Federal Court of Appeal  Cour d'appel fédérale

Date: 20121024

Docket: A-309-11

Citation: 2012 FCA 266

CORAM: **PELLETIER J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

LAWRENCE ABRAHAM, WALLACE ABRAHAM, WALTER ABRAHAM, ANTHONY ALEXANDER, HENRY BOUBARD, RICHARD BOUCHIE, NEIL BOULETTE, GEORGE BRUYERE, DANIEL BUNN, JASON BUNN, JOSEPH BUNN, EVA MARIE COURCHENE, HAROLD COURCHENE (DECEASED), JASON COURCHENE, JONATHON COURCHENE, LARRY COURCHENE, REINIE COURCHENE, WAYNE COURCHENE, BARRY FONTAINE, CURTIS FONTAINE, FELIX FONTAINE (DECEASED), GEORGE FONTAINE, HARRY FONTAINE, KEITH FONTAINE, NELSON FONTAINE, NORMAN FONTAINE, PETER FONTAINE (DECEASED), RONALD FONTAINE, WILFRED LEO FONTAINE (DECEASED), BRADLEY FOUNTAIN, BRIAN DOUGLAS FOUNTAIN (DECEASED), DOUGLAS FOUNTAIN (DECEASED), MARK FOUNTAIN, ADRIAN GUIMOND, ALLAN GUIMOND, NORBERT GUIMOND, RANDAL PAUL GUIMOND, TERRY GUIMOND, DARRIN HATHER, ARTHUR HENDERSON, CHRIS HENDERSON, DONALD HENDERSON, FLOYD HENDERSON, JOHN HENDERSON, ALLAN HOUSTON, CLIFFORD HOUSTON, EDGAR HOUSTON, RAYMOND HOUSTON, VINCENT KUZDAK, HAROLD LAVADIER, ROGER LUSTY, KELVIN PAKOO, MARK PAKOO, NEIL PAKOO, RODERICK PAKOO, JOHN GLEN SANDERS, LEE GLENN SANDERSON, JAMES SETTE, HANK SIEGAL, WALTER SOUKA, JASON STARR, JOSEPH STRONGQUILL, DOUGLAS SWAMPY, RICHARD SWAMPY, KELLY ZACHARIAS

Respondents

Heard at Saskatoon, Saskatchewan, on March 12, 2012.

Judgment delivered at Ottawa, Ontario, on October 24, 2012.

REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRING REASONS BY:	PELLETIER J.A.
CONCURRED IN BY:	DAWSON J.A.

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Respondents

REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from the judgment dated June 1, 2011 of the Federal Court (*per* Justice Campbell): 2011 FC 638.

[2] The Federal Court quashed a decision of a delegate of the Minister (the "Delegate") under subsection 152(4.2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). The Delegate had exercised her discretion against reassessing the respondents' 1985-1998 tax returns.

[3] The respondents had asked the Delegate for those reassessments, relying upon section 87 of the *Indian Act*, R.S.C. 1985, c. I-5 – an exemption applicable in some circumstances to aboriginal peoples and/or their property. They sought reassessments to exempt employment income they earned in those years at a pulp mill.

[4] The Federal Court reviewed the Delegate's decision on the standard of review of correctness and quashed it, finding that the respondents were entitled, at all times, to the section 87 exemption.

[5] For the reasons set out below, I would allow the appeal and restore the Delegate's decision. The applicable standard of review of the Delegate's decision is reasonableness and the Delegate's decision is reasonable.

A. Facts

(1) Background

[6] The respondents are all Sagkeeng Band members who were employed at the Tembec Pulp Mill in Pine Falls, Manitoba.

[7] The Band members have a long history of employment at the mill. In 1926, based on a promise that Band members would be employed in the mill, the Band surrendered lands for the purposes of building the mill. The mill was built and, consistent with the promise, Band members have worked in the mill until its closure.

(2) The respondents' requests for reassessment under subsection 152(4.2) of the *Income Tax Act*

[8] In 2003, the respondents asked the Minister to issue reassessments for every taxation year back to 1985, recalculating their tax on the basis that their employment income from the mill was exempt under section 87 of the *Indian Act*. The request for reassessment concerning the more recent taxation years fell within the normal reassessment period. The request for reassessment concerning the earlier taxation years fell outside of the normal reassessment period. For those years, subsection 152(4.2) of the *Income Tax Act*, as it read at the time, applied.

