Federal Court  Cour federale

Unrevised certified translation

Date: 20100513

Docket: T-940-08

Citation: 2010 FC 531

Ottawa, Ontario, May 13, 2010

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

MARCEL LALONDE

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction and background

[1] The self-represented applicant, Marcel Lalonde (applicant), has applied for judicial review of the decision dated May 13, 2008, by Guy Gohier, the Minister of National Revenue's delegate (delegate) and the Chief of Appeals of the Canada Revenue Agency (Agency). His decision was further to the judgment of my colleague, Justice Luc Martineau, who, on February 14, 2008, set aside, in part, the decision of Jean Laporte, a litigation manager at the Agency. Justice Martineau's judgment is reported at 2008 FC 183, [2008] F.C.J. No. 316.

[2] On May 8, 2007, Mr. Laporte, in a second-level decision, denied Mr. Lalonde's application under subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA) for a waiver of interest that had accrued pursuant to assessments for the 1992 and 1993 taxation years. Mr. Laporte concluded that, apart from the periods of May 24, 1996, to June 9, 1997, and September 15 to December 15, 2001, there had been no undue delay in the Agency's processing of the applicant's file.

[3] In allowing the application for judicial review, Justice Martineau held as follows:

> 70 The application for judicial review is therefore well-founded. The impugned decision does not withstand a probing examination. In my opinion, the general conclusion that there was no undue delay except during the two periods referred to in the impugned decision is arbitrarily unreasonable. I also consider the general conclusion in Ms. Lepage's report that the applicant does not satisfy the criteria set out in Circular 92-2 arbitrary and unreasonable. Finally, all of the reasons in Mr. Laporte's letter and Ms. Lepage's report do not support their conclusion that there was no undue delay in processing the applicant's file after December 15, 2001.
>
> [Emphasis added.]

[4] Justice Martineau ordered as follows:

> 2. The decision of May 8, 2007, by the Minister's representative is set aside in part. Specifically, the Court sets aside the conclusion that there was no undue delay in the processing of the applicant's file after December 15, 2001;
>
> 3. The matter is referred back to the respondent so that a new decision can be made on the applicant's request for the cancellation

> of interest on the unpaid balance from the assessments dated April 30, 1997, and September 21, 2000, for the 1992 and 1993 taxation years;
>
> 4. In particular, the Minister's representative will have to reconsider the appropriateness of granting a reduction of interest for any period subsequent to December 15, 2001;
>
> 5. The respondent will have to follow the review procedure applicable to such matters and ensure that no one who was involved in the previous decisions on the applicant's fairness request takes part in the decision-making process;
>
> 6. Before making a final decision, the Minister's representative will have to take account, inter alia, of the specific circumstances of the applicant's file, the applicant's additional submissions, Circular 07-1, the spirit and intent of subsection 220(3.1) of the ITA, the guidance provided by the Court's reasons and any other relevant factor;
>
> 7. Any decision by the Minister refusing to cancel all or any portion of the interest will have to be supported by reasons so that the applicant and, if applicable, any reviewing court can understand the reasoning behind the decision and the way the relevant factors identified in the applicant's case were applied;
>
> 8. The final decision will have to be made within 90 days after the date of the Court's order;
>
> [Emphasis added.]

[5] The dispute between the parties has simplified: Mr. Lalonde is only seeking the cancellation of the interest accrued on the unpaid balance during the period from December 15, 2001, to the date, in 2008, when he paid the principal balance after receiving Mr. Laporte's decision. The Agency had suspended the processing of his file (1) on the basis of his appeal to the Tax Court of Canada (TCC) in October 2001, and (2) on the basis that, after that appeal was discontinued on June 9, 2004, similar cases were pending, the outcome of which might be favourable to the applicant. Mr. Lalonde

submits that the Agency's delay in processing his file is not warranted because he filed his appeal further to an erroneous opinion from the Agency, because the Agency had lost his file, and because the purportedly "similar cases" were not, in fact, similar.

[6] The following facts are not in dispute and are helpful in the understanding of this judicial review:

1. With respect to his 1992 and 1993 tax returns, Mr. Lalonde claimed deductions for exploration expenses related to certain flow-through shares that he had purchased. The shares were issued by Société Auriginor, a mining company. The deductions were initially allowed by the Minister, and Mr. Lalonde was assessed accordingly.
2. In 1995, the Minister of Revenue (the Minister) commenced an audit of seven financing arrangements implemented by three mining companies, including Auriginor, and of the tax returns of 234 investors, including Mr. Lalonde. The mining companies' promoters were charged with fraud and convicted in 2000.
3. In the meantime, on August 30, 1997, the Minister decided to reassess Mr. Lalonde, eliminating the deductions that had been allowed earlier. On June 2, 1997, Mr. Lalonde objected to those reassessments.
4. The Minister did not rule on Mr. Lalonde's objection until September 21, 2000, after the verdicts in the promoters' trial. The exploration expense deductions were disallowed, and the taxable capital gain on the buyback of the flow-through shares was cancelled and replaced with an $11,000 capital loss.

5. By letter dated July 10, 2001, Mr. Lalonde asked the Agency to adjust a T1 (income tax return) for the years 1992 and 1993. He ended his letter with the statement [TRANSLATION] "the request to cancel interest pursuant to the fairness package is maintained".

