Federal Court  Cour fédérale

Date: 20210108

Docket: T-1863-18

Citation: 2021 FC 27

Ottawa, Ontario, January 8, 2021

PRESENT: Mr. Justice McHaffie

BETWEEN:

JOSEPH F. SCHILLACI

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Minister of National Revenue has a discretion to waive certain interest and penalties payable under the *Income Tax Act*, RSC 1985, c 1 (5th Supp). In 2017, Joseph Schillaci sought a waiver of interest and penalties that arose from the 1989 and 1991 taxation years. He says he was not aware of the outstanding amounts, on which interest was still accruing even though the Canada Revenue Agency (CRA) had stopped active collection efforts in 1996. The Minister refused the requested relief on both an initial and second level review. The Minister noted that

the CRA's records showed numerous contacts and occasions on which Mr. Schillaci or his representative were advised of the outstanding balance, and concluded that he was not prevented from addressing his tax obligations due to circumstances beyond his control.

[2] On this application for judicial review of the Minister's second level decision, communicated in a letter dated September 17, 2018, Mr. Schillaci claims the refusal of his taxpayer relief request was unfair and unreasonable. He argues the Minister failed to adequately consider the delay between the accrual of the liability and the CRA's demands, or the CRA's own failure to notify Mr. Schillaci or take enforcement steps to collect the outstanding debt after 1996, which would have reduced interest accrued. He also argues the Minister should have consulted the tax records of his company, Cavana Corporation, which received taxpayer relief after Mr. Schillaci identified tragedies in his personal life that interfered with his ability to file timely returns.

[3] I conclude that the Minister's decision was neither unreasonable nor unfair. The Minister appropriately considered the grounds for relief raised by Mr. Schillaci and the relevant facts as set out in the CRA's records. The Minister was not under an obligation to take enforcement steps to collect the outstanding debt, and it was not unreasonable in the circumstances for the Minister to conclude that the requested waiver was not justified. Nor was the Minister required to conduct further inquiries into the records of a related taxpayer in search of additional grounds that might support the request for relief, as Mr. Schillaci contends.

[4] The application for judicial review is therefore dismissed. As requested, if the parties are unable to agree on costs, they may make submissions on costs in accordance with these reasons.

II. Statutory Framework and Decision Under Review

[5] Broadly stated, section 161 of the *Income Tax Act* provides that interest is payable on outstanding taxpayer liabilities and unpaid instalments. Sections 162 and 163.1 further provide that penalties are payable for failure to file returns or to pay instalments. Subsection 220(3.1) of the *Income Tax Act*, one of the provisions known as the "taxpayer relief provisions," gives the Minister a discretion to waive some or all of the interest and penalties, subject to a ten-year time limitation described in the subsection:

Waiver of penalty or interest	**Renonciation aux pénalités et aux intérêts**
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.
[Emphasis added.]	[Je souligne.]

[6] The Minister's discretion is delegated to officials of the CRA pursuant to subsection 220(2.01) of the *Income Tax Act*. In the present case, decisions regarding Mr. Schillaci's request for relief were made by officials of the Taxpayer Relief Centre of Expertise, Appeals Branch, in Prince Edward Island. Since the decision at issue was made by a delegate of the Minister on the Minister's behalf, I shall simply refer to it as the Minister's decision.

[7] Mr. Schillaci filed a request for taxpayer relief in the form of a waiver of penalties and interest on August 21, 2017, citing the following grounds:

> My accountant prepared my taxes for the periods in question and we terminated our relationship shortly thereafter.
>
> My assessments showed the total owing each year and I paid those amounts in full. I was surprised to discover that apparently I owed taxes not shown on the assessments I was receiving. Naturally, penalties and interest were being calculated on the taxes I was not aware of.
>
> Had I been aware of this liability I would have made arrangements to slowly pay it, without incurring all this additional debt (penalty and interest). The confusing assessments left me in [a] vulnerable position. In light of this, I request cancellation or waiving of the penalty and interest on my account.

[8] Mr. Schillaci's request was first refused in a letter dated April 16, 2018. That letter indicated that all of the penalties in question were assessed more than ten years prior to the relief request, and could therefore not be waived. The same conclusion pertained to interest accrued prior to January 1, 2007. With respect to the interest that could potentially be waived, the Minister found that the CRA had made Mr. Schillaci aware of the unpaid balances both before and after active collection was ceased in 1996, and that even though Mr. Schillaci had terminated

his relationship with his accountant, the onus was on each taxpayer to review their returns to ensure their accuracy.

[9] Mr. Schillaci sought a second review of his request. The grounds he set out for his request for second review were as follows:

> Decision not fair and reasonable. Please have another delegated official of the Taxpayer Relief Program do a second independent review. Our request of August 21, 2017 indicated that there were no taxes owed in the notices.
>
> […]
>
> Our initial request was based on the fact that if we were aware that the taxes were owed (no indication of that based on notices) we would have paid them and would not have incurred these penalties and interest, which is now equal to (give or take) the taxes. We maintain this position and hope you understand our situation.