[9] Subsection 152(4.2) of the *Income Tax Act* is part of the taxpayer relief sections of the Act. As can be seen from the text of subsection 152(4.2), set out below, the Minister has the discretion to reassess an individual after the expiration of the normal reassessment period for a year, if the individual requests the reassessment to reduce the tax payable or permit a claim for a tax refund for that year. When the Minister exercises that discretion in the taxpayer's favour, the taxpayer is relieved from the usual requirement that a request for a reassessment can only be made within a particular period of time.

[10] Subsection 152(4.2) (the version enacted in S.C. 1994, c. 7, the relevant version in this case) provides as follows:

152. (4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining, at any time after the expiration of the normal reassessment period for a taxpayer who is an individual (other than a trust) or a testamentary trust in respect of a taxation year,	**152.** (4.2) Malgré les paragraphes (4), (4.1) et (5), pour determiner à un moment donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable – particulier, autre qu'une fiducie, ou fiducie testamentaire – pour une année d'imposition le remboursement auquel le contribuable a droit à ce moment pour l'année ou la réduction d'un montant payable pay le contribuable pour l'année en vertu de la présente partie, le minister peut, sur demande di contribuable:
(a) the amount of any refund to which the taxpayer is entitled at that time for that year, or	*a)* établir de nouvelles cotisations concernant l'impôt, les interest ou les pénalités payables par le contribuable pour l'année en vertu de la présente partie;
(b) a reduction of an amount payable under this Part by the taxpayer for that year,	
the Minister may, if application therefor has been made by the taxpayer,	
(c) reassess tax, interest or penalties available under this Part by the taxpayer in respect of that year, and	*b)* déterminer de nouveau l'impôt qui est repute, en application des

(d) redetermine the amount of tax, if any, deemed by subsection 119(2), 120(2), 120.1(4), 122.2(1), 122.5(3), 127.1(1), 144(9) or 210.2(3) or (4) of this Act or subsection 122.4(3) of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, as it applied to taxation years ending before 1991, to have been paid on account of the taxpayers tax under this Part for that year.	paragraphes 119(2), 120(2), 120.1(4), 122.2(1), 122.5(3), 127.1(1), 144(9) ou 210.2(3) ou (4) de la présente loi ou du paragraphe 122.4(3) de la Loi de l'impôt sur le revenue, chapitre 148 des Statuts révisés du Canada de 1952, dans sa version applicable aux années d'imposition se terminant avant 1991, avoir été payé au titre de l'impôt du contribuable pour l'année en vertu de la présente partie.

[11] The basis for the respondents' requests in 2003 for reassessments for every taxation year back to 1985 was section 87 of the *Indian Act*. In their view, while in every year from 1985 they had paid tax on income from employment at the mill, that income was exempt from taxation under that section.

[12] Section 87 of the *Indian Act* provides as follows:

87. Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal and Statistical Management Act*, the following property is exempt from taxation:	**87.** (1) Nonobstant toute autre loi fédérale ou provinciale, mais sous réserve de l'article 83 et de l'article 5 de la *Loi sur la gestion financière et statistique des premières nations*, les biens suivants sont exemptés de taxation:
(*a*) the interest of an Indian or a band in reserve lands or surrendered lands; and	*a*) le droit d'un Indien ou d'une bande sur une réserve ou des terres cédées;
(*b*) the personal property of an Indian or a band situated on a reserve.	*b*) les biens meubles d'un Indien ou d'une bande situés sur une réserve.

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.	(2) Nul Indien ou bande n'est assujetti à une taxation concernant la propriété, l'occupation, la possession ou l'usage d'un bien mentionné aux alinéas (1)*a*) ou *b*) ni autrement soumis à une taxation quant à l'un de ces biens.
(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(*a*) or (*b*) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.	(3) Aucun impôt sur les successions, taxe d'héritage ou droit de succession n'est exigible à la mort d'un Indien en ce qui concerne un bien de cette nature ou la succession visant un tel bien, si ce dernier est transmis à un Indien, et il ne sera tenu compte d'aucun bien de cette nature en déterminant le droit payable, en vertu de la *Loi fédérale sur les droits successoraux*, chapitre 89 des Statuts revisés du Canada de 1952, ou l'impôt payable, en vertu de la *Loi de l'impôt sur les biens transmis par décès*, chapitre E-9 des Statuts revisés du Canada de 1970, sur d'autres biens transmis à un Indien ou à l'égard de ces autres biens.

