authority to make a discretionary ruling under subsection 96(5.1) of the Act pursuant to the CRA's "just and equitable" authority. In a June 10, 2013 letter, Ms. Mah informed R&S that "[d]ue to the Delegation of Authority, the amended election has been forwarded to the Audit Division for review and consideration of acceptance" (AR, p 89).

[14] On July 18, 2013, the New T2059 submissions were sent to Kathy Katzenback, a Senior Income Tax Auditor in CRA's Audit Division, for review. Ms. Katzenback subsequently requested further information from the Applicant on a $572,146 discrepancy between the total non-share consideration she identified in the documentation attached to the Notice of Objection ($39,931,772) and the total non-share consideration listed on the New T2059 ($39,359,626) (RR, p 193). Ms. Katzenback made several further requests of the Applicant to provide written back-up for the amended election, but no information could be located or provided: the Applicant states that it had difficulty documenting the discrepancy because of staff turnover at BELP.

[15] It also appears from the record that by this time Roger Stokowski had lost any controlling interest in BELP in an acrimonious buy-out (RR, p 334).

[16] On October 4, 2013, R&S told the Respondent that it would further amend the New T2059 and accept the higher goodwill figure of $572,146 that had been identified by Ms. Katzenback, based on one possible figure postulated by CRA staff. This new goodwill figure had the effect of increasing the amount for the transferred goodwill to $3,054,868.

[17] Ms. Katzenback, after her review of the New T2059 submissions, decided to refuse the amendment. She then submitted her analysis and her recommendations to Ms. Mah.

[18] On January 31, 2014, Ms. Mah sent her Decision to R&S denying the submission of the New T0259. In her Decision, which is the subject of this judicial review, Ms. Mah found that "there does not appear to be any provision in the Agreement [between R&S and BELP] that would require the reallocations provided" but that instead "the reallocations result in the agreed amount for goodwill being overstated and in contravention of the specific terms of the Agreement". She concluded that, "pursuant to the power delegated to me under subsection 220(2.01) of the Income Tax Act and in accordance with the facts presented, your request to amend the original T2059 filed under subsection 97(2) has been denied" (AR, p 14).

[19] Ms. Mah did not instruct the Applicant anywhere in her Decision as to how R&S might challenge it. R&S contends that it was not aware that this was a decision pursuant to the subsection 96(5) "just and equitable" provisions of the Act, the redress for which is a judicial review application to this Court. It further contends that as a result CRA's failure to make it clear that this was indeed a final decision on the amended election, it was thus unaware that the 30 day

timeline for filing of a judicial review under subsection 18.1(2) of the FC Act had begun to run as of its receipt date.

[20] R&S's counsel wrote two subsequent letters to the Audit Division asking to discuss the rejection contained in the Decision, stating that the Applicant believed an agreement had been reached with Ms. Tymchuk to accept the New T2059.

[21] In response, Ms. Tymchuk sent a May 30, 2014 letter to R&S stating that the CRA Audit Team Leader, Ms. Mah, had denied the New T2059 submission, and that if R&S had an issue with that decision, it could apply for judicial review under section 18.1 of the FC Act within "30 days of the date the decision was first received" (AR, p 246). Ms. Tymchuk further stated that she would hold the objection "in abeyance should you wish to apply for a judicial review. However, I will require a copy of the complete Form 301, Notice of Application before June 20, 2014 to do so" (AR, p 246). Ms. Tymchuk stated that she would otherwise proceed in evaluating the Applicant's objection on the basis of the Original T2059.

[22] On August 8, 2014, Carla Schur-Ellison, Team Leader of the CRA Appeals Division, wrote a further letter to the Applicant, this time under the heading "Notice of Objection: Final Decision". The letter states that since the amended election had been denied by Ms. Mah, the objection had been assessed on the basis of the Original T2059, concluding that:

> As we have verified that the auditor's adjustments correctly reflect the tax consequences… based on the elected amounts outlined in Schedule "A" filed with the T2059 Election and the request to amend the election was denied, our decision is to confirm the assessment. (AR, p 109)

[23] Ms. Schur-Ellison also noted that if the Applicant disagreed with the decision to confirm the reassessment, the Applicant could appeal to the Tax Court of Canada [the TCC]. If, however, the Applicant disagreed with the decision to deny the New T2059, the correct recourse "was to apply for judicial review of that decision… within 30 days of the date the decision was first received" (AR, p 110).

