Date: 20080429

Docket: T-1094-06

Citation: 2008 FC 554

Ottawa, Ontario, April 29, 2008

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

3500772 CANADA INC.

Applicant

and

THE MINISTER OF NATIONAL REVENUE
and THE CANADA REVENUE AGENCY

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review of the May 30, 2006 decision of the Minister of National Revenue (the Minister), rendered by his delegate, Director Arlene White of the Canada Revenue Agency (CRA). In the decision, the Minister refused to exercise his discretion under section 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) to cancel arrears interest worth $72,280.81 owed by the Applicant. The Minister also refused the Applicant's request to amend its income tax return for the taxation year ending July 31, 1999.

[2] The Applicant seeks an Order setting aside the impugned decision, compelling the CRA to waive the accrued interest and permitting the Applicant to amend its 1999 tax return. Alternatively, the Applicant requests that the matter be referred back for re-determination by a different delegate of the Minister. The Applicant also seeks costs of this application.

II. Fairness Provisions

[3] The Fairness request was processed at the Vancouver office of the CRA. There is provision for a two level review process for such requests. The first level Fairness request is assigned to a CRA officer (the First Officer) who reviews the basis for the request and determines whether it should be granted or denied. A report, which includes the First Officer's recommendation, is then prepared and forwarded to the First Committee, composed of a team leader and/or one or more managers. The First Committee then reviews the report and makes a decision to grant or deny the Fairness request. This decision is then communicated to the taxpayer in writing.

[4] A taxpayer who does not agree with the decision made by the First Committee may initiate a second level review of its Fairness request. A second level Fairness request is assigned to a different CRA officer (the Second Officer) who will again review the basis for the request and determine whether it should be granted. He then prepares a report, which includes a recommendation that will be forwarded to the Second Committee, again composed of a team leader and/or a manager, along with the assistant director of the Revenue Collection Division.

The Second Committee reviews the report and makes a decision to grant or deny the request. Again, the decision is communicated to the taxpayer in writing.

[5] The Minister's discretionary authority to waive or cancel all or any portion of penalty or interest otherwise payable under the Act is found in s. 220(3.1). Guidelines are published by the Minister to assist in determining Fairness requests. These Guidelines are intended to frame the exercise of the Minister's discretion. Paragraph 5 of the Guidelines provides that penalties and interest may be waived or cancelled in whole or in part where they result in circumstances beyond a taxpayer's or employer's control. Similarly, Paragraph 10 enumerates factors that the Minister must consider in making his determination. The Guidelines are not intended to be exhaustive nor are they intended to restrict the spirit or intent of the Act.

[6] In the instant case, a first level Fairness request was initiated with respect to the grounds of extraordinary circumstances. A parallel first level Fairness request was initiated with respect to the grounds of financial hardship. The Fairness request on the grounds of financial hardship is not in dispute in this application. The Applicant challenges only the decision rendered for his Fairness request regarding "extraordinary circumstances."

III. Background

[7] There are three separate corporations involved in this case:

i) 3500772 Canada Inc. (the Applicant);

ii) Conor Pacific Environment Technologies Inc. (CPET), a Canadian corporation listed for trading on the Toronto Stock Exchange [CPET

changed its name to Conor Pacific Group Inc. (Conor Group) and then to Precision Assessment Technology Corporation]; and

iii) Conor Pacific Canada Inc. (Conor Canada).

[8] The Applicant is a holding company whose sole business was to hold shares in CPET. Conor Canada is the Applicant's parent company. At the relevant time, Conor Canada's source of money was the sale of CPET shares or fees from CPET.

[9] In the 1999 tax year, the Applicant sold a number of its CPET shares giving rise to a tax debt of $149,938.50. At the time of the sale, there was no concern as to the financial viability of CPET, and it was the Applicant's intention to pay the taxes owing from the sale by selling additional shares in CPET.