(3) Related proceedings in the Tax Court and this Court: the *Boubard* case

[13] Roughly at the same time the respondents were pursuing their request for reassessments on the basis of section 87 of the *Indian Act*, some of them were parties in *Boubard v. Canada*, 2008 TCC 133, aff'd 2008 FCA 392. At issue in *Boubard* was whether the respondents' employment income from the mill was exempt from taxation in the 2000-2002 taxation years by virtue of section 87 of the *Indian Act*. The respondents succeeded.

[14] After *Boubard*, the 2000-2002 taxation years were resolved; those taxation years before 2000 remained in issue in the subsection 154(4.2) request.

(4) The administrative decisions

[15] The respondents' request was considered through two levels of consideration. Ultimately, on November 12, 2009, the Delegate decided that the respondents were entitled to taxpayer relief under subsection 152(4.2) for the 1999 taxation year and following, but not for the 1985-1998 taxation years.

[16] The detailed basis for her decision will be outlined below. Broadly speaking, she was not satisfied that the Minister would have exempted the respondents' employment income from tax under section 87 of the *Indian Act* in the 1985-1998 taxation years.

(5) Proceedings in the Federal Court

[17] As mentioned above, the Federal Court quashed the Delegate`s decision. The Federal Court reviewed the Delegate's decision on the standard of review of correctness. It found that the respondents were entitled, at all times, to the section 87 exemption and so they were entitled to reassessments in all of the taxation years in issue.

B. Analysis

(1) The standard of review

[18] On appeal from the Federal Court's disposition of the application for judicial review, this Court`s task is to determine whether the Federal Court judge correctly determined the standard of review and applied it properly: *Canada Revenue Agency v. Telfer*, 2009 FCA 23.

[19] Relying on the legal nature of the question before the Delegate, the Federal Court found that the standard of review was correctness.

[20] The respondents submit that the Federal Court chose the proper standard of review. They submit that the Delegate's decision should be reviewed under the correctness standard of review.

[21] The respondents base their submission on a parsing of the task performed by the Delegate under subsection 152(4.2) of the *Income Tax Act*. They submit that the Delegate's decision involved two different steps.

- The first step was an assessment of the state of the law under section 87 of the *Indian Act* in each year during the period in question. The aim of this step was to assess whether the respondents were entitled to the tax exemption. This was mainly a question of interpreting the state of the jurisprudence under section 87.

- The second step was whether relief should be given under section 87 of the *Indian Act*. This was mainly a discretionary step.

[22] The respondents submit that what is truly in issue in this case is the first step. They say that step involved only legal interpretation. Accordingly, in their submission, the standard of review is correctness.

[23] In adopting correctness as the standard of review, the Federal Court found that the question before the Delegate was the respondents' legal entitlement to relief under section 87 of the *Indian Act*. As this was a legal question, the correctness standard applied (at paragraph 13).

[24] I disagree with the Federal Court. I do not accept that the question before the Delegate was the respondents' legal entitlement to relief under section 87 of the *Indian Act*.

[25] I also disagree with the respondents. I do not accept that the Delegate's decision should be parsed into two different steps for the purposes of determining the standard of review.

[26] Subsection 152(4.2) of the *Income Tax Act* does not give the respondents an entitlement to relief. Instead, it only gives them a right to ask the Minister to exercise his discretion to reassess after the expiration of the normal reassessment period.

