Federal Court  Cour fédérale

Date: 20120525

Docket: T-1944-10

Citation: 2012 FC 644

Ottawa, Ontario, May 25, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

GRAHAM WORSFOLD, STONERIDGE MANAGMEENT SERVICES INC., LYN WORSFOLD, JONATHAN COLES AS TRUSTEES FOR GR AND LS WORSFOLD LIFE INTEREST SETTLEMENT TRUST

Applicants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a consolidated application under subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7 for judicial review of the second level review decisions by an assistant director of enforcement of the Minister of National Revenue (the officer), made between October 22, 2010 and November 17, 2010, refusing to waive the penalties and interest owed by the applicants as a result

of the late filing of their tax returns. The decisions not to exercise the discretion under subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) to reduce the penalties and interest were based on the officer's finding that the applicants' disclosures were not voluntary as they were prompted by enforcement action against a related company.

[2] The applicants request that the decisions be set aside and sent back for reconsideration with directions that this Court deems appropriate.

Introduction to Voluntary Disclosure Program

Taxpayer Relief Provision

[3] Taxpayers that file late tax returns generally incur penalties and interest on the payments. However, subsection 220(3.1) of the *Income Tax Act* grants the Minister the discretion to cancel or waive all or any portion of any penalty or interest otherwise payable under the Act. This taxpayer relief provision was introduced in 1991 as part of what was called a fairness package (see *Bozzer v Canada (Minister of National Revenue)*, 2011 FCA 186, [2011] FCJ No 842 at paragraph 22). The purpose of this provision was articulated by Mr. Justice Paul Rouleau in *Kaiser v Canada (Minister of National Revenue)*, 93 FTR 66, [1995] FCJ No 349 (at paragraph 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 […]

[4] Granting of relief under this provision is discretionary. It is not available as of right (see *Lanno v Canada (Customs and Revenue Agency)*, 2005 FCA 153, [2005] FCJ No 714 at paragraph 6).

Voluntary Disclosure Program

[5] The exercise of the discretion under subsection 220(3.1) of the *Income Tax Act* is integral to the Canada Revenue Agency (CRA)'s voluntary disclosure program (VDP). The VDP allows taxpayers to make disclosures to correct inaccurate or incomplete information, or to disclose information not previously reported. This program is intended to promote voluntary compliance. Therefore, when a valid disclosure has been made, the Minister may exercise its discretion under subsection 220(3.1) to cancel or waive associated penalties and interest.

Applicable CRA Policies

[6] The CRA has published policy documents to assist the Minister and its delegates with the exercise of its discretion under subsection 220(3.1) of the *Income Tax Act*. At the time of the applicants' disclosures in 2005, the following documents pertinent to this exercise of discretion and the VDP were in effect:

1. CRA Information Circular IC00-1R, effective from September 30, 2002 to October 21, 2007 (the IC00-1R); and

2. VDP Processing Guidelines (the Guidelines).

[7] The Guidelines are an internal CRA document intended to assist VDP officers in exercising their functions.

Conditions for Valid VDP Disclosures

[8] IC00-1R outlines four conditions for a disclosure to be deemed valid (at paragraph 6) – it must:

1. Be voluntary – meaning it must be initiated by the taxpayer and must not "have been made with the knowledge of an audit, investigation, or other enforcement action that has been initiated by the [CRA], or other authorities or administrations with which the [CRA] has information exchange agreements";

2. Be complete – meaning it must include "full and accurate reporting of all previously inaccurate, incomplete, or unreported information";

3. Involve a penalty – meaning if no penalties apply to the information being disclosed, the taxpayer does not need to seek penalty relief under the VDP; and

4. Meet timing conditions – meaning it must:

    a. include information that is at least one year past due; or

    b. if the information is not one year past due, the disclosure must not be initiated simply to avoid late filing or installment penalties.

Determining Voluntariness

[9] Guidance for a VDP officer's determination of whether a disclosure is voluntary is provided under section 8.3 of the Guidelines. Subsection 8.3.1 states in part:

> A disclosure is considered voluntary if a [taxpayer] has wholly initiated the disclosure in order to ensure his or her tax records are completed. A disclosure must meet this definition of voluntary in order to be considered as a valid voluntary disclosure. The following suggestions for research are guidelines only. […]

[10] The relevant date to the question of voluntary disclosure is the "effective date of disclosure". This is the "date the taxpayer identifies himself or the date the taxpayer or his representative signs the client agreement form, whichever of the two is earliest" (see *Brown v Canada (Customs and Revenue Agency)*, 2005 FC 1639, [2005] FCJ No 2087 at paragraph 16; affirmed in 2007 FCA 26, [2007] FCJ No 141).

Enforcement Action Questions

[11] When a VDP officer discovers that enforcement actions have commenced, section 8.3.5 of the Guidelines recommends that the officer answer the following set of questions (the enforcement action questions):

1. Was any direct contact made with the [taxpayer] or is the [taxpayer] likely to have been aware of the enforcement action?

2. Is it likely that the CRA would have uncovered the information disclosed based on the enforcement action?

[12] In assessing these questions, the Guidelines explicitly state that taxpayers should be given the benefit of the doubt (section 8.3.5).

Background

[13] Graham Worsfold is the principal applicant and a computer science engineer. In 2001, he moved to Canada from the United Kingdom (UK) under a temporary work permit. After renewing this permit on at least one occasion, the principal applicant and his family were granted permanent residency status in January 2005.

[14] The additional applicants in this case are: Lyn Worsfold – the principal applicant's wife; Stoneridge Management Services Inc. (Stoneridge Management) – a company incorporated on December 16, 2003 in the British Virgin Islands that provides management consulting services on international computer development. The principal applicant is the sole director and shareholder, and has been employed by the company since 2004; and The GR and LS Worsfold Life Interest Settlement Trust (Worsfold Trust) – a personal family trust located in the UK and established in 1997 by the principal applicant. The trustees are the principal applicant, his wife and Jonathan Coles (a UK based lawyer).

[15] As of October 3, 2005, the applicants had not filed tax returns in Canada.

[16] This application also concerns Stoneridge Inc. (Stoneridge). Stoneridge is a real estate development company that was incorporated on August 1, 2002. The principal applicant does not

receive employment income from Stoneridge. However, as of October 3, 2005, the principal applicant was a director, held all of the preferred shares of Stoneridge and held one third of the common shares of GLD Holdings Inc. which owns all the common shares of Stoneridge. Larry Burton and David Turk held equal parts of the remaining common shares of GLD Holdings Inc.

Timeline of Events

[17] On September 6, 2005, the principal applicant completed a tax amnesty form on the DioGuardi and Company LLP (DioGuardi) website. This entailed the provision of personal and financial information on the principal applicant's worldwide income and immigration status. By completing this form, a request was also made for an assessment and legal opinion on his need and eligibility for a voluntary disclosure (tax amnesty).

[18] On September 21, 2005, DioGuardi sent the principal applicant an email stating they believed he needed to file tax returns and was eligible for a voluntary disclosure. The principal applicant was asked to contact their office.

[19] On September 23, 2005, the principal applicant called DioGuardi's office. During this call, it became evident that an in-depth meeting was required. As the principal applicant was out of the country during the week of September 25 to 29, the meeting was scheduled for Wednesday, October 5, 2005.

[20] At 7:30 a.m. on Monday, October 3, 2005, CRA auditor Joanne Adey (the auditor) from the East Central Ontario (Peterborough) tax service office called Larry Burton, Stoneridge's secretary and listed contact, to inform him that the CRA was planning to audit Stoneridge's 2003 and 2004 tax returns. The purpose of the audit was to review property transactions, conduct a general review and review associated T2 corporation tax returns. The Stoneridge audit had been assigned to the auditor in the preceding week. Prior to speaking with Larry Burton, the auditor had left two voice messages to Larry Burton's attention with her name and contact information. She had also spoken to his wife, with whom she also left her name and contact information.

[21] During the call on October 3, 2005, Larry Burton informed the auditor that the other two shareholders, the principal applicant and David Turk, ran Stoneridge. Larry Burton and the principal applicant work in the same building. Later the same morning, at 10:07 a.m., the principal applicant made a short call to DioGuardi. The principal applicant states that this call was to confirm the October 5th meeting. Conversely, the respondent suggests that this call was to schedule a meeting with DioGuardi in response to being informed by Larry Burton of the pending Stoneridge audit.

[22] On October 5, 2005, the principal applicant met with Paul DioGuardi at DioGuardi's Ottawa office. Paul DioGuardi indicated that at this meeting, they discussed the tax implications of the principal applicant's immigration status and his sources of income. From this discussion, Paul DioGuardi determined that a voluntary disclosure was necessary for the 2001 tax year onwards. The Stoneridge audit was allegedly not discussed at this meeting and the principal applicant maintains that at that time he still had no knowledge of the planned audit.

