Federal Court  Cour fédérale

**Date: 20171108**

**Docket: T-3-17**

**Citation: 2017 FC 1022**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, November 8, 2017**

**PRESENT: The Honourable Mr. Justice Roy**

**BETWEEN:**

**BOREL CHRISTEN, CLAIRE**

**Applicant**

**and**

**CANADA REVENUE AGENCY**

**Respondent**

## JUDGMENT AND REASONS

[1] The Attorney General of Canada, acting on behalf of the Canada Revenue Agency [CRA], is appealing the order made by Prothonotary Morneau on April 27, 2017. Such an appeal is provided for in rule 51 of the *Federal Courts Rules*, SOR/98-106 [Rules].

## I. Background

[2] The hearing on October 31, 2017, helped to clarify the confusion surrounding this case. In an attempt to unravel everything, some background information is required.

[3] It appears that in the course of 2015, Ms. Borel Christen decided to make a voluntary disclosure to the CRA. She then allegedly initiated discussions with her current counsel but, unfortunately, it took some time to gather all the necessary information to make the disclosure. As a result, the applicant did not make a disclosure before the CRA informed her that it intended to conduct an audit. A CRA auditor reportedly contacted Ms. Borel Christen in late September or very early October 2015 to notify her that an audit had been undertaken. The applicant (respondent to the motion) subsequently contacted her counsel, and she filed a voluntary disclosure request on October 20, 2015. That request was denied, and the applicant filed a second request.

[4] That second request for [TRANSLATION] "administrative review", filed on August 18, 2016, was denied on December 2, 2016. The decision specifies that the relevant information circular provides that a [TRANSLATION] "disclosure must meet four conditions to be valid. Unfortunately, your disclosure is not valid because it is not considered to be voluntary." It appears that the CRA concluded that it [TRANSLATION] "received your disclosure on October 20, 2015, and we initiated an audit before the disclosure date." The decision letter closes by notifying the taxpayer that she can still file an application for judicial review. That is what she did.

## II. The confusion arises

[5] It may be that the confusion emerged with that application for judicial review. In the application for judicial review, the taxpayer is seeking two remedies, which are as follows:

> a) To have set aside the decision rendered by Daniel Martineau in his letter dated December 2, 2016;
>
> b) To have the case referred back to the Assistant Director of the CRA's Voluntary Disclosures Program with the instructions to reopen file GB162351547375 and process the applicant's disclosure as if it were valid, since it meets the four conditions for validity set forth in the CRA's applicable internal policies.

[6] Thus, with that second remedy, the applicant is asking the Federal Court to conclude that her voluntary disclosure request is valid. In other words, that remedy seeks to short-circuit the typical process, in which Parliament designated an administrative tribunal to decide on these issues, and replace it with a Federal Court decision. The application for judicial review is not limited to referring the case back to another administrative decision-maker. Instead, the applicant wants the Court to determine the validity of her voluntary disclosure request. The respondent described this remedy as a [TRANSLATION] "conclusion in *mandamus*." The applicant refers to it as a [TRANSLATION] "directed verdict."

[7] It appears that the respondent is prepared to concede that the decision rendered on December 2, 2016, could contain a procedural fairness defect. It could be alleged that this decision might be viewed by an informed person examining the matter in a reasonable manner as being tarnished by an appearance of bias (*Committee for Justice and Liberty et al. v. National*

*Energy Board et al.*, [1978] 1 SCR 369). Thus, it was agreed not to oppose that remedy. However, the situation became more complicated, largely because things were not stated clearly.

[8] In fact, the respondent chose to file an unnamed motion on March 20, 2017. That motion, presented in writing under rule 369, sought [TRANSLATION] "an order allowing the judicial review filed on January 3, 2017, in accordance with subsection 18(1) of the *Federal Courts Act* and rules 3 and 392 of the *Federal Courts Rules*." It is not very clear how rules 3 and 392 apply. What we do know is that the respondent's "motion" was intended only to state the willingness [TRANSLATION] "to reconsider the applicant's request." In other words, it had to be inferred that the respondent consented to the first remedy in the application for judicial review dated January 3, 2017. The remedy to refer the case back with the instruction to accept the validity of the voluntary disclosure request was ignored and was not included in the motion filed on March 20, 2017. The applicant therefore dissented, arguing that such a conclusion could not be imposed because her application for judicial review has two components, one of which is to have the decision dated December 2, 2016, set aside, which the respondent seemed willing to do in its "motion" dated March 20, 2017. However, the respondent did not agree to the second remedy sought by the applicant to allow her to submit her voluntary disclosure.

[9] To complicate matters, that motion dated March 20, 2017, was associated with a conflict regarding the filing of affidavits by two of the counsels involved in this case. In my view, this was a futile conflict that need not be detailed.

## III. Appealed decision

[10] I was unable to gain a clear understanding of the nature of the motion dated March 20, 2017, because the desired outcome is far from explicit. It seems to be seeking to force the applicant to consent and thus abandon the second remedy in her application for judicial review. In any case, it resulted in Prothonotary Morneau's order on April 27, 2017, which sought to respond to the motion dated March 20, 2017, as worded. He declared himself competent to decide on the motion without a hearing.