[10] Janet Arsenault, a Taxpayer Relief Officer with the Taxpayer Relief Centre of Expertise, Appeals Branch, in PEI was assigned to review Mr. Schillaci's request and prepare a report. That report, dated September 7, 2018, recommended denial of the relief. The report was passed to the delegated authority, Amanda DesRoches, a Team Leader in the same office. Ms. DesRoches indicated her agreement with the recommendation and sent a letter to Mr. Schillaci dated September 17, 2018, again refusing his request for taxpayer relief. This decision is the decision under review on this application for judicial review. The reasons for the decision are summarized in the letter. As this Court has previously held, the contents of Ms. Arsenault's report, to which Ms. DesRoches indicated her agreement, serve as justification for and may constitute part of the reasons for decision: *Lambert v Canada (Attorney General)*, 2015 FC 1236 at para 35; *Lalonde v*

Canada (Canada Revenue Agency), 2008 FC 183 at para 59; see also *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 94–98.

[11] The September 17, 2018 letter again concluded that the penalties and any interest accrued prior to January 1, 2007 could not be waived given the ten-year limit. With respect to the remaining interest, the letter stated that the CRA's records showed:

- Mr. Schillaci was contacted numerous times by phone and mail prior to the CRA ceasing active collection in 1996;
- his legal representative was called and advised of the debt balance in September 2000;
- in April 2012, details of the balance were discussed with the representative, who requested a statement;
- Mr. Schillaci was sent collection letters from August 2000 to January 2014 that included the statement "Note: The balance owing indicated above does not include a previously unpaid amount"; and
- Notices of Assessment for the 1996 to 2013 tax years included a statement that the CRA was "using [his] refund to reduce an earlier, unpaid balance not shown in the "Summary" area."

[12] The Minister underscored taxpayers' responsibilities to ensure timely and correct returns and payments are made, and the expectation that taxpayers will have knowledge of their obligations and comply with them "without being asked to do so." The Minister therefore did not

conclude that Mr. Schillaci was prevented from addressing his tax obligations due to circumstances beyond his control and refused his request for taxpayer relief.

[13] The report by Ms. Arsenault that underlay this decision includes more detail and factual background on the matters raised in the letter, but is consistent with the reasons given in the letter. Indeed, the letter closely parallels the "Analysis of All Facts/Factors" section of Ms. Arsenault's report, with some additional facts drawn from other parts of the report.

[14] Mr. Schillaci filed this application for judicial review on October 22, 2018. He filed a brief supporting affidavit on November 19, 2018. The Minister responded with an affidavit from Ms. Arsenault. Mr. Schillaci subsequently brought a motion in writing seeking to file additional evidence relating to (i) a request for taxpayer relief made by his company, Cavana Corporation, and (ii) his 2017 tax return. By order of Prothonotary Milczynski dated April 8, 2019, Mr. Schillaci's motion was referred to the judge hearing the application.

[15] When this matter originally came on for hearing in November 2019, Mr. Schillaci remained self-represented, and mistakenly believed that only his motion was to be heard. Over the objection of the Minister, I granted Mr. Schillaci's request to adjourn the matter to allow him to retain counsel and prepare for the hearing. After a considerable intervening period, attributable in part to the COVID-19 pandemic, the matter was rescheduled for hearing in October 2020. On the eve of that hearing, Mr. Schillaci retained counsel, who sought leave to file a supplementary written argument at the hearing. With the consent of the Minister, I permitted that argument to be filed and heard counsel's submissions in support of the application.

III. Issues and Standards of Review

[16] As elaborated through Mr. Schillaci's additional submissions and the parties' written and oral arguments, this application for judicial review and Mr. Schillaci's motion raise the following three main issues:

A. What evidence is properly before this Court on this application for judicial review?

B. Did the Minister err in refusing Mr. Schillaci's request for taxpayer relief, and in particular by:

   (1) giving inadequate consideration to the long passage of time since the original debt was incurred and the lack of enforcement steps in the interim;

   (2) failing to consider whether the CRA had given adequate notice of the debt or, conversely, whether they had misled Mr. Schillaci about the existence of the debt; and/or

   (3) failing to consider the taxpayer relief given to Mr. Schillaci's wholly-owned corporation and the circumstances giving rise to that relief?

C. Was the Minister's refusal issued in breach of the requirements of procedural fairness or natural justice?

[17] The first of these issues is a matter of evidence before the Court and does not involve a review of an administrative decision. No standard of review is therefore applicable.

[18] On the second issue, the parties agree that this Court's review of the substance of the Minister's refusal to exercise discretion should be undertaken on the reasonableness standard: *Vavilov* at paras 16–17, 23–25; *Lanno v Canada (Customs & Revenue Agency)*, 2005 FCA 153 at para 7; *Canada Revenue Agency v Telfer*, 2009 FCA 23 at paras 2, 24. In conducting reasonableness review, the Court considers "the outcome of the administrative decision in light

of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified": *Vavilov* at para 15. A reasonable decision is one that is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85, 90, 99, 105–107.

