Federal Court Cour fédérale

Date: 20250107

Docket: T-2297-23

Citation: 2025 FC 36

Ottawa, Ontario, January 7, 2025

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ELIN GUSTAFSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The Applicant, Elin Gustafson, is contesting the Second Review Decision of a Canada Revenue Agency [CRA] validation officer, rendered on October 3, 2023, finding her ineligible for the Canadian Recovery Caregiving Benefit [CRCB] for periods 1-3, 5, and the Canadian Emergency Response Benefit [CERB] for periods 1-23, 25-28.

[2] The parties jointly requested that the two challenges, that the Applicant is not eligible for the CERB and the CRCB, be heard together despite Rule 302 of the *Federal Courts Rules*, SOR/98-106. Such request was granted by Madam Associate Judge Steele on January 22, 2024. The two decisions were accordingly challenged in one notice of application and the Court will deal with the two matters in this Judgment.

I. Facts

[3] In 2015, the Applicant moved to Ottawa to take care of her terminally ill brother. Following her brother's death in December 2016, the Applicant remained in Ottawa to take care of her mother, Ms. Harriet Gustafson, who was diagnosed with Alzheimer's disease.

[4] From March 2017 to March 2020, the Applicant claims that she worked part-time for Mrs. Sheila Williams [Mrs. Williams], where she assisted Mrs. Williams with household chores, twice a week, for approximately eight (8) hours per week at the rate of pay of $25 per hour, as stated in her letter submitted to the CRA.

[5] On March 16, 2020, the Applicant claims she could no longer work for Mrs. Williams due to the COVID-19 pandemic. Moreover, due to COVID-19, the Applicant's mother could no longer attend her program at the Ottawa West Community Support, in which she initially participated twice a week, during the Applicant's workdays. In the meantime, the Applicant's father was diagnosed with an advanced life threatening illness, which required her full-time care in addition to taking care of her mother.

[6] The Applicant applied for and received the CERB for periods 1 to 3, from March 15, 2020, to June 6, 2020 and for period 5, from July 5, 2020 to August 1, 2020. This benefit became available under the *Canada Emergency Response Benefit Act*, SC 2020, c 5, s 8.

[7] The Applicant also applied for and received the CRCB for periods 1 to 23, from September 27, 2020, to March 6, 2021 and for periods 25 to 28, from March 14, 2021 to April 10, 2021. These were different benefits from the CERB, made available through a special statute, the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2. Part III of that Act in this case, referred to as Canada Recovery Caregiving Benefit, covers the benefit. Its eligibility requirements are set out in section 17.

[8] As usual, the benefits were initially issued without prior review. But an *ex post facto* review could be conducted, and the Applicant's case was selected for that purpose.

A. *First Review #1*

[9] On January 26, 2023, the Applicant received a letter from the CRA, in which she was informed that her file was assigned for a first review regarding the CERB and CRCB applications. The CRA also required the Applicant to provide evidence of her income exceeding $5,000 in 2019.

[10] On May 11, 2023, having received no documentation or information from the Applicant supporting her eligibility for the benefits, the CRA issued two first review decisions finding the Applicant not eligible to the CERB and CRCB benefits.

[11] On May 18, 2023, the Applicant received two letters from the CRA demanding the repayment of $13,500 for payments received under the CRCB, and $8,000 for payments received under the CERB.

[12] On June 6, 2023, the Applicant informed the CRA via letter that she had submitted documents in support of the first review to the CRA, including several supporting documents, along with an additional explanatory letter dated as of April 24, 2023. Thus, the Applicant requested that the CRA perform another first review of her file in light of said documents.

B. *First Review #2*

[13] On August 8, 2023, the First Reviewing Agent located in the CRA electronic filing system the supporting documents which confirmed that the Applicant had submitted in April 2023 documents in support of the benefits she had received. The documents submitted by the Applicant are as follows:

i. A letter dated April 24, 2023, and signed by the Applicant;

ii. A letter dated March 21, 2023, and signed by Mrs. Sheila Williams;

iii. A letter dated October 8, 2020, and signed by Dr. Soojin Chun, Geriatric Psychiatrist at The Royal Ottawa Mental Health Centre;

iv. A letter dated October 21, 2020, and signed by Mr. Allan Cormier, Adult Day Program Manager at the Ottawa West Community Support;

v. A letter dated December 11, 2020, and signed by Dr. T. Jennings at the Community Palliative Medicine Associates;

vi. An annotated copy of the initial contact letter sent by the CRA and dated January 26, 2023;

vii. An excerpt of a Scotiabank account in the name of “Sheila Williams” for the period of March 11, 2019 to March 10, 2020, in which certain information is marked with lines;

viii. An excerpt of a CIBC account with no name and no account number, represented to be the account of the Applicant for April 30, 2019, to April 9, 2020, in which certain information is marked with lines.