[10] On November 10, 2000, CPET filed for bankruptcy protection under the *Companies Creditors' Arrangement Act* (CCAA), which caused the value of CPET shares to fall. The Applicant could not pay its tax debt liability on time, as it was unable to liquidate the CPET common shares. The Applicant paid the tax debt in 2004 through a delayed payment plan consented to by the CRA. By that time, interest had accrued on the debt.

[11] From 2000 to 2004, Conor Canada loaned funds to CPET in an attempt to keep it operating. In 2001, CPET emerged from CCAA protection. In January 2003, the Conor Group (formerly CPET) commenced an action against CRA alleging that CPET was forced to file for CCAA protection as a result of CRA's unlawful seizure of $501,582.44 from CPET to satisfy an

outstanding income tax debt. The Applicant contends that this seizure resulted in CPET failing to meet its financial obligations and the loss of its primary source of financial support.

A. *First Fairness Request*

[12] On December 23, 2003, the Applicant applied to the MNR for “Fairness relief” on the basis that the tax liability was incurred due to circumstances beyond the Applicant’s control. The underlying circumstances advanced in support of the application were as follows:

> CPET was forced to file for bankruptcy protection under the [CCAA] due to actions taken by various Government Departments, including CCRA…Those actions include the illegal withdrawal by CCRA of funds from CPET’s bank account, giving rise to a withdrawal of credit supported by CPET’s Bankers. This withdrawal of support forced the filing for protection and the resulted erosion in share value, which rendered the taxpayer unable to pay.

[13] The Applicant also requested an amendment to its 1999 statute-barred income tax return to provide for a dividend for the taxpayer’s parent company that would result in a refundable tax credit worth approximately $50,000.

[14] The first level Fairness request with respect to the grounds of "extraordinary circumstances," was assigned to CRA officer David Kirk. Mr. Kirk reviewed the Applicant’s request for relief and prepared a report for Ms. Narrin Gill, Assistant Director, Verifications and Enforcement Division and member of the First Fairness Committee. In his report, Mr. Kirk stated that the taxpayer filed for bankruptcy in the fall of 2000, that the taxpayer claimed that actions taken by various government departments caused the fall in the value of the shares, and

that the taxpayer had filed a lawsuit against various government departments, including the CRA, and, if successful, someone else may be liable for the interest. Mr. Kirk recommended that the Applicant's request for relief be denied.

[15] In a letter to the Applicant dated June 7, 2005, eighteen (18) months after the Fairness request was submitted, Ms. Gill denied the Applicant's request for relief for reasons that there appeared to be no errors in the actions of the CRA and the erosion in share value that occurred could not be said to have arisen from circumstances beyond the corporation's control. She also denied the Applicant's request to amend its 1999 tax return on the ground that the discretion to reassess a statute-barred income tax return applies only to individuals and testamentary trusts and not corporate tax returns. See s. 152(4.2) of the Act.

[16] CRA officer Larry Wohl was assigned the first level Fairness request with respect to the Applicant's request for relief on the basis of "financial hardship" and recommended that the request be denied. The First Committee adopted Mr. Wohl's recommendation and communicated their decision to the Applicant by letter dated July 21, 2005. The reason for denying the request based on financial hardship was that the Applicant's December 31, 2003 balance sheet indicated that the company had declared $697,687 in dividends during 2003 while there was a tax balance owing.

[17] On December 16, 2005, the Applicant appealed the first level Fairness request decision by filing a Second Fairness Request.

[18] The Second Level Fairness appears also to be based on the grounds of “financial hardship” and “extraordinary circumstances”. However, in this application for judicial review, the Applicant challenges the decision only as it relates to the grounds of “extraordinary circumstances”.

B. *The Second Fairness Request*

[19] In his December 16, 2005 letter, the Applicant alleged that certain facts were misapprehended in the first level Fairness decision. The applicant submitted the following in an attempt to clarify the facts:

1. At the relevant time,

   (a) the Applicant’s source of money was either advances from Conor Pacific Canada or the sale of shares of Conor Pacific Environmental Technologies Inc. (CPET)

   (b) Conor Pacific Canada’s source of money was similarly the sale of assets, namely CPET shares or fees from CPET.

