Federal Court  Cour fédérale

Date: 20190725

Docket: T-1998-17

Citation: 2019 FC 1001

Ottawa, Ontario, July 25, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ERIC ADEY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

AND FILES: T-2001-17, T-2002-17, T-2003-17, T-2011-17, T-2012-17, T-2013-17, T-2014-17, T-2015-17, T-2016-17, T-2017-17, T-2018-17, T-2019-17, T-2020-17, T-2022-17, T-2023-17, T-2024-17, T-2025-17, T-2026-17, T-2027-17, T-2028-17, T-2029-17, T-2030-17, T-2031-17, T-2032-17, T-2033-17, T-2034-17, T-2035-17, T-2036-17, T-2037-17, T-2038-17, T-2039-17, T-2040-17, T-2041-17, T-2042-17, T-2043-17, T-2044-17, T-2045-17, T-2047-17, T-2048-17, T-2050-17, T-2051-17, T-2052-17, T-2053-17, T-2054-17, T-2056-17, T-2057-17, T-2058-17, T-2059-17, T-2061-17, T-2062-17, T-2063-17, T-2064-17, T-2065-17, T-2066-17, T-2067-17, T-2068-17, T-2069-17, T-2070-17, T-2071-17, T-2072-17, T-2073-17, T-2074-17, T-2075-17, T-2076-17, T-2107-17 T-2108-17, T-2109-17, T-154-18, T-238-18

JUDGMENT AND REASONS

I. Overview

[1] This decision relates to 70 applications for judicial review, brought by the Applicants in the Court files identified above. Pursuant to the Order of Prothonotary Tabib acting as Case

Management Judge, dated September 26, 2018, these applications were consolidated for case management purposes, with the records of the parties in all applications to be filed in the proceeding named in the above style of cause, T-1998-17. All 70 applications were argued together in Halifax on July 9, 2019.

[2] The Applicants (see Schedule "A" for a full list) are seeking judicial review of decisions of the Minister of National Revenue [the Minister], relating to adjustment requests in respect of various taxation years in order to claim an Overseas Employment Tax Credit [OETC], in which decisions a delegate of the Minister refused to allow the OETC in respect of one or more taxation years for each Applicant [the Decisions].

[3] As explained in more detail below, these applications are dismissed, because the Decisions are reasonable.

II. **Background**

[4] The Applicants were or are employees of the College of the North Atlantic [the College], a community college in Newfoundland and Labrador, and worked at its campus in Qatar [CNA-Q] in the 2000s. The Qatar campus, in Doha, offered engineering technology programs to Qataris.

[5] The College considered that its CNA-Q employees might potentially be eligible to claim the OETC, pursuant to s 122.3 of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [the Act], which eligibility turned on whether CNA-Q was carrying on a qualifying activity which

included, *inter alia*, "the exploration for or exploitation of petroleum, natural gas, minerals or other similar resources" and "engineering activity". The College and a number of its employees discussed the eligibility issue with the Canada Revenue Agency [CRA]. The consistent response from CRA was that CNA-Q was an educational establishment and, thus, was not engaged in a qualifying activity so as to invoke s 122.3 of the Act. Subsequently, the College asked for a ruling from the CRA Income Tax Rulings Directorate, which reaffirmed the CRA's position multiple times.

[6] As a result of these responses, the College did not provide its CNA-Q employees with OETC claim forms [T626s] from 2002 until late 2008. According to the Applicants, in December 2008, the College advised CNA-Q employees that it would sign T626s if the employee signed a waiver acknowledging that they were claiming the credit "at their own risk". The General Counsel for the College warned CNA-Q employees that applying for the OETC was "fraught with risk" because, in view of the CRA's position (that CNA-Q was not engaged in a qualifying activity), even if the OETC was initially granted, it could be clawed back after an audit or other internal review by CRA. Some Applicants did submit T626s, and some OETCs were granted but then clawed back with interest.

[7] In October 2009, a CNA-Q employee filed an appeal of a denial of the OETC, but this appeal was denied by the Tax Court of Canada [the Tax Court] in May 2010 in *Humber v The Queen*, 2010 TCC 253, in part based on the Court's conclusion that the appellant had failed to lead sufficient evidence to show a connection between the training provided by CNA-Q and the oil and gas industry in Qatar. In 2010, another CNA-Q employee filed an appeal of a denial of

the OETC and the Tax Court ruled in his favour in *Legge v The Queen*, 2011 TCC 413 [*Legge*]. *Legge* held that CNA-Q was engaged in a qualifying activity pursuant to s 122.3 of the Act, and Mr. Legge was permitted to claim an OETC with respect to his taxation year 2007.

