Federal Court | Cour fédérale

Date: 20211015

Docket: T-1475-20

Citation: 2021 FC 1076

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 15, 2021

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

Diane HAMEL
in her capacity as Executor of the Estate of the
Late Jean-René Hébert

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Diane Hamel, in her capacity as executor of the estate of her husband, the late Jean-René Hébert [the Deceased], is seeking judicial review of the November 4, 2020, decision of the Director General, Legislative Policy Directorate, Legislative Policy and Regulatory Affairs

Branch [the Director General], of the Canada Revenue Agency [the Agency]. In short, the Director General concluded that the requested remission of tax or interest could not be supported in the case of the Deceased, that it was not unreasonable or unfair to collect the properly assessed tax and interest, and that it was not in the public interest to grant remission.

[2] The decision that is the subject of this judicial review was made by the Director General as a delegate of the Minister of National Revenue [the Minister] in the exercise of the power conferred by subsection 23(2) of the *Financial Administration Act*, RSC 1985, c F-11 [the Act].

[3] Subsection 23(2) of the Act provides that the Governor in Council may, on the recommendation of the Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty. As the respondent, the Attorney General of Canada [the AGC], points out, this is an exceptional measure that can only be granted if the Governor in Council finds that the collection of the debt was unreasonable or unjust or that the public interest warrants it. The Minister and her officials have a very broad discretion in deciding whether to recommend the remission requested (*Twentieth Century Fox Home Entertainment Canada Limited v Canada (Attorney General)*, 2012 FC 823 [*Twentieth Century Fox* (FC)] at para 18 (aff'd 2013 FCA 25 at para 11); *Canada (Attorney General) v Abraham*, 2012 FCA 266 at para 48; *Waycobah First Nation v Canada (Attorney General)*, 2011 FCA 191 [*Waycobah FCA*] at paras 18–20).

[4] Despite my sympathy for Ms. Hamel, I am of the view that the application for judicial review must be dismissed for the following reasons. Based on the evidence in the record, Ms. Hamel has not satisfied me that the Director General's decision was unreasonable or that the principles of natural justice and procedural fairness were breached.

II. Context according to the evidence in the record

[5] In support of her claim for judicial review, Ms. Hamel filed, along with her applicant's file, her own affidavit sworn on February 3, 2021; the affidavit of Steven Guillemette [the Analyst], Policy Analyst in the Remissions and Delegations Section, Legislative Policy Directorate, Legislative Policy and Regulatory Affairs Branch of the Agency [the Remissions Section]; and 11 exhibits and documents certified pursuant to section 318 of the *Federal Courts Rules*, SOR/98-106.

[6] As a preliminary matter, the AGC submits that Ms. Hamel's affidavit contained several passages that were inadmissible as evidence in this judicial review as Ms. Hamel asserted facts there that were not before the decision-maker.

[7] It is established, in the decision of the Federal Court of Appeal [FCA] in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*], for example, that [TRANSLATION] "only the evidence that was before the administrative decision maker is relevant and admissible on judicial review" (*Access Copyright* at paras 19 and 20). Mr. Guillemette identified the portions of Ms. Hamel's affidavit containing facts that were not made known to him during the processing

of the remission request. Paragraph 20 of the *Access Copyright* decision sets out three exceptions to the general principle against the admission of new evidence. As one of these exceptions, the FCA noted that it would admit into evidence an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review and to provide context, and it is this exception that Ms. Hamel relied on. The FCA stated, however, that "[c]are must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider" (*Access Copyright* at para 20).

[8] Thus, several elements of Ms. Hamel's affidavit identified by Mr. Guillemette are indeed not in the certified record, were not before the decision-maker, go beyond context or general background, and constitute evidence on the merits of the claim. I will therefore not consider them (see the passages identified by Mr. Guillemette in connection with paragraphs 10, 20, 37 and 38 of Ms. Hamel's affidavit). That being said, the inadmissibility of this evidence does not affect my decision.

[9] The documents in the record provide the context described below.

[10] On January 25, 2017, Jean-René Hébert sadly died. Ms. Hamel, his wife, was the liquidator of his estate.