[23] In the same afternoon, at 3:25 p.m., the auditor faxed the initial audit letter to Brad Huggins, the corporate accountant for Stoneridge, requesting that specific books and records be ready for her to review at the beginning of the audit, scheduled for October 27, 2005. The end of this letter stated:

> Please be advised that as the audit progresses, we may request additional records related to the associated companies and all respective shareholders. [emphasis added]

[24] Later the same day, at 4:25 p.m., Paul DioGuardi sent a fax to the CRA initiating a no-name voluntary disclosure for the 2001 to 2004 taxation years. This disclosure stated that it was on behalf of a male taxpayer, born in 1956 and resident of Canada since 2001. The disclosure was for unreported income and capital gains for the taxation years 2001 to 2004, and possibly GST.

[25] On November 17, 2005, Brad Huggins told the auditor that the principal applicant "was being investigated by Ottawa on international issues". This investigation pertained to a letter from CRA London requesting information on a clearance certificate request for DigiPos shares disposed of by the principal applicant. As no information was submitted, this request was denied.

[26] On November 30, 2005, DioGuardi informed the CRA that the principal applicant was the individual behind the no-name disclosure made on October 5, 2005. DioGuardi also provided CRA with a memorandum from its accounting firm detailing additional research and returns to be filed for the principal applicant's spouse, overseas trusts and various companies potentially deemed resident of Canada based on the principal applicant's residency status.

[27] On August 31, 2006, after several extensions of time, the principal applicant's tax returns and foreign information forms, along with tax returns for the other applicants, were filed with the CRA.

[28] On September 19, 2006, the applicants' files were referred to the auditor for review to determine if the information was accurate and met the complete criterion under the VDP.

[29] In a memorandum dated April 26, 2007, the auditor recommended to Mark Loftus, VDP officer in Ottawa, that adjustments be made to the principal applicant's income for the 2002 and 2003 taxation years. The auditor also found that the principal applicant had appropriated $315,451 from Stoneridge in 2004. The documents that the auditor used to support these adjustments were provided to her during her audit of Stoneridge.

First Level Review Decisions

[30] In letters dated September 25, 2007, the applicants were informed that all their VDP applications had been denied (the first level review decisions). The following issues were raised with their disclosures:

Principal applicant:

Not voluntary – CRA had initiated enforcement actions against a related taxpayer prior to the date of voluntary disclosure;
Not complete – material amounts of taxable income had not been properly included in the T1 returns; and
Timing – included information that was not one year past due.

Principal applicant's wife:

Not voluntary – CRA had initiated enforcement actions against a related taxpayer prior to the date of voluntary disclosure; and

No penalty – included a year that did not involve a penalty.

Stoneridge Management:

Not voluntary – CRA had initiated enforcement actions against a related taxpayer prior to the date of voluntary disclosure;
No penalty – did not involve a penalty for some years; and
Timing – included information that was not one year past due.

Worsfold Trust:

Not voluntary – CRA had initiated enforcement actions against a related taxpayer prior to the date of voluntary disclosure; and
No penalty – did not involve a penalty for some of the years.

[31] Between April 25 and 28, 2008, all the applicants filed separate requests for second level reviews. The principal applicant's request included a receipt dated September 6, 2005 from DioGuardi acknowledging a payment of $45 to cover an assessment and legal opinion fee.

Additional Submissions

[32] In letters dated October 5, 2009, July 30, 2010 and September 9, 2010, applicants' counsel made additional submissions in support of their voluntary disclosures.

[33] The first letter (October 5, 2009) provided clarification on alleged inaccuracies, namely that:

1. The disclosure was not made as a reaction to the audit;

2. The principal applicant fully intended to make the disclosure;

3. The disclosure was materially complete; and

4. The audit did not sufficiently constitute an enforcement action on which to deem the disclosure involuntary.

[34] In the letter dated July 30, 2010, applicants' counsel reviewed provisions in the Guidelines and applied them to the facts of this case. The voluntary aspect of disclosure, the completeness of the disclosure and the exercise of discretion were discussed. The following points were also included in this submission:

1. Email dated September 21, 2005 and apparently from Philippe DioGuardi to the principal applicant stating that "our opinion of your current tax situation" is that "you are eligible for a tax amnesty";

2. Letter dated September 29, 2008 to the principal applicant from Dean McIntosh, investigator of the Enforcement Division of CRA. The letter proposes an adjustment of $132,606 to the principal applicant's 2004 T1 general income tax and benefit return. The letter also states that penalties will be applied to this adjustment and sets out the basis for which the CRA proposed that charges be laid against the principal applicant under section 239 of the *Income Tax Act*; and

3. Notice of Reassessment from CRA dated November 12, 2008.

[35] Finally, the following documents were included in the letter dated September 9, 2010:

1. Letter from Brad Huggins, the corporate accountant for Stoneridge, to Dean McIntosh (dated August 5, 2008) with attachments:

a. CRA question sheet indicated that Brad Huggins likely had a call regarding the audit with Larry Burton on October 3, 2005, and had a conversation with the principal applicant on either October 3 or 4, 2005; and

b. Brad Huggins' timesheet (for October 4 and 5, 2005) indicating that Brad Huggins had a call with Dave Turk on October 4, 2005: "Two hours, audit prep, call Dave T.";

2. Bell print-outs of the principal applicant's personal communications showing that he placed calls on September 23, 2005 and October 3, 2005 to DioGuardi Tax Law; and

3. Information to obtain production order which included:

a. References to the principal applicant's journal in which an entry labeled "Brad" (from Stoneridge's accounting firm) precedes an entry for DioGuardi (allegedly suggesting that the principal applicant communicated with Stoneridge's accountant before touching base with DioGuardi).

b. Statement that Paul DioGuardi provided an affidavit claiming that he met with the principal applicant at 1:30 p.m. on October 5, 2005, at which time the principal applicant signed an agreement. No information was provided as to when the date of this meeting was set or whether it was arranged through the internet or a phone conversation.

Officer's Decisions

[36] In response to the applicants' requests for second level reviews, their files were transferred to a separate CRA office in St. Catharines. The officer tasked with these reviews stated that the IC00-1R were applied and the Guidelines were considered. To maintain independence and impartiality, the officer also stated that this review was kept separate from the first level review.

[37] Separate decisions were issued for each applicant. Each decision consisted of a letter and a report with more detailed explanations of the underlying reasons. All the decisions included: a summary of the sequence of events leading up to the principal applicant's disclosure and the audit of Stoneridge; a description of the share structures for Stoneridge and its associated companies

(GLD Holdings Inc., Burton Custom Homes Inc. and Lighthouse Developments Inc.) with an acknowledgment that all of these companies were mentioned in the initial audit letter; and an observation that the principal applicant owned shares in Stoneridge and one or more of the associated companies.

[38] The following details were included in the individual decisions.

Principal Applicant (Graham Worsfold)

[39] In a letter dated October 22, 2010, the officer denied the principal applicant's second level review request on his personal T1 tax returns. The officer observed that the effective date of disclosure was October 5, 2005, at which time CRA had already commenced an enforcement action against Stoneridge, a related party. Based on the timeline of events, the officer deemed it reasonable to expect that on being made aware of CRA's intention to audit Stoneridge, Larry Burton and Brad Huggins would have been in immediate contact with all of the corporation's directors and/or shareholders. Therefore, the officer concluded that the principal applicant's disclosure was made with knowledge of an enforcement action against Stoneridge.

[40] In the report dated November 9, 2010, the officer noted that the principal applicant's communications with DioGuardi in September 2005 had occurred before both the audit notification and the subsequent disclosure. This, coupled with the fact that the principal applicant had not filed any tax returns or reported income to the CRA since coming to Canada, rendered it reasonable that the CRA would have uncovered the income disclosed by the principal applicant. As the disclosure

was deemed non-voluntary, the officer did not consider the remaining three conditions outlined in the IC00-1R.

[41] In a letter dated November 10, 2010, the officer also denied the principal applicant's second level review request on his foreign information returns. Similar reasons were provided as those set out above for his personal T1 tax returns.

Lyn Worsfold

[42] In the decision letter dated November 17, 2010, the officer observed that Lyn Worsfold and the principal applicant are the settlors and trustees of the Worsfold Trust. In addition, the officer noted that the second level review had determined that title to a property being reviewed in the Stoneridge audit had been registered in Lyn Worsfold's name. Therefore, although the audit had not been commenced against Lyn Worsfold, the officer concluded that it was reasonable to believe that the information disclosed by Lyn Worsfold would have been uncovered during the course of the audit. On this basis, the officer found that the disclosure by applicant Lyn Worsfold was not voluntary and her second level review request was denied.

