Federal Court Cour fédérale

**Date: 20221201**

**Docket: T-990-22**

**Citation: 2022 FC 1659**

**Ottawa, Ontario, December 1, 2022**

**PRESENT: Mr. Justice Diner**

**BETWEEN:**

**AMANDA COSCARELLI**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] Ms. Coscarelli has brought an Application for Judicial Review of a decision by the Canadian Revenue Agency [CRA] Officer to deny her the Canada Recovery Benefit [CRB] for the fourteen two-week periods she applied for in 2021.

## II. Background

[2] The CRB provided financial support to employed and self-employed Canadians directly affected by Covid-19 and who were not entitled to Employment Insurance benefits. Canadians could apply for the CRB for 28 separate two-week eligibility periods starting September 27, 2020 and ending October 23, 2021.

[3] Ms. Coscarelli applied for the CRB for periods 9 to 13 (January 17, 2021 to March 27, 2021), period 15 (April 11 to 24, 2021), period 17 (May 9 to 22, 2021), period 19 (June 6 to 19, 2021) and period 21 (July 4, 2021 to September 25, 2021), for a total of fourteen two-week periods.

[4] During the course of the validation of her eligibility, Ms. Coscarelli submitted supporting documentation to CRA on October 6, 2021 and October 14, 2021. She also spoke with an agent on November 17, 2021.

[5] On November 24, 2021, a CRA officer informed Ms. Coscarelli by letter that she was not eligible for the CRB [First Review decision] because she did not earn at least $5,000 of employment or net self-employment income in 2019, 2020, or in the 12 months before the date of her first application [Income Requirement].

[6] On November 30, 2021, Ms. Coscarelli submitted to CRA a letter objecting to the First Review decision and requesting a second review.

[7] On April 11, 2022, a CRA officer informed Ms. Coscarelli by phone that she was not eligible for the CRB because she did not meet the Income Requirement [Initial Second Review decision]. During the call, Ms. Coscarelli objected to the Initial Second Review decision, stating that she would file an application for judicial review.

[8] The Initial Second Review Officer took note of the conversation and this comment. The Respondent confirmed at the hearing that the CRA understood this call to be a request from Ms. Coscarelli, for a further second review.

[9] The Initial Second Review Officer sent Ms. Coscarelli an ineligibility letter dated April 13, 2022 setting out the reason for the Initial Second Review decision, namely that she "did not earn at least $5,000 (before taxes) of employment or net self-employment income in 2019, 2020 or the 12 months before the date of [her] first application."

[10] On May 13, 2022, Ms. Coscarelli filed with this Court an Application for Judicial Review of the Initial Second Review decision.

[11] On May 16, 2022, the CRA officer who conducted the further second review [Officer] informed Ms. Coscarelli by phone that she was not eligible, because she did not meet the Income Requirement [Final Second Review decision]. The Officer also sent Ms. Coscarelli a letter dated May 18, 2022 with the Final Second Review decision.

## III. Preliminary Issues

[12] I first note that the style of cause should be amended to identify the Respondent as "Attorney General of Canada" in place of "Attorney General of Canada and Canada Revenue Agency" pursuant to Rule 303(2) of the *Federal Courts Rules*, SOR/98-106. In the circumstances, the Court orders that the style of cause be amended immediately.

[13] Second, the Respondent argues that the Application is moot, because the decision that Ms. Coscarelli is seeking to have judicially reviewed by this Court, namely the Initial Second Review decision, is not the final decision. The Respondent contends the Final Second Review decision issued on May 18, 2022, after Ms. Coscarelli's May 13, 2022 filing of the Notice of Application, is the final decision.

[14] The Respondent asks this Court to dismiss the Application, arguing that none of the factors in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at page 353, would justify the Court exercising its discretion to hear a moot case, are present at hand:

a) the necessary adversarial context does not exist since CRA already reconsidered the Initial Second Review decision during the Final Second Review and subsequent decision;

b) it is not a good use of scarce judicial resources to review the Initial Second Review decision when Ms. Coscarelli has already received the relief of a redetermination of the Initial Second Review decision;

c) the issues raised by the Application do not give rise to important hypothetical questions or novel issues of public importance, which may otherwise evade review by the Court; and

d) it is unclear what effect allowing this Application would have on the Final Second Review decision.

[15] I disagree. The adversarial context certainly still exists. Ms. Coscarelli made her intentions well known to the Initial Second Review Officer, telling him she disagreed with his decision, and that she would challenge it in Federal Court. This is the opportunity that the non-eligibility letter he followed up with clearly stated as the next step in the process, and indeed, it ordinarily is. The Respondent was unable to explain to the satisfaction of the Court why the CRA took the matter back for the second level review a second time.