[11] On May 9, 2017, following the filing of the Deceased's tax return for the 2016 taxation year, the Agency issued a Notice of Assessment with respect to 2016. This Notice of Assessment states, in part, that:

> [TRANSLATION]
> As of the date of this notice, you have an unused amount of net capital losses of other years of $48,191. You can use this amount to reduce the taxable capital gains you report this year. If you apply this amount to other years, you may have to recalculate your unused balance because different inclusion rates apply to capital gains from those years. For more information, see Guide T4037, Capital Gains.

[12] On November 27, 2017, Ms. Hamel provided the Agency with documents confirming that she was the liquidator of the Deceased's estate, indicated her desire to have access to the Deceased's previous tax returns through the online service My Account and requested that the Agency take the necessary steps to provide her with access (Applicant's Record [AR] at 138).

[13] On January 31, 2018, the Agency's Customer Service Department notified Ms. Hamel by letter that it could not process her request due to the lack of a complete and signed document/will, and requested that she return her request with a photocopy of the complete legal document and other documents (AR at 139).

[14] On February 23, 2018, Ms. Hamel sent the Agency's Customer Service Department the originals of the required documents, requesting that they be returned to her (AR at 140).

[15] On March 6, 2018, the Agency registered Ms. Hamel as the legal representative of the Deceased (Exhibit E of Mr. Guillemette's affidavit).

[16] On March 9, 2018, the Agency's Client Services Department returned to Ms. Hamel the originals of the documents provided and invited her to contact the Individual Tax Enquiries staff by telephone or to visit the Agency's website if she wished to obtain more information (AR at 141).

[17] There is no indication in the record that Ms. Hamel contacted the Agency about the Deceased's tax records prior to December 5, 2018.

[18] On or about March 16, 2018, Desjardins Trust issued a T4RSP slip to the Deceased indicating that he held an unmatured RRSP at the time of his death with a fair market value of $124,124 (Exhibit F of Mr. Guillemette's affidavit). On April 10, 2018, Ms. Hamel signed the Death of an RRSP Annuitant – Refund of Premiums form to designate $69,758 of that RRSP as a refund of premiums for the 2017 taxation year (Exhibit G of Mr. Guillemette's affidavit). On April 15, 2018, Ms. Hamel filed the Deceased's final tax return for the 2017 taxation year. She claimed a deduction of $72,288 for net capital losses of other years.

[19] According to the integrated list of notes in the Deceased's Agency record, between February 23, 2018, and April 15, 2018, Ms. Hamel did not follow up on her e-portal access request, nor did she communicate by telephone with the Individual Tax Enquiries staff, whose contact information was provided to her in the March 9, 2018, letter referred to above (Exhibit D of Mr. Guillemette's affidavit).

[20] On April 23, 2018, the Agency issued a notice of assessment to the Deceased's estate for 2017 and denied the deduction of net capital losses of other years because information in the record indicated that the estate was not entitled to such a deduction on its 2017 return (Exhibit I of Mr. Guillemette's affidavit).

[21] On April 28, 2018, Ms. Hamel filed a Notice of Objection against the 2017 Notice of Assessment with the Agency's Appeals Division (AR at 191). On the form she signed in this regard, Ms. Hamel pointed out, as the grounds for her objection, that the Notice of Assessment failed to take into account previously incurred net capital losses, and referred to the Guide for Preparing Returns for Deceased Persons (T4011) [the Guide] (Exhibit J of Mr. Guillemette's affidavit).

[22] On December 5, 2018, Ms. Hamel contacted the Agency for online access to the Deceased's account. An encrypted email request to update the authorization was sent to the Tax Center's Taxpayer Representative Identification System (TRIS) mailbox (Exhibit D of Mr. Guillemette's affidavit).

[23] A statement from the Agency, dated December 18, 2020, indicated [TRANSLATION] "INTERNET ACCESS: NO", and that Ms. Hamel was the Deceased's legal representative(Exhibit E of Mr. Guillemette's affidavit).

[24] Further, in connection with the Notice of Objection, the system notes reveal that on January 29, 2019, the officer in charge of the objection had communicated with Ms. Hamel and

her accountant. On February 12, 2019, the officer spoke with the accountant and notified him that the objection was denied since the Deceased had requested a capital gains exemption (CGE) of $96,467 in 1990. The accountant informed the officer that he was not aware that the taxpayer had requested a CGE in 1990 and requested the Agency's internal documents that demonstrated this fact (AR at 219). On February 14, 2019, the officer forwarded the Deceased's 1990 and 1995 tax return information (AR at 219). On February 25, 2019, Ms. Hamel contacted the officer and expressed her dissatisfaction that the Agency had never shared this information with her. Ms. Hamel pointed out that she felt the Agency had been negligent in its failure to notify her in the various letters the Agency had sent, which showed the net capital loss balance, but not the amount of CGEs already used. On the same day, Ms. Hamel left a voice mail message for the officer and requested a copy of the schedules of the Deceased's returns for 1990 and 1995, and the name of the accountant for those years.