[43] In the report dated November 12, 2010, the officer again noted that Lyn Worsfold and her husband (the principal applicant) were settlors, trustees and primary beneficiaries of the Worsfold Trust. The officer stated that the timeline of events made it reasonable to expect that the principal applicant would have informed his wife that the audit was underway. The officer also acknowledged that the effective date of the initial disclosure was October 5, 2005, although the

request to include Lyn Worsfold's 2001 T1 personal tax return and T1135 foreign income verification statement for 2001 to 2005 was not made until August 31, 2006. Based on the review of the documentation on file, the officer believed that there was sufficient information to conclude that CRA would have uncovered the information disclosed by the principal applicant's spouse by way of the Stoneridge audit.

Stoneridge Management

[44] In a letter dated November 10, 2010, the officer concluded that Stoneridge Management's disclosure was not voluntary because it was prompted by the principal applicant's disclosure. The officer found that through the Stoneridge audit, it was reasonable to believe that CRA would have uncovered the income disclosed by the principal applicant, including the T4 earnings from Stoneridge Management. It was also reasonable to believe that the unfilled T4 supplementaries and summaries, T2 returns and T1135 foreign income information returns for Stoneridge Management would have been addressed through the audit process. As Stoneridge Management did not meet the voluntary requirement, the officer did not consider the other three factors and Stoneridge Management's second level review request was denied.

[45] In the report dated November 9, 2010, the officer noted that the principal applicant, the sole shareholder of Stoneridge Management, received a T4 slip from Stoneridge Management in 2004 and in future years. The years 2003 and 2004 were initially slated for review in the Stoneridge audit. The officer acknowledged that the effective date of the initial disclosure by Stoneridge Management was August 2006, when its returns were first filed. However, for the sake of consistency, the VDP

officer (for the first level review) accepted October 5, 2005 as the effective date of disclosure. Based on the circumstances, the officer found that through the Stoneridge audit, it was reasonable to believe that the CRA would have uncovered the income being disclosed by the principal applicant, a shareholder of one or more of the associated companies. This discovery would have led to the discovery of Stoneridge Management's unfiled returns.

Worsfold Trust

[46] In a letter dated November 17, 2010, the officer found that Worsfold Trust's disclosure was not voluntary and its second level review request was therefore denied.

[47] In the report dated November 10, 2010, the officer acknowledged that the principal applicant and his wife were settlors, trustees and primary beneficiaries of the Worsfold Trust. The officer noted that although the effective date of disclosure was October 5, 2005, a request to include information on the trust in the disclosure was not received until August 30, 2006. Nevertheless, whether the effective date of disclosure was in fact October 5, 2005 or August 30, 2006, the officer found that the auditor had made direct contact with Stoneridge prior to both of these dates.

[48] The officer highlighted that the principal applicant, his wife and the Worsfold Trust had not filed any tax returns since their arrival in Canada in 2001 The officer noted that the principal applicant's no-name disclosure was filed on the same day as Stoneridge's accountant received the audit letter for Stoneridge, a related party. Therefore, based on the officer's review of the documentation on file, the officer believed that there was sufficient information to conclude that

CRA would have uncovered the unfiled returns and unreported income of the Worsfold Trust from the Stoneridge audit. As the Worsfold Trust's application was deemed non-voluntary, the officer did not evaluate the remaining three requirements and the second level review request was denied.

Penalties

[49] Based on the above decisions, late filing penalties were issued to all the applicants as follows:

Principal applicant:	
T1 tax returns	$175,000
Foreign information returns	$ 47,500
Lyn Worsfold:	$ 12,500
Stoneridge Management:	$ 8,000
Worsfold Trust:	$ 14,000

The total late filing penalty for all the applicants was $257,000.

[50] In response to these decisions, the applicants filed five separate notices of application. By order of this Court dated February 11, 2011, these applications were consolidated into the present application.

Issues

[51] The applicants submit the following points at issue:

1. Did the respondent err in law in its interpretation of subsection 220(3.1) of the *Income Tax Act* and the IC00-1R and Guidelines regarding the voluntary criteria?

2. Were the respondent's decisions based on reasonable findings of fact rationally supported by the material before it?

3. Did the respondent observe the principles of natural justice and procedural fairness in making the decisions?

4. Did the respondent act in bad faith in the decision making process?

[52] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer err in the finding that the applicants' disclosures were prompted by the audit of Stoneridge?

3. Did the officer base the decisions on any findings of fact that were made in a perverse or capricious manner or without regard to the material on the record?

4. Did the officer breach principles of natural justice or procedural fairness?

Applicants' Written Submissions

Standard of Review

[53] The applicants submit that the appropriate standard of review for decisions involving the exercise of discretion under subsection 220(3.1) of the *Income Tax Act* is reasonableness. Similarly, a reasonableness standard should be applied to the findings of fact made in these decisions. Questions of procedural fairness are reviewable on a standard of correctness.

Relation of Enforcement Action to the Applicants

[54] The applicants refer to subsection 6(a) of IC00-1R which states in part:

> A disclosure may not qualify as a voluntary disclosure under the above policy if it is found to have been made with the knowledge of an audit, investigation, or other enforcement action that has been initiated by the [CRA], or other authorities or administrations with which the [CRA] has information exchange agreements. [emphasis added]

[55] The applicants submit that in *L'Heureux v Canada (Attorney General)*, 2006 FC 1180, [2006] FCJ No 1479, this Court held that the words "audit, investigation, or other enforcement action" in the above provision should not be interpreted as being limited to activities initiated against the individual making the disclosure (at paragraph 24). The applicants submit that in this case there were no enforcement actions initiated against any of the them. Rather, the relevant enforcement action pertained to the audit of Stoneridge, a third party.

[56] The applicants highlight the CRA policy on enforcement actions against third parties, as provided in section 8.3.3 of the Guidelines:

> In some cases, it may also be appropriate to determine whether or not there has been enforcement activity on related program lines, partners of the client or corporations related to the client. In all cases, discretion should be applied in determining whether these activities should invalidate a disclosure based on how closely those activities relate to the disclosure.

[57] Turning to the enforcement action questions outlined in section 8.3.5 of the Guidelines, the applicants submit that they provide that not all enforcement actions invalidate a disclosure. Further, it is a reviewable error for the second of the two questions not to be expressly considered in the reasons for a VDP decision (see *Poon v Canada*, 2009 FC 432, [2009] FCJ No 1713 at paragraph 26). This second question focuses on finding a link between the enforcement action and the information being disclosed; not a link between any particular parties. The applicants submit that support for this position is provided in both *L'Heureux* above and *Amour International Mines d'Or Ltée v Canada (Attorney General)*, 2010 FC 1070, [2010] FCJ No 1325.

[58] The applicants submit that in the decisions, the officer erred by only focusing on whether they were related to Stoneridge and not whether the information they disclosed was related to the scope of the corporate audit. The applicants highlight the officer's acknowledgement that although the principal applicant's returns were not reviewed to determine the source of income, the officer was aware that none of the applicants reported income from Stoneridge. In addition, the officer did not review Stoneridge's T2 returns to consider whether there was a link between the information on the corporate tax returns and the information disclosed by each of the applicants.

[59] The applicants submit that by limiting the review to the relationships between the entities involved and not examining what was disclosed and audited, the officer blatantly disregarded the enforcement action questions. In so doing, the officer erred in law. The decisions should therefore be quashed and referred back for redetermination.

Findings of Fact

[60] The applicants also submit that the officer's findings that the disclosures were not voluntary were based on two unreasonable findings of fact that were not rationally supported by the material:

1. The principal applicant had knowledge of the audit of Stoneridge, which triggered the disclosure for all the applicants; and

2. Each applicant was related to Stoneridge and the audit of Stoneridge would have uncovered the information disclosed by each applicant.

[61] On the first finding of fact, the applicants submit that the decisions infer that they all had knowledge of the audit from either Larry Burton or Brad Huggins prior to the October 5, 2005 disclosure; knowledge which prompted their disclosures. However, the applicants submit that suspicion of such prior knowledge cannot alone form the basis of a reasonable decision. The decision must be based on a full objective evaluation of the facts.

[62] The applicants submit that there is independent evidence of another reason that explains the timing of their disclosure. This reason was described by both the principal applicant and Paul DioGuardi in their provision of details on the events preceding the filing of the principal applicant's

formal disclosure. Records (receipts, emails and phone logs) were filed to substantiate these claims. This evidence must be considered when weighing whether the disclosures were made as a result of knowledge of a pending audit. In addition, in preferring one version of events over the other, the officer erred in not providing an explanation for the preference chosen.