[8] After *Legge*, numerous current and former employees of CNA-Q began submitting T626 forms and applied for adjustments with respect to their taxation years in issue. These applicants requested taxpayer relief pursuant to ss 152(4) and 152(4.2) of the Act, the details of which provisions will be set out later in these Reasons, seeking adjustments to allow the OETC to be claimed for taxation years ranging from 2003 to 2010. A delegate of the Minister considered the requests and sent decision letters to each applicant. Subsequently, 153 applicants filed judicial review applications in respect of decisions by the Minister's delegate to deny certain of the adjustments requests. By consent, these matters were referred back to the Minister for a second review of the requests.

[9] On November 30, 2017, following the agreed reconsiderations, another delegate of the Minister [the Delegate] sent decision letters to the applicants which, under s 152(4) of the Act, allowed adjustment requests in respect of taxation years that were within the normal three year reassessment period (as prescribed by s 152(3.1)(b) of the Act) at the time of the request. For adjustment requests that involved taxation years that were outside the three year reassessment period at the time of the request (referred to by the Delegate and now the parties as "statute-barred" years), the decision letters, applying s 152(4.2) of the Act, allowed adjustment requests where the applicant had not been advised by the CRA of certain recourse rights, which were considered to represent extraordinary circumstances, but denied the remaining requests. These

Decisions made under s 152(4.2) of the Act, denying certain of the adjustment requests advanced by the Applicants, are the subject of the present applications for judicial review.

III. **Issues and Standard of Review**

[10] The Applicants submit that the issues raised by their applications for judicial review are the Minister's decision not to reassess their statute-barred years in issue and therefore not to grant the OETC for each year.

[11] The Respondent submits that the applications for judicial review raise the following two issues:

A. whether there is a ground to review the discretionary decisions to deny the adjustment requests; and

B. if there is a ground to review the decisions, whether there is a basis to interfere with the decisions.

[12] The parties agree that that standard of review applicable to decisions made under s 152(4.2) of the Act is reasonableness (see *Canada (Attorney General) v Abraham*, 2012 FCA 266 [*Abraham*] at para 36). My conclusion is that the sole issue to be determined by the Court is whether, taking into account the parties' arguments, the Decisions are reasonable.

IV. **Analysis**

[13] Both parties refer the Court to the decision in *Barron v Minister of National Revenue* (1997), 209 NR 392 (Fed CA) [*Barron*] at para 5, in which the Federal Court of Appeal explained as follows the basis on which the Court can intervene in a decision made under s 152(4.2) of the Act:

> 5 Before saying why we think these findings are wrong, it may be useful to recall that subsection 152(4.2) of the *Income Tax Act* confers a discretion on the Minister and that, when an application for judicial review is directed against a decision made in the exercise of a discretion, the reviewing court is not called upon to exercise the discretion conferred on the person who made the decision. The court may intervene and set aside the discretionary decision under review only if that decision was made in bad faith, if its author clearly ignored some relevant facts or took into consideration irrelevant facts or if the decision is contrary to law.

[14] In oral submissions, the Applicants advanced two principal arguments in support of their position that the Decisions should be set aside by the Court. They argue that the Decisions are contrary to law, because they failed to apply the *Legge* decision, and that the Delegate ignored relevant facts by failing to take into account what the Applicants describe as their particular circumstances as employees of the College. The Applicants refer to the fact that the College, along with its employees, had been engaged with CRA on the issue of OETC eligibility for many years before the *Legge* decision, which itself relates to an employee of the College, was released. The Applicants acknowledge that their two principal arguments are very much related, in my view sufficiently so that they should be considered together.

[15] In advancing their arguments, the Applicants also observe that there were two principal policy considerations underlying the Decisions: (a) concern that the *Legge* decision was the reason the Applicants pursued the readjustment requests; and (b) concern about applying the *Legge* decision retroactively. The Applicants note that these policy considerations are grounded in policy documents published by the CRA but submit that the concerns underlying these policy considerations are not applicable to their circumstances and that the Delegate therefore erred in slavishly or robotically applying these policies without taking their particular circumstances into account.