[11] Prothonotary Morneau summarily dealt with the issue of filing affidavits. The affidavit of counsel for the taxpayer was admitted under rule 82. The affidavit in reply of counsel for the respondent was denied under subsection 369(3) of the Rules. He noted that the CRA, on the face of its motion, did not acquiesce to the two remedies sought in the application for judicial review. The Prothonotary stated that he agreed with the arguments of counsel for the applicant, whereby she could not be forced to abandon one of the remedies in her application for judicial review, which would be the result of allowing the motion dated March 20, 2017. That naturally resulted in the motion dated March 20, 2017, being dismissed, with costs of $300.00 in favour of the applicant/respondent to the motion. (I now note that the application for costs before Prothonotary Morneau was for the amount of $3,000.00.) It is that decision that is being appealed by the CRA.

[12] Motions ancillary to judicial reviews can be heard by a prothonotary. What seems to have caused the confusion is the non-explicit nature of the unnamed motion from March 20, 2017.

This was later presented as being a motion for consent to judgment. But consent from whom? It appears that it was the respondent who wanted to consent, and it has not been articulated why a motion like that of March 20 was necessary. In fact, we can see that the respondent wanted to consent only to half of the application for judicial review. But, if that was the case, it should have sought, with supporting arguments, the dismissal of the second remedy, which it alleges to be in the nature of *mandamus* (whereas the applicant describes it as a "directed verdict"). However, for that to be clear, it would have had to be stated, and, if it had been stated, it would have been possible to determine that it was a (disguised) request to have one of the remedies in the application for judicial review dismissed. Such a request is not within the jurisdiction of a Federal Court prothonotary. Only a judge can decide an application for judicial review on the merits. However, it was not in these clear terms that matters were presented, which ultimately led the Prothonotary to find that the unnamed motion for consent did not relate to the two components of the initial application, resulting in the motion being dismissed.

## IV. Analysis

[13] The incident regarding the affidavits was futile. Counsel for the taxpayer wanted to submit evidence in reply to the March 20 motion that he had tried to settle this matter. It seems that the CRA referred to a planned assessment with penalties while he refused to abandon the second remedy, which the CRA was seeking to have set aside. In reply, counsel for the CRA tried to submit her own affidavit.

[14] Prothonotary Morneau simply accepted the affidavit of counsel for the taxpayer by applying the discretion granted to him by rule 82. He concluded that the affidavit on behalf of the

moving party in reply to that of the respondent was not permitted under subsection 369(3) of the Rules. While it may be possible, as an exception, to file an affidavit in reply, it was not demonstrated what the error might have been.

[15] Given what was at issue, both affidavits were irrelevant. They had no bearing on the only issue for the Prothonotary to address: can a party that refuses to withdraw one of its remedies be forced to consent to a judgment that drastically reduces its application? The conflict with the affidavits, which the Prothonotary quickly handled, did not change anything about the outcome.

[16] This confusion therefore results from a motion that ought to have been clearer, thus allowing it to be dealt with expeditiously. Prothonotary Morneau was prescient to refuse to allow that motion, stating that [TRANSLATION] “it is clear that the respondent is not seeking to acquiesce or consent to a judgment based on the two (2) main remedies of the Application.” He was right. The confusion arises from two aspects: an unnamed motion and the premature dismissal of one of the remedies sought in an application for judicial review. Thus, the CRA is prepared to consent to judgment, but only to admit that the *certiorari* part of the application is well-founded because of the appearance of bias. However, with time, we learned that it wants the taxpayer to consent to the *certiorari* part, which should not be difficult to accomplish, but also implicitly for her to consent to the second component, described by the parties as a *mandamus* or a directed verdict, being thus withdrawn. The taxpayer flat out refused.

[17] It is only in the respondent’s reply that it was possible to see an indistinct glimpse of the argument that [TRANSLATION] “directed conclusions” are possible only under exceptional

circumstances. However, we do not find a conclusion whereby the second remedy should be dismissed, without a hearing and without the submission of arguments. In its initial motion, which does not clearly indicate the relief sought, aside from the application for judicial review dated January 3, 2017, being allowed, certain paragraphs need to be cross-referenced to understand the limited scope of the consent given by the respondent. In a motion written under rule 369, we can only expect that the relief sought be clearly stated and that the arguments be articulated. Here, nothing of the sort is apparent. The reply barely alludes to directed conclusions and refers to two judgments in the footnotes.

[18] The Attorney General's written submissions on appeal indicate that the Prothonotary erred when he concluded, citing the applicant's memorandum of fact and law, that one [TRANSLATION] "cannot acquiesce to the remedy to have the impugned decision set aside without acquiescing to the other conditions sought by the applicant and that emerge from the wording of the application" (memorandum of fact and law, paragraph 33).