[63] The applicants also submit that the officer's testimony on cross-examination indicates that the officer ignored the correspondence and actions prior to the date that the auditor first attempted to contact Larry Burton. However, this information was relevant as it supported the alternative explanation of the timing of the applicants' disclosure. Had it been considered, any suspicions that the principal applicant only came forward in response to knowledge of the audit would have been eliminated. The applicants submit that this refusal to consider relevant evidence is a breach of procedural fairness and also renders the decisions unreasonable.

[64] The applicants highlight the officer's failure to contact any of the parties to evaluate the credibility of their statements. Rather, the officer made the decisions purely on the basis of a paper exercise and little deference is therefore owed. By failing to articulate a rationale for the officer's suspicions and by failing to ask further questions of the parties, the decisions are unsupported and the applicants are deprived of the right to know or respond to the allegations.

[65] Further, the applicants submit that the officer's conclusion that the principal applicant actively ran Stoneridge was based on a misapprehension of the facts and was not supported by the evidence. In support, the applicants note Larry Burton's: signature on the Stoneridge tax returns; repeated involvement in the audits; and position as the listed contact for Stoneridge. In addition, the

applicants highlight the principal applicant's: constant absence from Canada due to overseas travel for business; external employment and significant income from his computer development business; lack of income from Stoneridge; statement to the auditor that Larry Burton and David Turk were responsible for day to day operations as he was too busy with his other companies; and statement to the auditor that the only time the principal applicant got involved pertained to a loss of right-of-way that affected two of the properties purchased by Stoneridge.

[66] Similarly, the officer's finding that an authorized contact of a company would immediately inform all directors and shareholders of an audit was purely speculative without any evidentiary basis.

[67] The applicants also highlight the officer's limited analysis in the decisions as to how the applicants (other than the principal applicant) would have been made aware of the Stoneridge audit.

[68] For these reasons, the applicants submit that they were not properly accorded the benefit of doubt required in evaluations of the voluntariness of disclosures under section 8.3.5 of the Guidelines. The officer did not establish a reasonable basis in the evidence that supported a causal link between the notification of a third party of the planned audit and the applicants' disclosures. The applicants submit that this rendered the officer's decisions unreasonable.

[69] On the second finding of fact, the applicants submit that the officer erred in the shareholding analysis to determine whether the applicants were related to Stoneridge as defined under section 251 of the *Income Tax Act*. Nevertheless, none of the applicants could be considered related to

Stoneridge as the principal applicant only had a non-controlling one third indirect interest in the company and none of the other applicants owned any shares in it. In addition, submissions were provided throughout the second review that outlined the lack of relationship between the applicants and Stoneridge. It did not appear that the officer considered these submissions.

[70] The applicants further submit that the decision for the principal applicant did not include a statement that the officer believed the audit of Stoneridge would have uncovered the income that the principal applicant disclosed. As such, the officer did not address the second of the two enforcement action questions. As per *Poon* above, the decision should therefore be overturned.

[71] The applicants also criticize the officer's speculative domino effects approach to the Stoneridge audit. According to the officer's affidavit, the Stoneridge audit would have uncovered the fact that the applicants had not filed tax returns. However, the applicants submit that this approach disregards the CRA policies that expressly focus on the relationship between the information being audited and that being disclosed. In addition, the applicants submit that the officer's belief that more information would be uncovered was purely speculative and not supported by the evidence. In fact, the narrow scope of the Stoneridge audit would not have uncovered the actual information disclosed by the applicants in their voluntary disclosures.

[72] Finally, the applicants submit that the statement in the October 5, 2005 letter that "as the audit progresses, we may request additional records related to the associated companies and all respective shareholders" is a standard sentence used in audit notifications. Drawing similarities to the facts in *Amour Mines* above, the applicants submit that the mere possibility that an auditor could

have asked for additional records was insufficient to demonstrate that the enforcement action would have triggered an in-depth audit and uncovered the information filed by them. There was also nothing in the screener's comments, auditor's notes or audit plan to suggest that CRA intended to pursue or did pursue any audit of the applicants.

Principles of Natural Justice and Procedural Fairness

[73] The applicants submit that the officer did not observe the principles of natural justice and procedural fairness in making the decisions. The applicants submit that when exercising its discretion, the CRA is both required and expected to operate reasonably and by its own guidelines (see *Montréal (City) v Montreal Port Authority*, 2010 SCC 14, [2010] 1 SCR 427 at paragraph 33).

[74] As discussed above, the applicants submit that there were several procedural errors in the officer's decision, specifically:

1. Failure to follow the criteria set out in the Guidelines;
2. Failure to give the applicants the benefit of doubt;
3. Failure to provide adequate reasons;
4. Reliance on conjecture and speculation to support the findings of fact;
5. Considerations of irrelevant evidence of the relationship between parties; and
6. Ignoring relevant submissions and evidence.

[75] The applicants criticize the officer's failure to obtain the full audit and investigation file for the second level reviews. Rather, the officer relied on incomplete evidence and the opinion and summaries of others, which perpetuated the prejudices and errors identified at the first level reviews.

[76] The applicants further submit that the length of time that it took to process the second reviews, over two and a half years, was unacceptable and invalidated the subsequent decision.

[77] As such, the decisions were not made in accordance with the principles of natural justice and they lacked procedural fairness.

[78] In summary, the applicants submit that the decisions were not made in accordance with the Guidelines and inadequate and unsupportable reasons were provided. These were based on conjecture and cannot withstand probing examination. The decisions should therefore be set aside and the applicants' VDP requests reconsidered.

Respondent's Written Submissions

Standard of Review

[79] The respondent submits that the question of whether the officer failed to observe a principal of natural justice or procedural fairness is reviewable on a correctness standard. Conversely, the question of whether the officer based the decisions on erroneous findings of fact made in a perverse or capricious manner or without regard to the material is reviewable on a reasonableness standard.

Even if this Court finds the answer to these questions is in the affirmative, the respondent submits that this Court must consider the outcome of the officer's exercise of discretion in making the final decision.

[80] The respondent also submits that the standard of review of decisions made under the VDP is reasonableness. The respondent highlights the unstructured nature of the Minister's extraordinary statutory discretion and submits that this militates against a Court subjecting the decision process to close scrutiny.

Relation of Enforcement Action to the Applicants

[81] The respondent refers to the conditions for a valid VDP, as provided in IC00-1R. It submits that the application before this Court pertains to the first of these conditions; namely, that the VDP must be voluntary to be valid. The respondent submits that the enforcement action does not need to be against the taxpayer who made the disclosure (see *L'Heureux* above, at paragraph 24). To come to a determination on this issue, all relevant facts must be considered. If the officer finds that the disclosure was prompted by knowledge of an enforcement action, the respondent submits that this is a sufficient ground on which to deny the disclosure as it evidences that the taxpayer did not come forward voluntarily.

[82] With regards to the Guidelines, the respondent submits that it does not articulate strict tests that must be followed in determining whether a VDP application is valid.

[83] Although a direct link between the enforcement action and information disclosed can serve as proof that the disclosure was not voluntary, the respondent submits that an officer is not limited to relying on a direct link. An officer can also examine indirect links or other factors. This includes a finding that the taxpayer would not have come forward were it not for an enforcement action against a related party or the disclosure by a related party that was prompted by an enforcement action.

[84] The respondent submits that *Amour Mines* above, is not applicable to this case. The respondent distinguishes *Amour Mines* above, as pertaining to an enforcement action against an indirect shareholder. Conversely, in this case, the enforcement action is against an operating corporation. The respondent further notes that there was a clear sense that the disclosure was not prompted by an enforcement action by the CRA in *Amour Mines* above.

[85] The respondent also submits that the definition of the word “related” as used in the Guidelines, is not restricted to the definition set out in section 251 of the *Income Tax Act*. It is notable that the Guidelines do not refer to this provision of the *Income Tax Act* and the VDP itself is not limited to the *Income Tax Act* but applies to many legislative schemes. Therefore, rather than being used in a technical sense, the respondent submits that the term “related” refers to a relationship between two or more persons of a somewhat close nature.

Findings of Fact

[86] The respondent submits that the officer's findings of fact were reasonable and justified based on the evidence. In support, the respondent provides submissions on the following:

1. Voluntariness of principal applicant's disclosure;
2. Voluntariness of principal applicant's wife's disclosure;
3. Voluntariness of Stoneridge Management's disclosure;
4. Voluntariness of Worsfold Trust's disclosure;
5. Officer's obligation to gather additional information; and
6. Deference owed to the officer's findings of fact.

