

Federal Court



Cour fédérale

Date: 20101224

Docket: T-952-09

Citation: 2010 FC 1333

Ottawa, Ontario, December 24, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

BRADLEY A. YACHIMEC

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a May 13, 2009 decision of the Minister of National Revenue (the Minister), rendered by his delegate Carol Sukich of the Canada Revenue Agency (CRA). In the decision, the Minister refused to exercise his discretion under subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c.1 (the Act) to grant the Applicant taxpayer relief.

[2] The Applicant requests that the matter be referred back to the Minister for redetermination by a delegate not previously involved in the review of the Applicant's request. Furthermore the Applicant asks the Court to order that all material be reviewed; the review be conducted on the basis that the failure to remit tax is due to a circumstance beyond the Applicant's control, namely a psychiatric disorder; that the compliance history to be considered is the compliance history for the period prior to the development of the psychiatric disorder.

[3] Based on the reasons below, this application is allowed.

I. Background

A. *Factual Background*

[4] The Applicant, Mr. Bradley Yachimec, suffered a severe brain injury as a result of a motor vehicle accident in 1985. He was 24 at the time of the accident, and has been unable to work since. He receives a disability pension and some rental income. Prior to the accident the Applicant worked at one of his family's car dealerships as a sales manager.

[5] The Applicant alleges that although he is able to live independently, his brain injury has left him severely disabled; he has reduced cognitive function and memory, is clinically paranoid and, in some respects, delusional. The Applicant claims that he suffers from an unshakeable delusion that the government has no legal right to impose income tax, and for that reason he has refused to pay tax.

[6] Medical evidence submitted on the Applicant's behalf shows that subsequent to the accident, the Applicant developed psychiatric problems. When discharged from the hospital in 1985, the Applicant was diagnosed as being in a "profound post-traumatic confusional state with global impairment of all higher mental functions" due to an "acute closed head injury."

[7] By 1989 a neurophysiologist report noted the development of psychological problems due to the Applicant's awareness of his own cognitive impairments due to the injury. The assessor noted that the Applicant was anxious, depressed and dissatisfied with himself and his level of functioning. Psychiatric treatment was recommended. The assessor was of the opinion that the Applicant was probably totally and permanently disabled.

[8] A 1996 neuropsychological assessment noted that the Applicant spent most of his time dwelling upon his disability and his sense of injustice at the hands of others, including his family members and lawyers. The assessor noted that the Applicant's thinking was subject to mental confusion, "contributing to disturbed and unconventional thought processes, of a decided cynical and paranoid flavour" and later in the report the assessor concluded that "an acquired personality disturbance is likely."

[9] By this time, the CRA had already become aware that the Applicant had psychological problems. The "Chronological Order of Events" that was before the decision-maker notes that as early as 1993 the CRA received a letter from the Applicant stating:

I really appreciate your notices of the illegal money source for the Canadian Government. Your best bet would be to get me into a

Court of Law, before I personally send a Statement of Claim against Revenue Canada Taxation and get you into Court.

[10] In the following years, the Applicant maintained his position that income tax was unconstitutional and made this clear in his interactions with the CRA. The CRA noted in January 1996 that the Applicant “seems to have mental problem” and during a visit to their office in October 1996 the notes record that the Applicant went on in circles and gave a package to CRA employees containing letters to the Prime Minister and Ralph Klein, among others, claiming that all the departments were illegal and not constitutional.

[11] The Applicant paid his taxes up until 1991. However, consistent with the behaviour noted by the CRA, from 1992 onwards the Applicant showed complete disregard for tax obligations. The years in issue in the present application are 1995-2007.

[12] The Applicant retained his present legal counsel for assistance with certain legal issues. Over the course of dealing with the Applicant, counsel became aware that the Applicant had not been filing tax returns. The Applicant refused to pay tax until he was given an opportunity to make representations in court to a judge on the constitutionality of the CRA’s claim. He was given this opportunity via an application made in 2007. The Applicant’s claims were dismissed.

[13] On the Applicant’s behalf, the Applicant’s counsel filed a first level request to the Minister of National Revenue for relief under subsection 220(3.1) of the Act with respect to waiver of interest and penalties for the Applicant’s 1995 to 2007 taxation years on March 7, 2008.

[14] The Applicant sought to have the interest and penalties cancelled or waived on the basis of extraordinary circumstance, namely the delusions and mental disability that arose as a result of his brain injury.

[15] Attached to the first request was a letter from Dr. Sanderman, the Applicant's psychiatrist. When the Applicant first met with his present counsel, there were concerns regarding his competence to give instructions and he was sent to see Dr. Sanderman in that regard.

Dr. Sanderman continued to treat the Applicant and observed:

Mr. Yachimec's delusions revolved around the federal government and the issue of taxation. Subsequently, I do not feel that he understands his obligation to pay tax but rather feels he is being slighted and put upon duly by the federal government.

[16] On August 27, 2008 the Applicant's first level request for relief was denied on the basis that, notwithstanding the Applicant's submission of Dr. Sanderman's opinion, no medical information was submitted to substantiate his reasons for not complying with his tax obligations.