[25] It is not disputed that Ms. Hamel was unaware—when she submitted the Deceased's tax return in the spring of 2018—that the Deceased had requested a CGE of $96,467 in 1990 and that she did not learn of this until February 2019.

[26] On February 7, 2019, the legal representative's online access was updated, and on February 25, 2019, Ms. Hamel accessed the Deceased's My Account online account.

[27] On February 25, 2019, the accountant sent his representations to the officer (Respondent's Record at 1). On March 15, the officer sent his analysis to the accountant and

gave him until April 15, 2019, to submit in writing the relevant facts and reasons supporting the objection (AR at 194).

[28] On April 26, 2019, Ms. Hamel communicated her submissions, again in connection with her objection. In these, she pointed out that she had begun soliciting the Agency for access to the Deceased's previous tax returns and his online file several months in advance, by telephone and in writing. She referred to correspondence dated November 27, 2017, January 31, 2018, February 28, 2018, and March 9, 2018, and to the online My Account JRH Estate transaction record active since February 25, 2019, which she attached to her letter (AR at 131–43). Ms. Hamel essentially argued that (1) the language of the 2016 Notice of Assessment indicated an amount of net capital losses that appeared to be available for the deduction claimed; and (2) the Agency had been late in providing her with access to the e-portal, the only means of learning about the existence of the deductions requested in 1990.

[29] Ultimately, on May 31, 2019, the Agency confirmed the assessment and dismissed Ms. Hamel's objection (AR at 204).

[30] On or about May 22, 2019, the Team Leader of the Appeals Division sent a request for remission under subsection 23(2) of the Act to the Remissions Section (AR at 144). In her missive the Team Leader included the Notice of Objection served by Ms. Hamel, the accountant's representations of February 25, 2019, the officer's submission of March 15, 2019, and Ms. Hamel's representations of April 26, 2019.

[31] On or about May 28, 2019, an officer in the Remissions Section acknowledged receipt of the remittance request, notified Ms. Hamel of the four main analysis factors set out in the guidelines, and invited her to contact her by telephone (AR at 147). There is no indication that Ms. Hamel contacted the officer after receiving this letter.

[32] According to the notes in Steven Guillemette's file on his analysis of the remission request (AR at 177), Mr. Guillemette contacted Ms. Hamel on January 8, 2020, and spoke with her by telephone on January 9. According to the transcript, in response to a question from the analyst, Ms. Hamel told him that she had tried ("kept trying") to contact the Agency and had not gained online access until February 2019.

[33] On July 13, 2020, the analyst sent a memorandum to the Remission Committee (AR at 149). Among other things, the analyst noted that [TRANSLATION] "[t]he information in the Agency's systems confirms that it was not until February 25, 2019, that Ms. Hamel first accessed the Deceased's account through the 'My Account' service and reviewed his previous tax returns" (AR at 149). Lynne Laplante, Mr. Guillemette's manager, signed the report with a negative recommendation for remission and sent it to the Remissions Committee (AR at 149).

[34] On July 16, 2020, the Remissions Committee reviewed the file and unanimously concluded that the recommendation for remission was not appropriate (AR at 158).

[35] On September 15, 2020, Lynne Laplante emailed a draft decision letter to the Director General (AR at 160). Ms. Laplante and the Director General exchanged emails until October 15,

2020, the day on which the Director General approved the latest version of the draft decision letter (AR at 160).

[36] On March 10, 2021, Mr. Guillemette signed his affidavit and recorded in paragraph 14 that he had learned after the final decision was rendered in Ms. Hamel's remission request file that [TRANSLATION] "the 'INTERNET: NO' field on the printout of information about the authorized representatives in the Deceased's account (Exhibit E) indicated that access to the My Account electronic portal had not been activated for the applicant on March 9, 2018, and that the CRA had activated it on February 7, 2019".