[14] On August 11, 2023, after reviewing the additional documentation, the CRA sent a letter to the Applicant informing her that she had failed to demonstrate that she met the eligibility criteria for the CERB and CRCB benefits.

C. *Second Review*

[15] On September 25, 2023, the Applicant received a call from a CRA agent in order to gather additional information with regards to her applications. The Applicant did not submit any further documentation.

[16] On October 3, 2023, the Second Review Officer concluded that the Applicant was ineligible for both the CERB and the CRCB for the periods in question.

[17] On October 30, 2023, the Applicant filed her application for judicial review of the Second Review Decision regarding her ineligibility for the CRCB and the CERB.

II. Decision Subject to the Application for Judicial Review: Second Review Decision

[18] The following reasons were provided for the CRCB decision:

- You did not earn at least $5,000 (before taxes) of employment and/or net self-employment income in 2019, 2020, 2021, or in the 12 months before the date of your first application.
- Your scheduled work week was not reduced by at least 50% because you were caring for a family member for reasons related to COVID-19.
- You were not employed or self-employed on the day before your first application period.

[19] The following reasons were provided for the CERB decision:

- You did not earn at least $5,000 (before taxes) of employment and/or self-employment income in 2019 or in the 12 months before the date of your first application.
- You did not stop working or have your hours reduced for reasons related to COVID-19.

[20] Ms. Gustafson's ineligibility for the CRCB and CERB is before the Court. The only issue in dispute at this stage is whether Ms. Gustafson met the $5,000 threshold of earnings before taxes to be eligible for the benefits. The Respondent limits its contestation to its challenge that the Applicant earned $5,000 of net self-employment income in 2019. The reasons for the denial of the benefits were explained in the notes in the CTR at Document 6, in the communications log system maintained by the CRA. These notes are an integral part of the decision (*Aryan v Canada (Attorney General)*, 2022 FC 139 at para 22 [*Aryan*]).

[21] The Applicant's benefits for 2020 to 2021 were denied by the CRA given that, *inter alia*, the $5,000 income threshold criteria was not met during the relevant time frame. To render this

decision, the CRA found that the Applicant did not support her alleged income for the periods at issue with sufficient evidence.

III. Standard of Review

[22] The standard of review that applies in this circumstance is reasonableness. To my knowledge, the case law is unanimous in declaring that the standard of review on the merits of a COVID-19 decision is the reasonableness standard (*Aryan* at paras 15–16; *Hayat v Canada (Attorney General)*, 2022 FC 131 at para 14; generally, on the presumption that the standard is that of reasonableness, see *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 7 [*Mason*]). Thus, the role of the Court is to determine "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 [emphasis added]" while operating in accordance with the principle of restraint and adopting a posture of respect. The Court is deferring to the conclusions of the administrative decision-makers where the decision is internally coherent and follows a rational chain of analysis, and remains justified in relation to the facts and the law (*Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*] at paras 13, 14, 99, 85).

[23] Moreover, it is the Applicant who bears the burden of showing that the decision being challenged is unreasonable (*Vavilov* at para 100). In *Mason*, the Court summarized in a few lines the principle of deference by which the reviewing judge is bound: "Reasonableness review starts from a posture of judicial restraint and focusses on 'the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the

court itself would have reached in the administrative decision maker's place'" (*Mason* at para 8, referring to *Vavilov* at paras 5 and 24).

IV. Relevant Provisions

[24] Section 17 of the *Canada Recovery Benefits Act* sets out the eligibility criteria for the CRCB. Paragraph 17(1)(d) of the Act requires that applicants make at least $5,000 in total income from any of the sources listed, including self-employment as mentioned in subparagraph 17(1)(d)(ii). I reproduce paragraph 17(1)(d):

Eligibility	**Admissibilité**
17 (1) A person is eligible for a Canada recovery caregiving benefit for any week falling within the period beginning on September 27, 2020 and ending on May 7, 2022 if	**17 (1)** Est admissible à la prestation canadienne de relance économique pour les proches aidants, à l'égard de toute semaine comprise dans la période commençant le 27 septembre 2020 et se terminant le 7 mai 2022, la personne qui remplit les conditions suivantes :
…	[…]
(d) in the case of an application made under section 18 in respect of a week 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:	**d)** dans le cas d'une demande présentée en vertu de l'article 18 à l'égard d'une semaine qui débute en 2020, ses revenus provenant des sources ci-après, pour l'année 2019 ou au cours des douze mois précédant la date à laquelle elle présente sa demande, s'élevaient à au moins cinq mille dollars :

(i) employment,	**(i)** un emploi,
(ii) self-employment,	**(ii)** un travail qu'elle exécute pour son compte,
(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*,	**(iii)** des prestations qui lui sont payées au titre de l'un des paragraphes 22(1), 23(1), 152.04(1) et 152.05(1) de la *Loi sur l'assurance-emploi*,
(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	**(iv)** des allocations, prestations ou autres sommes qui lui sont payées, en vertu d'un régime provincial, en cas de grossesse ou de soins à donner par elle à son ou ses nouveau-nés ou à un ou plusieurs enfants placés chez elle en vue de leur adoption,
(v) any other source of income that is prescribed by regulation;	**(v)** une autre source de revenu prévue par règlement;

[25] The legislative framework for the CERB is set out in the *Canada Emergency Response Benefit Act*, which is found in Part 2 of the *COVID-19 Emergency Response Act*, SC 2020, c-5. The eligibility criteria are to be found in s 6 of the CERB Act. The one relevant to this case is that an applicant be a "worker" as defined in s 2 as follows:

worker means a person who is at least 15 years of age, who is resident in Canada and who, for 2019 or in the 12-month period preceding the day on which they make an application under section 5, has a total income of at least $5,000 — or, if another	***travailleur*** Personne âgée d'au moins quinze ans qui réside au Canada et dont les revenus — pour l'année 2019 ou au cours des douze mois précédant la date à laquelle elle présente une demande en vertu de l'article 5 — provenant des sources ci-après s'élèvent à au

amount is fixed by regulation, of at least that amount — from the following sources:	moins cinq mille dollars ou, si un autre montant est fixé par règlement, ce montant :
(a) employment;	**a)** un emploi;
(b) self-employment;	**b)** un travail qu'elle exécute pour son compte;
(c) 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*; and	**c)** des prestations qui lui sont payées au titre de l'un des paragraphes 22(1), 23(1), 152.04(1) et 152.05(1) de la *Loi sur l'assurance-emploi*;
(d) 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. (*travailleur*)	**d)** des allocations, prestations ou autres sommes qui lui sont payées, en vertu d'un régime provincial, en cas de grossesse ou de soins à donner par elle à son ou ses nouveau-nés ou à un ou plusieurs enfants placés chez elle en vue de leur adoption. (*worker*)

Furthermore, the worker must have ceased working for reasons related to COVID-19 and did not quit their employment voluntarily (para 6(1)(a) and ss 6(2)).

[26] As can be readily seen, an applicant must demonstrate at least $5,000 of income, which includes income generated from self employment, in 2019 or in the 12-month period preceding the day on which the application for the benefit is made.

V. Parties' Submissions and Analysis

A. *Applicant's Arguments*

(1) Preliminary issue

[27] As a preliminary issue, the Applicant raises the argument that new evidence should be accepted, and the refusal to admit new evidence is a breach of procedural fairness. The Applicant submits new evidence in paragraphs 43 to 45, 52 to 53 and 57 of the Applicant's affidavit, as well as Exhibits C and M.

[28] The Applicant relies on *Slaeman v Canada (Attorney General)*, 2012 FC 641, stating that the Court may consider additional information submitted through an affidavit provided that such evidence is submitted in support of an argument pertaining to procedural fairness.

[29] The Applicant argues that during the September 25th call to determine the Applicant's eligibility for the second review, the Applicant did not know that the call was a formal second review call. She was under the impression that the call was to interpret the documents she had previously submitted. Had she known, she would have been able to submit the Notice of Assessment for the year 2019 at Exhibit C of her affidavit in this Court on judicial review.

[30] The Applicant further submits that it is only after being informed that the CRA refused her eligibility for the CERB and CRCB on October 3, 2023, that she proceeded to retain the

services of Raymond Chabot Grant Thornton to assess her file and therefore received the report at Exhibit M of her Affidavit.

[31] Therefore, the Applicant submits that disregarding the evidence would be a breach of procedural fairness.

(2) Reasonableness of the decisions under review

[32] The Applicant claims that she was eligible for the CERB and CRCB benefits as she made over $5,000 in 2019. She claims that the work she did for Mrs. Williams was enough to meet the $5,000 threshold. She was compensated by Mrs. Williams in the form of cash payments and in e-transfers.

[33] Ultimately, the Applicant submits that she had a job providing her with an annual salary higher than $5,000 in 2019 and she submits to the Court that the CRA's review of her file is erroneous and that she is eligible to the CERB and CRCB. Since it was reasonable to be considered eligible because she earned at least $5,000 during 2019, it would be unreasonable to deny her the benefit of the two programs. Alternatively, the Applicant contends that in view of the evidence submitted, i.e. that she declared income of more than $5,000 for year 2019, the evidence of Mrs. Williams and the bank statements from Mrs. Williams which confirm bank withdrawals in 2019, the decision to deny the benefits was unreasonable.

B. *Respondent's Arguments*

(1) Preliminary issue

[34] With respect to the preliminary issue of the admission of new evidence, the Respondent submits that the evidence is not necessary in providing general background to the Court, nor is it a breach of procedural fairness to refuse it. The Respondent states that the Second Reviewer appropriately advised the Applicant over the phone on September 25, 2023, that she was the Second Reviewer and followed all necessary steps to ensure that the Applicant was well aware of the ongoing second review.

[35] The Respondent submits that the new documents are an attempt to supplement the Applicant's evidence. The Respondent cites *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128, in support of the declaration that the new evidence is inadmissible. The information was never submitted to the Second Reviewer, and as such, the Court should not consider it.

(2) Reasonableness of the decisions under review

[36] The Respondent submits that the Applicant did not discharge her burden to establish that she met the eligibility criteria for the CERB and CRCB. The Respondent argues that the decisions from the CRA are reasonable, as the Decision Maker based her reasons on the documents provided by the Applicant.

[37] Further, the Respondent submits that the Applicant did not discharge her burden to show that the decisions of the Second Reviewer are unreasonable. The Respondent relies on *Singh v Canada (Attorney General)*, 2024 FC 51, and submits that the documents were insufficient to establish an income of over $5,000 and that the Applicant has the burden to maintain sufficient records in order to rely on cash payments to support their eligibility to the benefits.

[38] The Respondent also cites the Federal Court decision in *Aryan*, where the Court confirms that tax assessments are not determinative of income earned for the purposes of an applicant's eligibility to COVID-19 benefits.

C. *Analysis*

[39] It is necessary to address first the preliminary issue. Is the new evidence introduced through the Applicant's affidavit admissible? I will then discuss the merits of this judicial review application.

(1) Preliminary issue

[40] As part of the Applicant's record, Ms. Gustafson sought to introduce in evidence some information which was not before the decision maker. This new information was referred to in paragraphs 43, 44, 45, 47, 52, 53 and 57:

- communications with a Minister of the Crown and her staff;
- the notice of assessment for the year 2019, dated June 15, 2020;
- a memorandum from an accounting firm which offers the view that the Applicant is eligible for the CERB and the CRCB;

- the Applicant informs the Court of costs incurred by her in defending her eligibility for the two programs.

[41] The Respondent objected to the new evidence being part of the record of this judicial review application. As I have tried to explain during the hearing of this application, these paragraphs, together with exhibits C and M to the affidavit, must be struck from the record.