[17] The Applicant made a second level request for relief under subsection 220(3.1) by letter dated September 9, 2008, and thereafter provided further medical documentation in support of the request including a second medical opinion by Dr. Sanderman dated September 30, 2008 and the 1989 and 1996 neuropsychological assessments.

[18] On December 2, 2008, the Applicant's second level request was denied. A delegate of the Minister, different from the first delegate, determined that relief was not warranted based on the submitted medical documentation and the Applicant's compliance history. The delegate

acknowledged that the Applicant was disabled, but based on the fact that he was never declared a dependent adult found that he remained responsible for his tax obligations.

[19] After the issuance of the December 2, 2008 second level decision of the Minister, the Applicant provided additional medical documentation in support of his request. As a result, an application was made to the Federal Court for judicial review of that decision, and by consent the application was granted. The Applicant's request for waiver of interest and penalties was referred back to the Minister for reconsideration by a delegate not previously involved in the review of the Applicant's request with a direction that all material be reviewed.

B. *Impugned Decision*

[20] The Applicant's request for relief was denied by a delegate of the Minister on May 13, 2009. The delegate found that the Applicant was competent, as previously stated, and therefore responsible for his tax obligations.

[21] This is the decision under review.

II. Issues

[22] The only issue raised in this application is whether the Minister, in exercising his discretion pursuant to subsection 220(3.1) of the Act:

- (a) based his decision on an erroneous finding of fact that he made in a perverse or capricious manner or without regard for the material before him, or
- (b) failed to observe a principle of procedural fairness.

A. *Statutory Scheme and Guidelines*

[23] Subsection 220(3.1) of the Act provides:

Waiver of penalty or interest

(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

Renonciation aux pénalités et aux intérêts

(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

the penalty or interest.

contribuable ou la société de
personnes pour tenir compte de
pareille annulation.

[24] The Minister's exercise of discretion under subsection 220(3.1) is subject to review by the Federal Court pursuant to section 18.1 of the *Federal Courts Act*.

[25] The guidelines for exercising this discretionary power are set out in Information Circular 1C07-1, entitled "Taxpayer Relief Provisions" (the Guidelines).

[26] The circumstances where relief from penalty and interest may be warranted include, *inter alia*, situations of extraordinary circumstances.

[27] The Guidelines describe extraordinary circumstances as follows:

Extraordinary Circumstances

25. Penalties and interest may be waived or cancelled in whole or in part where they result from circumstances beyond a taxpayer's control. Extraordinary circumstances that may have prevented a taxpayer from making a payment when due, filing a return on time, or otherwise complying with an obligation under the Act include, but are not limited to, the following examples:

- (a) natural or man-made disasters such as, flood or fire;
- (b) civil disturbances or disruptions in services, such as a postal strike;
- (c) a serious illness or accident; or
- (d) serious emotional or mental distress, such as death in the immediate family.

[28] The Guidelines are not exhaustive and are not meant to restrict the spirit or intent of the legislation. They also list the factors that the CRA will consider when determining whether penalties and interest will be waived or cancelled (para. 33):

(a) whether or not the taxpayer has a history of compliance with tax obligations;

(b) whether or not the taxpayer has knowingly allowed a balance to exist on which arrears interest has accrued;

(c) whether or not the taxpayer has exercised a reasonable amount of care and has not been negligent or careless in conducting their affairs under the self-assessment system; and

(d) whether or not the taxpayer has acted quickly to remedy any delay or omission.

III. Standard of Review

[29] Both parties agree that the appropriate standard of review of a discretionary decision of the Minister under subsection 220(3.1) is reasonableness. This is supported by recent jurisprudence of the Federal Court of Appeal: *Slau Ltd. v. Canada (Revenue Agency)*, 2009 FCA 270, 3 Admin L.R. (5th) 251 at para. 27 and *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, [2009] 4 C.T.C. 123 at para. 25.

[30] As set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; and *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12; [2009] 1 S.C.R. 339 reasonableness requires consideration of the existence of justification, transparency, and intelligibility in the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes that are defensible in respect of the facts and law.

[31] Questions of procedural fairness are reviewed on a standard of correctness

IV. Argument and Analysis

A. *The Minister's Decision was Unreasonable and Based on a Clear Misapprehension of the Facts*

[32] The forgiveness of interest and penalties provision under subsection 220(3.1) is intended to allow Revenue Canada to administer the tax system more fairly by granting the Minister latitude in dealing with taxpayers who, due to circumstances beyond their control, are unable to meet deadlines or comply with the rules under the Act. (*Kaiser v. Canada (Minister of National Revenue - M.N.R.)*, 93 F.T.R. 66, [1995] 2 C.T.C. 329 at para. 8). This provision is part of the so-called “fairness package” and aims to allow for the application of common sense in such situations.