[27] It must be recalled that under subsection 152(8) of the *Income Tax Act*, in the absence of a reassessment following a timely objection or a successful appeal, an assessment is final and binding. Later, the taxpayer may discover an error in the assessment, but it is too late – the taxpayer has no entitlement to have the error corrected. Rather, recourse is to be had under subsection 152(4.2) of the *Income Tax Act* – a request, not for an entitlement, but for an exercise of discretion. There is nothing in subsection 152(4.2) that requires the Minister to exercise his discretion in favour of the taxpayer if the taxpayer would be entitled to a tax benefit if he or she claimed within the regular reassessment period. In the words of this Court in *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153 at paragraph 6, "[t]he granting of relief is discretionary, and cannot be claimed as of right."

[28] In *Armstrong v. Canada*, 2006 FCA 119 at paragraph 29, this Court has held that the discretionary assessment of the Minister under subsection 152(4.2) is a broad one – whether a reassessment is warranted or appropriate in the circumstances.

[29] Parsing the subsection into two parts, a legal part and a discretionary part, as the respondents urge transforms the decision under subsection 152(4.2) from a single one of broad discretion into a two-part decision, one of legal entitlement and one of discretion. That is contrary to the above analysis and the thrust of this Court's decisions in *Armstrong* and *Lanno*.

[30] In addition, even if it were acceptable to bifurcate the Minister's task under subsection 152(4.2) of the *Income Tax Act* into two steps, the first step, the supposedly legal step, is not a pure

question of law. It is a question of mixed fact and law. In this case, the Delegate had to interpret the state of the law under section 87 of the *Indian Act* and assess how it applied to the factual circumstances of the respondent.

[31] Seen in this way, subsection 152(4.2) of the *Income Tax Act* is like any other section that vests a broad discretion in a decision-maker, a discretion founded upon legal and factual matters. Here, the Minister (or, in this case, the Delegate) must, in the words of section 71 of *Information Circular 07-1-Taxpayer Relief Provisions*, be "satisfied that such a refund or reduction would have been made if the return or request had been filed on time" – this is the component in the discretion that has some legal content – and may take into account a number of other factors, many of which are also enumerated in the Information Circular.

[32] Normally, exercises of discretion of this sort are subject to reasonableness review: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 at paragraph 27; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 53.

[33] Consistent with these Supreme Court decisions, this Court has twice adopted the reasonableness standard in reviewing exercises of discretion under subsection 152(4.2) of the *Income Tax Act*: *Lanno*, *supra* at paragraph 7; *Hoffman v. Canada (Attorney General)*, 2010 FCA 310 at paragraph 5. Where the jurisprudence has already determined "in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question," the issue of standard of review is settled: *Dunsmuir*, *supra* at paragraph 62. In my view, the above analysis

confirms that *Lanno* and *Hoffman* have satisfactorily determined the standard of review for exercises of discretion under subsection 152(4.2) of the *Income Tax Act*.

[34] The respondents submit that this Court's decision in *Bozzer v. Canada (Attorney General)*, 2011 FCA 186 is directly on point and requires that a correctness standard be adopted in this case. *Bozzer* is distinguishable. It concerned the interpretation of a different provision, subsection 220(3.1) of the *Income Tax Act*. As well, the precise issue in *Bozzer* was the meaning of the ten year limitation period set out in that subsection. That was a pure question of law, not an issue of discretion.

[35] The respondents have not cited any authority from this Court or from the Supreme Court of Canada suggesting that an exercise of discretion such as subsection 152(4.2) that is based on a broad array of circumstances, one of which has a legal component, is, by virtue of the presence of that legal component, subject to correctness review.

[36] Therefore, for the foregoing reasons, I conclude that the standard of review in this case is reasonableness.

(2) The meaning of reasonableness review

[37] In light of the submissions made before us, however, more must be said about what the reasonableness standard of review means in a case such as this.

[38] Before us, the Minister submitted that reasonableness is a deferential standard and so the Court can interfere only rarely in a case such as this. However, the respondents argued that there is a significant legal component to the Delegate's decision: whether on the law the Minister could have been satisfied at various times that respondents' employment income from the mill was exempt from tax under section 87 of the *Indian Act*. As we have seen, the respondents suggested that this legal component meant that the Delegate's decision was to be reviewed using the correctness standard, a submission I have rejected. But does this significant legal component in the decision affect in some way our assessment of the reasonableness of the Delegate's decision under subsection 152(4.2)?

