

**Date: 20080911**

**Docket: T-1613-07**

**Citation: 2008 FC 1022**

**Ottawa, Ontario, September 11, 2008**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**ANDRZEJ JANUSZ LEPIARCZYK**

**Applicant**

**and**

**CANADA REVENUE AGENCY**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**O'KEEFE J.**

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of the decision of the Minister of the Canada Revenue Agency (the Minister or CRA) dated August 10, 2007 wherein the Minister refused the applicant's request that the Minister waive taxes imposed on the applicant for excess RRSP contributions made from 2003 to 2005 under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act).

- [2] The applicant requested the following relief be granted:
- a) an order setting aside CRA's conclusion;
  - b) an order that the excess RRSP contributions were a result of a reasonable error;
  - c) an order that the applicant made reasonable efforts to correct the situation;
  - d) an order that CRA will clarify to the applicant the issue of retiring allowance, particularly grounds for classification of legal costs as retiring allowances; and
  - e) an order that the penalty is waived or refer the matter back to CRA with directions to grant a waiver of the penalty tax.

### **Background**

[3] Under subsection 204.1(1) of the Act, a taxpayer who contributes more to his or her RRSP than they are entitled to deduct in a given taxation year must pay tax on the excess amount. Andrzej Janusz Lepiarczyk (the applicant) contributed more to his RRSP than he was entitled to deduct from 1994 to 2005, with the exception of 1995. In a letter dated February 6, 2007, the Minister informed the applicant of the RRSP tax under subsection 204.1(1) and requested that he pay the RRSP tax in relation to the excess contributions made from 2003 to 2005. As a result, in a letter dated March 4, 2007, the applicant then made a request to the Minister that he waive the RRSP tax pursuant to his discretion under subsection 204.1(4) of the Act. In a letter dated May 18, 2007, the Minister refused the applicant's request. The applicant then wrote the Minister on June 4, 2007 urging reconsideration of the decision. The Minister's initial decision was confirmed in a letter dated

August 10, 2007. This is the judicial review of the Minister's initial decision dated May 18, 2007 and the confirmation of that decision dated August 10, 2007.

### **Minister's Decision and Subsequent Confirmation**

[4] In a letter dated May 18, 2007, the Minister noted that in order to exercise his discretion under subsection 204.1(4) of the Act, he had to be satisfied that the excess contributions resulted from reasonable error and that reasonable steps were taken to eliminate the excess. The Minister provided the following reasons for choosing not to exercise his discretion:

Our records show you have had excess unused RRSP contributions since at least 2000 and you continued to have unused contributions that exceeded your deduction limits up to and including 2005. At the beginning of 2003 your unused contributions were \$12656 and, based on the receipts in your 2003 tax return, you contributed an additional \$17558 for a total of \$30214. As your 2003 allowable deduction limit was only \$14500, at the end of your 2003 unused contributions were \$15714.

You state CRA's NoA's use the term "unused RRSP deductions" and you understood this to mean that you had not used your limit and could contribute more to your RRSP. However, in actual fact, the NoA states "unused RRSP contributions" and the NoA also advises you to contact CRA if you are unsure of the meaning of the term or if you are unsure of any tax consequences on unused contributions.

You also say, the problem continued in 2004, when you received \$50000 in a wrongful dismissal dispute and as it was taxable income you assumed it would be taken into consideration for RRSP purposes, therefore, you contributed accordingly. However, even if the \$50000 was qualified income for RRSP purposes, it would have been taken into consideration for tax year 2005, not 2004 and prior, which are the years you contributed more to your RRSP than your allowable RRSP deduction limits.

Also, for your information, as the \$50000 was paid to you as a Retiring Allowance (R/A), the \$2000 contribution made in 2004 was a transfer of the eligible portion of the R/A and it was not taken into consideration when determining your unused amounts.

Therefore, based on the facts presented, it cannot be concluded that the requirements of subsection 204.1(4) have been met and administrative relief will not be granted.