III. Impugned decision

[37] On November 4, 2020, the Director General concluded that a remission could not be recommended. In his decision, the Director General discussed (1) the review process; (2) a summary of the background information; and (3) the results of the review, including (a) whether or not there had been incorrect action or advice on the part of Agency officials and the adverse tax consequences that could have resulted; and (b) whether or not there had been a significant financial setback coupled with extenuating factors. He then devoted a short section to his conclusion.

[38] At page 2 of his decision, the Director General noted that Ms. Hamel had indicated that she had no way of knowing that the Deceased had ever claimed a capital gains deduction. He further pointed out that Ms. Hamel had also indicated that she had requested information from the Agency to complete the Deceased's final tax return, but had not received all of the requested

information by the tax return filing deadline. Lastly, he noted that Ms. Hamel stated that she would have done the estate tax planning differently had she known that no deduction was available, and that completing the tax return without this information had resulted in undesirable tax consequences.

[39] The Director General considered whether any Agency official had taken an incorrect action or provided incorrect advice and found that (1) the Agency had returned Ms. Hamel's documents to her on March 9, 2018, and had notified her of the option of contacting the Individual Tax Enquiries hotline or visiting the Agency's website if additional information was needed; (2) because the Deceased's 2017 tax return was due on April 30, 2018, Ms. Hamel was given permission to view the Deceased's tax account just under two months before the filing deadline (April 30, 2018); (3) it was not until February 25, 2019, that Ms. Hamel accessed the Deceased's account through My Account for the first time, which was after she filed the 2018 return; and (4) there is no indication in the record or in the information provided of any circumstances that would have prevented Ms. Hamel from retrieving this information earlier. The Director General concluded that the delay incurred by Ms. Hamel in accessing the Deceased's tax information did not result from any action taken by the Agency.

[40] In his affidavit, Mr. Guillemette acknowledged that, when he conducted his analysis, he was unaware that access to the My Account electronic portal for the Deceased's account had not been activated on March 9, 2018, when Ms. Hamel had been authorized as legal representative, and that such access was instead activated on February 7, 2019. The Director General also did not have this information when he issued his decision.

[41] With respect to Ms. Hamel's argument about the inaccuracy of the 2016 Notice of Assessment, the Director General cited the statement in the Notice of Assessment as to the amount of net capital losses and concluded that the statement was accurate. He added that it did not apply to a situation where a taxpayer wishes to apply a net capital loss to his or her other sources of income (income other than a taxable capital gain) in the year of death. The Director General noted that under Canada's self-assessment system, legal representatives are responsible for ensuring that the information they provide is accurate and complete, and that it was Ms. Hamel's responsibility to gather all the necessary information through the My Account service or the Individual Tax Enquiries line.

[42] The Director General further noted that the expectation of a lower tax assessment was not a mitigating factor for remission purposes. He then concluded that remission of tax or interest could not be supported in the Deceased's case.

IV. Parties' positions

[43] In the Notice of Application she filed on December 4, 2020, Ms. Hamel requested that the Court reverse the decision of the Director General and refer the matter back to the Minister for reconsideration of the remission request by another officer. In her application, Ms. Hamel referred only to paragraph 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-17, and argued that the impugned decision was based on an erroneous finding of fact, made without regard to the material before the Agency.

[44] In her Memorandum of Fact and Law, Ms. Hamel argues that the Remissions Section failed to observe the principles of natural justice and procedural fairness and that the decision was unreasonable.

[45] First, relying on paragraph 18.1(4)(b) of the *Federal Courts Act*, Ms. Hamel argues that the Remissions Section had failed to respect her right to be heard (1) at the time of the analysis, as the decision was rendered on the basis of the Agency's internal records which Ms. Hamel was never able to access or comment on, as well as on guidelines found in a Remissions Manual for Canada Revenue Agency employees [the Manual] (Exhibit A of Mr. Guillemette's affidavit) to which she did not have access; (2) by an alert and sensitive decision-maker, given that the Remissions Section failed to ascertain from its records that she was correct to say that she did not have access to the Deceased's online tax file until February 2019; and (3) by an impartial decision-maker acting in good faith, as the Remissions Section made no real attempt to corroborate Ms. Hamel's version of events.