[87] On the first point, the respondent submits that the officer's finding that the principal applicant's disclosure was prompted by the enforcement action against Stoneridge was reasonable and justified. The respondent highlights:

1. Ties to Stoneridge: The principal applicant was a director and major shareholder of Stoneridge.
2. Property transactions: The principal applicant was involved in property transactions with Stoneridge that were reported in the company's books and records.
3. Chain of events: The chain of events, particularly the notification of the audit and the subsequent filing of the disclosures that occurred between October 3 and 5, 2005.
4. Scope of audit: The scope of the Stoneridge audit (including property transactions and T2 returns of associated corporations) rendered it a reasonable finding that the principal applicant would have known that the audit would lead to him.

5. Jennings property: The involvement of Larry Burton and the principal applicant in the Jennings property scheme rendered it likely that Larry Burton would have informed the principal applicant about the audit.

6. Lack of evidence: The lack of concrete evidence submitted by the applicants to show that the principal applicant's disclosure was not prompted by the enforcement action – particularly the lack of documentary evidence on the substance or purpose of the communications between the principal applicant and DioGuardi.

[88] The respondent also highlights the applicants' previous requests that the officer not communicate with those involved in the principal applicant's audit and investigation, followed by their subsequent critique of the officer abiding to these requests. Further, although some information was inaccurate in the VDP file, the respondent submits that while the applicants had the opportunity to do so, they did not address these errors or show that they would have made a difference in the officer's decisions.

[89] The respondent distinguishes this case from *Livaditis v Canada (Revenue Agency)*, 2010 FC 950, [2010] FCJ No 1184. Rather than preferring the account of a fellow CRA officer over that of a taxpayer, the officer in this case put more weight on the concrete evidence than on the principal applicant's allegations. It was within the officer's purview to weigh the evidence in this manner.

[90] In addition, the respondent submits that the officer did not limit the review to the relationship between the parties, but considered all the evidence as well as the relationship between

the information at issue. Based on this review, the officer reasonably concluded that the audit of Stoneridge, a closely-held company, would have led to the principal applicant.

[91] Finally, the respondent submits that neither the principal applicant's reasons for making the disclosure or the fact that he consulted with DioGuardi automatically renders his disclosure voluntary. Considering the idea of disclosure is not sufficient and a taxpayer that delays in coming forward does so at his own risk. Concrete action must be taken.

[92] The respondent submits that the officer's decision on the disclosure of the principal applicant's wife was also reasonable. An auditor reviewing the principal applicant's case would also have reasonably considered that of his wife. Further, the principal applicant's wife was not only related to Stoneridge through her husband, but also through her previous property transaction with the company.

[93] The respondent submits that the officer's decision on Stoneridge Management's disclosure was also reasonable. This company was closely associated with the principal applicant, who was its sole director and shareholder and who received substantial income therefrom.

[94] The Worsfold Trust is closely related to both the principal applicant and his wife. The couple act as trustees of the trust and it was set up for their benefit and that of their children. Further, as the principal applicant reported income from a trust, this would have led to an inquiry on whether there were other trusts from which he received an income. Finally, the couple would also have been required to submit foreign income verification statements with their tax returns.

[95] The respondent submits that the officer was not obliged to gather more information. In this case, the applicants made submissions and the officer considered them. The officer's decision to disagree with the applicants' submissions was well within the officer's discretionary power.

[96] Finally, the respondent submits that the applicants' submissions are, in essence, objections to the officer's weighing of the evidence. Weighing of the evidence lies at the heart of the officer's exercise of discretion and it is not the reviewing court's role to consider alternative assessments of the evidence. The Court must instead consider whether the officer's interpretation was reasonable.

Principles of Natural Justice and Procedural Fairness

[97] The respondent submits that the officer did not breach any principles of natural justice or procedural fairness.

[98] First, the respondent submits that the officer acted impartially in the second level review of the applicants' disclosures. The officer's consideration of whether the disclosures were voluntary revolved around the facts that took place in 2005 and were not impacted by subsequent events. In addition to preserve independence, the officer avoided discussing the case with the individuals previously involved with it.

[99] Second, the respondent submits that while IC00-1R is the governing instrument on VDP requirements and policy, the Guidelines are merely an internal document that is intended to assist VDP officers in the exercise of their function. The Guidelines do not grant legal rights to applicants.

There are no tests outlined in the Guidelines for determining the validity of disclosures, nor are there legitimate expectations that the CRA will strictly follow them or be bound by them. Further, the respondent submits that the Guidelines are not meant to provide an exhaustive list of factors that a VDP officer needs to follow, nor constrain the respondent's exercise of discretion in any way. In fact, an officer's strict application of the Guidelines, without exercising its own judgment in considering the merits of a particular case, would be a fettering of its discretion.

[100] The respondent also submits that the doctrine of legitimate expectation only creates procedural rights, not substantive rights. Therefore, to allege that the Guidelines must be strictly followed would incorrectly elevate them from an internal document to the status of law.

[101] The respondent submits that *Poon* above, is not applicable to this case. It is incompatible with the VDP officer's discretion that a test suggested in internal guidelines be mandatory in reviewing a file.

[102] Finally, the respondent submits that the officer's reasons were adequate to support the decisions. The respondent highlights the officer's reasons addressing the circumstances pertaining to the principal applicant's decision to come forward. In addition, the respondent submits that the officer did address the connection between the enforcement action against Stoneridge and the information disclosed by the applicants.

Analysis and Decision

[103] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[104] The jurisprudence has clearly established that the appropriate standard of review for discretionary decisions made in relation to the VDP is reasonableness (see *Charky v Canada (Attorney General)*, 2010 FC 1327, [2010] FCJ No 1641 at paragraphs 20 and 21; *L'Heureux* above, at paragraph 15; and *Palonek v Canada (Minister of National Revenue)*, 2006 FC 494, [2006] FCJ No 619 at paragraphs 72 and 73). This standard of review requires the Court to consider whether the decision-making process is transparent and intelligible and whether the decision is rationally justified. Both the ultimate result and the manner in which the result is achieved must fall within a "range of possible, acceptable outcomes" (see *Dunsmuir* above, at paragraph 47; and *Livaditis* above, at paragraph 25).

[105] Findings of fact made by the officer in making the decisions are also afforded a considerable degree of deference (see *Spence v Canada (Revenue Agency)*, 2010 FC 52, [2010] FCJ No 51 at paragraph 18).

[106] Conversely, issues of procedural fairness and natural justice are reviewable on a standard of correctness. Decision-makers are not entitled to any deference by the Court on these issues (see *Canada (Attorney General) v Sketchley*, 2005 FCA 404, [2006] 3 FCR 392 at paragraphs 52 to 54; and *Poon* above, at paragraph 17).

[107] **Issue 2**

Did the officer err in the finding that the applicants' disclosures were prompted by the audit of Stoneridge?

In this case, the officer's decisions ultimately rest on the finding that the applicants' disclosures were prompted by the audit of Stoneridge; thereby rendering their disclosures non-voluntary.

[108] To determine whether the officer's findings in relation to the voluntariness of the disclosure were reasonable, the underlying facts must be carefully considered. As a starting point, it is not in dispute that the principal applicant first made contact with Paul DioGuardi, a tax amnesty lawyer, on or about September 6, 2006. On September 21, 2009, Philippe DioGuardi, Paul DioGuardi's son, sent the following email to the principal applicant:

> Taxamnesty.ca Communication Backup
>
> From: support@taxamnesty.ca
>
> Sent: September 21, 2005 6:37:25 PM
>
> To: GWORSFOLD61@HOTMAIL.COM
>
> Here is our opinion of your current tax situation:
>
> Based on the information you have provided, you are eligible for a tax amnesty. Given the total of undeclared income and/or gain and

subject to considering your residency status, you may be committing criminal tax evasion under section 239 of the Income Tax Act. Prosecution could result in a prison sentence as well as criminal and civil penalties and fines that could be as much as %250 of the amount of the tax owing. A tax amnesty will resolve your situation.

Here are your next steps:

Contact me during the course of this week to represent you in this matter. I can be reached by telephone at 613-237-2222, 416-657-4408 or 1-866-758-9030. When we speak I will explain to you our services. In pursuing a tax amnesty for you, I will endeavor to negotiate a settlement with the authorities on the following terms:

- No charges for tax evasion.
- Complete waiver of all penalties.
- A limit to the interest owing or a limit on the number of years on which you must pay tax.

At all times your identity will be protected by the confidentiality of lawyer-client privilege. Your name will only be revealed after a settlement has been agreed by you.

It is extremely important that you file for a tax amnesty before the Canada Revenue Agency becomes aware of your tax evasion. I urge you to retain our services to begin your tax amnesty immediately.

I look forward to speaking with you by telephone ASAP.

Yours sincerely,

Philippe DioGuardi
613-237-2222
416-657-4408
1-866-758-9030

[109] The principal applicant's phone records show that he made a telephone call to the DioGuardi law office on September 21, 2009 at which time a meeting between the DioGuardi law firm and the principal applicant was set up. The meeting was subsequently held and it was

determined that a voluntary disclosure should be made. There was no evidence that the Stoneridge audit was discussed at the meeting.

[110] On October 3, 2005, the CRA auditor first spoke with Larry Burton, a director of Stoneridge, to inform him of the audit. Two days later, in the afternoon of October 5, 2005, the auditor faxed the initial audit letter to Brad Huggins, the corporate accountant of Stoneridge. Mr. Huggins was not the principal applicant's accountant and there was no clear evidence of contact between Mr. Huggins and the principal applicant. The principal applicant's disclosure was filed an hour after the auditor faxed the initial audit letter to Mr. Huggins.

[111] In the report on the second level request, the officer made frequent use of the word "alleged" to describe certain factual statements made by the principal applicant and his tax advisors. The officer ultimately found that the facts indicated that the applicants' disclosures were not voluntary.

[112] The requirement that a disclosure be voluntary is set out in the first condition for a valid disclosure in IC00-1R, as follows:

> **Conditions for a valid disclosure**
>
> 6. A valid voluntary disclosure is defined by the following four conditions:
>
> (a) The CCRA determines that the disclosure is **voluntary**.
>
> The disclosure must be voluntary. The client has to initiate the voluntary disclosure. A disclosure may not qualify as a voluntary disclosure under the above policy if it is found to have been made with the knowledge of an audit, investigation, or other enforcement action that has been initiated by the CCRA, or other authorities or administrations with which the CCRA has information exchange agreements.

This is the only condition for a valid disclosure that is at issue in this case.

[113] The effective date of the disclosure is the date on which CRA receives the disclosure; in this case that date was October 5, 2005.

[114] It is my view that there is no evidence before me that would lead to the conclusion that any of the applicants knew of the existence of an audit of Stoneridge by CRA. In fact, the evidence points the opposite way. The respondent has accepted that there is no clear evidence that Stoneridge's accountant, Mr. Huggins, spoke with any of the applicants. The letters from DioGuardi to the CRA made no mention of an audit of Stoneridge.

[115] In addition, the facts of the case establish that the principal applicant took the first step in a process that ultimately led to the voluntary disclosures on October 5, 2005. Although the voluntary disclosure is not effective until the date received by CRA, the chain of events shows that the voluntary disclosure process which was initiated by the principal applicant on September 6, 2005 was not triggered by the audit of Stoneridge.

[116] The respondent simply relies on the inference that after the call with the auditor on October 3, 2005, the director Larry Burton would have been in immediate contact with all of the directors and shareholders, including the principal applicant who was also a director. The respondent submits that this alleged contact then caused the principal applicant to file the voluntary disclosure. I do not accept this conclusion as there is insufficient factual basis for this conclusion. It is mere conjecture.

[117] I would also note that the officer did not deal with the facts submitted by Mr. DioGuardi and the principal applicant. The reason for the officer's preference of conjecture over the other facts is not clear from the officer's decisions. Concurrently, it is important to consider the closing words of section 8.3.5 of the Guidelines:

> If the answer to either of these question is "NO", the disclosure may be considered voluntary. Clients should be given the benefit of the doubt. [emphasis added]

In light of the lack of evidence in this case, it would appear that none of the applicants were granted the "benefit of the doubt".

[118] I conclude that the applicants had no knowledge of the audit when they filed their disclosures.

[119] In further support, I also note section 8.3.5 of the Guidelines which outlines the two enforcement action questions:

> 8.3.5 Impact of Enforcement Activity on Determination
>
> Not all enforcement action is automatic cause to invalidate a disclosure. If any of the above research suggests that the CCRA or a related administration has taken enforcement action against a disclosing client, partner, or related corporation, the VDP officer will need to consider whether the disclosure can still be considered voluntary. For example:
>
> - a source deduction audit may have no relation at all to a GST disclosure that is being made;
>
> - the CCRA may have established an audit protocol with a large file client and the client may have disclosed a matter unrelated to the audit.

> Therefore, when a VDP officer discovers that enforcement actions have begun against a client, the following judgments should be made:
>
> - Was any direct contact made with the client or is the client likely to have been aware of the enforcement action?
>
> - Is it likely that the CCRA would have uncovered the information being disclosed based on this enforcement action?
>
> If the answer to either of these questions is "NO", the disclosure may be considered voluntary. Clients should be given the benefit of the doubt.

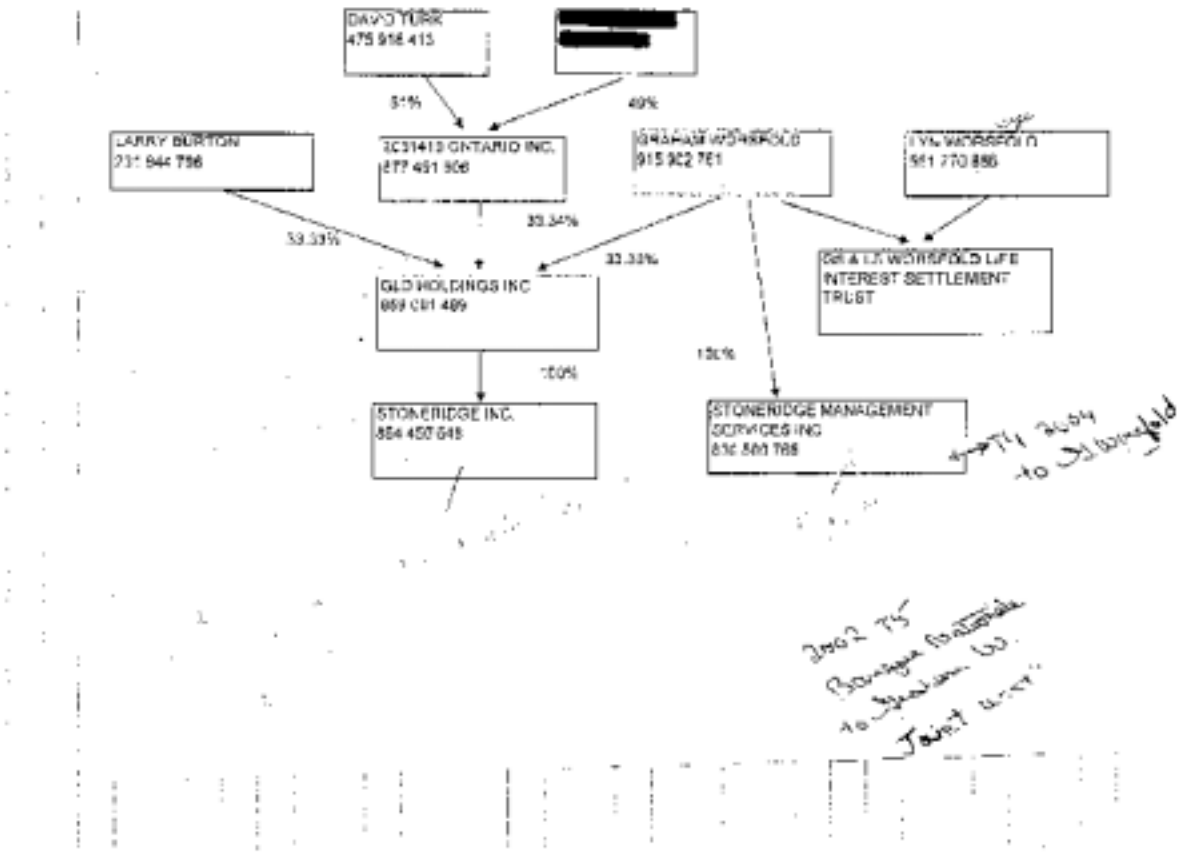
[120] To begin, it is important to note that no audit was being done on any of the applicants. The audit or enforcement action was being done on Stoneridge; an unrelated company. The only connection seems to be that the principal applicant was a director of Stoneridge.

Was any direct contact made with the client or is the client likely to have been aware of the enforcement action?

[121] I have already dealt with the facts as they relate to the principal applicant under this first question. As I concluded that there was insufficient evidence that the principal applicant had knowledge of the audit of Stoneridge when he made his voluntary disclosure on October 5, 2005, this first question must be answered in the negative. The same is also true for the other applicants as there is no evidence that any of them were contacted or were aware of the enforcement action relating to Stoneridge.