[16] In considering these arguments, it is useful first to review the sections of the Act which confer upon the Minister the authority under which the Decisions were made, as well as the policy documents that apply to the exercise of that authority. Section 152(4) of the Act confers upon the Minister the authority to make a reassessment of tax for a taxation year but, subject to certain exceptions which are not relevant to the present matters, restricts that authority to the taxpayer's normal reassessment period. As previously noted, for an individual taxpayer, the normal reassessment period is prescribed by s 152(3.1)(b) of the Act to be the period ending three years after issuance of the original notice of assessment. Policy document 75-7R3, entitled "Reassessment of a Return of Income," has been published by CRA to guide its officials in performing such reassessments. As observed by the Applicants, paragraph 4 of 75-7R3 reads as follows:

> 4. A reassessment to create a refund ordinarily will be made upon receipt of a written request by the taxpayer, even if a notice of objection has not been filed within the prescribed time, provided that … (b) the Department is satisfied that the previous assessment or reassessment was wrong; … and (e) the application for a refund

is not based solely upon a successful appeal to the Courts by a taxpayer.

[17] When a request for an adjustment relates to a period outside the taxpayer's normal reassessment period, it is s 152(4.2) of the Act which prescribes the Minister's authority to consider the request:

Reassessment with taxpayer's consent	**Nouvelle cotisation et nouvelle détermination**
(4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining — at any time after the end of the normal reassessment period, of a taxpayer who is an individual (other than a trust) or a graduated rate estate, in respect of a taxation year — the amount of any refund to which the taxpayer is entitled at that time for the year, or a reduction of an amount payable under this Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is 10 calendar years after the end of that taxation year,	(4.2) Malgré les paragraphes (4), (4.1) et (5), pour déterminer, à un moment donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable — particulier (sauf une fiducie) ou succession assujettie à l'imposition à taux progressifs — pour une année d'imposition, le remboursement auquel le contribuable a droit à ce moment pour l'année ou la réduction d'un montant payable par le contribuable pour l'année en vertu de la présente partie, le ministre peut, si le contribuable demande pareille détermination au plus tard le jour qui suit de dix années civiles la fin de cette année d'imposition, à la fois :
(a) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year; and	**a)** établir de nouvelles cotisations concernant l'impôt, les intérêts ou les pénalités payables par le contribuable pour l'année en vertu de la présente partie;

(b) redetermine the amount, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 122.8(4), 122.9(2), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year or deemed by subsection 122.61(1) to be an overpayment on account of the taxpayer's liability under this Part for the year.	**b)** déterminer de nouveau l'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 122.7(2) ou (3), 122.8(4), 122.9(2), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année ou qui est réputé, par le paragraphe 122.61(1), être un paiement en trop au titre des sommes dont le contribuable est redevable en vertu de la présente partie pour l'année.

[18] Under this section, the Minister has the authority to reassess tax applicable to a taxation year outside the normal reassessment period, provided the taxpayer has sought that reassessment less than 10 calendar years after the end of that taxation year. As previously noted, these taxation years outside the normal reassessment period are referred to in the Decisions, and by the parties in their submissions, as "statute-barred" years. The policy published by CRA applicable to decisions under s 152(4.2) of the Act is Part IV of IC07-1, entitled "Taxpayer Relief Provisions." The particular portions of IC07-1 referenced by the Applicants in their submissions are paragraphs 71 and 87, which read as follows:

> 71. The CRA may issue a refund or reduce the amount owed if it is satisfied that such a refund or reduction would have been made if the return or request had been filed or made on time, and provided that the necessary assessment is correct in law and has not been already allowed.
>
> 87. CRA policy does not allow for the reassessment of a statute-barred return if the request is made as a result of a court decision (for more information, see Information Circular 75-7R3, *Reassessment of a Return of Income*). Requests made to reassess a

> statute-barred return based only on the successful appeal by another taxpayer will not be granted under subsection 152(4.2).

[19] As is evident from the above quotations, both 75-7R3 and IC07-1 reflect CRA policy not to perform reassessments or issue refunds in circumstances where the taxpayer's request is based only on a successful appeal by another taxpayer. The CRA has adopted this policy consideration in connection both with requests made during the taxpayer's normal reassessment period and with requests applicable to statute-barred years.

[20] The Applicants observe that the both the Decisions and the Taxpayer Relief Fact Sheets in the record which serve as background to the Decisions demonstrate that, for most of the Applicants, the Delegate concluded that the *Legge* decision was not the sole factor underlying the requests for adjustments, although it was a significant factor or indeed the main factor. The Delegate therefore granted the requests by those Applicants for the OETC for the years that were within the normal three year reassessment period, as paragraph 4(e) of 75-7R3 did not apply.