[39] Some words offered in answer to this question may provide helpful guidance in future cases. Discretionary decisions are frequently made under subsection 152(4.2) and elsewhere in the *Income Tax Act*. Many of those decisions involve the exercise of discretion with a significant legal component. The argument before us revealed some uncertainty as to how reasonableness should be analyzed in such a case. This uncertainty should be resolved for the benefit of future cases.

[40] Further, reasonableness review is assuming greater and greater prominence in Canadian administrative law, and so any clarification of its meaning will yield significant dividends. Where, as here, the opportunity presents itself, we should do what we can to transform reasonableness review from a vague and impressionistic notion into a tangible and practical tool.

[41] As is well-known, reasonableness is concerned "mostly with the existence of justification, transparency and intelligibility within the decision-making process." But reasonableness "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." The discussion of a "range of possible, acceptable outcomes" recognizes that decision-makers "have a margin of appreciation within [that] range." See *Dunsmuir*, *supra* at paragraph 47.

[42] Reasonableness is a single standard of review. But asserting that there is a range of possible, acceptable outcomes begs the question as to how narrow or broad the range should be in a particular case. As the majority of the Supreme Court said in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59, while "[r]easonableness is a single standard," it "takes its colour from the context."

[43] That context affects the breadth of the ranges. The Supreme Court has confirmed that the range of acceptable and rational solutions depends on "all relevant factors" surrounding the decision-making: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraphs 17-18 and 23; *Halifax (Regional Municipality)*, *supra* at paragraph 44.

[44] For example, where the decision-maker is considering a discretionary matter that is based primarily on factual and policy matters having very little legal content, the range of possible, acceptable outcomes open to the decision-maker can be expected to be quite broad. As a practical

matter, the breadth of the range in that sort of case means that it will be relatively difficult for a party applying for judicial review of the decision to show that it falls outside of the range.

[45] In other cases, however, the situation might be different. For example, where the decision-maker is considering a discretionary matter that has greater legal content, the range of possible, acceptable outcomes open to the decision-maker might be narrower. Legal matters, as opposed to factual or policy matters, admit of fewer possible, acceptable outcomes.

[46] A good example of the constraining effect of legal matters when assessing the reasonableness of a discretionary decision can be found in *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193. In that case, the tribunal made a discretionary decision concerning remedies. The Court found that the standard of review of this discretionary decision was reasonableness. However, the discretion was not one where factual and policy-matters predominated. The tribunal was acting under a statutory provision requiring it to consider a list of factors when exercising its remedial discretion. Only those exercises of discretion based on the statutory list of factors could be said to be within the "range of possible, acceptable outcomes." The tribunal did not consider some of the statutory factors at all. As a result, this Court found the tribunal's discretionary decision to be unreasonable. For a similar approach, see *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 at paragraph 43.

[47] In *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71, the Court of Appeal for Ontario adopted the same framework for analyzing the reasonableness standard. Rouleau J.A., writing for the Court, acknowledged that the standard of

reasonableness embodied a single standard, that of deference, and that "[i]t is not necessary or appropriate to…assess the degree of deference within the reasonableness standard" (at paragraph 18). This being said, the size of the range of outcomes available to the decision-maker may be broad or narrow, depending on the circumstances (at paragraph 22):

> Applying the reasonableness standard will now require a contextual approach to deference where factors such as the decision-making process, the type and expertise of the decision-maker, as well as the nature and complexity of the decision will be taken into account. Where, for example, the decision-maker is a minister of the Crown and the decision is one of public policy, the range of decisions that will fall within the ambit of reasonableness is very broad. In contrast, where there is no real dispute on the facts and the tribunal need only determine whether an individual breached a provision of its constituent statute, the range of reasonable outcomes is, perforce, much narrower.

[48] A number of Supreme Court decisions are consistent with the above analysis of when the range of possible, acceptable outcomes is narrow or broad under the reasonableness standard. In the case of matters involving statutory interpretation, the Supreme Court has often articulated the range of possible, acceptable outcomes open to the administrative decision-maker in a narrow way, likely because of the specificity of the particular statutory provisions in issue: see, *e.g.*, *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37. Where the legal component in the decision is smaller, and where factual appreciation, specialized understandings and policies predominate, the Supreme Court has often articulated the range of possible, acceptable outcomes open to the administrative decision-maker in a broad way: see, *e.g.*, *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care*

Professionals, 2011 SCC 59, [2011] 3 S.C.R. 616; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Halifax (Regional Municipality)*, *supra*.