2. In late 1999, the Ministry of Environment had refused to pay properly rendered accounts for work properly done, and in 2000, the Minister of National Revenue illegally caused the withdrawal of CPET’s last amounts of working capital, which caused its bank accounts to be frozen. With bank accounts frozen, the market for shares of CPET completely evaporated – almost overnight. These events were extraordinary circumstances beyond the Applicant’s control. They also happened quickly, which resulted in no money being available to either CPET or the Applicant.

3. These events so severely damaged CPET, Conor Pacific Canada and the Applicant, that they were unable to raise money from other sources. The non-payment of the taxes was not a refusal but instead due to the inability to secure the necessary funds.

4. During the period from 2000 until 2003/2004, whatever money Conor Pacific Canada had went into CPET in an attempt to save it. Funds

> were borrowed to save the company and until those funds were repaid in 2003, no money was available. Assets were liquidated and the operations were reduced to almost nothing. To put things in perspective, CPET went from approximately 400 employees in Canada to four.

[20] Ms. Suk Poon was appointed the second level fairness officer. She reviewed the second request for relief and prepared a report for the Second Committee. The Committee approved Ms. Poon's recommendation to deny the Applicant's request. Ms. Poon's report was forwarded to Ms. Arlene White, Director of the Vancouver Tax Services Office. In a letter to the Applicant dated May 30, 2006, Ms. White denied the Applicant's second request for relief. This is the decision under review in the case at bar.

[21] In making her decision, Ms. White reviewed the following material in the CRA file:

(a) The Applicant's requests for first and second Fairness reviews;

(b) The first and second Fairness reports;

(c) A covering memorandum from Ms. Loretta Bemister, Assistant Director, Audit Division and member of the Second Committee, summarizing the Applicant's second level Fairness request;

(d) Correspondence between the Applicant and CRA officers maintained on file; and

(e) CRA Guidelines on issuing refunds and granting interest relief.

[22] The Applicant did not request the CRA to conduct a second review on its request to amend its statute-barred tax return. This issue was not addressed by the CRA on its second review. In her memo to Ms. White, Ms. Bemister noted that this request had been denied on the

first Fairness review. Ms. White did not address this issue in her letter to the Applicant. At the hearing of the within application for judicial review, the Applicant abandoned its claim for relief regarding its request to amend its statute-barred return.

IV. Relevant Provisions of the Act

152(4.2) Notwithstanding subsections 152(4), 152(4.1) and 152(5), for the purpose of determining, at any time after the expiration of the normal reassessment period for a taxpayer who is an individual (other than a trust) or a testamentary trust in respect of a taxation year,	**152(4.2)** Malgré les paragraphes (4), (4.1) et (5), pour déterminer à un moment donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable -- particulier, autre qu'une fiducie, ou fiducie testamentaire -- pour une année d'imposition le remboursement auquel le contribuable a droit à ce moment pour l'année ou la réduction d'un montant payable par le contribuable pour l'année en vertu de la présente partie, le ministre peut, sur demande du contribuable:
(*a*) the amount of any refund to which the taxpayer is entitled at that time for that year, or	*a*) établir de nouvelles cotisations concernant l'impôt, les intérêts ou les pénalités payables par le contribuable pour l'année en vertu de la présente partie;
(*b*) a reduction of an amount payable under this Part by the taxpayer for that year, the Minister may, if application therefor has been made by the taxpayer,	*b*) déterminer de nouveau l'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année ou qui est réputé, par le paragraphe 122.61(1), être un paiement en trop au titre des sommes dont le contribuable est redevable en vertu de la présente partie pour l'année.
(*c*) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year, and	
(*d*) redetermine the amount, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year or deemed by subsection 122.61(1) to be an overpayment on account of the taxpayer's liability under this Part for the year.	
…	[…]

220. (3.1) The Minister may at any time waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by a taxpayer or partnership and, notwithstanding subsections 152(4) to 152(5), such assessment of the interest and penalties payable by the taxpayer or partnership shall be made as is necessary to take into account the cancellation of the penalty or interest.	**220. (3.1)** Le ministre peut, à tout moment, renoncer à tout ou partie de quelque pénalité ou intérêt payable par ailleurs par un contribuable ou une société de personnes en application de la présente loi, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

V. Issues

[23] There are two issues to consider in this application:

1. Did the Minister base his decision on an erroneous finding of fact that he made in a perverse or capricious manner or without regard for the material before him?