[21] The Respondent notes two exceptions to these conclusions. In relation to a taxpayer named Derek Ballard,[1] the Delegate concluded only that the *Legge* decision was not the sole reason for Mr. Ballard making the adjustment request, because Mr. Ballard had expressed his disagreement with CRA's assessment. As with other taxpayers, the Delegate granted the requests by Mr. Ballard under s 152(4) for the OETC for the years that were within the normal three year

[1] Derek Ballard's application for judicial review, in Court file T-2000-17, was adjourned without day by Order dated June 24, 2019, and is not one of the applications being decided by this Judgment and Reasons. However, the Delegate's decision in that matter is included in the record before the Court, as Mr. Ballard's application was originally scheduled to be heard along with the Applicants.

reassessment period. In relation to a taxpayer named Christopher Barrington, the Delegate concluded that the adjustment requests were based solely on the *Legge* decision, as no action had been taken by Mr. Barrington to claim the credit or adjust his returns prior to that decision. It appears that Mr. Barrington's requests related only to years outside the three year reassessment period, all of which were denied.

[22] I do not understand the Applicants to be arguing that any of these conclusions are unreasonable, in the sense of being unsupported by the evidence before the Delegate. Nor do they argue that the underlying policy is unreasonable. Indeed, the Applicants' counsel conceded that it is understandable that CRA would be concerned that, following a change in the law resulting from a successful appeal by a taxpayer, it would be a presented with a flood of reassessment requests by other taxpayers. As the Applicants note, in *Lanno v Canada (Customs & Revenue Agency)*, 2005 FCA 153 [*Lanno*] at para 15, the Federal Court of Appeal confirmed the policy considerations underlying paragraph 4(e) of 75-7R3 to be sound:

> 15 The Judge considered the exception in paragraph 4(e) of Information Circular 75-7R3 to be a sound policy. I agree, and would adopt the explanation from paragraph 10 of her reasons:
>
> > The CCRA needs to be able to avoid a huge flood of reassessment applications every time a court decision impacts a taxpayers' liability. Thus, when a taxpayer is successful in an appeal of his tax liability to the Courts, refunds to other taxpayers who were not part of the litigation will not be paid if the successful appeal is the only reason for a refund application.

[23] However, the Applicants argue that the floodgates concern does not apply to their particular circumstances, as they are a limited group of taxpayers and are not strangers to the tax

credit issue that was addressed by *Legge*, as they are employees of the College like Mr. Legge, and as they and the College have been engaged with the CRA on this issue for many years. They therefore submit that, in the absence of the floodgates concern, the Delegate erred by undertaking the analysis as to whether the Applicants' requests resulted from the *Legge* decision.

[24] I find no reviewable error by the Delegate in this aspect of the Decisions. As noted above, the policy consideration underlying this aspect of the Delegate's analysis has received appellate approval in *Lanno.* The Decisions also demonstrate that the Delegate was aware of the Applicants' particular circumstances, as each of the Decisions refers to the history of the work on the OETC issue undertaken by the College, the Applicants' employer. While the Applicants submit that the Decisions do not set out any analysis of the significance of this history, I do not consider the absence of an express analysis to support a conclusion that the Delegate clearly ignored these facts, so as to undermine the reasonableness of the Decisions. I appreciate the argument that the floodgates concern could be considered less significant in a context where there are a limited number of taxpayers who may seek to rely upon a judicial decision. However, in my view, this argument asks the Court to disagree with the Delegate's conclusion on the application of a relevant policy consideration, which is not the Court's role on judicial review. The Delegate's treatment of this consideration is within the range of acceptable outcomes and is therefore reasonable.

[25] I note that, while this argument was not pursued in oral submissions, the Applicants' written representations also submit that the Delegate erred by failing to apply this policy consideration properly, in that the policy documents speak of rejecting adjustment requests when

made solely as a result of a court decision, and the Delegate's conclusion was that the *Legge* decision was not the only reason for the request. I find no reviewable error based on this argument. In my view, the applicable policy documents do not preclude the Delegate from considering the extent to which an adjustment request has resulted from the ruling of a court, even if the ruling is not the sole cause of the request.

[26] Moreover, I read the Decisions as turning most significantly on the fact that, because the *Legge* decision was not the applicable law when timely requests for adjustment of the statute-barred year could have been filed, such requests would not have been granted. This interpretation is supported by the Delegate's decision in the Ballard matter (T-2000-17). The Delegate found that the *Legge* ruling was not the sole reason for Mr. Ballard making the adjustment request, because Mr. Ballard had expressed his disagreement with CRA's assessment, and the Delegate made no finding that that ruling was a significant factor underlying the request. However, the Delegate nevertheless denied Mr. Ballard's requests for the statute-barred years, because the OETC would not have been allowed for those years based on the CRA's interpretation of the law at that time.

