

Federal Court



Cour fédérale

**Date: 20160713**

**Docket: T-1641-15**

**Citation: 2016 FC 798**

**Ottawa, Ontario, July 13, 2016**

**PRESENT: The Honourable Mr. Justice Barnes**

**BETWEEN:**

**LAWRENCE LEMIEUX**

**Applicant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**JUDGMENT AND REASONS**

**UPON** hearing this application for judicial review at Edmonton, Alberta on June 8, 2016;

**AND UPON** reviewing the materials filed with the Court and hearing counsel on behalf of the Respondent and the Applicant in person;

**AND UPON** reserving decision;

**AND UPON** concluding that this application should be allowed for the following reasons:

[1] This application arises from the Respondent's refusal to grant discretionary relief to the Applicant, Lawrence Lemieux, from the imposition of a repeat late filing penalty of \$4,745.87.

[2] The record discloses that the Respondent granted relief from penalties and interest imposed in connection with Mr. Lemieux's late filing of his 2007 to 2010 tax returns but declined to do so for his 2011 return. The partial grant of relief was based on a history of personal tragedy including the death of Mr. Lemieux's wife by suicide following a lengthy period of depression. This event was compounded by the death of Mr. Lemieux's brother at the age of 59 and of his sister-in-law.

[3] The record discloses that Mr. Lemieux sought medical attention in 2009 at which point a diagnosis of anxiety, depression and extended grief reaction was noted. This was followed in May 2013 by a medical report authored by Mr. Lemieux's family physician, Dr. Henderson, following a medical assessment at that time. The record suggests that Dr. Henderson did not offer a current diagnosis but related the earlier difficulties Mr. Lemieux had experienced in preparing and filing his tax returns.

[4] The decision denying relief for the late filing of Mr. Lemieux's 2011 tax return turned, in part, on the fact that he was able to file his 2007 to 2010 returns but neglected to do so for the 2011 return. This apparently caused the decision-maker to conclude Mr. Lemieux had sufficiently recovered to the point he was no longer hampered by circumstances beyond his control.

[5] Not surprisingly, the decision letter does not contain an analysis of all the relevant evidence. In order to understand how the medical evidence was treated, it is necessary to consider the underlying reports and, in particular, the Taxpayer Relief Fact Sheets. Because those reports describe the evidence in more detail and provide the recommendations which underpinned the formal decisions, I accept them as forming a part of the decision under review.

[6] In the initial Fact Sheet, the reviewer was disposed to recommend “full relief” as requested by the taxpayer. This Fact Sheet refers to the 2011 tax year but it is not clear whether the 2011 repeat late filing penalty was under consideration. The recommendation of full relief was largely based on Mr. Lemieux’s documented medical history. This Fact Sheet refers to a letter from Dr. Henderson confirming a diagnosis of anxiety, depression and an extended grief reaction dating back to the death of Mr. Lemieux’s wife in 2009. In dealing with the issue of whether the circumstances were beyond Mr. Lemieux’s control the reviewer stated:

Yes. According to the taxpayer, his spouse took her own life in the home they shared on February 8, 2009. The letter from Dr. Henderson dated May 29, 2013, states the taxpayer was seen and appears to be suffering from anxiety, depression, and an extended grief reaction in response to the deaths of his brother and wife. The letter further states these circumstances likely impaired his ability to file his taxes appropriately.

[7] As noted above, this recommendation was accepted for the taxation years 2007, 2008, 2009, and 2010 (see p. 34). Mr. Lemieux then questioned the failure to address the repeat late filing penalty assessed against his 2011 return. On further review, a denial of relief for 2011 was recommended. The applicable taxpayer review Fact Sheet again referenced the May 2013 medical report from Dr. Henderson. According to one passage in the Fact Sheet, Dr. Henderson’s letter of May 29, 2013 related to “the difficulty Mr. Lemieux had with filing the 2007 to 2011

returns”. However, on the same page the reviewer stated “the medical documentation submitted was specific to the 2007 to 2010 tax years” (see Respondent’s record p 39). This is a material inconsistency which cannot be resolved on judicial review because the Respondent cannot produce Dr. Henderson’s medical report. Apparently the report was destroyed after relief for the 2007 to 2010 tax years was granted. The importance of this evidence is acknowledged in the Certified Tribunal Record at Tab F where the review states: “The first review officer appears to have placed the majority of their weight on taxpayer’s ongoing medical condition.”

[8] Dr. Henderson’s medical report is material to the decision under review and it should have been included in the Certified Tribunal Record. Its absence from the record prevents the Court from conducting a proper review of the decision denying relief for the 2011 tax year. In these circumstances, I am faced with a contradiction in the record about whether Dr. Henderson’s opinion extended to Mr. Lemieux’s failure to file a tax return for 2011. If it did, the reviewer’s contrary statement is wrong and the decision would be unreasonable on that basis. Without this evidence the benefit of doubt must be given to Mr. Lemieux.

[9] The same problem was addressed in *Parveen v Canada (Minister of Citizenship and Immigration)*, 168 FTR 103, [1999] FCJ No 660, where the respondent had stripped from the Certified Tribunal Record several pages of relevant notes. The Court expressed a concern about the completeness of the record and went on to address the issue in the following way:

[8] The Court is thus invited to believe that the applicant is not telling the truth when she states that such documents were provided to the visa officer, and that she is not telling the truth when she told the visa officer that she had had formal training. However, the computer entries on the respondent's records demonstrate that more educational documents than those that are

now in the record that is before the Court were provided by the applicant to the respondent. In addition, when the applicant first applied for landed immigrant status, she listed on her Application for Permanent Residence form her Diploma in Secretarial Science that she had received in 1980 (for the 1978-79 year). Thus, it is hardly likely that the applicant would have “confirmed” to the visa officer that she had no formal secretarial training.

[9] There are other similar discrepancies between the applicant's and the visa officer's descriptions of what occurred at the interview. I do not find it necessary to describe them. I think it is sufficient to note that the respondent controls the record that is put before the Court. Thus, any disputes that arise as a result of deficiencies in the record should, in general, be interpreted against the respondent rather than in her favour. Indeed, I think an incomplete record alone could be grounds, in some circumstances, for setting aside a decision under review. The respondent, as one of the parties before the Court, and being in control of how extensive a record is kept of these interviews, has a responsibility to ensure that the Court is provided with a complete and accurate record.

Also see *Yadav v Canada (Citizenship and Immigration)*, 2010 FC 140, 3095, [2010] FCJ No 353, at para 36.

[10] In this case the same problem arises and I am disposed to adopt the same solution, that is, to quash the decision and remit it to a different decision-maker for redetermination on the merits. Given the passage of time, Mr. Lemieux will have the opportunity to submit fresh medical and other evidence to substantiate his claim to relief.

[11] For the foregoing reasons this application is allowed.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this decision under review is set aside with the matter to be redetermined on the merits by a different decision-maker.

“R.L. Barnes”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1641-15

**STYLE OF CAUSE:** LAWRENCE LEMIEUX v THE MINISTER OF  
NATIONAL REVENUE

**PLACE OF HEARING:** EDMONTON, ALBERTA

**DATE OF HEARING:** JUNE 8, 2016

**JUDGMENT AND REASONS:** BARNES J.

**DATED:** JULY 13, 2016

**APPEARANCES:**

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FOR THE APPLICANT  
(ON HIS OWN BEHALF)

Mary Softley

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

N/A

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