2. Did the Minister err by fettering his statutory discretion pursuant to s. 220(3.1) by misinterpreting the Guidelines and by placing undue emphasis on “extraordinary circumstances beyond the Applicant’s control” while ignoring other relevant parts of the Guidelines?

VI. Standard of Review

[24] Both the Applicant and Respondent submit that the applicable standard of review is reasonableness *simpliciter*.

[25] In *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153, the Federal Court of Appeal, conducted a pragmatic and functional analysis, determined the applicable standard of review of a Fairness decision of the Minister to be reasonableness *simpliciter*. See also *Comeau v. Canada (Customs & Revenue Agency)* 2005 FCA 271, (2005), 361 N.R. 141 (F.C.A.) at

paragraph 16. Since *Lanno*, the Federal Court has consistently applied the reasonableness standard in reviewing decisions rendered pursuant to subsection 220(3.1) of the Act. See, amongst others, *Dort Estate v. Canada (Minister of National Revenue - M.N.R.)*, 2005 FC 1201, [2005] 4 C.T.C. 233 (F.C.); *Dobson Estate v. Canada (Attorney General)*, 2007 FC 565, [2007] 4 C.T.C. 93 (F.C.); *Carter-Smith v. Canada (Attorney General)*, 2006 FC 1175, [2007] 1 C.T.C. 163 (F.C.); *Young v. Canada (Attorney General)*, 2006 FC 1164, [2007] 1 C.T.C. 124 (F.C.).

[26] The Supreme Court of Canada in *David Dunsmuir v. Her Majesty the Queen in Right of the Province of New Brunswick*, 2008 SCC 9, recently decided that there are now only two standards of review; reasonableness and correctness. In its reasons, the Supreme Court defined the concepts of these two standards and provided guidance in determining the appropriate standard of review to be applied in individual cases. At paragraphs 55 and 56 of the Court's reasons for decision, Justices Bastarache and Lebel for the majority wrote:

> [55] A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> - A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
> - A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
> - The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a

> reasonableness standard where the two above factors so indicate.
>
> [56] If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[27] The above cited factors were among the factors considered by the Court of Appeal in *Lanno*. In that decision the Court found that: the granting of relief is discretionary, and cannot be claimed as of right; the decision is not protected by a privative clause and is subject to judicial review by the Federal Court; and, the decision combines fact finding with a consideration of the policy of the administration, and sometimes questions of law. While the decision maker has more expertise than the courts in relation to matters of the policy of tax administration, it is not higher than that of the courts in relation to questions of law or findings of fact. The Federal Court of Appeal concluded that all of these factors pointed to a reasonableness standard. In my opinion, nothing in *Dunsmuir* would cause me to conclude differently. For the purposes of this application, I will therefore apply the reasonableness standard.

[28] The Supreme Court provides further guidance in articulating the approach to be followed in applying the "new" reasonableness standard at paragraph 47 of its reasons:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of

> reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

VII. Analysis

1. *Did the Minister base his decision on an erroneous finding of fact that he made in a perverse or capricious manner or without regard for the material before him?*

[29] The Applicant contends that the decision ignores certain relevant facts and misapprehends others. It is argued that these facts form the basis for the Minister's decision and, as a result, the decision is clearly wrong.