[27] This brings me to the second principal policy consideration which the Applicants identify as underlying the Decisions, i.e. concern about applying the *Legge* decision retroactively. The Applicants submit that the Decisions are contrary to law, as they fail to apply the law as set out in *Legge*. More precisely, they apply *Legge* to those taxation years that were within the applicable three year reassessment period but do not apply it to the statute-barred years. The Applicants argue that the Delegate applied a "hard stop" to the retroactive effect of the *Legge*

decision at the juncture of the reassessment period and the statute-barred period. They submit that there is no statutory foundation for that approach, based on the language of ss 152(4) and (4.2), or any other defensible basis for it.

[28] The Respondent defends the Delegate's approach based on the differences in the statutory rights of the taxpayer before and after the end of the reassessment period. The Respondent submits that, for taxation years within the reassessment period, the taxpayer would have been entitled to recourse to the Tax Court, to have the law as determined by *Legge* applied to those years. Therefore, the applicable policy, 75-7R3, provides in paragraph 4 for a positive exercise of the ministerial discretion under s 152(4) if (among other considerations) the previous assessment was wrong. In contrast, for the statute-barred years outside the reassessment period, paragraph 71 of IC07-1 provides for the Minister to look both to whether the requested reassessment is correct in law and whether a refund would have been granted if the request had been made on time. The application of the latter consideration, whether the OETC would have been granted if the refund request had been made on time, resulted in the Delegate's denial of the request for the statute-barred years, because a timely request would have been denied under the pre-*Legge* law that was then applicable.

[29] In reply to these submissions by the Respondent, the Applicants maintain that it was unreasonable for the Delegate to have refused to apply to the statute-barred years the flexibility, in terms of willingness to apply *Legge* retroactively, that was applied to the years that were within the reassessment period. However, in my view, the case law relied upon by the Respondent supports the reasonableness of the Delegate's approach to the statute-barred years.

In *Abraham* at paras 26-27, the Federal Court of Appeal explained as follows the role of s 152(4.2) including the fact that, outside the normal reassessment period, a taxpayer has no entitlement to have an error in an assessment corrected:

> 26 Subsection 152(4.2) of the *Income Tax Act* does not give the respondents an entitlement to relief. Instead, it only gives them a right to ask the Minister to exercise his discretion to reassess after the expiration of the normal reassessment period.
>
> 27 It must be recalled that under subsection 152(8) of the *Income Tax Act*, in the absence of a reassessment following a timely objection or a successful appeal, an assessment is final and binding. Later, the taxpayer may discover an error in the assessment, but it is too late – the taxpayer has no entitlement to have the error corrected. Rather, recourse is to be had under subsection 152(4.2) of the *Income Tax Act* – a request, not for an entitlement, but for an exercise of discretion. There is nothing in subsection 152(4.2) that requires the Minister to exercise his discretion in favour of the taxpayer if the taxpayer would be entitled to a tax benefit if he or she claimed within the regular reassessment period. In the words of this Court in *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153 at paragraph 6, "[t]he granting of relief is discretionary, and cannot be claimed as of right."

[30] *Abraham* also considered the role of IC07-1 in ministerial decisions made under s 152(4.2) and was followed by Justice Manson's decision in *Lambert v Canada (Attorney General)*, 2015 FC 1236 [*Lambert*] at paras 50-57:

> 50 The Court was directed to the decision in *Abraham*, at paragraphs 31, 52, 57-61 and 66. I find the Court of Appeal's interpretation of the provisions and policies applicable to the present case:
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> > [31] Seen in this way, subsection 152(4.2) of the *Income Tax Act* is like any other section that vests a broad discretion in a decision-maker, a discretion founded upon legal and factual matters. Here, the Minister (or, in this case, the Delegate) must, in the words of section 71 of *Information Circular 07-1-*

Taxpayer Relief Provisions, be "satisfied that such a refund or reduction would have been made if the return or request had been filed on time" - this is the component in the discretion that has some legal content - and may take into account a number of other factors, many of which are also enumerated in the Information Circular.

[52] In making her decision, the Delegate closely followed the relevant *Information Circular, Information Circular 07-1-Taxpayer Relief Provisions*, and reached an outcome that was consistent with it. As is well-known, Information Circulars such as this have the legal status as policies or guidelines, not laws.