[19] On its face, there is no error on Prothonotary Morneau's part. In fact, the Attorney General later tried to argue that the second remedy in the application for judicial review had to be dismissed. He would have had to state this and present his arguments. On the one hand, after reviewing the jurisprudence, I am not so certain that it is inevitable that the case be referred back for a third review; it is not clear that it must be so. On the other hand, no such argument is found in the motion dated March 20, 2017, which is also only one page long. The written submissions in support of the motion in writing are also limited in their content, not exceeding a single page, either. It was only in the CRA's reply on April 11, 2017, that we see that the motion dated

March 20 is for a consent to judgment. The articulation of a position is lacking, from start to finish.

[20] In order to appeal a prothonotary's decision and to submit that a remedy sought in an application for judicial review cannot be granted greatly exceeds what was argued before the Prothonotary and what he had the jurisdiction to decide. To put things directly, the Prothonotary did not have jurisdiction to deny that remedy, whether it is in the nature of *mandamus* or a "directed verdict," since that is possible only under particularly exceptional circumstances (*D'Errico v. Canada (Attorney General)*, 2014 FCA 95 [*D'Errico*] and *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55). In fact, that would constitute dismissing part of a judicial review on the merits.

[21] I cannot see how Prothonotary Morneau's handling of the motion dated March 20, 2017, would constitute a decision reviewable on appeal. The pleadings were deficient as a result of being too vague. He simply responded to a motion that sought to confirm a consent to judgment by the applicant that did not exist. The Prothonotary could not confirm a consent that did not exist and was unable to deny a remedy sought in the application for judicial review on the merits even if he were able to decipher that such a request had been made. What was before him was an unnamed motion that he accepted as being for a consent to judgment so that the voluntary disclosure request could be reconsidered. That was not a consent to everything requested by the taxpayer. A part of the application for judicial review was vacated without really stating so, as if by implication. The Prothonotary found that to be inappropriate. If the respondent wanted to bring an end to the application for judicial review, it would have had to consent to all the

remedies. Not only did the respondent fail to demonstrate a palpable and overriding error but, in my view, the Prothonotary's decision is correct (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215). In my opinion, the parties must be heard on this second remedy sought by the taxpayer. Consequently, the appeal of Prothonotary Morneau's decision on April 27, 2017, must be dismissed.

[22] The Federal Court of Appeal acknowledged over 22 years ago that "the direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself" (*David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 FCR 588 [*David Bull*] at page 197). The Court stated that a motion may exceptionally be useful "to dismiss in summary manner a notice of motion which is so clearly improper as to be bereft of any possibility of success" (*David Bull*, at page 600). Yet it is far from being clear that an unnamed motion, of which the conclusions are at the very least ambiguous, was useful in the context of this judicial review. It does not help matters that there was a conflict regarding the filing of affidavits for a futile remedy, such as the motion dated March 20, 2017. Several months were lost.

[23] As I stated, the pleadings were deficient and that caused definite confusion, which persisted even during the appeal of the Prothonotary's decision. In the wake of *David Bull*, I must add that this confusion could have been completely avoided by contesting the second remedy in the application for judicial review dated January 3, 2017, during the hearing on the merits. Section 18.4 of the *Federal Courts Act* expressly provides that an application for judicial review shall be heard and determined without delay and in a summary way. If the respondent

wants to argue that rule 302 applies in this case, which may not be evident (*Habitations Îlot St-Jacques Inc. v. Canada (Attorney General)*, 2017 FC 535), it should have done so in contesting the judicial review, instead of carrying on in an unnamed motion that it calls a motion for consent to judgment. It would also be possible at the hearing on the merits of the application for judicial review to address the possibility of a "directed verdict" that the applicant appears to be seeking or the impossibility of obtaining a conclusion that the respondent alleges to be in the nature of *mandamus*, because the conditions would not be met (*D'Errico*, at paragraphs 14 *et seq.*). The very specific conditions under which the jurisprudence allows these types of conclusions could be fully debated before a Federal Court judge.

[24] The appeal of Prothonotary Morneau's order dated April 27, 2017, is therefore dismissed. The applicant, who sought costs of $3,000.00 before Prothonotary Morneau, is now seeking $5,000.00. The Court is not inclined to accept such an application. However, the appeal launched by the respondent concerning this judicial review was certainly bold. Under the circumstances, costs of $1,000.00 are ordered in favour of the applicant, Ms. Borel Christen.

**JUDGMENT in T-3-17**

**THIS COURT'S JUDGMENT is that**:

1. The appeal of Prothonotary Morneau's order dated April 27, 2017, is dismissed;
2. Costs of $1,000.00, including taxes and disbursements, are ordered in favour of the applicant, Ms. Borel Christen.

"Yvan Roy"
Judge

Certified true translation
This 2nd day of October 2019

Lionbridge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-3-17 |
| **STYLE OF CAUSE:** | BOREL CHRISTEN, CLAIRE v. CANADA REVENUE AGENCY |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | OCTOBER 31, 2017 |
| **JUDGMENT AND REASONS:** | ROY J. |
| **DATED:** | NOVEMBER 8, 2017 |

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