[46] Second, relying on paragraph 18.1(4)(d) of the *Federal Courts Act*, Ms. Hamel argues that the standard is that of reasonableness and that the decision in this case was unreasonable because it was based on an erroneous finding of fact made without regard to the available evidence. In this regard, Ms. Hamel argues that the Agency granted her access to the Deceased's online tax file only as of February 7, 2019, not March 9, 2018, and that Mr. Guillemette admitted this fact in his affidavit at paragraph 14. Ms. Hamel added that she was not notified that she had access to the file, but happened to notice it by chance on February 25, 2019. Thus, Ms. Hamel argues that (1) the Remissions Section's finding that she had made no effort to access the file

was not intelligible as it was based on a mistaken belief that Ms. Hamel had had access to the file since March 9, 2018; (2) the 2017 Notice of Assessment contained incomplete information and amounted to an improper action on the part of Agency officials; and (3) the Remissions Section could have viewed the application of the tax law as resulting in tax consequences that were clearly unfair and contrary to the spirit of the law.

[47] The AGC responded that the Notice of Application was silent on the alleged breaches of procedural fairness which should result in their not being considered (*St-Pierre v Canada (Attorney General)*, 2018 FC 1065 [*St-Pierre*] at paras 26–31), but that in any event, procedural fairness was respected in the processing of the remission request since Ms. Hamel had been heard and the Minister's representatives had acted impartially, and since the standard of reasonableness applies and the decision was reasonable.

[48] The AGC added that procedural fairness was respected and that (1) Ms. Hamel had been heard, that she had an opportunity to make her representations and that nothing in the conduct of the Minister's representatives had the effect of depriving her of an opportunity to make her case, considering in addition the context, in which the procedural obligation is at the lower end of the scale (*Waycobah First Nation v Canada (Attorney General)*, 2010 FC 1188 [*Waycobah FC*]); and that (2) the allegation of bias did not meet the established test and was based only on unproven impressions and conjecture.

[49] The AGC also responded that the decision was reasonable and noted that (1) the reasons were responsive; (2) the information contained in the 2016 Notice of Assessment was accurate;

(3) Ms. Hamel was able to obtain the information contained in the Deceased's tax record in a timely manner; and (4) Ms. Hamel did not identify the statutory provisions in question or how the result of their application would be contrary to the spirit of the Act.

V. Decision

A. *Principles of natural justice and procedural fairness*

(1) Notice of Application

[50] The Court must determine whether it can consider the allegations of procedural fairness pleaded by Ms. Hamel in her Memorandum of Fact and Law.

[51] The AGC cites the *St. Pierre* decision, which refers to *JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 [*JP Morgan*].

[52] In *JP Morgan* at paragraph 38, Stratas J. reminds us that "[i]n a notice of application for judicial review, an applicant must set out a 'precise' statement of the relief sought and a 'complete' and 'concise' statement of the grounds intended to be argued: Federal Courts Rules, SOR/98-106, paragraphs 301(d) and 301(e)". Therefore, in addition to the relief sought, the applicant must include a statement of reasons that, while concise, is comprehensive. The material facts in support of the reasons must also be included. The applicant should not, however, include all of the evidence by which those facts are to be proved, or even state the identity of the individuals who will be providing affidavits in support of the application (see, for example,

Simpson Strong-Tie Company, Inc v Peak Innovations Inc, 2008 FC 52; *JP Morgan* at paras 40-41).

[53] While the entirety of the evidence is obviously not contained in the Notice of Application for Judicial Review, the reasons must all be stated at this preliminary stage. Indeed, the case law confirms that a ground not set out in the Notice of Application cannot be raised in the party's memorandum of fact and law (see, for example, *Tl'azt'en Nation v Sam*, 2013 FC 226 at paras 6–7).

[54] In the latter decision, the Court noted that there is some room for discretion. However, Ms. Hamel pointed out in her Notice of Application that she was justified in believing that the process of assessing her remission request would be fair and equitable, an argument similar to the one made in her Memorandum.

[55] I will therefore deal with her arguments. However, in any event, as detailed below, my review of the evidence on the record and the case law leads me to conclude that the principles of procedural fairness were respected.

(2) Argument relating to the right to be heard by an alert and sensitive decision-maker

[56] In this case, the argument of the right to be heard by an alert and sensitive decision-maker need not be discussed in the context of natural justice and procedural fairness, but must be considered in light of the reasonableness of the decision, as explained by the AGC in paragraph 41 of its written submissions.