[54] Compliance by an administrative decision-maker with unchallenged policy statements and guidelines has been taken to be an indicator - not a conclusive one - of reasonableness: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 72 ("a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section"); *Herman v. Canada (Citizenship and Immigration)*, 2010 FC 629; *Khoja v. Canada (Citizenship and Immigration)*, 2010 FC 142. Similarly, on occasion, a decision's unexplained deviation from policy statements and guidelines can raise concerns about its reasonableness: *Kane v. Canada (Attorney General)*, 2011 FCA 19 at paragraphs 44-56.

[57] Also relevant are paragraphs 73, 87 and 88 of the Information Circular. Broadly speaking, these provisions prevent persons seeking reassessment after the normal deadlines have expired from taking advantage of later changes in the law or its application. These provisions read as follows:

> 73....The ability of the CRA to allow an adjustment to amounts for a statute-barred tax year should not be used as a means to have issues reconsidered ... [where the individual] chose not to challenge the issues through the normal objection/appeals processes....
>
> 87. CRA policy does not allow for the reassessment of a statute-barred return if the

> request is made as a result of a court decision (for more information, see Information Circular 75-7R3, Reassessment of a Return of Income). Requests made to reassess a statute-barred return based only on the successful appeal by another taxpayer will not be granted under subsection 152(4.2)…

[58] The Delegate followed these provisions of the Information Circular. In her reasons for decision, she stated:

> The CRA policy also states that the taxpayer relief provisions are not an acceptable substitute for the retroactive application of an adverse decision of a court where the taxpayer has not protected his or her right of objection or appeal.

[59] For completeness, I would add that there is no suggestion that the Delegate fettered her discretion by using the Information Circular in the way she did. In the circumstances of this case, her compliance with the Information Circular is an indication that her decision was reasonable.

[60] The Delegate then assessed whether, in the words of paragraph 71 of the Information Circular, she was "satisfied that...a refund or reduction would have been made if the return or request had been filed or made on time." This entailed an examination of the case law concerning section 87 of the *Indian Act*. She looked at each taxation year, assessed what the state of the law under section 87 was at that time, and asked whether the respondents would be entitled to a reduction of tax in that year in light of the state of the law in that year.

[61] This methodology of conducting a year-by-year examination of the state of the law is supported by the wording of subsection 152(4.2) of the *Income Tax Act*. If the Delegate adopted a methodology that were contrary to subsection 152(4.2), her exercise of discretion would fall outside the range of legal acceptability and defensibility. But that is not the case here.

[66] In fact, in my view, this reasoning is unassailable. It supports the view that in each of the taxation years 1985 to

> 1991, the Minister would not have been "satisfied that...a refund or reduction would have been made if the return or request had been filed or made on time."

51 The outcome in *Abraham* – that the Minister's decision was reasonable – is based upon the Delegate having conducted a detailed year-by-year examination of the state of the law as it applied to the tax years in question to conclude whether or not she was satisfied a refund or reduction would have been made had the return or request been filed on time. This is not the case here; the Delegate did not analyze the 2003 through 2011 tax years according to the law at the time, and in fact did not rest his Decision on any findings regarding same.

52 Taxpayer responsibilities under the self-assessment system were also cited as influential to the final Decision. The Applicants are responsible for ensuring that their tax returns are filed correctly under Canada's self-assessing tax system (*Sivadharshan v Minister of National Revenue*, 2013 FC 47 at para 14). The Minister has no obligation to reassess the years originally assessed as filed. As the FCA stated in *Lanno v Canada (Customs and Revenue Agency)*, 2005 FCA 153 at para 6, "[t]he granting of relief is discretionary, and cannot be claimed as of right."

53 What the Respondent did not refer the Court to in the *Abraham* decision was paragraph 53, where the FCA stated:

> [53] It would be open to a party to argue that the Delegate has misinterpreted subsection 152(4.2) of the *Income Tax Act* or that the Information Circular is inconsistent with subsection 152(4.2), such that the Delegate's reliance on the Information Circular is contrary to law. But the respondents do not make these arguments in this case.

54 The interpretation of subsection 154(4.2) and whether the Information Circulars are congruent with this interpretation is precisely what the Applicants are challenging in this case. They claim that reliance on CRA policy not to allow requests based solely on a court decision is subjective, leads to absurdity and is unreasonable.

55 On this point, I disagree. The Delegate's conclusion that the request is based on a court decision comes from an objective assessment of the evidence. As well, any subjective element to the decision-making does not render a Decision ad hoc and lead to uncertainty or inconsistency.