[5] The Minister affirmed the above decision in a second letter dated August 10, 2007. This letter was issued in response to the applicant's request for reconsideration. The August 10, 2007 letter also provided further reasons for denying the request:

Under subsection 204.1(4) of the *Income Tax Act*, the penalty tax may be waived if it arose as a result of a reasonable error and if reasonable steps are taken to correct the situation. The fact that you misunderstood the term "unused" is not considered a reasonable error. The documents in your 2003 to 2005 income tax returns clearly show your RRSP contributions carried forward from the prior year and these are referred to as "unused" and "undeducted". There is no mistaking what these terms represent, given the presentation of the amounts.

Documents prepared by your accountant and filed with your tax returns show the calculation of your current year RRSPs, your subsequent year RRSP deduction limit, the earned income used for RRSP purposes and the Schedule 7. Therefore, your accountant provided you with the information needed regarding your subsequent year RRSP contribution before you received our Notice of Assessment. Your settlement of a wrongful dismissal dispute has no relevance to the excess RRSP contributions made between the tax years 2000 and 2003, given the information provided to you.

As mentioned in our previous letter, each individual is responsible for ensuring that all contributions are made within the guidelines as set out in the legislation that govern RRSPs. The Notice of Assessment sent to you alerts you to the fact that excess RRSP contributions may be subject to tax. It is your responsibility to determine whether your contributions are subject to tax and if so, to decide whether you want to correct the situation. You are responsible

for calculating the tax using the T1-OVP Return, filing that return and for paying the tax. Information on RRSPs is readily available through the Agency.

### Issues

[6] The applicant has submitted the following issues for consideration:

1. Did the applicant knowingly and deliberately contribute to his RRSP over the limit or did a reasonable error occur in understanding CRA's terminology?
2. Did the applicant misunderstand CRA's terminology or in fact, was CRA's terminology backwards?
3. Is a statement, which requires a comparison of numbers to determine the meaning of the words in that statement clear or misleading?
4. Does "unused RRSP contributions and available to carry forward" indicate an excess of RRSP contributions or the opposite?
5. If the statement "unused RRSP contributions available to carry forward" was not misleading why then in 2004 did CRA add the clarifier: "If this amount is more than amount (A) above, you may be subject to a penalty tax"?
6. If there was no doubt what "unused RRSP contributions available to carry forward" means, why did CRA staff in current correspondence rather use the words "excess" or "over-contributions" to describe those unused and available to carry forward contributions?
7. Were there any other circumstances that the applicant would believe that his understanding was correct and he was not doing anything wrong?

8. Prior to February 2007, did CRA ever inform the applicant about the excess of his RRSP contributions?
9. When and how did the applicant learn about his excessive contributions?
10. Did the applicant take reasonable steps to correct the error? Is not the elimination of the error considered as a reasonable step to correct that error?
11. Did CRA, during the review, consider all facts, circumstances and the applicant's clarifications thoughtfully?
12. Did CRA properly apply their discretion to waive the penalty tax?

[7] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Minister commit a reviewable error in refusing to waive the tax penalty?

### **Applicant's Submissions**

[8] The applicant submitted that he considers himself a reasonably intelligent person, with reasonably good English skills. He submitted that his understanding of the statement "your unused RRSP contributions available to carry forward to ... the next taxation year" meant that in previous years he had not contributed the limit, and therefore in the following year his limit was extended by the specified amount. It was submitted that to remedy the believed deficit in contributions, the applicant made a \$15,000 RRSP contribution on January 8, 2004 towards his 2003 contributions. The applicant submitted that if he had known that he would be taxed, this action would have made

no sense as it would only have exacerbated the situation. The applicant made this rather large contribution because he knew he would be leaving Canada in April 2004 and would likely not make contributions to his RRSP for 2004.