6. My colleague Justice Martineau analyzed this request of July 10, 2001, and the confusion to which it gave rise. In his view, Mr. Lalonde, in a single document called the "fairness request", was raising two distinct legal components. Justice Martineau wrote the following:

> 29 On July 10, 2001, the applicant, in a single document (the fairness request), made a [TRANSLATION] "T1 adjustment request" for 1992 and 1993 and an [TRANSLATION] "interest cancellation request".
>
> 30 First, the applicant amended his tax returns in order to
>
> > 1) reduce (1992 and 1993) to nil the amounts entered as mining exploration expenses;
> > 2) report (1993) taxable capital gains ($5,250 and $6,000) and net capital losses corresponding to the total of these amounts ($11,000); and
> > 3) claim (1992 and 1993) allowable business investment losses ($9,000 and $10,500).
>
> He requested that reassessments be made accordingly (the adjustment request).
>
> 31 Second, in accordance with Mr. Dugré's letter of January 31, 1997, the applicant maintained his [TRANSLATION] "interest cancellation request pursuant to the fairness package" (the interest cancellation request).

> 32 The applicant's fairness request was sent to the Shawinigan-Sud Tax Centre and was received on July 13, 2001. Receipt of the [TRANSLATION] "adjustment request" for 1992 and 1993 was acknowledged by means of a letter dated August 23, 2001: [TRANSLATION] "We will process the request as soon as possible, and we will send you a notice of reassessment if applicable". . . .

[Emphasis added.]

7. This confusion is at the heart of the dispute between the parties. In actual fact, Mr. Laporte did not render a decision on the two requests until May 8, 2007. The only thing that Mr. Lalonde contested before Justice Martineau was the cancellation of interest.

8. The adjustment component was reviewed by an objections officer in October 2001; the officer in question discussed it with Mr. Lalonde. On October 25, 2001, she wrote in her notes (Respondent's Record, page 117): [TRANSLATION] "Taxpayer understands that we will not be taking action on his request because he has to go before the TCC." The officer also consulted Officer François Blais, who had issued the reassessments dated September 21, 2000. On November 5, 2001, the objections officer was aware that Mr. Lalonde had filed an appeal with the TCC, along with an application for an extension of time; she left a message for Mr. Blais.

On November 6, 2001, she noted the following: [TRANSLATION] "François explained the file to the taxpayer, and believed the taxpayer was satisfied and did not feel the need to file an appeal in the Court [emphasis added]. This

prompted Justice Martineau to make the following comment at paragraph 78 of his judgment:

> Fifth, the fact that the applicant was granted leave to appeal from the 2000 assessments (including the interest cancellation) on January 25, 2007, is no doubt a relevant factor. It must be assessed in light, *inter alia*, of the apparently confused or contradictory information the applicant had previously received from Ms. Charette and Mr. Blais in the fall of 2001. This is a point the Minister's representative will have to consider.
>
> [Emphasis added.]

9. The interest cancellation component was decided on November 14, 2001, by D. Corbeil, Chief of Appeals. He completely rejected Mr. Lalonde's cancellation request. The Agency then treated that decision as a first-level decision reviewable by the Agency at a second level, and noted that Mr. Lalonde had raised it in his appeal to the TCC, which clearly had no jurisdiction to grant a waiver of interest on the unpaid balance.

10. Mr. Gohier, the delegate, acknowledged that after the TCC appeal was discontinued, the Agency suspended [TRANSLATION] "the processing of his relief request" [emphasis added], preferring to await the outcome of certain disputes [TRANSLATION] "that might have had a positive impact on Mr. Lalonde's relief request". He also acknowledged that Mr. Lalonde was not notified of this administrative suspension.

II. Other comments by Justice Martineau

[7] In his reasons, Justice Martineau raised certain questions and made certain additional comments so that the parties would clearly understand "the purpose and effect of the order to set aside and refer back accompanying these reasons". I consider it important to point out the following questions and comments that Justice Martineau raised.

[8] At paragraph 62, Justice Martineau asks the following question:

> Can it be said that, in the applicant's case, there were errors in processing, delays, missing information in the file, incorrect information or changes of position that resulted from the Agency's actions? If so, do those actions justify any relief from the interest resulting from the reassessments in the applicant's specific circumstances? In other words, can it be said that there was undue delay, and during which particular periods?
>
> [Emphasis added.]

[9] At paragraph 77, he addresses the question of the non-payment of a tax balance, the accrual of interest, and the suspension of collection measures, in the following terms:

> Fourth, non-payment of the tax payable by a taxpayer creates an obligation to pay as well any interest claimed by the Agency following the Minister's initial assessment or reassessment for a given taxation year. Of course, a taxpayer may take advantage of the fact that collection is suspended while his or her objection or appeal to the TCC is being dealt with to wager on the outcome of the objection or appeal by not paying the amounts claimed by the Agency, with the result that interest will continue to accrue. However, if the objection or appeal is dismissed, then, in principle, the taxpayer cannot complain that the rules of the game put him or her at a disadvantage and must pay the interest that has accrued, unless, of course, the Minister agrees to cancel all or any portion of it under subsection 220(3.1) of the ITA (*Comeau v. Canada Customs and Revenue Agency*, 2005 FCA 271, at paragraph 20). On the other hand, a taxpayer who is entitled to a tax refund following a

> reassessment can also expect to be paid interest (subsections 164(3) and (3.2) of the ITA). Therefore, the applicant should not claim victory too quickly here and should ensure that the additional submissions he makes to the respondent will, if appropriate, allow the Minister's representative to exercise his or her discretion by granting interest relief after December 15, 2001.
>
> [Emphasis added.]