[16] This is sufficient to reject the mootness argument. However, I also note that this argument was heard during the course of the judicial review and argued as a preliminary argument, along with those relating to the merits of the dispute. Thus, no judicial resources would be saved given the nature of these summary proceedings for judicial review, nor would it be just not to address the arguments and materials Ms. Coscarelli submitted to the Court, which she did in a considered and professional manner, given her status as a self-represented litigant without any particular expertise or background either in subject matter or more broadly with legal issues.

## IV. Analysis

[17] The sole issue is whether the Officer's Final Second Review decision denying Ms. Coscarelli's request for the CRB is reasonable. The applicable standard of review is reasonableness (*Aryan v Canada (Attorney General)*, 2022 139 at para 16). In *Canada (Minister of Citizenship and Immigration) Vavilov*, 2019 SCC 65 at paras 102 and 105 the Supreme Court of Canada explains that reasonableness review assesses whether an administrative decision

demonstrates a reasoning that is rational, logical and "justified in relation to the constellation of law and facts that are relevant to the decision."

[18] Ms. Coscarelli's sole argument with respect to the Final Second Review decision is that it is unreasonable because it contradicts previous calls she had in early 2021 with CRA officers who confirmed she was eligible to receive the CRB. Ms. Coscarelli alleges that during a January 2021 call, a CRA officer assured her that the WSIB payments she received in 2019 and 2020 were considered income for the purposes of the Income Requirement.

[19] The Respondent counters that the doctrine of legitimate expectation is only relevant when there is clear conduct of a decision-maker with respect to their duty of procedural fairness, and that representations that lead to a legitimate expectation have to relate to procedure and cannot be in conflict with the decision-maker's statutory duty. In this case, the Respondent argues that the alleged expectation relates to a substantial right – eligibility for the CRB – and that the Officer would have had to act in direct contradiction to subsection 3(1) of the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2 [*CRB Act*] in order to satisfy Ms. Coscarelli's alleged expectation.

[20] I agree with the Respondent that the doctrine of legitimate expectation is not applicable in this case. First, Ms. Coscarelli has not submitted any notes from the January call during which she alleges the representations she relied on were made, nor does any CRA record of this call exist. Instead, Ms. Coscarelli submitted call notes from the April 19, 20, and 23, 2021 calls. However, none of these call notes point to any conduct by the CRA officers that is "clear,

unambiguous and unqualified" which would have created a legitimate expectation on her part. (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 95). There, the Supreme Court stated:

> [95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:
>
> > The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. [Emphasis added.]
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> (D. J. M. Brown and J. M. Evans, Ju*dicial Review of Administrative Action in Canada* (loose-leaf), at §7:1710; see also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 29; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68.)

[21] Here, I find that CRA's requests for documents as Ms. Coscarelli was applying for additional CRB periods were a clear indication that her eligibility was still under review. There is nothing nearing a clear, unambiguous and unqualified statement on the record that she was told that her employment income of $4992.74 would qualify or that her WSIB payments would be eligible in supplementing her employment income, or qualifying as income for the purposes of her CRB eligibility.

[22] Even if something was said – which nothing in the record reflects – Ms. Coscarelli could not have relied on the alleged representations made by CRA officers about her eligibility, because they would have been made in direct conflict with the officers' statutory duty to ensure taxpayers meet all the requirements of the *CRB Act*, (*Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 68):

> [68] Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty.

[23] Again, legitimate expectations, if they would have arisen in this case, do not create stand-alone substantive rights. Here, the statutory scheme is clear. It states, in the relevant subsection 3(1):

> (d) in the case of an application made under section 4 in respect of a two-week period beginning in 2020, they had, for 2019 or in the 12-month period preceding the day on which they make the application, a total income of at least $5,000 from the following sources:
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> (i) employment,
> (ii) self-employment,
> (iii) benefits paid to the person under any of subsections 22(1), 23(1), 152.04(1) and 152.05(1) of the *Employment Insurance Act*,
> (iv) allowances, money or other benefits paid to the person under a provincial plan because of pregnancy or in respect of the care by the person of one or more of their new-born children or one or more children placed with them for the purpose of adoption, and
> (v) any other source of income that is prescribed by regulation;
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> (e) in the case of an application made under section 4 by a person other than a person referred to in paragraph (e.1) in respect of a two-week period beginning in 2021, they had, for 2019 or for 2020 or in the 12-month period preceding the day on which they make the application, a total income of at least $5,000 from the sources referred to in subparagraphs (d)(i) to (v);

> (e.1) in the case of an application made under section 4 by a person referred to in paragraph (g) whose benefit period was established on or after September 27, 2020 in respect of a two-week period beginning in 2021, they had, for 2019 or for 2020 or in the 12-month period preceding the day on which they make the application, a total income of at least $5,000 from the sources referred to in subparagraphs (d)(i), (ii), (iv) and (v) and from *regular benefits* and *special benefits*, as defined in subsection 2(1) of the *Employment Insurance Act*;

[24] WSIB payments do not fall within the definition of income under subsection 3(1)(d) of the *CRB Act*. The only employment insurance benefits that are exempted within the statute, of which the relevant portion is reproduced above, are those relating to parental and maternity benefits under the *Employment Insurance Act* (S.C.1996, c. 23).