[9] Upon the applicant's return to Canada in November 2005, he was advised by his accountant not to make another RRSP contribution. It was submitted that the accountant then explained to the applicant that "unused and available" meant "excess". The applicant submitted that he then froze his RRSP contributions and on January 1, 2006 they were below the allowed limit.

[10] The applicant submitted that the following circumstances prevented him from detecting the error earlier:

- Since his immigration to Canada in 1982, the applicant has almost always received tax refunds;
- Since 1995, the applicant's RRSP contributions comprised of bi-weekly payroll deductions which were matched by his then employer and topped up by a lump sum; and
- In April 2004, the applicant left for overseas for 13 months and did not see CRA's revised Notice of Assessment until November 2005.

[11] The applicant further argued that if numbers must be compared to determine the meaning of words then such a statement is misleading. Moreover, the deceptiveness of the use of the word "unused" is supported by the fact that prior to 2004, there was no clarifier on Notices of Assessment that such a comparison had to be conducted.

[12] The applicant also argued that the Minister erred in finding that the applicant's \$50,000 wrongful dismissal settlement from his employer (the settlement) was not relevant in determining whether to exercise discretion to waive the RRSP tax. He submitted that the settlement received in 2004 is relevant to the decision because it occurred during the relevant time period before 2005, it included a \$2000 RRSP contribution, part of the settlement was reimbursement of legal expenses, as part of the settlement was taxable it was logical for the applicant to assume that it was income and as income, this amount eliminates the excess RRSP contributions as of January 1, 2005. The applicant argues that the amount received for legal expenses are not Retiring Allowances as found by the Minister.

### **Respondent's Submissions**

[13] The respondent provided an overview of the legislative scheme highlighting the imposition of a 1% tax on a taxpayer's cumulative excess amount in respect of an RRSP as per subsection 204.1(2.1) of the Act. The respondent also noted that under subsection 204.1(4) of the Act, the Minister has the discretion to waive the RRSP tax if he or she is satisfied that both (a) the cumulative excess amount in question arose as a result of reasonable error, and (b) reasonable steps were taken to eliminate the excess. It was submitted that there are no written policy guidelines in place to provide guidance on the exercise of the discretion under subsection 204.1(4) of the Act, nor does the Act provide insight into what constitutes a reasonable error or reasonable steps. The Minister may choose the criteria so long as it is consistent with a general duty of fairness (*Estate of*



*the Late Henry H. Floyd v. M.N.R.*, [1993] F.C.J. No. 986; *Kaiser v. The Minister of National Revenue*, [1995] F.C.J. No. 926).

[14] The respondent submitted that given the discretionary nature of the decision, the appropriate standard of review is one of reasonableness. The respondent reviewed the ground of review set out in subsection 18.1(4) of the *Federal Courts Act* above, and submitted that none of the grounds are met. A reviewing court is not called upon during judicial review to exercise the discretion conferred on the Minister (*Her Majesty the Queen v. Barron*, [1997] F.C.J. No. 175) or to substitute its own decision for that of the Minister (*Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2).

[15] The respondent submitted that the Minister's decision not to exercise his discretion was reasonable given that with the exception of 1995, from 1994 to 2005, the applicant had consistently over contributed to his RRSP. Moreover, the Notices of Assessment for 2002, 2003, 2004, and 2005 each identified the unused RRSP contribution available for the following taxation year, and with the exception of the Notice of Assessment for 2002, the remaining Notices of Assessment also warned the applicant that if the amount of unused RRSP contributions was more than his RRSP deduction limit for the following year, he may be subject to tax on the excess contributions. Therefore, it was reasonable for the Minister to find that the applicant should have understood these warnings. The respondent also submitted that the Notices of Assessment for 2003 to 2005 assigned the letter "B" to the amount of unused RRSP contributions and the letter "A" to the applicant's RRSP deduction limit for the following taxation year. The notices then stated that if "B" was greater

than “A”, then the applicant may be subject to tax and therefore, there was no need for the applicant to actually understand what the term “unused” meant. The Minister properly exercised his jurisdiction and rendered a reasonable discretionary decision.