[10] I should point out that Mr. Lalonde had the opportunity to submit additional representations to the Agency but did not do so.

[11] With respect to the two components included in the "fairness request", Justice Martineau notes the following, at paragraph 79:

> Sixth, the fairness request included not only an interest cancellation request but also a request to have the previous assessments adjusted. The applicant was unable to convince the Agency, in May 2007, to treat the losses he had incurred in 1993 as business losses. The applicant is not disputing the lawfulness of this conclusion now. This factor may therefore have a negative impact on the amounts of arrears accrued after December 15, 2001. On the other hand, the fact that interest relief was not granted to the applicant until May 8, 2007, even though it could easily have been granted on June 9, 2004, when the applicant discontinued his appeal to the TCC, seems to be a factor that works in favour of the applicant and in favour of a partial reduction of interest if the delay was due to the Agency's actions. These are points the Minister's representative will therefore have to consider.
>
> [Emphasis added.]

III. The impugned decision

[12] The delegate notified Mr. Lalonde by letter dated February 14, 2008, of the following:

> [TRANSLATION]
> Based on an analysis of the file, I cannot grant the requested waiver which would start on December 15, 2001. In my opinion, there was no undue delay, and the interest is not the result of situations beyond your control or actions primarily attributable to the CRA.
>
> However, I find that it is appropriate to grant a reduction of interest for the period from January 10 to April 30, 2001, because some notes in the file suggest to me that the information sent to you on January 10, 2001, may have caused some confusion about the years in respect of which there was an objection and about the balance owing until April 2001.
>
> I have also ensured that the net capital loss totalling $8,250, incurred in 1993, has been added to the net capital loss carry-forward balance.
>
> [Emphasis added.]

[13] In support of his decision, the delegate filed an affidavit sworn on August 7, 2008, on which he was not cross-examined. Exhibit A to that affidavit sets out his decision and his reasons, in which he analyzes the delays in processing the applicant's file after September 2001 (Respondent's Record, at pages 26 and 27).

[14] After setting out the facts on which his analysis was based, he framed the question before him as follows:

> [TRANSLATION]
> Could the "fairness request" have been processed in June 2004, when the applicant withdrew his notice of appeal from the Court? The answer is probably yes. However, it is important to specify that from the moment that he received his notices of reassessment in

> September 2000, he was aware of the fact that an amount was owing, and it stands to reason that when the applicant discontinued his appeal in 2004, he was very much aware that the challenges were over and the balance was due. It was indisputably the applicant's decision to allow a balance to remain owing, which he knew would result in arrears interest.
>
> [Emphasis added.]

[15] According to the delegate, [TRANSLATION] "[f]or this reason, the time at which the 'fairness request' was processed is inconsequential, because there was no processing delay resulting in the taxpayer not being informed, within a reasonable time, that an amount was owing".

[Emphasis added.]

[16] In his opinion,

> [TRANSLATION]
> . . . the errors in processing (the failure to enter the net capital loss of $8,250 in the applicant's file in 2000 and 2007), the information missing from the file or the loss of documents (the difficulty in 2001 in finding the notices of reassessment issued in 2000 for the years 1992 and 1993, and the difficulty in 2007 in finding the fairness request following a discussion between the applicant and the Minister's representative Jean Laporte), and the Agency's failure to notify the applicant that his fairness request was being suspended as of 2004 were all taken into consideration in this analysis [and] all these points are not determinative and are not relevant in this case, where the issue is whether there were undue delays after December 15, 2001.
>
> [Emphasis added.]

[17] He concluded his decision with the following remarks:

> [TRANSLATION]

> …the analysis of the file, in light of the factors set out in Information Circulars 92-2 and 07-1, the special circumstances in the applicant's file, the spirit and intent of subsection 220(3.1) of the ITA, the guidance contained in the Court's reasons, and all other relevant factors, does not justify the granting of interest relief for undue delays subsequent to December 15, 2001, arising primarily from the Agency's actions.
>
> [Emphasis added.]

[18] However, he reduced the interest accrued from January 10, 2001 to April 30, 2001 on the basis that the applicant received incomplete information from the Agency, thereby causing him some confusion.

[19] The delegate also analyzed the questions that Justice Martineau held should be analyzed.