Is it likely that the CRA would have uncovered the information being disclosed based on the enforcement action?

[122] It may be helpful at this point to look at a chart prepared by an official at CRA which shows the various entities involved.



[123] With respect to the principal applicant, the officer must decide whether it was likely that the audit of Stoneridge would have uncovered the information contained in his voluntary disclosure. I have reviewed the decision of the officer and I am of the view that this question was not addressed by the officer. The most that could be said is that the officer looked at the relationship between some of the parties.

[124] There is no doubt that the officers were aware that this question should have been answered as the following e-mail was sent to George Deszpoth, the first level review officer by Harold Howard C.G.A.:

> From: Howard, Harold [Harold.Howard@cra-arc.gc.ca]
> Sent: Thursday, March 22, 2007 4:11 PM
> To: Deszpoth, George
> Subject: VDP Case for your info
> Follow Up Flag: Follow up
> Flag Status: Flagged
> Attachments: L'Heureux v AGC, 2006 FC 1180.doc
>
> George sorry I missed your call. But I thought it best to answer by email as I wanted to send the court case.
>
> with respect to your 3 points
>
> . . .
>
> Third issue – related party enforcement action. Review the attached case – it may shed some light on the situation.
>
> Questions to ask – Is the income on the T1 related to the corp. audit? If so there is a link.
>
> . . .
>
> Harold Howard, CGA
> Senior Officer, VDP /
> Enforcement & Disclosures Directorate / Direction de l'exécution et des divulgations
> Compliance Programs Branch
> Tel. 613-946-5136 / Fax. 613-948-8792

[125] In the applicants' oral submissions, Mr. Howard is referred to as the CRA's expert on voluntary disclosure matters. As of the time of the audit, the principal applicant had not shown any income from Stoneridge. Consequently, the disclosed T1 income has no connection or link with the audit.

[126] In addition, had the officer assessed the submissions made by Paul DioGuardi with respect to this question, the officer may well have found that the CRA would not, as a result of the audit of Stoneridge, have uncovered the information being disclosed by the principal applicant. There was simply no connection between the T1 income from Stoneridge Management and any audit findings from enforcement action against Stoneridge. The same can be said for the other applicants.

[127] In *Poon* above, Madam Justice Sandra Simpson of this Court stated at paragraphs 21 to 26:

> 21 The question is whether, having indicated in the Decision that he was applying the Guidelines, the Director was required to address section 8.3.5 thereof. It indicates that "Not all enforcement action is automatic cause to invalidate a disclosure".
>
> 22 As stated above, the Guidelines suggest, in part, that:
>
> > [...] when a VDP officer discovers that enforcement actions have begin against a client, the following judgments should be made:
> >
> > [Question 1] Was any direct contact made with the client or is the client likely to have been aware of the enforcement action?
> >
> > [Question 2] It is likely that the CRA would have uncovered the information being disclosed based on this enforcement action?
>
> If the answer to either of these questions is "NO", the disclosure may be considered voluntary. Clients should be given the benefit of the doubt.
>
> 23 The Decision refers to the Guidelines and provides fairly detailed reasons for explaining, in answer to the first question, why the Director concluded that the Applicant was aware of CRA's enforcement action against APS.
>
> 24 What is missing is any mention in the Decision of the Director's reasoning and conclusion about the second question.

> 25 The Applicant said, with regard to the second question, that any enforcement action CRA took against APS would not have revealed all the personal sources of income described in the Personal Disclosure. In particular, he referred to investment income, rental income and income from employers other than APS.
>
> 26 The Director's failure to deal with the second question in the Decision means that he has not adequately explained why he exercised his discretion to reject the Applicant's Personal Disclosure.

[128] In my view, the same situation arises in the present case. The second question that the officer must pass judgment on was simply not addressed. A review of the material in the record does not assist in this respect. The officer's decision is therefore unreasonable and must be set aside on that basis.

[129] Also, with respect to the knowledge of the applicants in relation to the enforcement action against Stoneridge, the officer's treatment of the evidence provided by the principal applicant, and his lawyer Paul DioGuardi was unreasonable. Why was it not accepted? No analysis or reason was provided. It was simply referred to as being "alleged".

[130] In my view, the same reasoning applies to all of the other applicants and the decisions with respect to them are therefore also unreasonable.

[131] Because of my finding on this issue, I need not deal with the remaining issues.

[132] The application for judicial review is allowed and the applicants' request for penalty and interest relief under the VDP are to be reconsidered by the Minister.

[133] The applicants shall have their costs of the application.

[134] A copy of these reasons for judgment and judgment are to be placed on files T-2049-10, T-2050-10, T-2077-10 and T-2078-10.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the applicants' request for penalty and interest relief under the voluntary disclosures program are to be reconsidered by the Minister.

2. The applicants shall have their costs of the application.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Federal Courts Act, RSC 1985, c F-7

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.
. . .	. . .
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(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;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(f) acted in any other way that was contrary to law.	f) a agi de toute autre façon contraire à la loi.

Income Tax Act, RSC 1985, c 1 (5th Supp)

220.(3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.	220.(3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, 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.
. . .	. . .
239. (1) Every person who has	239. (1) Toute personne qui, selon le cas :
. . .	. . .
(d) wilfully, in any manner, evaded or attempted to evade compliance with this Act or payment of taxes imposed by this Act, or	d) a, volontairement, de quelque manière, éludé ou tenté d'éluder l'observation de la présente loi ou le paiement d'un impôt établi en vertu de cette loi;
. . .	. . .
is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to	commet une infraction et, en plus de toute autre pénalité prévue par ailleurs, encourt, sur déclaration de culpabilité par procédure sommaire :
(f) a fine of not less than 50%, and not more than 200%, of the amount of the tax that was sought to be evaded, or	f) soit une amende de 50 % à 200 % de l'impôt que cette personne a tenté d'éluder;
(g) both the fine described in paragraph 239(1)(f) and imprisonment for a term not exceeding 2 years.	g) soit à la fois l'amende prévue à l'alinéa f) et un emprisonnement d'au plus 2 ans.

251. (1) For the purposes of this Act,

(a) related persons shall be deemed not to deal with each other at arm's length;

(b) a taxpayer and a personal trust (other than a trust described in any of paragraphs (a) to (e.1) of the definition "trust" in subsection 108(1)) are deemed not to deal with each other at arm's length if the taxpayer, or any person not dealing at arm's length with the taxpayer, would be beneficially interested in the trust if subsection 248(25) were read without reference to subclauses 248(25)(b)(iii)(A)(II) to (IV); and

(c) where paragraph (b) does not apply, it is a question of fact whether persons not related to each other are at a particular time dealing with each other at arm's length.

(2) For the purpose of this Act, "related persons", or persons related to each other, are

(a) individuals connected by blood relationship, marriage or common-law partnership or adoption;

(b) a corporation and

(i) a person who controls the corporation, if it is controlled by one person,

(ii) a person who is a member of a related group that controls the corporation, or

(iii) any person related to a person described in subparagraph 251(2)(b)(i) or 251(2)(b)(ii); and

(c) any two corporations

251. (1) Pour l'application de la présente loi :

a) des personnes liées sont réputées avoir entre elles un lien de dépendance;

b) un contribuable et une fiducie personnelle (sauf une fiducie visée à l'un des alinéas a) à e.1) de la définition de « fiducie » au paragraphe 108(1)) sont réputés avoir entre eux un lien de dépendance dans le cas où le contribuable, ou une personne avec laquelle il a un tel lien, aurait un droit de bénéficiaire dans la fiducie si le paragraphe 248(25) s'appliquait compte non tenu de ses subdivisions b)(iii)(A)(II) à (IV);

c) en cas d'inapplication de l'alinéa b), la question de savoir si des personnes non liées entre elles n'ont aucun lien de dépendance à un moment donné est une question de fait.

(2) Pour l'application de la présente loi, sont des « personnes liées » ou des personnes liées entre elles :

a) des particuliers unis par les liens du sang, du mariage, de l'union de fait ou de l'adoption;

b) une société et :

(i) une personne qui contrôle la société si cette dernière est contrôlée par une personne,

(ii) une personne qui est membre d'un groupe lié qui contrôle la société,

(iii) toute personne liée à une personne visée au sous-alinéa (i) ou (ii);

c) deux sociétés :

(i) if they are controlled by the same person or group of persons,

(ii) if each of the corporations is controlled by one person and the person who controls one of the corporations is related to the person who controls the other corporation,

(iii) if one of the corporations is controlled by one person and that person is related to any member of a related group that controls the other corporation,

(iv) if one of the corporations is controlled by one person and that person is related to each member of an unrelated group that controls the other corporation,

(v) if any member of a related group that controls one of the corporations is related to each member of an unrelated group that controls the other corporation, or

(vi) if each member of an unrelated group that controls one of the corporations is related to at least one member of an unrelated group that controls the other corporation.