(3) Argument relating to an impartial decision-maker acting in good faith

[57] With respect to the allegations of a breach of the right to be heard by an impartial decision-maker acting in good faith, Ms. Hamel does not cite any authority that discusses this issue. I quote more extensively from *Arthur v Canada (Attorney General)*, 2001 FCA 223, cited by the AGC:

> It seems to me that the applicant's counsel has confused the *audi alteram partem* rule with the right of his client to a hearing by an impartial tribunal. An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case. That is why such evidence is admissible in derogation of the principle that an application for judicial review must bear on the matter as it came before the court or tribunal. [Emphasis added.]

[58] Ms. Hamel has not submitted any evidence to support her allegation and has not proven any behaviour that derogates from the standard. I will therefore not accept this argument.

(4) Right to be heard

a) *Minimum level of procedural fairness*

[59] The analytical framework for considering procedural fairness requires that we first determine the level of procedural fairness to which the decision-maker is bound or to which the applicant is bound in the particular context of the case.

[60] In this case, and as the AGC pointed out, the Court in *Waycobah FC* (affirmed on appeal in *Waycobah FCA*) discussed the requirements of procedural fairness in the context of remission under the Act. The Court noted that "a decision to recommend or not to recommend remission is very different from a judicial decision, since it involves a considerable amount of discretion and requires the consideration of multiple factors. In addition, the remission of tax is an exception to the general principles of taxation law and it clearly does not amount to a right for the person affected, even if it can obviously have a significant impact on that person's life. When considered together, these factors militate for a duty of fairness at the lower end of the scale" (*Waycobah FC* at para 54).

[61] In *Waycobah FCA*, the FCA made it clear that the Act prescribes no procedure for dealing with requests for tax debt remission. This is left to the discretion of the Minister (*Waycobah FCA* at para 30), and the process followed, while not including an opportunity to "speak" directly to the decision-maker, does provide an opportunity to be heard (*Waycobah FCA* at para 33).

b) *Standard of review*

[62] The next step is to establish the applicable standard of review, although the term is not always considered entirely appropriate when dealing with natural justice and procedural fairness. For example, in paragraph 24 of *Waycobah FC*, the Court noted that "[f]inally, it is well established that questions of natural justice are not subject to a standard of review analysis. They are more appropriately assimilated to questions of law. In those cases, no deference is due, since

the decision-maker as either complied or not complied with the duty of fairness appropriate in the circumstances: see *Sketchley v. Canada (Attorney General)*, 2005 FCA 404".

[63] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court did not address the standard applicable to alleged breaches of procedural fairness, except to reiterate the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 77. The FCA has reiterated that "[t]he standard of review for procedural fairness issues is currently in dispute in this Court" (*CMRRA-SODRAC Inc v Apple Canada Inc*, 2020 FCA 101 [*CMRRA-SODRAC Inc*] at para 15; see also *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at paras 67–71). The FCA confirmed that the Supreme Court had not given any guidance on this in its recent decision in *Vavilov* (*CMRRA-SODRAC Inc*). In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 56, the FCA noted that:

> No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an *a priori* decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice—was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference.

[64] As cited by Ms. Hamel, the FCA's decision in *Canada (Attorney General) v Select Brand Distributors Inc*, 2010 FCA 3 [*Select Brand Distributors Inc*] at paragraph 46, states that "[t]he duty of fairness requires a tribunal to allow parties to know the case which must be met and to respond to it." It is necessary first to establish how the Court is to assess this aspect.

[65] Gascon J. discussed procedural fairness in a general manner at paragraph 28 of his decision in *Haba v Canada (Citizenship and Immigration)*, 2017 FC 732:

> The duty to act fairly does not concern the merit or the content of a decision, but rather, the process followed. This duty has two components: the right to a fair and impartial hearing before an independent panel and the right to be heard (*Therrien (Re)*, 2001 SCC 35 at paragraph 82). The nature and scope of the duty of procedural fairness can vary depending on the attributes of the administrative tribunal and its enabling statute, but in every case, its requirements refer to the procedure and not to the substantive rights determined by the tribunal. The principle of procedural fairness protects individuals and allows the Court to intervene if needed, when a decision does not respect a person's right to a fair and equitable proceeding.

c) *Application to the facts*

[66] Ms. Hamel, in paragraphs 16 to 29 of her Memorandum of Fact and Law, argues that she was not heard when her request was analyzed. She cites sections of the Manual and notes in particular the statement that [TRANSLATION] "[p]ersons wishing to make a request for remission should be advised to send their written request to", whereas in her case her request for remission was submitted to the Remissions Section by the Manager of the Appeals Division after her objection was denied.