[25] Ms. Coscarelli does not dispute the amounts of income she received, the amounts she reported, was assessed on, or the fact that she was indeed achingly close to having made the required $5000 cut-off in 2019, when that limit was subsequently codified in the *CRB Act* when it was enacted in October of 2020. WSIB benefits that she received in 2020 do not fall within the employment insurance income exemption outlined in subsection 3(1) of the *CRB Act* as above.

[26] Turning back once again to the CRA decisions, the officers' (in the first level review, and both second level reviews) common factual finding that Ms. Coscarelli did not meet the Income Requirement was reasonable in light of all the evidence. They noted that her T4 indicated that her 2019 employment income was $4992.74, which fell just shy of the $5000 mark, of which all three reviewing CRA officers were well aware. They were also well aware, and noted, that Ms. Coscarelli reported no employment income in 2020, but rather only WSIB payments.

[27] This conclusion was determinative of both Second Review decisions to refuse Ms. Coscarelli's CRB, as it was with the first level decision, on the basis that she was not eligible because she did not meet the Income Requirement. Despite being achingly close at $7.26 short of the qualifying mark of $5000 based on 2019 income from her employer at the time, the CRA's decision to deny her CRB was not only a reasonable decision – it is the only decision. As Justice Woods recently clarified, the $5000 threshold is a firm one, with no wiggle room at the edges, in *Flock v. Canada (Attorney General)*, 2022 FCA 187 at paras 4 and 7:

> Mr. Flock does not contest the finding that he does not satisfy the $5,000 threshold on a net income basis. However, Mr. Flock submits that it was inappropriate for the CRA to apply the net income test in the circumstances of his case. He submits that a gross income test should be applied. If a gross income test were applied, Mr. Flock would satisfy the eligibility criteria since he earned over $5,000 in revenue in the year 2019. As the Federal Court correctly pointed out, the CRA official had no choice but to apply the eligibility criteria set out in the legislation. Accordingly, this submission was properly dismissed in the Court below.
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> …
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> At the hearing, Mr. Flock also submitted that the eligibility criteria should not reference the year 2020, because it makes no sense to reference a pandemic year. He submits that the criteria should instead apply to the years 2018 and 2019. This is not a basis for relief by way of judicial review because the CRA official had no choice but to assess Mr. Flock's entitlement to the CRB based on the eligibility criteria set out in the legislation. This was a policy decision that Parliament was entitled to make, and the official had no ability to provide relief on grounds of fairness only.

[28] Here, I empathise with Ms. Coscarelli's situation. CRA officers also recognized the fact that she ended up approximately $7 shy of the $5000 CRB eligibility requirement. However, neither those officers, nor I, can reconstruct the law. There is no fairness or relief provision in the *CRB Act* as there is in other legislation (including in the *Income Tax Act*) that might have

otherwise provided a concession for the applicant. As explained during the hearing, in these circumstances where there has been no allegation of any constitutional violations or other flaw alleged in the legislation, the Court is only able to interpret the *CRB Act*, not rewrite it.

## V. Conclusion

[29] While truly unfortunate for the Applicant, I will say that Ms. Coscarelli has been an exemplary self-represented litigant, displaying all the best qualities of integrity, honesty, and helpfulness to the Court. Despite these admirable qualities and conduct, there is no reviewable error in her decision and thus no basis for this Court to overturn the finding of CRB ineligibility. For these and the other reasons cited above, the Application for judicial review is dismissed. No costs will issue.

**JUDGMENT in T-990-22**

**THIS COURT'S JUDGMENT is that**:

1. The Application is dismissed.
2. The style of cause is amended to identify the Respondent as "Attorney General of Canada" in place of "Attorney General of Canada and Canada Revenue Agency."
3. There are no costs awarded.

"Alan S. Diner"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-990-22 |
| **STYLE OF CAUSE:** | AMANDA COSCARELLI v THE ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | NOVEMBER 29, 2022 |
| **JUDGMENT AND REASONS:** | DINER J. |
| **DATED:** | DECEMBER 1, 2022 |

**APPEARANCES:**

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| Amanda Coscarelli | FOR THE APPLICANT (ON THEIR OWN BEHALF) |
| Tigra Bailey | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |