

**Date: 20071026**

**Docket: T-1969-06**

**Citation: 2007 FC 1111**

**Ottawa, Ontario, October 26, 2007**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**THE ESTATE OF GARY MCLEOD**

**Applicant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Estate of the late Gary McLeod seeks judicial review of a “fairness” decision by which the Minister of National Revenue denied Mr. McLeod’s request for relief from the interest and penalties assessed in relation to his 2000 to 2004 taxation years.

[2] For the reasons that follow, I am of the view that the Minister’s decision was unreasonable. As a result, the application for judicial review will be allowed.

**Background**

[3] By all accounts, Gary McLeod was a very successful businessman until 1999, when a devastating series of tragedies began to strike his family. In 1999, Lisa – one of Mr. McLeod’s

daughters – was diagnosed with a serious illness. After three years of failing health, this illness took Lisa's life in 2002.

[4] In 2000, Mr. McLeod's other daughter, Jennifer, became seriously ill. Jennifer was forced to undergo several difficult treatments, one of which was only available in the United States. This led to a battle between Mr. McLeod and the Ontario Health Insurance Plan, which had denied coverage for the treatment.

[5] To compound matters, the stress of Mr. McLeod's situation resulted in the breakdown of his marriage.

[6] Then, in April of 2005, just when his doctors say that he was starting to get back on his feet, Mr. McLeod was involved in a catastrophic motor vehicle accident that left him seriously injured, and unable to work.

[7] The stressors in Mr. McLeod's life resulted in his developing serious mental and emotional problems, including depression. This led to a failed suicide attempt in June of 2006, which resulted in his hospitalization in a psychiatric facility.

[8] In July of 2006, while awaiting a decision in relation to this fairness request, Mr. McLeod made another attempt on his life. Tragically, this attempt was successful.

[9] In October of 2006, Mr. McLeod's request for fairness relief was denied.

### **The Fairness Request**

[10] An initial fairness request filed by Mr. McLeod was allowed, and he was granted relief from late filing penalties for the 2000 and 2001 taxation years.

[11] It is Mr. McLeod's second fairness request that underlies the decision at issue in this application. This request was filed on May 5, 2006, and was based entirely on subsections 5(c) and 5(d) of Information Circular 92-2, which provides that:

Penalties and interest may be waived or cancelled in whole or in part where they result in circumstances beyond a taxpayer's control. For example, one of the following extraordinary circumstances may have prevented a taxpayer, a taxpayer's agent, the executor of an estate, or an employer from making a payment when due, or otherwise complying with the Income Tax Act:

[...]

(c) a serious illness or accident; or

(d) serious emotional or mental distress, such as a death in the immediate family.

### **The Decision Under Review**

[12] By letter dated October 5, 2006, a Minister's delegate denied fairness relief to Mr. McLeod. The letter states that "Based on the available information, we are not convinced that the delay in meeting his tax obligations was entirely due to the circumstances presented".

[13] The Fairness Committee Report underlying the Minister's delegate's decision notes that Mr. McLeod had previously received fairness relief in relation to late filing penalties for his 2000 and

2001 taxation years. The Report further observes that Mr. McLeod was not facing financial hardship, and could have made the necessary payments when they came due.

[14] The Report recommended that additional relief for the 2000 and 2001 taxation years be denied “as Lisa was married and living away from home when diagnosed, and she continued in her employment until she passed away. Jennifer had her surgery in October 2001, and she is in remission”.

[15] No penalties and interest were assessed in relation to Mr. McLeod’s 2002 taxation year, and as a result, the Report notes that no consideration of possible fairness relief was necessary.

[16] The Report states that Mr. McLeod’s 2003 tax return was due in April of 2004, and that there were no extenuating circumstances in existence at that time. As a consequence, relief was not recommended in relation to the 2003 tax year.

[17] With respect to Mr. McLeod’s 2004 tax year, the Report notes that Mr. McLeod’s tax return was due on June 15 of 2005, but was not filed until December of that year. The Report then notes that Mr. McLeod was elected as Chair of the Financial Advisors Association of Canada in May of 2005.

[18] Finally, the Report notes that doctors’ reports from the summer of 2005 indicated that Mr. McLeod looked well and was able to walk with the assistance of crutches. As a result, the Report

recommends that fairness relief be denied for the 2004 taxation year as Mr. McLeod could have hired an accountant to handle his tax matters.

### **Issues**

[19] While the Estate raises a number of issues on this application, including issues of procedural fairness and bias, I am of the view that I need only address the merits of the decision.

### **Standard of Review**

[20] This case involves a discretionary decision made by the Canadian Revenue Agency, pursuant to the ‘fairness’ provisions of the *Income Tax Act*, 1985, c. 1 (5th Supp.). It is not the task of this Court, sitting on judicial review, to substitute its own view of the situation for the decision of the respondent. Rather, the task of the Court is to determine whether the decision of the respondent was reasonable: see *Lanno v. Canada (Canada Customs and Revenue Agency)*, [2005] F.C.J. No. 714, 2005 FCA 153.

[21] That is, the question is whether the decision can withstand a somewhat probing examination: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20.

### **Analysis**

[22] I am of the view that the decision under review was unreasonable for several reasons.

[23] Firstly, with respect to the denial of additional relief for Mr. McLeod's 2000 and 2001 taxation years, it is not clear to me how the fact that Mr. McLeod's daughter lived away from home, was married and continued to work up until her death had any bearing on the degree of emotional or mental distress that Mr. McLeod may have suffered in conjunction with her illness and death, or on his capacity to deal with his financial affairs.

[24] Indeed, the medical and psychiatric evidence provided to the Canada Revenue Agency suggested that over the period between 2002 and 2006, the severe emotional strain which Mr. McLeod had been under "took a toll on his overall mental health, resulting in depression, anxiety, sleep disturbance and multiple psychosomatic problems."

[25] Relief was also denied for the 2003 tax year on the basis that the income tax return for that taxation year was due in April of 2004, and there were no extenuating circumstances in existence at that time.

[26] However, the medical evidence provided to the Agency suggested that Mr. McLeod's condition did not start to improve until the end of 2004.

[27] With respect to Mr. McLeod's 2004 tax year, fairness relief was denied as the doctors' reports from the summer of 2005 indicated that Mr. McLeod looked well and was able to walk with the assistance of crutches.

[28] However, the medical evidence provided to the Agency indicates that the automobile accident occurred on April 11, 2005, and that Mr. McLeod was hospitalized for some nine weeks thereafter. This means that he did not leave the hospital until shortly after the date on which his 2004 income tax return was due.

[29] Moreover, the medical evidence demonstrates that Mr. McLeod was in very serious condition while he was in hospital. The record demonstrates that Mr. McLeod had suffered multi-system traumatic injuries, as well as an open right femur fracture, a posterior dislocation of his left knee, and a fractured pelvis. He required surgery to repair a liver laceration, and also underwent a bowel resection. Additional surgery was required to repair his femur.

[30] In these circumstances, the finding that Mr. McLeod was in a position to deal with his financial affairs during the relevant period is unreasonable.

[31] Reference was also made to Mr. McLeod's having been "elected" as Chair of the Financial Advisors Association of Canada in May of 2005. Although the Report does not say so explicitly, the inference drawn from this appears to have been that Mr. McLeod must have been in reasonable shape, if he were able to assume such a responsibility.

[32] Firstly, there was no evidence before the Agency that Mr. McLeod stood for election to this position, which was evidently a volunteer position in an industry association. He may well have simply moved up the "ladder", as is so often the case with organizations such as this.

[33] More important, however, is that whatever voluntary position he may have assumed, the fact is that the Agency knew that in the spring and summer of 2005 that Mr. McLeod was totally disabled, and unable to work. We know this because by this point, it was garnisheeing Mr. McLeod's long term disability payments.

[34] As a result, it was unreasonable to draw the inference from Mr. McLeod's role with the Financial Advisors Association of Canada that he must therefore have been in reasonable shape, and able to hire an accountant to attend to his taxation issues.

### **Conclusion**

[35] For these reasons, I find that the decision under review cannot withstand a somewhat probing examination. As a consequence, the application for judicial review is allowed. Costs were not sought, nor are they ordered.



**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES** that this application for judicial review is allowed, and the matter is remitted to a different Minister's delegate for re-determination.

“Anne Mactavish”

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Judge

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-1969-06

**STYLE OF CAUSE:** THE ESTATE OF GARY MCLEOD v.  
THE MINISTER OF NATIONAL REVENUE

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** October 23, 2007

**REASONS FOR JUDGMENT  
AND JUDGMENT:** Mactavish J.

**DATED:** October 26, 2007

**APPEARANCES:**

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