[67] Ms. Hamel also points to the decision in *Select Brand Distributors Inc.* for the principle that the right to be heard requires administrative tribunal decision-makers to inform parties of the criteria based on which the decision will be made, and give the parties an opportunity to make submissions accordingly. Ms. Hamel argues that this principle was not applied as (1) the analyst did not advise her of the guidelines for remission requests, nor of her right to state her reasons; (2) she was not requested to provide any additional information during the analysis process; (3)

she received the final decision without any opportunity to respond to the assumptions on which the contested decision was based; and (4) the decision was made on the basis of internal Agency records which she was never able to challenge, as well as guidelines contained in a manual to which she did not have access and which is for the exclusive use of the Agency (*Mokrycke v Canada (Attorney General)*, 2020 FC 1027 [*Mokrycke*]).

[68] I note that there is no evidence of any internal records that were considered by the decision-maker but not included in the certified record in accordance with section 318.

[69] I further note, in particular, the text of the May 28, 2019, acknowledgment of receipt of the remission request (AR at 147) in which Jessica Delcourt communicated the criteria established by the guidelines:

> [TRANSLATION]
> The merits of each application are carefully considered according to guidelines to determine whether there is extreme financial hardship, incorrect action or advice on the part of Canada Revenue Agency officials, financial setback coupled with extenuating factors, or unintended results of the legislation.

[70] In addition, in her letter, Ms. Delcourt invited Ms. Hamel to contact her or to write to the Legislative Policy Branch, to which she gave her the mailing address. Ms. Hamel did not avail herself of this opportunity. Further, the evidence shows that the analyst did contact Ms. Hamel and that they had an opportunity to discuss the file.

[71] I also note that the present case is distinguishable from *Mokrycke* in that, among other things, the text of Ms. Delcourt's acknowledgment refers to the guidelines.

[72] As noted in the case law cited above, there are no specific procedural requirements under the Act to govern remission requests. Rather, the procedure to be followed is left to the discretion of the Minister. In this context, and given the discretionary and exceptional nature of the remission itself, the duty of procedural fairness is at the lower end of the scale. The FCA has held, as noted above, that the right to be heard is satisfied when the decision-maker has a summary that provides a complete picture of the main reasons for the remission request, enabling the decision-maker to make an informed decision (*Waycobah FCA* at paras 32–33). I agree with the AGC's position as set out in paragraphs 84 and 88 of its written submissions and find, based on the evidence, that Ms. Hamel was given the opportunity to make submissions, that she was duly heard, and that nothing in the conduct of the Minister's representatives had the effect of depriving her of an opportunity to make her case.

B. *Reasonableness of the decision*

[73] Ms. Hamel argues that responsive reasons, or the right to be heard by an alert and sensitive decision-maker, is a matter of procedural fairness, citing paragraphs 127 and 128 of *Vavilov* (MDH at paras 30 and following). But these paragraphs are found under the heading "III. Performing Reasonableness Review", under the sub-heading "E. *A Reasonable Decision Is One That Is Both Based on an Internally Coherent Reasoning and Justified in Light of the Legal and Factual Constraints That Bear on the Decision*", then under "(2) A Reasonable Decision Is Justified in Light of the Legal and Factual Constraints That Bear on the Decision", and finally under "(e) *Submissions of the Parties*". Thus, as the AGC pointed out in paragraph 41 of its written submissions, this point must be discussed when reviewing the reasonableness of the decision.

(1) Standard of review

[74] I agree with the parties that the Director General's decision must be assessed against the standard of reasonableness (*Vavilov*). The role of the reviewing court is to examine the reasons given by the administrative decision-maker and to determine whether the decision was based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The reviewing court must consider "the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15). The reviewing court must therefore ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 47 and 74, and *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 13).

[75] Thus, it is not enough for the outcome of the decision to be *justifiable*. Where reasons for a decision are required, "the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies" (emphasis in original) (*Vavilov* at para 86). A court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to it (*Vavilov* at para 87). The Court must focus on the decision made by the administrative decision-maker, including the justification offered for it, and not on the conclusion that the Court itself would have reached in the administrative decision-maker's place.