[19] The third issue is a matter of procedural fairness. On such issues, the Court assesses whether the procedure leading to the decision was fair in all of the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. While strictly speaking, no standard of review is being applied, this reviewing exercise is "best reflected in the correctness standard": *Canadian Pacific* at para 54, quoting *Eagle's Nest Youth Ranch Inc v Corman Park (Rural Municipality #344)*, 2016 SKCA 20 at para 20.

IV. Analysis

A. *The Record Before the Court on this Application*

[20] Each party objected to elements of the affidavits filed by the other, raising issues regarding the appropriate scope of evidence on an application for judicial review. These issues are governed by the principles laid out by the Federal Court of Appeal in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright (2012)*] at paras 14–20.

[21] In *Access Copyright (2012)*, Justice Stratas emphasized the different roles of administrative decision makers and judicial review courts. That difference informs the rules

regarding admissible evidence on judicial review: *Access Copyright (2012)* at paras 14–19. Given the Court's limited mandate on judicial review, the evidentiary record on a judicial review application is generally restricted to the record before the administrative decision maker, while evidence going to the merits that was not before the decision maker is not admissible: *Access Copyright (2012)* at para 19. Without purporting to close the list of exceptions to this general rule, Justice Stratas identified three recognized exceptions: (a) evidence providing general background that assists in understanding the issues, provided it does not go further and provide evidence relevant to the merits; (b) evidence regarding procedural fairness defects that cannot be found in the evidentiary record; and (c) evidence that highlights the absence of evidence before the decision maker in respect of a particular finding: *Access Copyright (2012)* at para 20; see also *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 19–25.

[22] Applying these principles, I conclude that the three affidavits put before the Court by the parties, namely Mr. Schillaci's initial affidavit sworn in November 2018, the affidavit of Ms. Arsenault filed by the Minister, and the supplementary affidavit that is the subject of Mr. Schillaci's motion, each contain evidence that is not properly before the Court.

(1) Mr. Schillaci's first affidavit

[23] Mr. Schillaci's initial affidavit includes (i) a statement that he relied on his accountant to monitor his tax liability but that his accountant did not do so; and (ii) evidence regarding a tragedy arising from the mental health of a family member, the details of which I need not repeat here. These facts, as sympathetic as the latter are, were not raised in Mr. Schillaci's request for taxpayer relief, either as grounds for relief or as supporting facts, as can be seen from the

grounds reproduced at paragraphs [7] and [9] above. Mr. Schillaci cannot now put forward these additional facts or arguments and seek to have this Court exercise a discretion that is conferred on the Minister: *Access Copyright (2012)* at paras 15, 18–19; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22–23.

[24] Ms. Arsenault's responding affidavit includes a statement confirming that the foregoing facts were not before her at the time she conducted her review. Contrary to Mr. Schillaci's arguments, this statement in Ms. Arsenault's affidavit is admissible. Evidence regarding "what is in the record [and] what cannot be found in the record" is admissible as an exception to the general rule: *Bernard* at para 24; *Access Copyright (2012)* at paras 20(a), (c).

(2) Ms. Arsenault's affidavit

[25] Ms. Arsenault's affidavit sets out (i) background regarding the CRA's procedures and guidelines for taxpayer relief requests generally, notably those set out in Income Tax Information Circular IC07-1R1, "Taxpayer Relief Provisions"; (ii) a description of the process followed in respect of Mr. Schillaci's request; (iii) statements describing and attaching documents that were before the CRA at the time of the decision; and (iv) statements about what Ms. Arsenault considered, noted, and concluded in her analysis of Mr. Schillaci's second level request. The evidence in the first three of these categories is admissible, while that in the fourth is not.

[26] I agree with the Minister that the information in category (i) falls within the first exception described in *Access Copyright (2012)*, namely general background information that is of assistance to the Court. These issues, such as the decision making process generally followed

by the Minister and the information in the relevant Information Circular, simply provide context for the decision in question and would have been known to the decision maker: *Bernard* at para 23; *Vavilov* at para 94. Similarly, the information in category (ii) falls within the first exception as general background, and within the second exception to the extent it goes to the issues of procedural fairness: *Access Copyright (2012)* at paras 20(a)–(b).

[27] Category (iii) is admissible because it sets out the documents that formed the record before the decision maker, even if they are not expressly referred to in the decision. The Court of Appeal has confirmed that an affidavit may be necessary to describe the record before the administrative decision maker and convey that record to the Court: *Canada (Attorney General) v Canadian North Inc*, 2007 FCA 42 at paras 3–4; *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268 [*Access Copyright (2015)*] at paras 19–22; *Bernard* at para 20. In the present case, Mr. Schillaci made no request for material in the possession of the Minister under Rule 317 of the *Federal Courts Rules*, SOR/98-106, and there was thus no certified record. Mr. Schillaci's initial affidavit only attached two relevant documents. Ms. Arsenault's affidavit was therefore an appropriate way for the Minister to describe and attach additional relevant documents that were before the decision maker, including the CRA's file summaries, Ms. Arsenault's report, and documents from Mr. Schillaci's CRA file: *Canadian North* at para 4; *Access Copyright (2015)* at paras 21–22; *Federal Courts Rules*, Rule 307.

[28] The evidence in category (iv), however, goes beyond what is admissible, by including statements regarding the facts and documents Ms. Arsenault considered in preparing her report, the particular facts she noted in Mr. Schillaci's compliance history, and what she concluded

based on these considerations. I agree with Mr. Schillaci that a decision maker—or someone whose report was part of the decision making process and forms part of the reasons for decision—cannot supplement their decision or report by bolstering their analysis or making further statements regarding their conclusions that are not otherwise found in the record: *Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 255 at paras 45–47. Ms. Arsenault's report required no affidavit evidence to summarize it; it was five pages in length and must stand on its own: *Bernard* at para 20. I will therefore ignore these aspects of Ms. Arsenault's affidavit.

(3) Mr. Schillaci's second affidavit

[29] Mr. Schillaci's motion sought leave to file his second affidavit, which describes and attaches ten exhibits, A through J. The first six of these pertain to a taxpayer relief request made by Cavana Corporation, a company owned by Mr. Schillaci. Mr. Schillaci files these documents to support his argument that the Minister should have considered the Cavana Corporation request and reached the same conclusion reached in respect of it, namely to grant taxpayer relief. Two of the six Cavana Corporation documents predate the September 17, 2018 decision under review: the request made by the company in June 2018 (Exhibit A), and its articles of incorporation showing Mr. Schillaci's ownership (Exhibit F). The remaining four, namely the Minister's decision granting relief to Cavana Corporation in November 2018 (Exhibit B) and three documents from December 2018 flowing from that decision, postdate the decision under review.

[30] The Minister objects to the inclusion of these documents. The Minister notes that the documents were not before the decision maker and that the request made by Cavana Corporation

was made on different grounds and included different information, notably information about the personal tragedy in Mr. Schillaci's family. The Minister argues Mr. Schillaci should not be permitted to file new evidence to raise a new issue that was not before the Minister on the underlying decision, citing *Access Copyright (2012)* and *Nametco Holdings Ltd v Canada (Minister of National Revenue)*, 2002 FCA 149.

[31] As can be seen from the Minister's arguments, the question of inclusion of these documents is intrinsically linked to the merits of Mr. Schillaci's argument that the CRA ought to have reviewed Cavana Corporation's records when making its decision. If that argument prevails and the Minister should have reviewed the documents, then they are admissible to show what ought to have been in the record. If not, the documents are irrelevant to the reasonableness of the Minister's decision. Either way, Mr. Schillaci's argument is effectively one regarding the appropriate scope of the record, and the Court can only consider it with knowledge and understanding of the documents that it is argued should have formed part of that record.

[32] I am therefore prepared to accept the two documents that predate the decision under review as evidence of what was and was not before the Minister at the time of the decision, for the limited purpose of assessing the reasonableness and fairness of the Minister not considering those records: *Access Copyright (2012)* at paras 20(b)–(c); *Bernard* at paras 24–25. As for the documents that postdate the decision under review, they could not possibly have been before the Minister at the time of the decision and cannot form part of the record. However, I will accept Exhibit B, the Minister's decision on the Cavana Corporation request, for the limited purpose of considering the potential impact of the Minister's alleged failure to consider the Cavana

Corporation records. While this may appear inconsistent with my conclusion that the statements in Mr. Schillaci's first affidavit are inadmissible, in my view there is a difference between Mr. Schillaci raising new facts regarding his personal circumstances in an affidavit, and his argument that documents disclosing those facts that were in the Minister's possession at the time ought to have been considered by the Minister.

[33] The next exhibit to Mr. Schillaci's second affidavit (Exhibit G) is a copy of his original request for relief, which is already an exhibit to Ms. Arsenault's affidavit. The mere inclusion of another copy of the document would be immaterial. However, Mr. Schillaci's affidavit makes a statement that amounts to argument about the nature of the grounds he raised, similar to the inadmissible statement made in his first affidavit. As with Ms. Arsenault's affidavit, Mr. Schillaci cannot now purport to supplement the grounds for his request through a statement that is not in the request. Argument regarding what can be understood or inferred from those grounds is appropriately contained in a memorandum of argument, not supplementary evidence: *Bernard* at paras 20–21; *Access Copyright (2012)* at para 26.

[34] The final three exhibits attached to Mr. Schillaci's affidavit consist of a page from Ms. Arsenault's affidavit (Exhibit H), and two documents that purport to respond to a statement contained in that affidavit regarding Mr. Schillaci's 2017 tax return (Exhibits I and J). Ms. Arsenault stated at paragraph 15 of her affidavit that in reviewing the CRA's files relating to the applicant's compliance history, she "noted" thirteen facts regarding Mr. Schillaci's file. One of those (at paragraph 15(a)(v)) was that he "has not filed his 2017 tax return." At the time the affidavit was sworn in December 2018, Mr. Schillaci had in fact filed his 2017 return. He argues

the statement in paragraph 15(a)(v) was therefore untrue at the time the affidavit was sworn, and seeks to file Exhibits I and J to refute the statement.

[35] On my read of Ms. Arsenault's affidavit, paragraph 15 sets out the facts she took note of at the time of her September 2018 report, and does not purport to speak to the state of affairs in December 2018. In September 2018, Mr. Schillaci's 2017 return was not filed. Given the temporal context in which the statement in paragraph 15(a)(v) was made, the evidence that Mr. Schillaci subsequently filed his 2017 return does not contradict the statement. It is also irrelevant to the reasonableness of the refusal of his taxpayer relief request, since it occurred after that decision. I therefore conclude that Exhibits I and J are not admissible. I note that Mr. Schillaci's concern about the truth of paragraph 15(a)(v) underscores one of the perils of filing affidavits that elaborate on the grounds for a decision. As set out above, the statements in Ms. Arsenault's affidavit regarding what she "noted" in her review (including paragraph 15) are not admissible. The inclusion of those statements led to unnecessary additional evidentiary issues.

[36] I therefore grant Mr. Schillaci's motion in part, accepting Exhibits A, B, and F to his second affidavit, sworn March 14, 2019, and the statements in that affidavit regarding those Exhibits, for the limited purpose described above.

B. *The Minister's Refusal of Taxpayer Relief was Reasonable*

[37] Mr. Schillaci argues the Minister refused to exercise jurisdiction, erred in law, made erroneous findings of fact, and acted contrary to law, citing paragraphs 18.1(4)(*a*), (*c*), (*d*), and

(*f*) of the *Federal Courts Act*, RSC 1985, c F-7. Mr. Schillaci's arguments on these grounds of review overlap. I therefore consider it most efficient to address the three main arguments he raises regarding the reasonableness of the Minister's decision, namely that the Minister: (1) failed to give adequate consideration to the fact that the original debt was incurred some 29 years prior to the determination, during which the CRA had not taken enforcement steps; (2) failed to consider the lack of adequate notice of the debt, to the extent of misleading Mr. Schillaci about its existence; and (3) failed to consider the circumstances underlying the taxpayer relief request made by Cavana Corporation, or the taxpayer relief granted to the company. For the following reasons, I cannot accept that any of these arguments establish that the Minister's decision was unreasonable.

[38] I pause to note that the Minister's refusal to waive the penalties or interest accruing prior to January 1, 2007 was based on the ten-year limitation set out in subsection 220(3.1) of the *Income Tax Act*. In other words, the Minister has no statutory discretion to waive these amounts. Mr. Schillaci has raised no argument to suggest that the Minister's interpretation or application of the ten-year limitation was unreasonable or even incorrect. I will therefore focus the remainder of these reasons on the issue of interest accruing from 2007 onward, which the Minister had the statutory discretion to waive.

(1) Timing of the debt and lack of enforcement

[39] Mr. Schillaci argues that the passage of 29 years between the underlying obligation and the current day is an unusual circumstance. He says the Minister ought to have considered this lengthy period of time, the resulting size of the interest obligation compared to the underlying

obligation, and the fact that the CRA did not enforce the debt in the interim. These arguments cannot succeed.

[40] As the Minister notes, the imposition of interest occurs by operation of the interest provisions of the *Income Tax Act*, and in particular section 161. The applicable rate of interest is prescribed in the *Income Tax Regulations*, CRC, c 945. The fact that the interest component now comprises a significant portion of Mr. Schillaci's indebtedness derives from the operation of these provisions and the length of time that the amounts have been outstanding. Ms. Arsenault's report shows that the Minister was aware of the amounts in issue. I cannot conclude that it was unreasonable for the Minister not to focus on the relative amounts of interest as a ground for granting discretionary relief.

[41] This is particularly so given that Mr. Schillaci did not raise this as a ground justifying relief. While he made mention in his request for second review of the fact the penalties and interest are "now equal to (give or take) the taxes," this statement was made in the context of his assertion that if he was aware that the taxes were owed, he would have paid them and therefore would not have incurred the interest. The relative amount of interest and original tax liability was not itself raised as a ground for relief. The Minister's reasons must be assessed in light of the submissions made by Mr. Schillaci, such that the Minister can hardly be faulted for not considering a ground he did not raise: *Vavilov* at paras 127–128. The words of Justice Evans of the Federal Court of Appeal at paragraph 31 of *Telfer*, a case that also dealt with a refusal to grant taxpayer relief under subsection 220(3.1), are equally applicable in this case:

> When, as in the present case, a consideration is not squarely presented to a decision-maker, it will be difficult to establish on

> judicial review that a failure to deal with it in the reasons for decision so deprives the process of "justification, transparency and intelligibility" as to render it unreasonable.

[42] In this regard, it is relevant to note that the form provided by the CRA to make a taxpayer relief request (RC4288 – Request for Taxpayer Relief – Cancel or Waive Penalties or Interest) includes a note stating that "It is important to provide the [CRA] with a complete and accurate description of your circumstances to explain why your situation merits relief" and further asks the taxpayer to "[d]escribe all circumstances and facts supporting your request for relief from penalties or interest." The onus is squarely placed on a taxpayer requesting relief to identify the grounds on which the request for relief is made.

[43] Mr. Schillaci also points to the CRA's lack of enforcement steps subsequent to 1996. He notes that if the CRA had enforced the debt earlier, the debt would have been satisfied and he would have incurred considerably less interest. He goes so far as to argue that the CRA should have taken further garnishment steps so as to eliminate the debt and reduce the resulting interest. These arguments are untenable.

[44] While the Minister has a general duty to administer and enforce the *Income Tax Act*, they are under no specific duty to a taxpayer to take collection steps so as to reduce the taxpayer's liability for interest: *Income Tax Act*, s 220(1). To the contrary, the process of tax collection relies primarily on taxpayer self-assessment and self-reporting, with taxpayers obliged to estimate their tax payable, disclose this estimate, and pay amounts owing: *Income Tax Act*, ss 150(1), 151, 156.1(4); *R v Jarvis*, 2002 SCC 73 at para 49; *Northview Apartments Ltd v Canada (Attorney General)*, 2009 FC 74 at para 11.

[45] Conversely, the Minister's powers to take collection steps such as garnishment are set out in permissive ("the Minister may") rather than imperative ("the Minister shall") language: *Income Tax Act*, s 224; *Interpretation Act*, RSC 1985, c I-21, s 11. Mr. Schillaci pointed to no statutory provision or case law to support the argument that the Minister must take available enforcement steps, or that a taxpayer can rely on the Minister not having done so to avoid a tax liability or justify a waiver. Nor did he point to any evidence that there were funds or debts available for the Minister to garnish had the Minister taken further enforcement steps in the period between 1996 and 2017. In any event, Mr. Schillaci again did not raise the Minister's lack of enforcement as a ground to support his taxpayer relief request. Rather, he relied on his own lack of awareness of the liability and his statement that he would have himself paid the amounts had he known they were outstanding.

[46] I agree with the Minister that there is no evidence or information to support Mr. Schillaci's allegation that the lack of enforcement shows the CRA "forgot" about the debt, or did not itself know the amounts owing. To the contrary, as discussed in further detail below, the CRA's records show that the debt continued to exist and was referenced by the CRA in documents and discussions.

[47] Mr. Schillaci also underscores his own record as a taxpayer in the intervening years, which he argues was insufficiently considered by the Minister. He contends that he filed 12 years of his taxes on time, and that while his was not a perfect record, it was not a "damning" one. Ms. Arsenault's report did refer to Mr. Schillaci's compliance history, noting that he had late filed 19 returns since 1987 (of which six resulted in credits or nil balances), had late paid 24 tax

years, and had incurred instalment interest on 11 tax years and one instalment penalty. Other details regarding penalties, interest, and omitted income are also included in the report. While this compliance history was not a significant factor in the Minister's overall analysis, I cannot agree with Mr. Schillaci that his profile during the intervening years was so positive that it was unreasonable for the Minister to accord it no positive weight in his consideration. This is particularly so when this was not a factor Mr. Schillaci relied on in making his request.

[48] I therefore conclude that Mr. Schillaci's arguments regarding the time between the taxation years at issue and the request for taxpayer relief, and the CRA's enforcement steps in the interim, do no demonstrate any unreasonableness in the Minister's decision.

(2) Notice of the debt

[49] Mr. Schillaci argues that the Minister failed to give sufficient consideration to the fact that the CRA did not give him adequate notice of his outstanding debts. He asserts that the Minister failed to consider whether the CRA's silence on the outstanding liability amounted to the CRA explicitly or implicitly misleading him about the existence of an old debt on which interest was accruing. In support of this argument, he relies primarily on the fact that the statements and assessments sent by the CRA did not set out the amounts he owed or the interest that was accruing.

[50] The Minister considered this assertion in the decision, noting the numerous occasions on which Mr. Schillaci was advised of the debt, either directly or indirectly through his representative. In particular, the Minister referred to communications in 2000 and 2012 with

Mr. Schillaci's representative, as well as the notes contained on the collection letters sent between 2000 and 2014, and the Notices of Assessment for the 1996 to 2013 years, as set out in paragraph [11] above. In my view, given the record before the Minister, this was an entirely reasonable response to Mr. Schillaci's argument.

[51] Mr. Schillaci relies on the statement made in his first affidavit that his "annual assessments showed that [his] tax liabilities were zero." Even in the absence of cross-examination, however, this statement cannot be reconciled with the Statement of Account Mr. Schillaci himself attached to his affidavit, which includes the note that "[t]he amount owing indicated on this statement does not include a previously unpaid balance" [emphasis added]. Such a statement does not show Mr. Schillaci's tax liabilities to be zero. Mr. Schillaci concedes that this note amounts to some notice of the outstanding liability, but argues that it was insufficient notice and that the Minister inappropriately gave the CRA "a pass" based on that one statement. Contrary to Mr. Schillaci's submissions, however, the Minister neither gave the CRA "a pass," nor assessed Mr. Schillaci's taxpayer relief request on the basis of the single note regarding previously unpaid balances. Rather, the Minister looked at the totality of the circumstances in assessing whether Mr. Schillaci's asserted ground for seeking relief—that he was unaware of the outstanding debt—justified the exercise of discretion.

[52] Mr. Schillaci takes issue with the Minister's reliance on statements recorded in the CRA's file. In particular, he points to the information that Mr. Schillaci's representative was advised of the debt balance from the 1989 and 1991 tax years in 2000, and that those debt balances were against discussed in 2012 with his representative, who requested a statement of

the debt balances to review with him. Mr. Schillaci argues that these statements amount to multiple hearsay, which the Minister should not be permitted to rely on. I disagree. In my view, in exercising their discretion under subsection 220(3.1), the Minister may rely on the facts regarding the taxpayer's compliance and enforcement history as set out in the CRA's records, particularly where there is no dispute regarding those facts. The Minister exercises a discretionary function in their administration of the *Income Tax Act* and is not limited to considering evidence that would meet the requirements of admissibility in a Court. Mr. Schillaci filed no evidence to bring into doubt the truth or reliability of the statements in the CRA's file regarding the communications with his representative.

[53] Mr. Schillaci also asserts that it can be inferred from the statements in the CRA's records that his representative did not receive a statement of account when one was requested in 2012. He argues that since Ms. Arsenault's report and the Minister's decision letter indicate that the representative requested a statement, without saying it was sent, this implies that it was not sent. I disagree. In my view, in the absence of further contact from the representative, the appropriate inference would be that the statement of account was received. Again, if Mr. Schillaci sought to contradict that or establish that his representative did not receive a requested statement, he could have done so, but did not. In any event, the issue was Mr. Schillaci's awareness of the outstanding debt, which was confirmed through the conversation with his representative. It was reasonable for the Minister to rely on these facts in assessing whether Mr. Schillaci's asserted lack of knowledge of the debt justified taxpayer relief.

[54] As for Mr. Schillaci's argument that the Minister failed to undertake an assessment of whether the CRA went beyond silence so as to mislead Mr. Schillaci, this again involves Mr. Schillaci seeking to fault the Minister for not addressing an argument he never raised: *Telfer* at para 31. In any event, given the numerous occasions on which the debt was referenced in communications with Mr. Schillaci or his representative, I see no merit in the suggestion that the CRA somehow misled him regarding the ongoing existence of a debt.

[55] I reach the same conclusion on Mr. Schillaci's argument that the CRA's conduct led to some form of estoppel precluding further enforcement of the debt. Leaving aside the absence of any apparent facts to ground an estoppel argument arising either from the CRA ceasing active collection efforts or the contents of the notices and statements it sent, the CRA's ability to collect the debt is not at issue on this application. The Minister's exercise of their discretion to waive interest is what is at issue. I see nothing in the CRA's communications with Mr. Schillaci and/or his representative that establishes that the Minister's refusal to waive interest was unreasonable.

(3) Cavana Corporation

[56] In June 2018, shortly after filing his request for a second level review of his taxpayer relief request, Mr. Schillaci filed a request for taxpayer relief in respect of his company, Cavana Corporation. That request sought relief from penalties and interest associated with the 2011 tax year. The grounds for the request were exclusively based on a tragedy arising from the mental health of a member of Mr. Schillaci's family, which resulted in him losing "all interest in business, and the responsibilities of the business were ignored, including filing tax returns on time etc." The Cavana Corporation request was considered by officials at the Taxpayer Relief

Centre of Expertise, Appeals Branch, in Shawinigan, Quebec. The Minister partially approved the request, cancelling the penalty and some of the interest, while concluding that interest charged after the 2011 return had been filed in 2014 would be maintained.

[57] As noted above, Mr. Schillaci did not raise these circumstances in his request for waiver of his personal tax liability, either on his first request or on his request for second level review. I accept based on the identified circumstances and the outcome of the Cavana Corporation request that if the circumstances had been before the Minister, the Minister may have reached a different conclusion on Mr. Schillaci's personal request. However, contrary to Mr. Schillaci's argument, the Minister's decision on his personal application was not made "[o]n the identical facts" as the Cavana Corporation decision. Rather, very different grounds and supporting facts were relied on. As I have concluded above, Mr. Schillaci cannot on this application for judicial review file new evidence and raise new grounds that were not put before the Minister, to argue that the Minister's exercise of discretion was unreasonable: *Access Copyright (2012)* at paras 15, 18–19; *Alberta Teachers' Association* at paras 22–23.

[58] Mr. Schillaci argues that at the time of the second level decision, the facts set out in the Cavana Corporation request were in the Minister's files in respect of a related taxpayer, and that it was incumbent on the Minister to review those facts and consider them in making their decision. He further argues that Ms. Arsenault's affidavit confirms that she reviewed the CRA's files, and that the Cavana Corporation files would have been available to her. He notes in particular that in addition to being a wholly owned company, the Cavana Corporation decision letter was addressed to Mr. Schillaci.

[59] I cannot accept these arguments. I agree with the Minister that they are not under an obligation to review all of the CRA's records, even in respect of a related taxpayer, in search of additional grounds that might justify a waiver of penalties or interest. A taxpayer making a relief request is required to set out the grounds for that request and cannot rely on the Minister to raise new grounds, even if they might be found somewhere in the CRA's records.

[60] While this is sufficient to dispose of Mr. Schillaci's arguments on this point, I note that Ms. Arsenault did not claim to have reviewed all of the CRA's records, or even all of the records of the Taxpayer Relief Centre of Expertise in PEI, let alone those in other locations. Rather, she indicated that her affidavit was derived from her review of "the CRA file for the applicant," and that in preparing her report, she reviewed records "pertaining to the applicant."

[61] While the circumstances described by Mr. Schillaci are certainly unfortunate, I cannot conclude that the Minister's refusal was unreasonable because those circumstances were not considered by the Minister.

C. *The Minister's Decision was Fair*

[62] Mr. Schillaci makes a number of arguments under the rubric of natural justice or procedural fairness. Most of these, however, do not relate to the procedure leading to the decision, and are therefore not truly procedural fairness arguments. Rather, they go to the merits of the decision. A number of these arguments are canvassed above.

[63] Mr. Schillaci argues that it was a breach of procedural fairness that he be penalized by 29 years of penalties and interest for not paying the old debt "without being asked to do so," particularly since the CRA had apparently forgotten about the debt. Regardless of whether this is considered a fairness argument or one that goes to the merits of the decision, it cannot be sustained. As set out above, the imposition of penalties and interest, and the requirement that those penalties and interest be paid, occurs by operation of the *Income Tax Act* independently of the discretion of the Minister to waive them. In any case, Mr. Schillaci was "asked" by the CRA to pay the outstanding tax liability, penalties, and interest, to the extent of facing garnishment actions during the period from 1996. That the CRA did not continue enforcement proceedings or send further statements or notices beyond those described above does not create an unfairness. Nor, as I have concluded above, does the lack of enforcement action suggest that the CRA "forgot" about the debt.

[64] Mr. Schillaci also argues that it was a breach of natural justice and procedural fairness for the Minister to have made its decision as "the consideration of a discretionary gift or courtesy" and did not adequately consider the impact of the CRA's conduct, actions, omissions, or miscommunications on its ability to claim the full period of interest. Again, this is not truly a procedural fairness argument, as it goes to the merits of the Minister's decision and an alleged lack of consideration by the Minister of relevant factors. For the reasons set out above, the arguments regarding the CRA's communication and lack of enforcement cannot be accepted.

[65] The Minister rendered their decision after providing Mr. Schillaci with an opportunity to present the grounds and arguments on which he based his request for taxpayer relief. The

Minister considered those grounds and concluded that relief was not warranted. There was no breach of the duty of procedural fairness or the requirements of natural justice.

V. Conclusion

[66] Mr. Schillaci has not established that the Minister's decision was unfair or that there are "sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency": *Vavilov* at para 100. The application for judicial review is therefore dismissed.

[67] The parties requested an opportunity to make submissions on costs. In the circumstances, particularly given the late engagement of counsel, I am prepared to grant that opportunity despite the expectation that parties to an application for judicial review be prepared to speak to costs at the hearing: *Notice to the Parties and the Profession: Costs in the Federal Court*, April 30, 2010. I encourage the parties to reach an agreement with respect to the issue of costs. If they are unable to do so, they may file written submissions on the following basis:

- The Minister may file written submissions on costs, in letter format, not to exceed three pages single-spaced, within three weeks. The Minister may attach a bill of costs as an appendix.

- Mr. Schillaci may file written submissions on costs, in letter format, not to exceed three pages single-spaced, within three weeks of receipt of the Minister's submissions or, if none are filed, the expiry of the time for doing so. Mr. Schillaci

may attach as an appendix a bill of costs and/or a submission, not to exceed one page, addressing specific line items in the Minister's bill of costs (if filed).

- The Minister may file reply submissions, in letter format, not to exceed one page single-spaced, within seven days of receipt of Mr. Schillaci's responding submissions. The Minister may attach as an appendix a submission, not to exceed one page, addressing specific line items in Mr. Schillaci's bill of costs (if filed).

- The parties may consent to extend the foregoing dates, provided all materials are filed by March 15, 2021, or they may address the Court further.

[68] Finally, as requested by the Minister and with the consent of Mr. Schillaci, the style of cause will be amended to properly reflect the respondent as the Minister of National Revenue.

JUDGMENT IN T-1863-18

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to name the respondent as the Minister of National Revenue.
2. The application for judicial review is dismissed.
3. If unable to reach agreement on costs, the parties may file written submissions on costs in accordance with the reasons given.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1863-18
STYLE OF CAUSE:	JOSEPH F. SCHILLACI v THE MINISTER OF NATIONAL REVENUE

HEARING HELD BY VIDEOCONFERENCE ON OCTOBER 29, 2020 FROM OTTAWA, ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	JANUARY 8, 2021

APPEARANCES:

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