[42] On judicial review, the Court is limited to the record which was before the administrative decision maker. Since at least *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 NR 297 [*Access Copyright*], the Federal Court of Appeal has consistently reaffirmed the general rule. There are exceptions to the rule, but they must be understood in view of the role that a reviewing court plays. In *Access Copyright*, the Court of Appeal says this:

> [17] In determining the admissibility of the Juliano affidavit, the differing roles played by this Court and the Copyright Board must be kept front of mind. Parliament gave the Copyright Board – not this Court – the jurisdiction to determine certain matters on the merits, such as whether to make an interim tariff, what its content should be, and any permissible terms associated with it. As part of that task, it is for the Board – not this Court – to make findings of fact, ascertain the applicable law, consider whether there are any issues of policy that should be brought to bear on the matter, apply the law and policy to the facts it has found, make conclusions and, where relevant, consider the issue of remedy. In this case, the Copyright Board has already discharged its role, deciding on the merits to make an interim tariff and to refuse to amend it.
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> [18] Now before the Court is an application for judicial review from this decision on the merits. In such proceedings, this Court has only limited powers under the *Federal Courts Act* to review the Copyright Board's decision. This Court can only review the overall legality of what the Board has done, not delve into or re-decide the merits of what the Board has done.
>
> [19] Because of this demarcation of roles between this Court and the Copyright Board, this Court cannot allow itself to become

> a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board. In other words, evidence that was not before the Board and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court. As was said by this Court in *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.), "[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial de novo, of questions that were not adequately canvassed in evidence at the tribunal or trial court." See also *Kallies v. Canada*, 2001 FCA 376 at paragraph 3; *Bekker v. Canada*, 2004 FCA 186 at paragraph 11.

[43] It is not surprising that, in view of the limited role played by reviewing courts (and indeed confirmed in *Vavilov*), the exceptions to the general rule are not meant to provide fresh evidence that would be relevant to the merits of the matter that must be decided by the administrative decision maker. Three exceptions are currently recognized. Other exceptions may eventually be created by the Common law. They are:

- background information: it is not new information going to the merits. It is merely a summary of the evidence which was before the decision maker;
- affidavit disclosing the complete absence of evidence on some subject-matter;
- evidence relevant to an issue of natural justice, procedural fairness, improper purpose or fraud.

[44] One of the better articulations of the ambit of the exceptions can be found in *Bernard v Canada (National Revenue)*, 2015 FCA 263 [*Bernard*]. In this case, the applicant argues that it is the third exception that applies. The Court of Appeal in *Bernard* notes that it is evidence "that could not have been placed before the administrative decision-maker and that does not interfere with the role of the administrative decision-maker as merits-decider" (para 25) that could qualify under the third exception.

[45] In the case at hand, the new evidence consists of information created once the decision maker on the second review had made their decision, or of a notice of assessment in existence since June 2019. They all seek to supplement the record once a negative decision has been rendered. It could have been placed before the decision maker on the second review and most probably earlier than that.

[46] Indeed, as for the hearsay evidence of the Minister and her staff and the memo from the accounting firm, that is evidence whose relevance is problematic in that it is an attempt to introduce opinion evidence.

[47] Although the new evidence must be struck from the record, the evidence that the Applicant had filed a tax return where income above $5,000 was declared is evidence that can be considered on judicial review because the Respondent had conceded that such information was already before the decision maker. We read the following from paragraph 37a of the Respondent's memorandum of fact and law:

> 37. Furthermore, the New Documents and Facts should not be considered by this Court given that:
>
> a. The 2019 Assessment contains information that was already before the Second Reviewer during her second review of the Applicant's eligibility to the Benefits.

(2) Reasonableness of the decisions under review

[48] The only issue before the Court is that of the reasonableness of the outcome. The Applicant argues, initially, that because it would have been possible to find that the Applicant

had earned at least $5,000 in 2019, it follows that any other outcome would have to be unreasonable. I am afraid such proposition constitutes the fallacy of the inverse (*National Labour Relations Board v Canning* (2014), 134 S. Ct 2550). At any rate, the very notion of reasonableness includes that more than one solution can be reasonable. That will explain why the reviewing court's starting point is the principle of restraint (*Vavilov*, para 13) and it adopts a posture of respect toward the decision maker (*Vavilov*, para 14). If the decision is based on an internally coherent and rational chain of analysis and it is justified in view of the constraints posed by the facts and the law, the reviewing court will defer to such decision in spite of the fact that the reviewing court may have come to a different outcome on the merits of the decision made: "What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place" (*Vavilov*, para 15).

[49] The Applicant also argued that the outcome is not reasonable because the decision maker failed to explain, even minimally, how can be discounted the evidence offered to prove that she earned $5,000, at least, in 2019. That evidence consists of (1) the statement made by Mrs. Williams, the person who claimed she hired the Applicant and was compensating her by paying cash $25/hour, (2) Mrs. Williams' bank statements that tend to show cash withdrawals consistent with payments of the types both Mrs. Williams and the Applicant declare were made and received, and (3) the fact, as conceded by the Respondent, that the Applicant declared for year 2019 total income higher than the minimum required for eligibility to the two benefits programs.

[50] Evidently it becomes critical to understand the reasoning behind the decision made (*Vavilov*, para 85) to assess whether it is reasonable as a whole. How were those elements of evidence brought to the fore discounted? We must therefore turn to the decisions themselves.

[51] The decisions themselves do not provide much insight into the reasoning that led to the decision. The decision letters concerning the eligibility to the CERB and CRCB benefits simply note why the Applicant is not eligible. In the two cases before the Court, the letters state simply that Ms. Gustafson did not earn at least $5,000 (before taxes) in 2019.

[52] However, a reviewing court is not stymied to the extent that it can rely on the notes made by the decision maker which are made available to the Applicant (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, para 44; *Aryan*, at para 22, followed extensively in the Federal Court).

[53] The notes, which are included in the Certified Tribunal Record, reveal the contents of the conversation between the decision maker and the Applicant on September 25, 2023 (CTR, p 10-11). Thus, the decision maker says that she advised the Applicant of the reason of her call and that the information provided will be reviewed, to be followed by a letter which would be the decision reached on the second review.

[54] It appears that the conversation focused on the possible evidence that Ms. Gustafson was running a business which would generate self-employment income. Numerous questions, coming

from scenarios supplied to decision makers by CRA, are asked with the person providing answers. I reproduce the questions and answers found at page 10 of the CTR:

> Advised the TP why we were calling. Asked the TP to explain her work history from 2019 to 2021. The TP advised in 2019 she was self employed. The TP advised she was working for a woman named Shelia Williams.
> 1. When did you start your business?
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> The TP advised she has been sort of working for herself for many years. The TP advised she believes she has been self employed for 10 years. Asked the TP what the name of her business is. The TP advised she does not have a name for her business, she is just self employed. Asked the TP what services she provides through her self employment. The TP advised prior to moving to Ottawa she used to work at a small gallery cutting hair. The TP advised when she moved to Ottawa, she began working for a woman by the name of Shelia. The TP advised she cooked, cleaned, gardened, and helped Shelia out around the house.
>
> 2. Do you have a business licence or is it registered for GST/HST? (if they say yes, ask for the business number)
> The TP advised no.
> 3. Is the business full or part time?
> The TP advised part time.
> 4. What are the typical hours of operation?
> The TP advised her typical hours of operation were twice a week, 4 hours a day. Asked the TP if she worked a set schedule. The TP advised no. The TP advised Shelia was very flexible seeking how she was caring for her mother.
> 5. Do you work out of your home, or do you have a separate business location?
> The TP advised she worked at Shelia's house.
> 6. Do you have a website or any social media presence?
> The TP advised no. Asked the TP if she advertised her services.
> The TP advised no.
> 7. How do you find your customers?
> The TP advised Shelia was her friend. The TP further explained Shelia was in a rough situation and the TP was in a rough situation, so they supported one another.
> 8. Do you typically work for companies or individuals? Asked the TP if she looked for other work outside of the services she provided to her friend Shelia.
> The TP advised no. The TP advised Shelia was her only client, and she was not looking for other clients as she had to take care of her

> mother. The TP advised she would sometimes take her mother to Shelia's with her.
> 9. How are you paid?
> The TP advised she thinks she was paid once a week or every two weeks but she is unsure.
> 10. What method of payment do you accept?
> The TP advised she was paid cash and she received a few e-transfers as well. The TP advised she also accepts cheques but did not receive any.
> 11. Do you use invoices/receipts? If so, what type of invoices are used?
> The TP advised she has no invoices or receipts.
> 12. How do you keep track of your sales and expenses?
> The TP advised she did not have expenses. The TP advised she did not keep track of her sales because she was only working twice a week and would spend the money as soon as she received it. Confirmed with the TP she did not deposit the money she received from Shelia. The TP confirmed.
>
> 13. Do you handle the bookkeeping or does someone else?
> The TP advised she did not have a bookkeeper or do any bookkeeping. Asked the TP if she files her own taxes. The TP advised she sends them to her accountant to complete.
> 14. Do you use a business software.
> The TP advised no.
> 15. What [*sic*] your weekly sales? Monthly sales?
> The TP advised she is unsure.
>
> [The reference to "Shelia" is understood to be to "Mrs. Sheila Williams".]

That appears to be the basis on which the Applicant was denied: in essence, the normal features associated with running a business concern, or business entity, were not present. There is no business licence, registration for GST/HSTP, website or social media presence, business location, advertisement of services and how are customers found, method of payment, invoices/receipts, bookkeeping.

[55] The explanation for the rationale of the decisions is also found in the notes (CTR p 32 for CERB and p 34 for CRCB). In essence, because of the answers given by the Applicant to the

questionnaire of September 25, 2023, the decision maker concludes in both cases that “it is difficult to confirm the TP was running an active business and receiving income for her self employment services. We are unable to confirm the TP earned 5k of employment or self employment income in 2019 or the 12 months prior to [CERB (April 7, 2019 – April 6, 2020)] [CRCB (Oct. 28, 2019 – Oct. 27, 2020] as we lack sufficient documentation”.

[56] It remains, however, that Ms. Gustafson tried to justify her self-employment through the letter of March 21, 2023, from the person for whom she was performing services, shortly after the initial communication from CRA advising of the matter of the eligibility of Ms. Gustafson for the two programs. The letter was supplemented with bank statements which tended to show cash withdrawals that corresponded somehow with the alleged payments of more than $5,000 in 2019 for services rendered. What is more is that the Respondent acknowledges that the decision maker was in possession of the information contained in the 2019 tax assessment. Thus, the decision maker knew that the Applicant had declared income of $6,100 for year 2019; furthermore, the decision maker had the information that CRA had assessed the tax return on June 15, 2020, well before Ms. Gustafson was selected for the review which was undertaken in January 2023. In other words, it appears from the record that the Applicant did not file her return after she was selected for an audit, but rather in due course for the taxation year 2019. To put it simply, the tax return did not come *ex post facto*, but rather contemporaneously.

[57] In the “decision explanation” concerning the CERB (CTR, p 32), the decision maker, speaking of the letter of March 21, 2023, discounts the letter by saying that she is “unable to use this as a contract, as it is not created in real time”. It appears that the letter was not considered for

a more general purpose, such as evidence of an unwritten contractual agreement. Counsel for the Respondent pointed out during the hearing of the application that, at page 11 of the CTR, the decision maker asked the Applicant why the cash withdrawals from Mrs. Williams' bank account for Ms. Gustafson were for different totals: Ms. Gustafson did not know. The conversation is not reported as going any further than that: it is not known, on this record, what inference, if any, was drawn from this. How the Applicant should have known how the money withdrawn to, arguably, pay for her services, is left unanswered. Moreover, there is not any reference to the decision having the information contained in the 2019 tax assessment which confirmed that Ms. Gustafson declared income totaling $6,100 in 2019, being factored in. That information, in the context of this case, was not determinative, but it was critical.

[58] Reading the reasons as a whole, the evidence coming from the Applicant is discounted, yet the income tax return is not even mentioned. The decision maker has a scenario supplied by her employer, which she follows, in search of supplied criteria to what often constitutes a business generating self-employed income.

[59] However, on judicial review, the Court looks for the justification in relation with the relevant factual and legal constraints that bear on the decision. In that vein, *Vavilov* identifies a number of constraints (paras 105 to 138), two of which are especially relevant in this case.

[60] First, the decision maker must be attentive to the evidence presented by an applicant. A reviewing court will generally defer to the assessment of evidence made by the decision maker

and will not interfere with the findings. But the decision maker must consider the evidentiary record. The Supreme Court, in *Vavilov*, puts the requirement in the following terms:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, at para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would also have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: *ibid*.