[24] On November 6, 2014, R&S sent a Notice of Appeal to the TCC in respect of the confirmation of the 2010 assessment. In it, R&S states that the Respondent's representatives "were responsible for an atmosphere of confusion" and that it was never clear, throughout the proceedings, that an exercise of ministerial discretion had occurred (AR, p 116).

[25] On April 16, 2015, the Respondent filed a reply [the Reply] in the matter of the TCC appeal brought by the Applicant. In the Reply, the Respondent states that the "Tax Court of Canada has no jurisdiction to judicially review the Minister's decision in this regard" (AR, p 125). R&S argues in this judicial review, that this Reply marked the first time that the "nature, background and reasons for the Decision [to reject the amended T2059] were provided in full context" (AR, p 311).

[26] This judicial review was filed on May 19, 2015.

III. The Decision

[27] Ms. Mah, in her Decision of January 31, 2014, states that she reviewed the New T2059, which "amended [the Original T2059] by adjusting the non-share consideration and share

consideration allocated to each of the assets that were transferred to the partnership". Ms. Mah notes that while the adjustments were made in accordance with counsel's interpretation of article 4.1(a) of the Transfer Agreement, a "standard clause in agreements in which a taxpayer transfers property to a corporation or a partnership", the adjustments resulted in an increase of goodwill from the elected amount of $2,502,600 to $3,054,868 (AR, pp 13-14).

[28] Beyond the higher amount for goodwill, Ms. Mah noted a second issue, which was that the number of partnership units in BELP issued to the Applicant in the agreement, namely 20,499,334, differed from the 20,384,909 in the New T2059. She observed that the total value of these units originally transferred was $102,496,670, while the total value of that figure in the New T2059 was $101,924,524 – a decrease of $572,146, which equalled the discrepancy identified by Ms. Katzenback (the difference between the total non-share consideration identified in the Notice of Objection and the total non-share consideration listed on the New T2059).

[29] Ms. Mah concluded that "[t] here does not appear to be any provision in the Agreement that would require the reallocations provided… In fact the reallocations result in the Agreed Amount for Goodwill being overstated and in contravention of the specific terms of the Agreement which specifically states that the elected amount shall be $2,502,600". As a result, Ms. Mah denied the request to amend the Original T2059.

IV. Analysis

[30] There were three issues raised by the Applicant in this judicial review:

A. Is the judicial review time-barred?

B. Did the Respondent's delegate fail to provide the Applicant an adequate opportunity to make submissions prior to denying the New T2059, and thereby denying its right to procedural fairness?

C. Is the Decision reasonable?

[31] In reviewing the Respondent's actions for procedural fairness, this Court should apply a correctness standard (*Williams v Canada (National Revenue)*, 2011 FC 766 at para 13; *Yachimec v Canada (National Revenue)*, 2010 FC 1333 at para 31). In a correctness review, "a reviewing court will not show deference to the decision maker's reasoning process"; instead, it must conduct its own analysis of the question (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50 [*Dunsmuir*]).

[32] As for the substance of the decision, discretionary decisions of the CRA attract a reasonableness standard (*Coombs v Canada (National Revenue)*, 2012 FC 1499 at para 14, *Canada (Attorney General) v Abraham*, 2012 FCA 266 at para 32; *Dingman v Canada (National Revenue)*, 2009 FC 395 at para 26). In a reasonableness review, this Court should approach with deference and intervene only if the officer's assessment lacks "justification, transparency and intelligibility" and falls outside "a range of possible, acceptable outcomes defensible in respect of the facts and law" (*Dunsmuir* at para 47).

A. *Was this judicial review brought out of time?*

[33] The Respondent argued preliminarily that this judicial review should be denied because the application was not commenced on time, that there is no court order extending the time to

commence it, and there is no reason for this Court to exercise its discretion to let it be heard, per subsection 18.1(2) of the FC Act, which reads:

> An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

[34] The Applicant insists that the Decision was never properly "communicated" until April 16, 2015 – the date the Reply was filed in the TCC proceedings – and thus that the May 19, 2015 filling of this judicial review was within the 30 day window.

[35] The requirement that the decision be "communicated" has been held by the Federal Court of Appeal to signify "some positive action… on the part of the decision-maker in order to communicate his decisions to the parties directly affected" (*Atlantic Coast Scallop Fishermen's Association et al v Canada (Minister of Fisheries and Oceans)*, (1995), 189 NR 220 at 222 (FCA)). The Federal Court of Appeal has further held that "[w]aiting for reasons is not an acceptable excuse for failure to file an application in time" (*Canada (Attorney General) v Trust Business Systems*, 2007 FCA 89 at para 27).

[36] I find that the Respondent's first letter, sent on January 31, 2014, was sufficiently communicative of the Decision for the Applicant to comply with the filing requirements of subsection 18.1(2) of the FC Act. Ms. Mah conveyed the decision that had been made, provided

reasons, and expressed the fact that it was exercised pursuant to a delegation of ministerial authority under subsection 220(2.01) of the Act.

[37] CRA was under absolutely no obligation to set out the available recourse, i.e., to commence a judicial review in this Court. Even if it were so required, the two subsequent CRA communications of May 30, 2014 from Ms. Tymchuk and August 8, 2014 letter from Ms. Schur-Ellison of the CRA both made it entirely clear that section 18.1 of the FC Act applied and therefore a judicial review application at the Federal Court was the proper forum to contest the Decision. Still, the Applicant filed no application for judicial review until May19, 2015 – over 15 months after the Decision was first communicated and well past the 30 day period prescribed by subsection 18.1(2) of the FC Act.

[38] R&S argues that the April 16, 2015 CRA Reply "was the first time CRA's decision in respect of the Submission was conveyed to the Applicant in a discernable context clearly identifiable as an exercise of ministerial discretion to which the Applicant could make this Application in any meaningful way" (AR, p 9).

[39] I cannot accept this contention. Ms. Mah's January 31, 2014 letter was entirely clear in its disposition of the re-election request. It could not be plainer. I further do not accept the proposition that the Respondent has a duty to map out the consequences of each decision, including how it can be challenged in Court. The Applicant could not point me to any such authority. Furthermore, R&S could not explain how the subsequent two letters from the CRA – where the review route was plainly mapped out – were unclear. Indeed, Ms. Tymchuk, in her

May 30, 2014 letter, offered to hold the objection process in abeyance if R&S wished to proceed with the judicial review and provided a deadline by which time she would need proof of said filing. R&S, however, chose not to act on that offer.

[40] The Respondent advised R&S of its Federal Court rights, once again, in the Schur-Ellison letter of August 8, 2014 and, once again, no application ensued. R&S had counsel throughout. Had there been an unrepresented party in a similar situation, the delay of some 16 months may have been easier to explain, but counsel even gave testimony in cross-examination as to his knowledge of the difference between delegated decisions and those decisions made in the assessment and appeal process (RR, pp 331-32).

(1) Should an extension of time be granted?

[41] Given the lengthy delay, I must now assess whether this Court should exercise its discretion to extend the timeline. This discretion is guided by a series of flexible principles, most recently reformulated as four questions in *Exeter v Canada (Attorney General)*, 2011 FCA 253 [*Exeter*] at para 4:

1. Does the moving party have a continuing intention to pursue an application for judicial review?
2. Has the responding party suffered any prejudice as a result of the moving party's delay?
3. Has the moving party offered a reasonable explanation for the delay?
4. Does the intended application for judicial review have any prospect of success?

[42] As noted in *Apotex Inc v Canada (Health)*, 2012 FCA 322, these questions serve to guide this exercise of discretion, rather than to bind it in any way. The question I must ultimately

answer is "whether, in the circumstances presented, to do justice between the parties calls for the grant of the extension" (*Grewal v Minister of Employment and Immigration*, [1985] 2 FC 263 [*Grewal*] at 272).

[43] After some consideration, I find that I will not exercise this discretion. R&S does not meet the *Exeter* principles for the following reasons.

(a) *Continuing Intention to Pursue*

[44] The fifteen-month delay between the Decision and the filing of the application for judicial review was punctuated by long periods of silence. Most significantly, within this period, the Applicant never acted when provided with explicit details about redress. It chose not to avail itself of CRA's May 2014 offer to hold the objection in abeyance. While R&S made some inquiries and remained in contact at various points during the fifteen-month period in question, it should have filed this judicial review if not within 30 days from the January 31, 2014 letter, then at least within 30 days of Ms. Tymchuk's May 30, 2014 letter. Failing to file it after the August 8, 2014 letter from Ms. Schur-Ellison was the third strike, in my view. It is quite possible, as the Respondent suggests, that this application was only filed in May 2015 because that was when the Applicant realized that it might not get the remedy it sought from the Tax Court.

(b) *Prejudice to the Responding Party*

[45] The Respondent has suffered prejudice on account of the delay. CRA decisions, like many other decisions by government entities, must retain a degree of finality and certainty

(*Canada (Attorney General) v Larkman*, 2012 FCA 204 at para 87). Those two principles would be undermined were I to grant the requested extension. The Applicant has argued that, since litigation before the Tax Court has been ongoing throughout this period, there is no loss of certainty or finality. But that interpretation again erroneously conflates the two separate decisions – the decision to deny the new T2059 and the decision to deny the objection – into one continuous action.

(c) *Reasonable Explanation*

[46] I also do not find that the Applicant has met the third criterion, namely a reasonable explanation of delay. Here, R&S has had representation throughout the process by leading tax and legal professionals. Mistakes were made along the way and mistakes are excusable; indeed, the Act provides redress to amend those errors, and opportunities to challenge any unsuccessful efforts to amend. What was not reasonable, however, was the length of the delay. Even though heeding the CRA's May and August, 2014 letters would have resulted in a missed deadline, there certainly would have been a much stronger argument at that time for the Applicant to seek an extension, particularly in light of the offer that the CRA had made to hold the objection process in abeyance, which was slightly less than twelve months before R&S finally filed its Application.

(d) *Merit to the Application*

[47] Finally, and most significantly from a substantive point of view, I do not find there to be merit to the application. The opportunities to provide information and documentation to the CRA, outlined above, were more than sufficient to be considered fair to R&S. The CRA was

both patient with the Applicant and even went out of its way to assist R&S when required. Ms. Tymchuk's offer to hold the objection process in abeyance was one such instance. Another instance was when the Applicant could not locate its own documentation of previous filings made with the CRA after having been asked to explain the positions it had taken in its amendment (New T2059) request. Ultimately, CRA sent R&S its own tax documentation, which R&S had previously filed with the CRA, to assist in this regard.

[48] R&S argues that it should have been warned, prior to the Decision, that the New T2059 and the Transfer Agreement were in conflict. It also argues that it should have been given a chance to respond to the goodwill issue. In so doing, R&S is essentially arguing for the right to review the exercise of ministerial discretion before it occurs. I do not agree that there was any lack of fairness, nor any insufficient notice or communication. The Applicant had plenty of time to respond and knew that there were issues with respect to goodwill and numbers, even after the amended election that did not reconcile.

[49] The case law involving analogous exercises of ministerial discretion under the Act suggest that the Respondent must accept submissions and remain communicative, but flatly refuses a more onerous procedural right to comment on a decision before it is made. For example, in *Sherry v Canada (National Revenue)*, 2011 FC 1208 at para 18, this Court held that the "Applicant was afforded ample opportunity to provide all necessary information to CRA when she submitted her request for review. The rules of procedural fairness did not entitle her to further comment before the Decision was made". In *Costabile v CCRA*, 2008 FC 943 at paras 37-38, the applicant took issue with the fact that there was no opportunity to discuss the outcome or

the reviewing of the fairness order. Justice Russell rejected the applicant's complaint, holding that "[t]he Applicant was given the opportunity to submit information and documents when he submitted his fairness request. I do not find that the Minister was required to seek further information, documents, or submissions from the Applicant in this case". I find that the rationale of these decisions applies equally in the context of subsection 96(5.1) of the Act.