[76] In analyzing the reasonableness of a decision, the reviewing court must examine the reasons provided with "respectful attention", and seek to understand the reasoning process followed by the administrative decision-maker to arrive at its conclusion (*Vavilov* at para 84). The reviewing court must adopt an attitude of restraint and intervene "only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13). It is important to remember that reasonableness review always finds its starting point in the principle of judicial restraint, and must still demonstrate a respect for the distinct role of administrative decision-makers (*Vavilov* at paras 13 and 75). The presumption of reasonableness review is based on a (*Vavilov* at para 46). Deference, in particular, is the norm where the decision-maker is exercising discretion (*Twentieth Century Fox Home Entertainment Canada Limited v Canada (Attorney General)*, 2012 FC 823 at para 18 (aff'd 2013 FCA 25 at para 11); *Canada (Attorney General) v Abraham*, 2012 FCA 266 at para 48; *Waycobah First Nation v Canada (Attorney General)*, 2011 FCA 191 at paras 18–20). In this case, the reasonableness of the decision-maker's decision was not jeopardized because the decision-maker did not fundamentally misapprehend the evidence before it (*Vavilov* at para 126). The decision-maker's erroneous finding with respect to Ms. Hamel's access to the online account was not determinative and was not at the heart of the issue that the decision-maker had to consider (*Vavilov* at paras 100 and 126).

(2) Arguments

[77] Ms. Hamel begins by arguing that the decision was based on an erroneous finding of fact made without regard to the available evidence since the online access portal was activated in

February 2019 and not in March 2018. Mr. Guillemette acknowledged that this had not been known; however, as submitted by the AGC, this error is not fatal given the circumstances.

[78] First, as the Director General pointed out in her decision, Ms. Hamel was indeed registered as the legal representative and had access to the Deceased's file as of March 9, 2018. Yet, there is no evidence that she attempted to obtain information via the portal or via any other means prior to December 2018, and certainly not prior to filing the Deceased's tax return in the spring of 2018.

[79] This is because, as the evidence confirms, Ms. Hamel and her accountant were unaware that the Deceased had used a CGE in 1990. Ms. Hamel therefore had no apparent reason to seek access to the Deceased's old tax returns.

[80] In this regard, Ms. Hamel has not persuaded me that it was incumbent on the Agency to notify the Estate of the Deceased's detailed tax history before the Estate filed the Deceased's tax return. Moreover, there is every indication that the Notice of Assessment contained no errors.

[81] At the hearing, the AGC reiterated that the principle of self-assessment is at the heart of the Canadian tax system: taxpayers are responsible for their own tax choices, and it is not the role of the Agency to oversee them. Furthermore, the Guide, to which Ms. Hamel referred in her letter of objection of April 26, 2019 (AR at 130), sets out the steps for the calculation of losses in relation to the calculation of net capital losses applicable in the case of a deceased person, as well as the necessary caveats.

[82] Finally, there is no evidence that the Director General's decision disregarded the principles of the Guide or that it was unreasonable for the Director General to have concluded that the Notice of Assessment was accurate. The information available to Ms. Hamel, including the Guide, allowed her to see for herself the requirements of the legislation with respect to deductions for net capital losses on death. Finally, I do not accept Ms. Hamel's argument as to the unintended result of the application of the legislation. I agree with the AGC that this argument is incomplete.

VI. Conclusion

The Director General's decision was reasonable. The analysis was coherent, rational and justified in relation to the facts and law that constrained the Director General (*Vavilov* at para 85). I find in the Director General's decision the hallmarks of a reasonable decision, namely, justification, transparency and intelligibility (*Vavilov* at para 99). The shortcoming of the decision, i.e., the failure to notice and analyze the missing access to the electronic portal, is not consequential or fatal, given all the circumstances of the case.

JUDGMENT in T-1475-20

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed;

2. Costs of $500.00 are awarded in favour of the respondent.

"Martine St-Louis"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1475-20
STYLE OF CAUSE:	DIANE HAMEL in her capacity as Executor of the Estate of the Late Jean-René Hébert v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC, VIA VIDEOCONFERENCE
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JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	OCTOBER 15, 2021

APPEARANCES:

Diane Hamel	REPRESENTING HERSELF
Olivier Charbonneau-Saulnier	FOR THE RESPONDENT

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