[61] In the matter at hand not only the decision maker discounts the Applicant's evidence concerning two important elements, but she completely ignores an important one, the contemporaneous filing of the tax returns which tend to show income of more than $5,000 for year 2019. Mrs. Williams' evidence and the cash withdrawals are arguably corroborated by the information in the hands of CRA that this Applicant had declared more than $5,000 in income in 2019.

[62] While there is a letter from the person who alleges that she paid the Applicant for work performed by the Applicant in 2019, the decision maker eliminates it from consideration by finding that it cannot be a contract, as opposed to considering it for the fact that the services were effectively retained. While there is evidence offered that bank accounts suggest corroboration through a long series of bank withdrawals of amounts that fit a pattern of payments (the ABM withdrawals are in round numbers from $100 to $500), the decision maker excludes those

payments because the Applicant cannot explain why Mrs. Williams would at times withdraw amounts that are not exactly equal to a two-week period of work done (8 x $25). One would be hard pressed to understand why Mrs. Williams would have been obligated to withdraw the exact amount every time, let alone how Ms. Gustafson could be held to know how Mrs. Williams was doing her own ABM withdrawals.

[63] As already observed, what makes the consideration of the Applicant's evidence even more problematic is the complete absence from the decisions of any analysis of the income tax return for 2019 from the Applicant (which the Respondent confirms was before the second reviewer), income tax return that is not *ex post facto*. From the record before the Court, it does not appear that the decision maker even inquired as to the source of income for 2019 which was assessed by CRA. There was no attempt made to find the connection, or lack thereof, between the evidence of work done for Mrs. Williams, and cash withdrawals that could have been used for the services performed, and the tax returns for 2019, assessed by CRA on June 15, 2020, which show income of $6,100. In effect, the evidence is that the decision maker followed closely, if not exclusively, on scenarios supplied by CRA to assist decision makers.

[64] In my view, the failure to account for the evidence which is particularly germane to this case, shows that the conclusion reached was not based on the evidence actually before the decision maker.

[65] Second, in a case like this, which carries a significant impact on the Applicant, the expectation must be that the quality of the decision reflects the stakes. Here, the decision maker

followed closely the scenario supplied by CRA, merely with a view to offering guidance and not to become a checklist of some sort.

[66] The Respondent is right to refer the Court to *Sjogren v Canada (Attorney General)*, 2023 FC 24 [*Sjogren*], where our Court reminds us that "small businesses are not forbidden from taking cash payments" nor to deposit the money in bank accounts. However, she who resorts to cash payments would be well advised to keep sufficient records (para 38). To the same effect, we can refer to *Zhang v Canada (Attorney General)*, 2023 FC 1761, at para 30. Indeed, the notice of assessment by itself has been found not to be determinative (*Sjogren*, para 39).

[67] But such is not the issue. There is no doubt that the decision maker possesses a measure of leeway in the assessment of the evidence. And a decision maker is also undoubtedly expected to use judgment, experience and expertise in examining the evidence (*Santaguida v Canada (Attorney General)*, 2022 FC 523, paras 28-29). A decision maker must also "grapple with key issues or central arguments raised by the parties" (*Vavilov*, para 128). Here, the Respondent acknowledges that the information contained in the 2019 assessment was already before the Second Reviewer. In my view, that Second Reviewer, the decision maker, had to grapple with the central argument that the Applicant was paid for her services, together with what was already known about the tax assessment for year 2019. At the very least, the decision maker could have sought to determine what the source of income was. Instead, the Second Reviewer was satisfied with a series of questions without grappling with evidence. That renders the decision unreasonable.

VI. Conclusion

[68] It follows that the decisions under review are unreasonable. They must accordingly be returned to a different decision maker for redetermination (*Vavilov*, para 141). It is for a new decision maker to assess the evidence in its entirety, and not for the reviewing court to opine on the merits of the decision made. As put in *Vavilov*, at paragraph 140, there is "the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide".

[69] Both parties requested their costs in this case. In view of the divided success, this is not a case where costs should be granted.

JUDGMENT in T-2297-23

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted. The matter is returned to a different decision maker for redetermination.

2. No costs are awarded.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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