Date: 20080625

Docket: A-469-06

Citation: 2008 FCA 228

CORAM: **NOËL J.A.**
BLAIS J.A.
EVANS J.A.

BETWEEN:

334156 ALBERTA LTD.

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Calgary, Alberta, on June 25, 2008.

Judgment delivered from the Bench at Calgary, Alberta, on June 25, 2008.

REASONS FOR JUDGMENT OF THE COURT BY: EVANS J.A.

Date: 20080625

Docket: A-469-06

Citation: 2008 FCA 228

CORAM: **NOËL J.A.**
BLAIS J.A.
EVANS J.A.

BETWEEN:

334156 ALBERTA LTD.

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Calgary, Alberta, on June 25, 2008)

EVANS J.A.

[1] This is an appeal by 334156 Alberta Ltd. from a decision of the Federal Court (2006 FC 1133), in which Justice Dawson dismissed the appellant's application for judicial review of a decision by the Chief of Appeals at the Calgary Tax Services denying the appellant's application to be relieved of penalties payable for the late filing of its tax returns for the taxation years 1998-2002.

[2] Upholding a decision made at the first level review, the Chief of Appeals concluded that the appellant was not eligible for relief from penalties under the Voluntary Disclosure Program

("VDP"). The appellant's disclosure was not voluntary for the purpose of the VDP because it had "been made with the knowledge of an audit, investigation, or other enforcement action" initiated by the Canada Revenue Agency ("CFRA"). The Chief of Appeals reached this conclusion by relying on a contemporaneous computer diary system entry by a CRA official of telephone conversations. The first was on February 11, 2003, with Mr Arthur Wenngatz, a 50% shareholder in the appellant. The second was on April 14, 2003, with Diane Olsen, the appellant's accountant. The Non-Filer Unit of the CRA used the computer diary system, "SUDS", in which these entries were made

[3] The entry of the first call stated that the officer spoke to "director Arthur Wenngatz … regarding o/s T2s for yrs. 98-2001", who referred him, "re o/s returns", to "his accountant, Diane Olsen". The entry of the call to Ms Olsen stated that she had told him that she had "most of the information for the 98 to 2001 years" and expected to file the returns at the end of April.

[4] The appellant challenged the Chief of Appeals' decision on the basis of statements by Mr Wenngatz and Ms Olsen which were before the Chief of Appeals when he made his decision. Mr Wenngatz denied speaking to a CRA officer about the late filed returns, while Ms Olsen stated that her records only indicated enforcement activity with respect to the years 1998 and 1999. Accordingly, the appellant argued, there was no evidence on which the Chief of Appeals could have based his negative decision. It was conceded that there was knowledge of enforcement activity respecting the years 1998 and 1999; only 2000 and 2001 were in dispute.

[5] After conducting a pragmatic and functional analysis, Justice Dawson held that unreasonableness *simpliciter* was the standard of review applicable to the Chief of Appeals' discretionary decision to deny the appellant "fairness relief" under the VDP, promulgated pursuant to subsection 220(3.1) of the *Income Tax Act*. Applying this standard, she concluded that the Chief of Appeals had drawn a reasonable inference from the computer entries about ongoing enforcement for the years 2000 and 2001 prior to the disclosure in February 2004, when the appellant filed the late returns.

[6] The appellant also argued that, even if the conversations with Mr Wenngatz and Ms Olsen occurred as the Chief Officer found, their knowledge of enforcement activity could not be attributed to the appellant because only Irene Wenngatz, a 50% shareholder and sole director and officer of the appellant, was authorized to speak to the CRA about its tax affairs. Justice Dawson refused to consider this argument because it was being advanced by the appellant for the first time on judicial review, and had not been put to the Chief of Appeals.

[7] Substantially for the reasons given by Justice Dawson, we see no reviewable error in the Chief of Appeals' decision. In view of the considerable deference given to administrative fact-finding, it cannot be said to have been unreasonable for the Chief of Appeals to have preferred the evidence provided by the computer entries to the subsequent statements of Mr Wenngatz and Ms Olsen.

[8] It was not necessary on the simple facts of this informal proceeding for the Chief of Appeals to have stated expressly that he had considered the statements of Mr Wenngatz and Ms Olsen and to have explained why he preferred the evidence provided by the SUDS' entries.

[9] We would only add this. It is now no longer appropriate for a court to review an administrative decision on a standard of unreasonableness *simpliciter*. However, to the extent that there is a difference between unreasonableness *simpliciter* and the standard of reasonableness articulated in *Dunsmuir v, New Brunswick*, 2008 SCC 9, it is not material on the facts of this case.

[10] For these reasons, the appeal will be dismissed with costs.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	**A-469-06**
(AN APPEAL FROM THE JUDGMENT OF THE HONOURABLE MADAM JUSTICE DAWSON DATED SEPTEMBER 26, 2006)	
STYLE OF CAUSE:	**334156 ALBERTA LTD. v. MINISTER OF NATIONAL REVENUE**
PLACE OF HEARING:	**CALGARY, ALBERTA**
DATE OF HEARING:	**June 25, 2008**
REASONS FOR JUDGMENT OF THE COURT BY:	**(NOËL, BLAIS & EVANS JJ.A.)**
DELIVERED FROM THE BENCH BY:	**EVANS J.A.**
DATED:	**June 25, 2008**

APPEARANCES:

ARTHUR H. WENNGATZ	**FOR THE APPELLANT**
CARRIE MYMKO	**FOR THE RESPONDENT**

SOLICITORS OF RECORD:

CARON & PARTNERS LLP CALGARY, ALBERTA	**FOR THE APPELLANT**
JOHN H. SIMS, Q.C. DEPUTY ATTORNEY GENERAL OF CANADA	**FOR THE RESPONDENT**