[49] This foregoing analysis suggests that although the reasonableness standard applies in this case, the legal aspects involved in the Delegate's decision tend to narrow the range of possible, acceptable outcomes. If, for example, the Delegate were to take an unacceptable view of the legalities, that might take her discretion outside of the range of possible, acceptable outcomes and render it unreasonable.

[50] In the end, however, despite the narrowness of the range of possible, acceptable outcomes available to the Delegate, I conclude that her exercise of discretion under subsection 152(4.2) of the *Income Tax Act* in this case fell within the range. It was reasonable.

(3) Applying the reasonableness standard of review: the Delegate's exercise of discretion was reasonable

[51] Certain features of the Delegate's decision lead to the conclusion that her decision was reasonable.

– I –

[52] In making her decision, the Delegate closely followed the relevant Information Circular, *Information Circular 07-1-Taxpayer Relief Provisions*, and reached an outcome that was consistent with it. As is well-known, Information Circulars such as this have the legal status as policies or guidelines, not laws.

[53] It would be open to a party to argue that the Delegate has misinterpreted subsection 152(4.2) of the *Income Tax Act* or that the Information Circular is inconsistent with subsection 152(4.2), such that the Delegate's reliance on the Information Circular is contrary to law. But the respondents do not make these arguments in this case.

[54] Compliance by an administrative decision-maker with unchallenged policy statements and guidelines has been taken to be an indicator – not a conclusive one – of reasonableness: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 72 ("a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section"); *Herman v. Canada (Citizenship and Immigration)*, 2010 FC 629; *Khoja v. Canada (Citizenship and Immigration)*, 2010 FC 142. Similarly, on occasion, a decision's unexplained deviation from policy statements and guidelines can raise concerns about its reasonableness: *Kane v. Canada (Attorney General)*, 2011 FCA 19 at paragraphs 44-56.

[55] Therefore, for the purposes of this case, compliance with the standards set out in the Information Circular – unchallenged in this case – can be taken as an indicator that the Delegate was, in the words of *Dunsmuir*, *supra*, acting within a range of acceptability and defensibility under subsection 152(4.2) of the *Income Tax Act*. The following analysis shows that the Delegate did comply with the Information Circular.

[56] Under paragraph 71 of the Information Circular, the Delegate's task was first to be "satisfied that…a refund or reduction would have been made if the return or request had been filed or made on time." The Delegate asked herself that very question.

[57] Also relevant are paragraphs 73, 87 and 88 of the Information Circular. Broadly speaking, these provisions prevent persons seeking reassessment after the normal deadlines have expired from taking advantage of later changes in the law or its application. These provisions read as follows:

> 73.…The ability of the CRA to allow an adjustment to amounts for a statute-barred tax year should not be used as a means to have issues reconsidered…[where the individual] chose not to challenge the issues through the normal objection/appeals processes….
>
> 87. CRA policy does not allow for the reassessment of a statute-barred return if the request is made as a result of a court decision (for more information, see Information Circular 75-7R3, Reassessment of a Return of Income). Requests made to reassess a statute-barred return based only on the successful appeal by another taxpayer will not be granted under subsection 152(4.2).
>
> 88. Similarly, knowledge of another taxpayer's negotiated settlement to resolve an objection, or another taxpayer's consent to judgment on an appeal, will not be extended to permit a reassessment of a taxpayer's statute-barred return under subsection 152(4.2), if the taxpayer has chosen not to protect his or her right of objection or appeal.

[58] The Delegate followed these provisions of the Information Circular. In her reasons for decision, she stated:

> The CRA policy also states that the taxpayer relief provisions are not an acceptable substitute for the retroactive application of an adverse decision of a court where the taxpayer has not protected his or her right of objection or appeal.

[59] For completeness, I would add that there is no suggestion that the Delegate fettered her discretion by using the Information Circular in the way she did. In the circumstances of this case, her compliance with the Information Circular is an indication that her decision was reasonable.