[20] Justice Martineau stated that Mr. Lalonde's appeal to the TCC was "no doubt a relevant factor", but was to be assessed "in light . . . of the apparently confused or contradictory information the applicant had previously received from Ms. Charette and Mr. Blais in the fall of 2001". The delegate responded that Ms. Charette [TRANSLATION] "correctly informed the applicant that he would have to file an appeal in the Court [the TCC] in respect of his loss claim". He noted that a taxpayer cannot make a correction request or an objection on a point already decided by the Appeals Division. In his opinion, the September 2000 notices of reassessment had determined the issue of the losses. As for the correspondence between Officer Blais and Mr. Lalonde, the delegate determined as follows:

> [TRANSLATION]
> Based on the analysis, it appears that at some point between October 25 and November 6, 2001, the objections officer, F. Blais,

> contacted the applicant to explain that he did not meet the Act's requirements for a BIL claim, and that, in a sense, it was pointless for him to waste his time filing a notice of appeal in the Court. He did not contradict the process mapped out by Officer D. Charette. Instead, he seems to have tried to dissuade the applicant from filing a court appeal because the BILs were not allowable.
>
> Consequently, it is our opinion that the applicant was not given confusing or contradictory information.
>
> [Emphasis added.]

[21] Justice Martineau also asked whether a notice of reassessment had to be issued to give effect to the Minister's decision (1) granting an interest reduction for the periods from May 24, 1996, to June 9, 1997, and from September 15 to December 15, 2001; and (2) recognizing net capital losses totalling $8,250 incurred by the applicant in 1993. The delegate's answer to the first question was negative; a statement of account was sufficient and had been sent to the applicant on June 4, 2007. With respect to the second point, the delegate acknowledged that the net capital loss of $8,250 had not yet been accounted for, but that this omission had no impact on the outstanding income tax balance because Mr. Lalonde had no taxable capital gains in 1992 and 1993, and, in his subsequent taxation years, his capital losses greatly exceeded his capital gains.

[22] With respect to Justice Martineau's assertion that Mr. Lalonde had contacted the Agency regularly for five years to try to find out how his file was progressing, but was never able to obtain any information whatsoever or even the name of a person or division responsible for his file, the delegate wrote the following:

> [TRANSLATION]
> In January 2002, the applicant was notified by letter that his notice of appeal had been accepted. He was therefore aware that his file was

> the subject of a court appeal, and he could have contacted the contact person named.
>
> In October and November 2001, the applicant was in touch with two objections officers (D. Charette and F. Blais). In our opinion, the applicant could have contacted one of those officers, who were still on staff at the Appeals Division. D. Charette sent out a letter dated November 14, 2001, and her contact information was in that letter.
>
> We have no way of corroborating the allegation that the applicant regularly placed calls every month for five years. In any event, it is our opinion that this does not constitute probative information that would have any bearing whatsoever on the decision concerning the interest waiver.
>
> [Emphasis added.]

[23] Justice Martineau had noted that the second period for which Mr. Laporte agreed to grant a waiver postdates the 2000 assessments. He had wondered why the calculation of interest relief stopped on December 15, 2001, and had stated that this point should be examined "having regard to the effect of the Agency's past errors in processing, if any". The delegate stated (1) that the first-level decision (made on November 14, 2001) did not grant any interest relief, but that it was acknowledged that the fact that Mr. Lalonde's net capital loss was allowed had not been accounted for, and that this would be rectified [TRANSLATION] "as soon as the objection and appeal processes were over"; and (2) that additional relief was being granted [at the second level] for the period from January 10 to April 30, 2001.

IV. The statutory scheme and the guidelines

A. *The ITA*

[24] The parties acknowledge that subsection 220(3.1) of the ITA gives the Minister the discretion, on the application of a taxpayer, to waive or cancel all or any portion of any penalty or interest payable. The provision was enacted in 1991 and applies to the 1985 and subsequent taxation years.

B. *The guidelines*

[25] The guidelines are set out in Information Circular IC 92-2. Their purpose is to help apply the relevant subsection of the statute. The Information Circular clearly states that its provisions are only guidelines, and that "[t]hey are not intended to be exhaustive, and are not meant to restrict the spirit or intent of the legislation". Information Circular IC 92-2 was replaced on May 31, 2007, by Information Circular IC 07-1. A comparison of the two documents shows that, for the purposes of this judgment, they are essentially identical.

[26] Paragraphs 5 and 6 of the Information Circular were reproduced in my colleague's judgment, at paragraphs 13 and 15:

> 13 Paragraphs 5 and 6 of Information Circular 92-2, *Guidelines for the Cancellation and Waiver of Interest and Penalties* (Circular 92-2), are relevant:
>
> > 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;

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

6. Cancelling or waiving interest or penalties may also be appropriate if the interest or penalty arose primarily because of actions of the Department, such as:

(a) processing delays which result in the taxpayer not being informed, within a reasonable time, that an amount was owing;

(b) material available to the public contained errors which led taxpayers to file returns or make payments based on incorrect information;

(c) a taxpayer or employer receives incorrect advice such as in the case where the Department wrongly advises a taxpayer that no instalment payments will be required for the current year;

(d) errors in processing; or

(e) delays in providing information such as the case where the taxpayer could not make the appropriate instalment or arrears payments because the necessary information was not available.

15 That being said, even where the delay is due to the actions of the Department or the Agency, other factors may come into play and possibly limit the amount of interest relief. This will depend on the taxpayer's conduct. Paragraph 10 of Circular 92-2 refers to these additional factors:

> 10. The following factors will be considered when determining whether or not the Department will cancel or waive interest or penalties:
>
> (a) whether or not the taxpayer or employer has a history of compliance with tax obligations;
>
> (b) whether or not the taxpayer or employer has knowingly allowed a balance to exist upon which arrears interest has accrued;
>
> (c) whether or not the taxpayer or employer has exercised a reasonable amount of care and has not been negligent or careless in conducting their affairs under the self-assessment systems;
>
> (d) whether or not the taxpayer or employer has acted quickly to remedy any delay or omission.
>
> [Emphasis added.]

V. The standard of review

[27] There is no dispute between the parties regarding the standard of review. The delegate's decision must be reviewed against the standard of reasonableness, further to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Before and after *Dunsmuir*, the Federal Court of Appeal held that the same standard applies in the case at bar: see *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153, [2005] F.C.J. No. 714 and *Slau Ltd. v. Canada (Revenue Agency)*, 2009 FCA 270, [2009] F.C.J. No. 1194. Justice Martineau applied the decision in *Lanno*, and thus, the reasonableness standard of review, in his judgment.

[28] *Dunsmuir* answers the question, "What does this revised reasonableness standard mean?"

I quote from paragraphs 46 and 47 of the judgment of Justices Michel Bastarache and Louis LeBel:

> 46 What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?
>
> 47 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.

[29] This standard of review does not exclude the application of paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which reads as follows:

Application for judicial review	**Demande de contrôle judiciaire**
Grounds of review	**Motifs**
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le

tribunal	cas :
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

[Emphasis added.]

[30] In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, the Supreme Court recognized that although paragraph 18.1(4)(*d*) was not a standard of review as such, it does provide "legislative guidance as to 'the degree of deference' owed to the . . . findings of fact" (paragraph 3) and "[i]t provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the *Federal Courts Act*". That is to say, "Parliament intended administrative fact finding to command a high degree of deference" (paragraph 46).
Justice Martineau recognized that determinations under subsection 220(3.1) of the ITA are essentially factual in nature (see paragraph 52 of his judgment; see also *Slau Ltd.*, above, at paragraph 34).

[31] However, it goes without saying that if the delegate erred in law in making his decision, the correctness standard applies.

VI. Analysis

A. *Certain principles*

[32] The case law regarding subsection 220(3.1) of the ITA establishes the following principles:

(1) The power to grant or deny interest relief is a discretion that must be exercised in good faith, in reliance on relevant factors and not on considerations irrelevant or extraneous to the statutory purpose (see *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2; *Hillier v. Canada (Attorney General)*, 2001 FCA 197, [2001] F.C.J. No. 945; *Robertson v. Canada (Minister of National Revenue - M.N.R.)*, 2003 FCT 16, [2002] F.C.J. No. 1828).

(2) The Minister can publish guidelines, but the guidelines cannot fetter the Minister's discretion by excluding other valid or relevant reasons (see *Maple Lodge*, above; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 72-73; *Nixon v. Canada (Minister of National Revenue - M.N.R.)*, 2008 FC 917, [2008] F.C.J. No. 1146).

(3) The Court can intervene where there is an erroneous finding of fact (see *Robertson* and *Johnson v. Canada*, 2003 FCT 713, [2003] F.C.J. No. 919 at paragraph 23).

(4) The purpose of subsection 220(3.1) was articulated as follows by Justice Paul Rouleau in *Kaiser v. Canada (Minister of National Revenue - M.N.R.)*, [1995] F.C.J. No. 349:

> 8. The purpose of this legislative provision is to allow Revenue Canada, Taxation, to administer the tax system more fairly, by allowing for the application of common sense in dealing with taxpayers who, because of personal misfortune or circumstances beyond their control, are unable to meet deadlines or comply with rules under the tax system. The language used in the section bestows a wide discretion on the Minister to waive or cancel interest at any time. To assist in the exercise of that discretion, policy guidelines have been formulated and are set out in Information Circular 92-2.

[Emphasis added.]

[33] Justice Karen R. Sharlow, in *Lanno*, above, wrote the following at paragraph 6:

> . . . The fairness package was enacted because Parliament recognized the need for relief from certain provisions of the *Income Tax Act* that can result in undue hardship because of the complexity of the tax laws and the procedural issues entailed in challenging tax assessments. The granting of relief is discretionary, and cannot be claimed as of right. . . .
>
> [Emphasis added.]

[34] Justice Martineau provides the following guidance at paragraph 9 of his judgment:

> The purpose of the "fairness" provisions (for example, subsections 152(4.2), 164(1.5) and 220(3.1) and (3.2) of the ITA) is to provide relief from the overly rigid application of some of the ITA's provisions by helping taxpayers resolve issues that arise through no fault of their own and by allowing for a common-sense approach. . . .
>
> [Emphasis added.]

V. Discussion and conclusions

[35] Justice Martineau came to the following conclusions in his reasons for judgment:

(1) At paragraph 61, he concluded that the Agency had to provide the taxpayer with an explanation of the reasons for and factors in the decision, that the request had to be decided on on its own merits by the Agency, and that, in this case,

> [o]ne of the major flaws of the impugned decision is the apparent failure . . . to analyze the merits of the interest cancellation request in light of the applicant's specific situation [and that] the problem with [the] analysis…is the lack of findings of fact on the causes of the delay and the responsibility of the Agency's employees.

[Emphasis added.]

(2) Immediately after making these remarks, he asked the following question at paragraph 62, which I have already quoted:

> Can it be said that, in the applicant's case, there were errors in processing, delays, missing information in the file, incorrect information or changes of position that resulted from the Agency's actions? If so, do those actions justify any relief from the interest resulting from the reassessments in the applicant's specific circumstances? In other words, can it be said that there was undue delay, and during which particular periods?

[Emphasis added.]

(3) Justice Martineau doubted the relevance of similar cases on which the Agency relied in suspending its consideration of the fairness case after Mr. Lalonde discontinued his appeal. He notes (with regard to *Comeau*) that the Federal Court trial and appellate judgments were rendered [TRANSLATION] "several years ago, on July 6, 2004, and August 10, 2005, respectively". At paragraph 67, he questions why the Agency did not process Mr. Lalonde's interest cancellation request earlier, if the request in *Comeau* was identical. With respect to the other purportedly similar case, namely, *Rouleau v. Placements Etteloc Inc.*, 2006 QCCS 5319, Justice Martineau stated that "[a]t first glance . . . I do not see how the judgment expected in *Rouleau-Joncas* could have had any impact on the exercise of the relevant ministerial power in the applicant's specific case".

(4) Justice Martineau wrote as follows, at paragraph 69 of his judgment:

> In light of the evidence on file, the Agency has not provided a reasonable explanation for a large portion of the delays since December 15, 2001, and especially between June 10, 2004, and

> May 8, 2007. Those delays are due mainly to the actions of the Minister or the Minister's representatives. I also note that the applicant does not seem to have been informed within a reasonable time that his file had been suspended pending decisions to be rendered shortly in "similar" cases.
>
> [Emphasis added.]

(5) At paragraph 70, he found that "the general conclusion that there was no undue delay except during the two periods referred to . . . is arbitrarily unreasonable" and that "all of the reasons . . . do not support their conclusion that there was no undue delay in processing the applicant's file after December 15, 2001". In my view, this is why Justice Martineau specifically set aside the conclusion that there was no undue delay in the processing of the applicant's file after December 15, 2001, having regard to the fact that the applicant's file had two components: the interest relief component and the component involving the correction of his tax returns under subsection 152(4), 152(4.2) or 152(6) of the ITA following the amendments made by Mr. Lalonde on July 10, 2001.

(6) In many places, Justice Martineau noted that the respondent's file contained no evidence in support of some of the decision-maker's contentions. For example, (1) no reassessments were produced (paragraphs 4 and 23); (2) the applicant's judicial review record included a statement of account dated June 11, 2007, showing that the last account statement he received was dated December 1, 2006 (paragraph 5); (3) there was a lack of information about the way in which the tax liabilities payable under the September 2000 reassessments were calculated, and Mr. Lalonde therefore become somewhat confused (paragraphs 26 and 27);

> (4) it appears that, on April 20, 2001, the collection officer sent him a letter informing him of his tax balance for the years 1992 and 1993, but the evidence in the court file does not indicate the balance (unpaid tax and interest) owed by the applicant on that date (paragraph 28); and (5) the applicant was required to provide the Agency with a copy of his file, e.g., copies of assessments and excerpts from certain documents (paragraphs 32 and 44). In this regard, I should note that the only deficiency rectified in the matter before me was the production of the September 2000 reassessments. However, the respondent's record contains no explanatory letter or appendix accompanying the 2000 reassessments, and no subsequent correspondence providing the applicant with the additional information that Justice Martineau said was missing.

[36] At paragraph 64, Justice Martineau wrote that "the Minister took a long time to make a final decision after the applicant discontinued his appeal to the TCC in June 2004" [emphasis added] and that "[a]ccording to the uncontradicted evidence on file, it was only the applicant's insistence on obtaining a final decision on his fairness request" that brought about such a decision.

[37] At paragraph 66, Justice Martineau stated that he was not satisfied that the "additional reasons given by Mr. Laporte in his affidavit prevented the Agency from making a final decision on the applicant's fairness request".

[38] At paragraph 28, Justice Martineau noted the following:

> The applicant wrongly treated the 2000 assessments as mere account notices. In January 2001, after receiving information by telephone from one Martine Manta, who worked at the Agency, he thought that he did not have to make payments or do anything else given that the challenge to the assessment [TRANSLATION] "for the entire group involved" was being appealed to the TCC.
>
> [Emphasis added.]

[39] With respect, I find, for the following reasons, that the Court's intervention is warranted. However, before going into further detail, I will recapitulate the essence of the impugned decision:

(1) It was made after Justice Martineau issued his judgment determining that the Agency "has not provided a reasonable explanation for a large portion of the delays since December 15, 2001, and especially between June 10, 2004, and May 8, 2007. Those delays are due mainly to the actions of the Minister or the Minister's representatives." He doubted the similar cases' relevance. He demanded explanations from the Agency. He pointed out that certain claims were unsupported by evidence.

(2) The delegate acknowledged that the fairness request [TRANSLATION] "could have been processed in June 2004", after the discontinuance of the TCC appeal. This is an important admission, because it is about a three-year processing delay.

(3) However, the delegate tempered his admission by stating that [TRANSLATION] "it is important to specify that from the moment that he received his notices of reassessment in September 2000, he was aware of the fact that an amount was owing [and that it] "was indisputably the applicant's decision to allow a balance owing, which he knew would result in arrears interest."

(4) According to the delegate, this knowledge of his outstanding balance, and failure to pay it, meant that [TRANSLATION] "the time at which the 'fairness request' was processed is inconsequential, because there was no processing delay resulting in the taxpayer not being informed, within a reasonable time, that an amount was owing".

(5) The delegate said that he considered the processing errors but determined that they [TRANSLATION] "are not determinative and are not relevant in this case, where the issue is whether there were undue delays after December 15, 2001".

(6) The delegate therefore decided that it would not be appropriate to grant [TRANSLATION] "interest relief for undue delays subsequent to December 15, 2001, arising primarily from the Agency's actions".

[40] All things considered, the delegate's reasoning is very simple. It boils down to saying that Mr. Lalonde knew that he had a balance owing after he received his reassessments in September 2000, and that it was his fault if interest then accrued because he could have, and should have, paid off his balance in order to avoid that accrual, notwithstanding Justice Martineau's finding that, following Mr. Lalonde's discontinuance of the appeal, the delays in processing his "fairness request" primarily arose because of actions of the Agency.

[41] The delegate appears to have accepted that the delays in processing his "fairness request" arose primarily from actions of the Agency, but to have accorded no weight to this, having found the [TRANSLATION] "errors in processing" to be immaterial and inconsequential because the interest

accrued by reason of the applicant's unpaid balance. In other words, Mr. Lalonde wagered on the outcome of his fairness request and lost (see the decision in *Comeau*, at paragraph 20).

[42] It is clear that the delegate's decision is based on two factors that are referred to in the guidelines and apply to two very different situations. The first factor is one of the factors referred to in subparagraph 6(a) of the guidelines in Information Circular 92-2 as an example of interest that "arose primarily because of actions of the Agency". That subparagraph reads as follows:

> . . . processing delays which result in the taxpayer not being informed, within a reasonable time, that an amount was owing;…
>
> [Emphasis added.]

Other examples cited include incorrect advice from the Agency and errors in processing.

[43] The other factor that the delegate considered is in subparagraph 10(b):

> (b) whether or not the taxpayer has knowingly allowed a balance to exist on which arrears interest has accrued;…
>
> [Emphasis added.]

This paragraph lists the factors that the Agency must consider in determining whether it will cancel interest that arose primarily from its actions.

[44] In his judgment, Justice Martineau

(1) was aware of the remarks of Justice Pelletier of the Federal Court of Appeal in *Comeau*, at paragraph 20, about the danger of allowing interest on a tax balance to accumulate while an objection before the Agency or an appeal before the TCC is

being processed. Justice Martineau was of the opinion that the existence of this factor did not exclude the possibility of interest relief under subsection 220(3.1) of the ITA (see paragraph 77 of Justice Martineau's decision);

(2) was also aware that paragraph 6 of the guidelines in Information Circular 92-02 applied to cases where the delay is attributable to the Agency's actions, but that the purpose of paragraph 10 was to list factors that could come into play and possibly limit the amount of interest relief, depending on the taxpayer's conduct (paragraph 15).

[45] I find that subparagraph 10(b) of the guidelines is just one relevant factor, and that there are others, including whether the taxpayer has a history of compliance with tax obligations, which seems to be admitted in this case, because Mr. Laporte and Officer Lepage acknowledged that Mr. Lalonde had complied with his tax obligations in the past (Respondent's Record, page 101).

[46] Moreover, at the request of the Department of Justice Canada, Mr. Lalonde had cooperated during the prosecution of the promoters, and this caused the Crown prosecutor to mention the possibility of [TRANSLATION] "claiming the interest charged by Revenue Canada" (Applicant's Record in the matter before Justice Martineau, at page 14).

[47] My final comments about these considerations are that Mr. Lalonde's record, in the matter before Justice Martineau, included a copy of the September 2000 reassessments, which showed a revised balance of $294 for 1992, and balance of $3,887 for 1993.

[48] I will now set out the reasons for my conclusion that the delegate's decision must be set aside.

[49] Firstly, the delegate misinterpreted and misapplied the guidelines. According to the guidelines, the first question for the decision-maker to address was whether or not the interest arose primarily out of the Agency's actions; if so, the decision-maker would have to consider the factors set out in paragraph 10 to determine whether the Agency should cancel the interest.

[50] In my opinion, the delegate's fundamental error was in applying the guidelines' factors. The relevant, but not exhaustive, factors to be considered in deciding the first question are set out in paragraph 6, notably subparagraph 6(b), which the delegate determined to be inapplicable as an example of an action of the Agency, because Mr. Lalonde was informed of his balance owing in September 2000 through the reassessments issued that month. With respect, the delegate was mistaken. The processing delays that Mr. Lalonde alleges were not the delays in processing his objections to the 1997 assessments, which led to the September 2000 reassessments. Rather, the delays that he alleges are the delays in processing his (two-pronged) fairness request, which was submitted on July 10, 2001, but was only decided in May 2007 (leaving aside the first-level decision not to cancel the interest), a date which, in the delegate's view, was inconsequential [TRANSLATION] "because there was no processing delay resulting in the taxpayer not being informed, within a reasonable time, that an amount was owing". In my opinion, that assertion is not supported by any evidence in the record. The applicant did not produce any statement of account.

[51] As a result of the exaggerated importance that the delegate attached to factor 6(a),

(1) the delegate neglected to consider the other relevant factors that the Minister has cited as indicia of actions of the Agency, notably erroneous answers, and processing errors such as the loss of his file;

(2) even if the delegate took the processing errors into consideration, he deemed those errors immaterial, which is contrary to subparagraphs 6(c) and (d) of the guidelines;

(3) the delegate took only the factor in subparagraph 10(b) into consideration, and neglected the other facts referred to in paragraph 10;

(4) the delegate deemed this factor determinative, thereby minimizing all the other factors contained in paragraphs 6 and 10 of the guidelines, and, consequently, contravening the spirit of the guidelines and the purpose of the ITA, which requires that all relevant factors be weighed.

[52] These analytical errors committed by the delegate resulted in an absurd interpretation of the guidelines. According to that interpretation, no delay in processing by the Agency can result in interest relief if the taxpayer is aware of his or her unpaid balance. I acknowledge that allowing an unpaid balance to accumulate is a relevant factor under subparagraph 10(b) of the guidelines, but this factor must be weighed along with all the other factors set out in paragraphs 6 and 10, and the decision-maker did not carry out this task.

[53] Secondly, as Justice Martineau noted, the respondent's record was short on evidence in support of the delegate's findings and conclusions. The record in the matter before me is similar to the respondent's record before Justice Martineau. I note the following examples:

(1) The decision-maker firmly asserts that Mr. Lalonde decided to allow a balance to remain unpaid, thereby voluntarily and knowingly allowing arrears interest to accrue. He referred to the correspondence between Mr. Lalonde and a collection officer, but never adduced the relevant notes from the comments, or the the officer's correspondence with Mr. Lalonde.

(2) Justice Martineau had made a comment on the letter that Mr. Lalonde had sent to Martine Manta on January 11, 2001, regarding the obligation to make instalments. The delegate did not clear up this point by adducing the relevant notes written by that officer.

(3) As has been mentioned, apart from the account statement that he himself adduced, Mr. Lalonde's file contains no account statements, sent to him during the relevant period, that would enable us to understand the magnitude of the accrued interest and assess whether the accrual was of such significance in the grand scheme of things that it warranted the decision not to grant even a partial interest waiver.

(4) The respondent did not correct the deficiencies in the evidence that Justice Martineau pointed out.

[54] It was such an absence of evidence from the Agency that prompted Justice Rouleau, in *Elwell v. Canada (Minister of National Revenue – M.N.R.),* 2004 FC 943, [2004] F.C.J. No. 1151 at

paragraph 9, to allow a judicial review in favour of a taxpayer whose interest waiver request had been denied.

[55] Thirdly, I find that some of the decision-maker's answers to the questions raised by Justice Martineau are unreasonable. In particular, the delegate's conclusion that Mr. Lalonde was not given any confusing or contradictory information in connection with his TCC appeal is not based on any evidence in the record, and the record contains no affidavit from François Blais with regard to his conversations with the applicant. And in addressing Justice Martineau's comment regarding Mr. Lalonde's efforts to obtain answers from the Agency, the delegate stated that there is no way to corroborate the applicant's efforts, but found that the applicant's efforts were not a probative (or relevant) factor. This conclusion is unreasonable. On the contrary, I find that this evidence was very probative because it supported the applicant's contention, substantiated by further evidence, that the Agency had lost his file and that this was a major reason for the delay in processing the file that he submitted on July 10, 2001.

[56] Fourthly, at the hearing, the respondent did not provide any additional arguments capable of altering Justice Martineau's view, at "first glance", as to whether the Agency properly relied on *Comeau* and *Rouleau* to suspend the processing of Mr. Lalonde's file, without notice, following his discontinuance. This is reinforced by the fact that counsel for the Minister has not satisfied me that there was no inconsistency in the Agency's conduct with respect to the question of whether or not the applicant would have to deal with the TCC in order to have his request for an adjustment to his

1992 and 1993 tax returns dealt with. The inconsistency stems from the fact that Mr. Laporte made a ruling on this question after the TCC appeal was discontinued.

[57] Fifthly, throughout the delegate's analysis, there is a persistent ambiguity as to whether the delegate was taking both components of the applicant's July 2001 fairness request into consideration. It appears to me that he was not doing so, and was only only considering the interest relief component, not the adjustment component.

[58] Lastly, it is my opinion that this judgment finds support in the very recent decision of the Federal Court of Appeal in *Slau Ltd.*, most notably paragraphs 33 and 39.

[59] For these reasons, the application for judicial review is allowed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is well-founded, that the decision of the Minister's delegate is set aside, and that the matter is referred back to the respondent for a redetermination of Mr. Lalonde's request for the cancellation of interest accrued after December 15, 2001, on the unpaid balance of the assessments related to the 1992 and 1993 taxation years. The redetermination in question must comply with the reasons for this judgment, and must be made on or before July 13, 2010, unless there is a settlement between the parties, which the Court considers desirable and encourages. The applicant is entitled to reasonable disbursements and to assessable costs, which I set at $250.

"François Lemieux"
Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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