[50] The Respondent's approach throughout was an eminently appropriate and fair one. R&S was repeatedly afforded the opportunity to make submissions and the Respondent was in communication throughout the decision-making process. The evidence even reveals that Ms. Katzenback made several attempts to contact R&S and its counsel to discuss concerns she had, but that R&S often did not respond (RR, p 195). And when Ms. Katzenback asked for evidence explaining the discrepancy between the non-share consideration listed on the New T2059 and the non-share consideration in the Notice of Objection, R&S was unable to provide any evidence whatsoever. The Respondent was not obliged by procedural fairness requirements to do more.

[51] As for the Applicant's argument on the reasonableness of the Respondent's Decision, I can find no reviewable error. The Respondent took the Transfer Agreement into account, as it was the only evidence that existed regarding goodwill, and reached a justifiable and intelligible interpretation of its terms.

[52] R&S argues that the Respondent made an unreasonable error in requiring that, to accept the New T2059, there be written evidence of an agreement to change the elected amount for goodwill from $2,502,600, as described in the Transfer Agreement, to $3,054,868. R&S

contends that article 4.1(a) the Agreement does not impose this requirement, and that since both BELP and R&S were under the control of Mr. Stokowski, it would have made no sense for him to draft a contract to demonstrate that he shared an intention with himself. In light of this, the New T2059 should have been more than adequate evidence of Roger Stokowski's intentions.

[53] R&S also argues that the Respondent's interpretation of the contract was illogical. because it contravenes the rules of the Transfer Agreement that the Respondent is stating is being breached, due to the following flawed logic:

A. The Respondent requires that the agreed amount for goodwill must be $2,502,600, because there was no written agreement otherwise.

B. Therefore, the Respondent interprets the Transfer Agreement to require any increase in aggregate non-share consideration, which would normally be allocated to goodwill, to be allocated to the other, non-goodwill assets.

C. However, the Respondent's interpretation would also require that the non-share consideration for any asset adhere to the terms of the Transfer Agreement – which fixed that non-share consideration to the cost amount of each asset in question.

D. As a result, the excess non-share consideration would, in being assigned to the other, non-goodwill assets, breach the terms of the Transfer Agreement and article 4.1(a) anyway.

[54] I am unable to accept these arguments. CRA's interpretation of the Transfer Agreement and the underlying facts were reasonable. Simply put, there was insufficient evidence available to substantiate the Applicant's claim that a new agreement had been made, and the Respondent

drew a reasonable conclusion from this absence. As for R&S's submissions on the logic of the decision itself, the Respondent argues that R&S is ignoring the words "provided however", a critical phrase in its interpretation of article 4.1(a) of the Transfer Agreement (reproduced above), such that it was entirely open to Ms. Katzenback to conclude that if the goodwill was not going to remain at $2,502,600, there needed to be agreement from the other parties. I agree that the words "provided however" in article 4(1)(a) provide a plain and clear meaning.

[55] Despite the arguments about an illogical structure and outcome to the CRA Decision, there appears nothing unreasonable in the Respondent's conclusions, which found that (1) the Transfer Agreement requires that goodwill be fixed at a certain amount unless the parties agree otherwise; (2) the New T2059 does not fix the goodwill at that amount; and (3) therefore, it is in contravention of the Transfer Agreement and should not be accepted. The Respondent asked for evidence to show that there was an agreement between the parties to substantiate the amended election, but none was ever produced.

[56] As noted by Justice Evans in *Canada Revenue Agency v Telfer*, 2009 FCA 23 at para 25, another judicial review of an exercise of ministerial discretion under the Act, "[w]hen reviewing for unreasonableness, a court must examine the decision-making process (including the reasons given for the decision), in order to ensure that it contains a rational 'justification' for the decision, and is transparent and intelligible." This Court cannot engage in a search for the "correct" answer. Instead, I find that this is a transparent, intelligible conclusion provided by a decision-maker with expertise in the subject-matter and, from the deferential perspective of a reasonableness review, there would be no reason to disturb it.

[57] In summary, in considering the principles laid out in *Exeter* and *Grewal*, I do not find that the Applicant should be granted an extension of time.

V. Conclusion

[58] In light of the above, this application for judicial review is dismissed. It was not made in a timely fashion and I see no reason to exercise my discretion to entertain it, given that R&S has failed to meet the criteria set out in *Exeter*.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed.

2. Costs are awarded to the Respondent.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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