[30] A review of the record establishes that errors of fact and omissions are contained in the First and Second Reports. In the First Report, the following misapprehensions of fact and argument are found. First, the Report indicates the taxpayer filed for bankruptcy in the fall of 2000, while in fact it was CPET that filed for bankruptcy; second, the Report indicates the taxpayer had filed a lawsuit against various government departments, including the CRA, while the record shows that litigation was initiated by the Conor Group not the Applicant. Third, the Report fails to reflect an understanding of the

> Applicant's argument and states that the taxpayer claimed that actions taken by various government departments caused the fall in the value of the shares, while the Applicant had argued that CPET was forced to file for creditor protection under the CCAA due to the actions of the CRA and others. It is as a result of CPET's filing for creditor protection, that the value of CPET's common shares plummeted, rendering it impossible for the Applicant to pay the Tax Debt in a timely manner.

[31] The Second Report also contains errors of fact and omissions. In particular:

(a) the Report makes no reference to CPET filing for CCAA protection and makes no mention of the effect of this filing on the value of its common shares, as argued by the Applicant;

(b) the Report repeats the error contained in the First Report, that the "taxpayer" filed a lawsuit against the CRA and various government departments;

(c) the Report confuses Conor Canada, which funded CPET while it was in financial distress, with the Applicant. This is evident from the Report which states, "…the financial situations and operations of CPET bear no consequences to the ability of the Company to pay the taxes owing. The explanation given was that the money available was used to save another corporation. This is a business use of funds choice and not a circumstance for consideration of waiver and interest." There is simply no evidence on the record to support that the Applicant used monies to attempt to save CPET.

[32] I am satisfied that the First and Second Officers ignored and misapprehended the above-noted facts and the Applicant's arguments. I am also satisfied that these errors may have caused the Minister to conclude that the Applicant's hardship is attributable to its business decisions and not circumstances beyond its control. This is clearly the impression left with Ms. White, who issued the Minister's final decision in respect of the Applicant's Fairness Request under review. She stated in her final decision:

> …I have care fully reviewed both your previous and current submissions and the response to your initial request. My review has found no indication of errors or improper actions by the CRA in this case. The events that caused the erosion in value of the company's investments and the company's use of funds to try to save a business are business related events and choices. We do not consider these to be circumstances eligible for relief under the fairness provisions of the *Income Tax Act*. [My emphasis.]

[33] A review of the transcripts of Ms. White's cross-examination confirms that she relied upon the Second Report and the Memorandum from Loretta Bemister in preparing her decision. She deposed that she did not take into consideration the fact that CPET had filed protection from its creditors under the CCAA in making her decision. She further acknowledged that it was her understanding the Corporation to be saved was CPET and that the source of those funds was Conor Canada, and not the Applicant as suggested by Ms. Poon in the Second Report. It is clear that the errors and omissions in the First and Second Report and affirmed in Loretta Bemister's Memorandum were essentially adopted by Ms. White in rendering her decision.

[34] I am left to conclude that the decision was based on erroneous findings of fact made without regard to the material on record. It is not for this Court to speculate on the result, had the above discussed errors not been made. I am satisfied that these errors are reviewable and warrant the Court's intervention.

2. *Did the Minister err by fettering its statutory discretion pursuant to s. 220(3.1) by misinterpreting the Guidelines and by placing undue emphasis on "extraordinary circumstances beyond the Applicant's control" while ignoring other relevant parts of the Guidelines?*

[35] My finding regarding the first issue is determinative of the within application. I nevertheless think it useful to consider the second issue raised by the Applicant.

[36] The Applicant contends that the Minister fettered his discretion by misinterpreting the Guidelines. It is argued that Ms. White committed a reviewable error by requiring that the circumstances beyond a taxpayer's control be "extraordinary circumstances". It is argued that such an interpretation is inconsistent with paragraph 5 of the Guidelines merely lists "the extraordinary circumstances" as examples of circumstances that are beyond the taxpayer's control. The Applicant contends that section 220(3.1) of the Act and the Guidelines provide for no such limitation on the Minister's discretion.