### **Analysis and Decision**

[16] **Issue 1**

What is the appropriate standard of review?

Very recently in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada reviewed the standard of review analysis in Canada and eliminated the standard of patent unreasonableness. In doing so, the Supreme Court stated the following about the reformed standard of review analysis at paragraph 62:

In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[17] Having canvassed the jurisprudence, I am of the opinion that it is necessary to engage in our own standard of review analysis. Applying the relevant factors listed in *Dunsmuir* above at paragraph 64, I find that the appropriate standard of review for the Minister’s decision is reasonableness. I note that of particular importance in this case is the fact that the decision is discretionary, and involves a question of mixed fact and law; therefore, some deference is owed to the Minister’s decision.

[18] **Issue 2**

Did the Minister commit a reviewable error in refusing to waive the tax penalty?

The applicant submitted that the Minister rendered an unreasonable decision in choosing not to exercise his discretion to waive the RRSP tax under subsection 204.1(4) of the Act. The respondent disagrees. In *Dunsmuir* above at paragraph 47, the Supreme Court of Canada made the following statements in relation to the standard of reasonableness:

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.

[19] Having reviewed the Minister's decision and the confirmation of that decision, I am of the opinion, that the Minister's decision was reasonable. The decision not to exercise discretion was a plausible and acceptable decision in light of the evidence before him. The Minister provided reasons as to why the error made by the applicant was not reasonable. I note that the applicant in his submissions was adamant that the error was an honest mistake and that he did not knowingly intend to over contribute to his RRSP. Although this may be so, the test to be met under subsection 204.1(4) of the Act is not the innocence of the applicant, but yet reasonability of the error made.

While innocence may be a factor to consider, it is not determinative in the present case. While the applicant urges the Court to reconsider his position and render a different decision, this is not the role of this Court on judicial review. The Minister reasonably addressed the issue of “unused RRSP deductions” and “unused RRSP contributions”.

[20] I am of the view that the application for judicial review must be dismissed.

**JUDGMENT**

[21] **IT IS ORDERED that** the application for judicial review is dismissed.

“John A. O’Keefe”

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Judge

## ANNEX

### Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.):

204.1(1) Where, at the end of any month after May, 1976, an individual has an excess amount for a year in respect of registered retirement savings plans, the individual shall, in respect of that month, pay a tax under this Part equal to 1% of that portion of the total of all those excess amounts that has not been paid by those plans to the individual before the end of that month.

(4) Where an individual would, but for this subsection, be required to pay a tax under subsection 204.1(1) or 204.1(2.1) in respect of a month and the individual establishes to the satisfaction of the Minister that

(a) the excess amount or cumulative excess amount on which the tax is based arose as a consequence of reasonable error, and

(b) reasonable steps are being taken to eliminate the excess,  
the Minister may waive the tax.

204.1(1) Le particulier qui, à la fin d'un mois donné postérieur au mois de mai 1976, a un excédent pour une année relativement à des régimes enregistrés d'épargne-retraite doit, pour ce mois, payer un impôt en vertu de la présente partie égal à 1 % de la partie du total de ces excédents qui n'a pas été restituée par les régimes au particulier avant la fin du mois en question.

(4) Le ministre peut renoncer à l'impôt dont un particulier serait, compte non tenu du présent paragraphe, redevable pour un mois selon le paragraphe (1) ou (2.1), si celui-ci établit à la satisfaction du ministre que l'excédent ou l'excédent cumulatif qui est frappé de l'impôt fait suite à une erreur acceptable et que les mesures indiquées pour éliminer l'excédent ont été prises.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1613-07

**STYLE OF CAUSE:** ANDRZEJ JANUSZ LEPIARCZYK  
- and -  
CANADA REVENUE AGENCY

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** March 13, 2008

**REASONS FOR JUDGMENT  
AND JUDGMENT OF:** O'KEEFE J.

**DATED:** September 11, 2008

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