– II –

[60] The Delegate then assessed whether, in the words of paragraph 71 of the Information Circular, she was "satisfied that…a refund or reduction would have been made if the return or request had been filed or made on time." This entailed an examination of the case law concerning section 87 of the *Indian Act*. She looked at each taxation year, assessed what the state of the law under section 87 was at that time, and asked whether the respondents would be entitled to a reduction of tax in that year in light of the state of the law in that year.

[61] This methodology of conducting a year-by-year examination of the state of the law is supported by the wording of subsection 152(4.2) of the *Income Tax Act*. If the Delegate adopted a

methodology that were contrary to subsection 152(4.2), her exercise of discretion would fall outside the range of legal acceptability and defensibility. But that is not the case here.

– III –

[62] Following that methodology, the Delegate proceeded to assess the state of the law.

[63] For each of the respondents' taxation years 1985 to 1991, the Delegate concluded that she was not satisfied that the respondents' income from employment at the mill would have been exempt from tax under section 87 of the *Indian Act*. This was primarily due to the Supreme Court of Canada`s 1983 decision in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29.

[64] The Delegate's reasoning was as follows:

> In January 1983, the Supreme Court of Canada rendered its decision in the *Nowegijick* court case. In this case, the location of the employment income was found to be where the employer resided. If the individual was paid from the employer's head office, and the employer's head office was located on reserve lands, then the employment income would be considered tax exempt. Prior to this, the CRA policy based on IT-62 [Cancelled by Special Release to IT-297R dated July 15, 1995] required that the duties be performed directly on the reserve in order for the earned income to be tax exempt. Due to the discrepancy between the CRA policy and the *Nowegijick* decision, the Federal government issued Remission Order P.C. 1985-2446. The Remission Order granted a remission of tax on any employment income earned for duties performed on a reserve for the years 1983 to 1992. As the income that your clients earned from the Mill does not meet the conditions of the remission order or the circumstances set out in *Nowegijick*, their income would not have been accepted as tax exempt during 1983 to 1991.

[65] There is nothing in this reasoning or the record of this case that would make the outcome the Delegate reached – an exercise of discretion against reassessment in each of the years 1985 to 1991 – unreasonable.

[66] In fact, in my view, this reasoning is unassailable. It supports the view that in each of the taxation years 1985 to 1991, the Minister would not have been "satisfied that…a refund or reduction would have been made if the return or request had been filed or made on time."

[67] Next, the Delegate considered the respondents' 1992 to 1998 taxation years. Here, in her view, the Supreme Court of Canada decision in *Williams v. Canada*, [1992] 1 S.C.R. 877 was key.

[68] The Delegate's reasoning was as follows:

> In 1992, the Supreme Court of Canada rendered its decision in the *Williams* case. The Supreme Court stated that it was important to consider whether the activity generating the income was "intimately connected to" the reserve, or whether it was more appropriate to consider it as a part of the "commercial mainstream." Based on *Williams*, a connecting factors test was developed on 1994 and used to determine if income should be considered exempt. During the 1993 through 1998 tax years, the connecting factors and the weight to be accorded to them in respect to the *situs* of employment income was evolving and was not settled.

[69] The Delegate's view of *Williams* is well-founded, as is her view that it was uncertain how the *Williams* test would play out on the respondents' facts during the 1992 to 1998 taxation years.

[70] Examining the *Williams* test and the facts, the Delegate in effect concluded, in the words of paragraph 71 of the Information Circular, that she would not have been "satisfied that…a refund or reduction would have been made if the return or request had been filed or made on time."

[71] I cannot say that there is anything in the Delegate's reasoning or the record of this case that would make the outcome she reached – an exercise of discretion against reassessment in each of the years 1992 to 1998 – unreasonable.

[72] Finally, the Delegate examined the respondents' taxation years from 1999 onwards. On this, she examined the applicable law and found that the Minister would have been satisfied that the respondents would have received a refund or reduction if the return or request had been filed or made on time. Her reasons were as follows:

> In terms of employment income with similar circumstance to those involved in your clients' situation, it was settled in 1999 by the Federal Court of Appeal in the *Amos* case. In 1998, the income would not have been accepted as tax exempt given the Tax Court of Canada decision in *Amos* in June 22, 1998.
>
> In 2007, the Federal Court of Canada rendered its decision in the *Wyse* case. It agreed with the Minister's decision that the applicants' employment income would not have been accepted as tax exempt prior to 1999.