[37] The Applicant further argues that the Minister's delegate failed to give proper consideration to the factors listed in paragraph 10 of the Guidelines. These factors, including the Applicant's compliance history and whether it acted quickly to remedy any

delay are required to be considered in a Fairness request. By failing to do so, it is argued that the Minister committed a reviewable error.

[38] The Respondent argues that, since the Act and the Regulations are silent as to what criteria should be considered, there is only a requirement that the criteria considered be relevant and applied in good faith. The Respondent acknowledges that the Minister's discretionary power must be exercised according to the rules of procedural fairness and also contends that the Minister's authority to waive or cancel penalties or interest should only be exercised in exceptional or extraordinary circumstances.

[39] Information Circular 92-2 provides guidelines to be followed when the Minister is exercising his discretion to waive or cancel interest pursuant to s. 220(3.1). Paragraph 5 of the Guidelines provides examples of circumstances where cancelling or waiving interest or penalties may be warranted:

> 5. Penalties and interest may be waived or cancelled in whole or in part where they result in circumstances beyond a taxpayer's or employer'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*:
>
> (*a*) natural or human-made disasters such as, flood or fire;
>
> (*b*) civil disturbances or disruptions in services such as, a postal strike;
>
> (*c*) a serious illness or accident; or

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

[40] In my view, the guideline is clear: it states that cancelling or waiving interest or penalties may be warranted in circumstances beyond the taxpayer's control. The jurisprudence has established that this is the primary factor under the Guidelines to be considered by the Minister in a request for Fairness relief (*Gandy v. Canada (Customs and Revenue Agency),* 2006 FC 862, [2006] 5 C.T.C. 109 at para. 21 (F.C.T.D.)). I do not read the Guidelines to require that the circumstances to be both, "beyond the taxpayers control" and "extraordinary". Put differently, the circumstances warranting relief may well be characterized as "extraordinary"; however, it is because they are beyond the taxpayers control that relief may be granted under the Guidelines. The circumstances need not necessarily be "extraordinary".

[41] The absence of extraordinary circumstances is heavily relied upon in the First and Second Reports, both of which were relied upon by Ms. White in making her decision. During her cross-examination, Ms. White deposed that the "extraordinary circumstances" enumerated in paragraph 5 of the Guidelines must be present for the Minister to exercise his discretion. This is an erroneous appreciation of the Guideline.

[42] Further, the factors in paragraph 10 of the Guidelines were not considered in the impugned decision. The reports prepared by Mr. Kirk and Ms. Poon's and the letters by Ms. Gill, Ms. Bemister and Ms. White are completely devoid of any consideration of the

factors set out in paragraph 10 of the Guidelines. These are relevant factors in the circumstances and should have been considered by Ms. White in making her decision.

[43] In *Nail Center and Esthetics Salon v. Canada (Customs and Revenue Agency)*, 2005 FCA 166, [2005] 3 C.T.C. 88 at paragraph 4, while the Federal Court of Appeal made clear that the criteria set out in paragraph 10 of the Guidelines is "…a non-exhaustive list of factors that will be considered in the exercise of the statutory discretion" it also established that, at the very least, the Minister must consider the said factors. This is consistent with Justice Harrington's decision in *Gandy* where he stated at paragraphs 20 and 21 that the Guidelines must be read as a whole and the four factors listed in paragraph 10 of the Guidelines "must always be considered".

[44] The decision under review was made on the basis of a misapprehension of paragraph 5 of the Guidelines and as a result, it was not properly applied. Further, the Minister's delegate failed to consider the factors listed paragraph 10 of the Guidelines in coming to her decision. In my view, these errors are reviewable and also warrant the Court's intervention.

VIII. Conclusion

[45] For the above reasons, I will allow this application for judicial review and refer the matter back for re-determination by a different delegate of the Minister to be decided in accordance with these reasons.

[46] The Applicant shall have its costs on the application.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed.

2. The matter is sent back for reconsideration by a different delegate of the Minister to be decided in accordance with the above reasons for judgment.

3. The Applicant shall have its costs.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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