> 56 As the Respondent submits, the policies are not inconsistent with the fairness provisions of the *ITA*. The applicable paragraphs of *IC07-1* (71 and 87) align with the objective of subsection 152(4.2), setting out that taxpayers seeking reassessment after the expiry of normal deadlines should not be able to take advantage of later changes in the law (*Abraham*, at para 82). This is emphasized in Communication *ATR-2014-02*. Inconsistency and absurd results are more likely to ensue if CRA were to permit taxpayers to retroactively apply a subsequent change in the law through reassessment requests every time a court decision changed it.
>
> 57 In my opinion, the policy is not unlawful or unreasonable, nor is the Delegate's reliance on it.

[31] The reasoning in *Lambert*, supported by the appellate authority in *Abraham*, establishes the reasonableness of the policy considerations underlying paragraph 71 of IC07-1 and the lawfulness of that policy. The Decisions cannot be considered contrary to law, or otherwise unreasonable, in declining to apply the change in the law represented by *Legge* to the statute-barred years.

[32] The Applicants also argue, based on *Hislop v Canada (Attorney General)*, 2007 SCC 10 at paras 81-108, that the decision whether to apply a judicial ruling retroactively requires a case-specific examination of facts and circumstances. The Applicants again point out that they are a discrete and small number of similarly-situated taxpayers, who have been engaged with CRA on the OETC eligibility issue for many years, and they note that they were discouraged by the College from claiming the OETC. They submit that the floodgates concern surrounding retroactive application of a judicial decision does not arise on these facts.

[33] In my view, these arguments do not undermine the reasonableness of the Decisions. As I have previously concluded, the Delegate's decision not to apply *Legge* retroactively is consistent

with CRA policy, that policy has been found to be consistent with s 152(4.2) (see *Lambert* at para 56), and the Decisions demonstrate that the Delegate was aware of the Applicants' circumstances. While it may have been available to the Delegate to depart from the policy based on the Applicants' circumstances, I find no basis for a conclusion that the Delegate's decision not to do so is outside the range of acceptable outcomes based on the facts and law applicable to these matters.

[34] Finally, in connection with the Applicants' submission that the Delegate slavishly applied the policy considerations canvassed above, I note the Respondent's argument that, in relation to six of the Applicants, the Delegate allowed adjustment requests applicable to statute-barred years, because the Applicant had not been advised by the CRA of certain recourse rights. The Delegate considered this to represent extraordinary circumstances, which warranted relief for those statute-barred years notwithstanding that the OETC would not have been granted for those years had the request for the credit been filed on time. I agree with the Respondent's submission that this analysis, while only applicable to a small number of the Decisions, is inconsistent with a conclusion that the Delegate approached the adjustment requests in a slavish or robotic manner.

[35] In conclusion, having considered the parties' arguments, I find that the Decisions are reasonable and that these applications for judicial review must therefore be dismissed.

V. **Costs**

[36] The parties take the joint position that the Court should not award costs in these matters, regardless of the outcome. My Judgment will so reflect.

JUDGMENT IN T-1998-17

AND FILES: T-2001-17, T-2002-17, T-2003-17, T-2011-17, T-2012-17, T-2013-17, T-2014-17, T-2015-17, T-2016-17, T-2017-17, T-2018-17, T-2019-17, T-2020-17, T-2022-17, T-2023-17, T-2024-17, T-2025-17, T-2026-17, T-2027-17, T-2028-17, T-2029-17, T-2030-17, T-2031-17, T-2032-17, T-2033-17, T-2034-17, T-2035-17, T-2036-17, T-2037-17, T-2038-17, T-2039-17, T-2040-17, T-2041-17, T-2042-17, T-2043-17, T-2044-17, T-2045-17, T-2047-17, T-2048-17, T-2050-17, T-2051-17, T-2052-17, T-2053-17, T-2054-17, T-2056-17, T-2057-17, T-2058-17, T-2059-17, T-2061-17, T-2062-17, T-2063-17, T-2064-17, T-2065-17, T-2066-17, T-2067-17, T-2068-17, T-2069-17, T-2070-17, T-2071-17, T-2072-17, T-2073-17, T-2074-17, T-2075-17, T-2076-17, T-2107-17 T-2108-17, T-2109-17, T-154-18, T-238-18

THIS COURT'S JUDGMENT is that the Applicants' applications for judicial review are dismissed, with no award of costs.