[73] In my view, these reasons are well-founded on the applicable jurisprudence the Delegate cites. But due to the brevity of the reasons, they require explanation.

[74] In 2008, this Court decided *Boubard*, *supra*. As explained above, in *Boubard* this Court found that section 87 of the *Indian Act* applied to the respondents' situation in the 2000-2002

taxation years and exempted their employment income from the mill. In *Boubard*, this Court upheld the decision of the Tax Court, which found the respondents' circumstances to be "on all fours" with the decision of this Court in *Amos v. Canada*, [1999] 4 CTC 1, 1999 D.T.C. 5333.

[75] In *Amos*, this Court acknowledged the difficult and uncertain state of the law concerning section 87 of the *Indian Act*: "[W]e recognize the difficulties faced by the Tax Court in trying to apply the various factors said by existing cases to be relevant in determining the *situs* of income for the purpose of section 87" (at paragraph 2). This is substantial support for the Delegate's view that the law concerning section 87 was too uncertain prior to 1999 for the Minister to have been satisfied that section 87 would have been applied to the respondents' situation.

[76] In *Amos*, this Court found that section 87 did exempt the income in question. It reversed the Tax Court's decision in 1998 that denied the section 87 exemption.

[77] Finally, in 2007, the Federal Court decided *Wyse v. Minister of National Revenue*, 2007 FC 535. At paragraph 98, the Federal Court stated:

> Third, during the applicants [sic] taxation years 1993 through 1998, the connecting factors appropriate and the weight to be accorded to them in respect to the *situs* of employment income was evolving and was not settled. In terms of employment income, it was settled in 1999 by the Federal Court of Appeal in *Amos*, above. [emphasis in original]

This is further support for the Delegate's view that the law concerning section 87 was too uncertain before 1999 for the Minister to have been satisfied that section 87 would have applied to the respondents' situation.

[78] In light of this analysis of the case law and examining the Delegate's reasons, I cannot say that there is anything in her reasoning or the record of this case that would make the outcome she reached – an exercise of discretion against reassessment in each of the years prior to 1999 – unreasonable.

– IV –

[79] One final submission of the respondents concerning the reasonableness of the Delegate's decision remains to be considered.

[80] The respondents, and for that matter the Federal Court as well, suggested that the respondents should get the benefit of section 87 of the *Indian Act* as it is interpreted today.

[81] I disagree. The respondents' submission and the Federal Court's holding are against the wording of subsection 152(4.2). On the reading of subsection 152(4.2) adopted by the Delegate in her decision and in the Information Circular, a retrospective examination of the state of the law at various times is required.

[82] Further, the respondents' submission and the Federal Court holding would undercut the objective of subsection 152(4.2), as expressed in paragraphs 73, 87 and 88 of the Information Circular (unchallenged in this case), that persons seeking reassessment after the normal deadlines have expired should not be able to take advantage of later changes in the law or its application.

[83] Therefore, I conclude that the Delegate's decision is reasonable.

C. Proposed Disposition

[84] For the foregoing reasons, I would allow the appeal, set aside the judgment of the Federal Court, and restore the Delegate's decision dated November 12, 2009, with costs throughout.

"David Stratas"

J.A.

PELLETIER J.A. (Concurring reasons)

[85] I have read the reasons of my colleague Stratas J.A. and I agree with them, save for paragraphs 37 to 50 which, in my view, go beyond what we are required to answer in order to dispose of this case.

"J.D. Denis Pelletier"
J.A.

“I agree
Eleanor R. Dawson J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-309-11
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE CAMPBELL DATED JUNE 1, 2011, NO. T-2067-09	
STYLE OF CAUSE:	Attorney General of Canada v. Lawrence Abraham *et al.*
PLACE OF HEARING:	Saskatoon, Saskatchewan
DATE OF HEARING:	March 15, 2012
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRING REASONS BY:	Pelletier J.A.
CONCURRED IN BY:	Dawson J.A.
DATED:	October 24, 2012

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