(3) Where two corporations are related to the same corporation within the meaning of subsection 251(2), they shall, for the purposes of subsections 251(1) and 251(2), be deemed to be related to each other.

(3.1) Where there has been an amalgamation or merger of two or more corporations and the new corporation formed as a result of the amalgamation or merger and any predecessor corporation would have been related immediately before the amalgamation or merger if the new corporation were in existence at that time, and if the persons who were the shareholders of the new corporation immediately after the amalgamation or

(i) si elles sont contrôlées par la même personne ou le même groupe de personnes,

(ii) si chacune des sociétés est contrôlée par une personne et si la personne contrôlant l'une des sociétés est liée à la personne qui contrôle l'autre société,

(iii) si l'une des sociétés est contrôlée par une personne et si cette personne est liée à un membre d'un groupe lié qui contrôle l'autre société,

(iv) si l'une des sociétés est contrôlée par une personne et si cette personne est liée à chaque membre d'un groupe non lié qui contrôle l'autre société,

(v) si l'un des membres d'un groupe lié contrôlant une des sociétés est lié à chaque membre d'un groupe non lié qui contrôle l'autre société,

(vi) si chaque membre d'un groupe non lié contrôlant une des sociétés est lié à au moins un membre d'un groupe non lié qui contrôle l'autre société.

(3) Lorsque deux sociétés sont liées à une même société au sens du paragraphe (2), elles sont, pour l'application des paragraphes (1) et (2), réputées être liées entre elles.

(3.1) Lorsqu'il y a eu fusion ou unification de plusieurs sociétés et que la nouvelle société formée à la suite de la fusion ou l'unification ainsi que toute société remplacée auraient été liées immédiatement avant la fusion ou l'unification, si la nouvelle société avait existé à ce moment et si les personnes qui étaient les actionnaires de la nouvelle société immédiatement après la fusion ou l'unification avaient été les actionnaires de la nouvelle société à ce

merger were the shareholders of the new corporation at that time, the new corporation and any such predecessor corporation shall be deemed to have been related persons.

moment, la nouvelle société toute société remplacée sont réputées avoir été des personnes liées.

(3.2) Where there has been an amalgamation or merger of 2 or more corporations each of which was related (otherwise than because of a right referred to in paragraph 251(5)(b)) to each other immediately before the amalgamation or merger, the new corporation formed as a result of the amalgamation or merger and each of the predecessor corporations is deemed to have been related to each other.

(3.2) En cas de fusion ou d'unification de plusieurs sociétés qui étaient liées (autrement qu'à cause d'un droit visé à l'alinéa (5)b)) les unes aux autres immédiatement avant la fusion ou l'unification, la société issue de la fusion ou de l'unification et chacune des sociétés remplacées sont réputées avoir été liées les unes aux autres.

(4) In this Act,

(4) Les définitions qui suivent s'appliquent à la présente loi.

"related group"
« groupe lié »
"related group" means a group of persons each member of which is related to every other member of the group;

« groupe lié »
"related group"
« groupe lié » Groupe de personnes dont chaque membre est lié à chaque autre membre du groupe.

"unrelated group"
« groupe non lié »
"unrelated group" means a group of persons that is not a related group.

« groupe non lié »
"unrelated group"
« groupe non lié » Groupe de personnes qui n'est pas un groupe lié.

(5) For the purposes of subsection 251(2) and the definition "Canadian-controlled private corporation" in subsection 125(7),

(5) Pour l'application du paragraphe (2) et de la définition de « société privée sous contrôle canadien » au paragraphe 125(7):

(a) where a related group is in a position to control a corporation, it shall be deemed to be a related group that controls the corporation whether or not it is part of a larger group by which the corporation is in fact controlled;

a) le groupe lié qui est en mesure de contrôler une société est réputé être un groupe lié qui contrôle la société, qu'il fasse ou non partie d'un groupe plus nombreux qui contrôle en fait la société;

(b) where at any time a person has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently,

b) la personne qui, à un moment donné, en vertu d'un contrat, en equity ou autrement, a un droit, immédiat ou futur, conditionnel ou non :

(i) to, or to acquire, shares of the capital stock of a corporation or to control the voting rights of such shares, the person shall, except where the right is not exercisable at that time because the exercise thereof is contingent on the death, bankruptcy or permanent disability of an individual, be deemed to have the same position in relation to the control of the corporation as if the person owned the shares at that time,

(i) à des actions du capital-actions d'une société ou de les acquérir ou d'en contrôler les droits de vote, est réputée occuper la même position relativement au contrôle de la société que si elle était propriétaire des actions à ce moment, sauf si le droit ne peut être exercé à ce moment du fait que son exercice est conditionnel au décès, à la faillite ou à l'invalidité permanente d'un particulier,

(ii) to cause a corporation to redeem, acquire or cancel any shares of its capital stock owned by other shareholders of the corporation, the person shall, except where the right is not exercisable at that time because the exercise thereof is contingent on the death, bankruptcy or permanent disability of an individual, be deemed to have the same position in relation to the control of the corporation as if the shares were so redeemed, acquired or cancelled by the corporation at that time;

(ii) d'obliger une société à racheter, acquérir ou annuler des actions de son capital-actions dont d'autres actionnaires de la société sont propriétaires, est réputée occuper la même position relativement au contrôle de la société que si celle-ci rachetait, acquérait ou annulait les actions à ce moment, sauf si le droit ne peut être exercé à ce moment du fait que son exercice est conditionnel au décès, à la faillite ou à l'invalidité permanente d'un particulier,

(iii) to, or to acquire or control, voting rights in respect of shares of the capital stock of a corporation, the person is, except where the right is not exercisable at that time because its exercise is contingent on the death, bankruptcy or permanent disability of an individual, deemed to have the same position in relation to the control of the corporation as if the person could exercise the voting rights at that time, or

(iii) aux droits de vote rattachés à des actions du capital-actions d'une société, ou de les acquérir ou les contrôler, est réputée occuper la même position relativement au contrôle de la société que si elle pouvait exercer les droits de vote à ce moment, sauf si le droit ne peut être exercé à ce moment du fait que son exercice est conditionnel au décès, à la faillite ou à l'invalidité permanente d'un particulier,

(iv) to cause the reduction of voting rights in respect of shares, owned by other shareholders, of the capital stock of a corporation, the person is, except where the right is not exercisable at that time because its exercise is contingent on the death, bankruptcy or permanent disability of an individual, deemed to have the same position in relation to the control of the corporation as if the voting rights were so

(iv) de faire réduire les droits de vote rattachés à des actions, appartenant à d'autres actionnaires, du capital-actions d'une société est réputée occuper la même position relativement au contrôle de la société que si les droits de vote étaient ainsi réduits à ce moment, sauf si le droit ne peut être exercé à ce moment du fait que son exercice est conditionnel au décès, à la faillite ou à l'invalidité permanente d'un

reduced at that time; and

particulier,

(c) where a person owns shares in two or more corporations, the person shall as shareholder of one of the corporations be deemed to be related to himself, herself or itself as shareholder of each of the other corporations.

c) lorsqu'une personne est propriétaire d'actions de plusieurs sociétés, elle est réputée, à titre d'actionnaire d'une des sociétés, être liée à elle-même à titre d'actionnaire de chacune des autres sociétés.

(6) For the purposes of this Act, persons are connected by

(6) Pour l'application de la présente loi :

(a) blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;

a) des personnes sont unies par les liens du sang si l'une est l'enfant ou un autre descendant de l'autre ou si l'une est le frère ou la soeur de l'autre;

(b) marriage if one is married to the other or to a person who is so connected by blood relationship to the other;

b) des personnes sont unies par les liens du mariage si l'une est mariée à l'autre ou à une personne qui est ainsi unie à l'autre par les liens du sang;

(b.1) common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship to the other; and

b.1) des personnes sont unies par les liens d'une union de fait si l'une vit en union de fait avec l'autre ou avec une personne qui est unie à l'autre par les liens du sang;

(c) adoption if one has been adopted, either legally or in fact, as the child of the other or as the child of a person who is so connected by blood relationship (otherwise than as a brother or sister) to the other.

c) des personnes sont unies par les liens de l'adoption si l'une a été adoptée, en droit ou de fait, comme enfant de l'autre ou comme enfant d'une personne ainsi unie à l'autre par les liens du sang (autrement qu'en qualité de frère ou de soeur).

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

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