"Richard F. Southcott"
Judge

SCHEDULE "A"

Court File	Applicant	Court File	Applicant
T-2001-17	TRUDY BARNES	T-2044-17	NEIL MERCURIUS
T-2002-17	DON BARNES	T-2045-17	BRENDA MOONEY
T-2003-17	RONALD BENNETT	T-2047-17	ROSE MARIE McCABE
T-2011-17	MARGARET BLACKMORE	T-2048-17	MARY C. MOORE
T-2012-17	SHARON ROBARTS	T-2050-17	THOMAS MOORE
T-2013-17	RUTH BENSON	T-2051-17	LYNN MYLER
T-2014-17	RON CHISHOLM	T-2052-17	BRENDA NEWHOOK
T-2015-17	GREG CHAYTOR	T-2053-17	GORDON PARSONS
T-2016-17	CAROL BOLDING	T-2054-17	DARYLE NIEDMAYER
T-2017-17	EILEEN BRAGG	T-2056-17	REX A. ROBERTS
T-2018-17	PAULA CORBETT	T-2057-17	BLANCHE ROGERS
T-2019-17	RALPH CANN	T-2058-17	PATRICIA RALPH
T-2020-17	SUSAN CURTIS	T-2059-17	ROBERT H. ROSE
T-2022-17	NORMA ELLIOTT	T-2061-17	SHIRLEY RYAN
T-2023-17	KEVIN DEVEAU	T-2062-17	CECIL R. SMITH
T-2024-17	BILL GOSSE	T-2063-17	EDITH SMITH
T-2025-17	LINDA DOODY	T-2064-17	DONALD H. SQUIBB
T-2026-17	BRENDA DOYLE	T-2065-17	ENID STRICKLAND
T-2027-17	THOMAS GREENE	T-2066-17	CECIL G. STURGE
T-2028-17	MICHAEL GREENE	T-2067-17	SCOTT TULK
T-2029-17	HARRY ELLIOTT	T-2068-17	JOYCE STURGE
T-2030-17	REGINA HAWCO	T-2069-17	DENNIS VAUGHAN
T-2031-17	COLLEEN HICKEY	T-2070-17	BRUCE WHITE
T-2032-17	GARY HUNT	T-2071-17	CYNHIA WELSH
T-2033-17	ANDREW HOWSE	T-2072-17	MARY VAUGHAN
T-2034-17	ANTHONY HUSSEY	T-2073-17	ELIZABETH WHITE
T-2035-17	CHARLES JANES	T-2074-17	GARY WHITE
T-2036-17	AUDREY JANES	T-2075-17	LINDA WOODMAN
T-2037-17	PAUL JANES	T-2076-17	ROBERT WOODMAN
T-2038-17	PEGGY JANES	T-2107-17	ROBERT BONNELL
T-2039-17	MAXWELL KEATS	T-2108-17	DALE TEMPLE
T-2040-17	MAY M. KEATS	T-2109-17	FOZIA JAMAL
T-2041-17	MONICA KENNEDY	T-154-18	GAIL MARIE ENGLISH
T-2042-17	TONYA LOPEZ	T-238-18	CHRISTOPHER BARRINGTON
T-2043-17	MARY ELEANOR KENNY		

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1998-17
	AND FILES: T-2001-17, T-2002-17, T-2003-17, T-2011-17, T-2012-17, T-2013-17, T-2014-17, T-2015-17, T-2016-17, T-2017-17, T-2018-17, T-2019-17, T-2020-17, T-2022-17, T-2023-17, T-2024-17, T-2025-17, T-2026-17, T-2027-17, T-2028-17, T-2029-17, T-2030-17, T-2031-17, T-2032-17, T-2033-17, T-2034-17, T-2035-17, T-2036-17, T-2037-17, T-2038-17, T-2039-17, T-2040-17, T-2041-17, T-2042-17, T-2043-17, T-2044-17, T-2045-17, T-2047-17, T-2048-17, T-2050-17, T-2051-17, T-2052-17, T-2053-17, T-2054-17, T-2056-17, T-2057-17, T-2058-17, T-2059-17, T-2061-17, T-2062-17, T-2063-17, T-2064-17, T-2065-17, T-2066-17, T-2067-17, T-2068-17, T-2069-17, T-2070-17, T-2071-17, T-2072-17, T-2073-17, T-2074-17, T-2075-17, T-2076-17, T-2107-17 T-2108-17, T-2109-17, T-154-18, T-238-18
STYLE OF CAUSE:	ERIC ADEY V ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JULY 9, 2019
JUDGMENT AND REASONS	SOUTHCOTT, J.
DATED:	JULY 25, 2019

APPEARANCES:

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