[33] The power to grant relief is a discretionary, and cannot be claimed as of right. However, this power must nonetheless be exercised in good faith, in accordance with the principles of natural justice, in reliance on relevant factors without regard to irrelevant or extraneous ones (*Lalonde v. Canada (Revenue Agency)*, 2010 FC 531, 2010 D.T.C. 5082 at para. 32)

[34] The Court can also intervene where the decision is based on a misapprehension of the facts (*Johnston v. Canada*, 2003 FCT 713, [2003] 4 C.T.C. 32 at para. 23).

[35] The Applicant reads the Decision as denying the Applicant relief based on insufficient medical evidence, the Applicant's compliance history and a finding that the Applicant is competent. The Applicant submits that the Decision shows a misapprehension of the relevant facts and constitutes a misapplication of the guidelines.

[36] The Applicant argues that, based on the medical documentation submitted, he has established on a balance of probabilities that his failure to pay taxes arises from extraordinary circumstances beyond his control; namely a psychiatric disability resulting in delusions. The Applicant relies on caselaw establishing that under the Guidelines the primary factor to be considered by the Minister in a request for fairness relief is whether the circumstances were beyond the taxpayer's control (*3500772 Canada Inc. v. Canada (Minister of National Revenue - M.N.R.)*, 328 F.T.R. 188, [2008] 4 C.T.C. 1 (F.C.) at para. 39).

[37] Furthermore, the Applicant argues that the compliance history that ought to be considered in making the decision is the compliance history relating to the period in which compliance was within the control of the taxpayer, not the period during which the taxpayer experienced extraordinary circumstances. In the case of the Applicant, this would be the period pre-dating the development of his psychiatric problems, namely the period prior to 1992. Up until that time the evidence shows that the Applicant was compliant.

[38] Lastly, the Applicant disputes that the previous finding of competence is relevant to the Applicant's condition during the time period in question, the years 1995-2007. Apparently this finding refers to a failed court application in 1991 brought by the Applicant's father and brother to

be appointed as his trustees. The Applicant points to the fact that the application was dismissed without written reasons and that it pre-dated the development of the Applicant's delusions regarding the legality of income tax. The Applicant submits that it is a misapprehension of the facts to conclude that the Applicant was found to be competent by any court during the time period in question.

[39] The Respondent submits that the Applicant requested the relief of waiver of interest and penalties with respect to outstanding tax payable on the basis that he suffered delusions that taxation was illegal due to a brain injury suffered in 1985. It is the Respondent's position that the Minister was never presented with the information that the delusions only began sometime in the 1990's and not in 1985 at the time of the accident. The Applicant argues that this assertion appears for the first time in the Applicant's written submissions in this application and as such it is irrelevant to the Court's review of the Decision. Further, a consideration of the Applicant's compliance from 1985 onwards was proper, relevant and necessary given the Applicant's own submissions.

[40] The Respondent asserts that the Applicant only asks this Court to reweigh the facts so as to arrive at the conclusion advocated by the Applicant. The Respondent points out that the weighting of the factors goes to the heart of the exercise of discretion and the Court is not able to disturb the weighting by the Minister solely on the basis that the Court would have done it differently.

[41] I have carefully considered the Respondent's submission that the Applicant is arguing for the first time on judicial review that his delusions began sometime in the 1990's and not in 1985.

[42] Certainly the present case is complicated – by the Applicant’s condition, which as attested to by Dr. Sanderman, is hard for the federal government to understand, by the Applicant’s long dealings with the CRA, which Applicant’s counsel described in the initial request as lengthy and complex, and even by the route the Applicant’s request has taken to end up here, at its second judicial review.

[43] That the Applicant developed the delusions which prevented him from paying taxes some time after his accident, but all the same due to the brain injury he sustained in the accident, is consistent with all of the evidence that was before the Minister. The September 30, 2008 letter from Dr. Sanderman stated:

By definition one cannot talk a person out of a delusional belief and here lies the problem... I do feel strongly that his current complex legal situation in regards to his dealings with the Federal Government over his taxes are a result of his severe head trauma and the subsequent cognitive disruption and thought disorder.

[Emphasis added]

[44] Although the Applicant’s written submissions for this application make the chronology of the Applicant’s psychiatric evolution much clearer, this information is available in the record used by the delegate. A better descriptor for this “new argument” might be, and indeed I find that it properly is, a misapprehension of the facts.

[45] The Respondent submits that it was for the Applicant to satisfy the Minister that not only did he suffer an injury, but that the injury was the cause of his failure to file tax returns and pay tax. The Respondent relies on *Formosi v. Canada (Revenue Agency)*, 2010 FC 326 wherein a delinquent taxpayer failed to convince the Court that there was any connection between several deaths and

illnesses of immediate family members and his inability to pay his taxes. This case has no relation to the present matter in which there is ample documentary evidence to support that the Applicant suffered an injury and that this was the cause of his failure to pay tax. That these events, the brain injury and the onset of delusion, are not temporally simultaneous does not negate their existence.

[46] Further, although notes in the record indicate that the Applicant's father and brother unsuccessfully tried to have him declared a dependent adult in the 1990's, the record also indicates that the father and brother successfully convinced the Applicant to sign a consent form to have his taxes actioned by an accountant. Returns are presently being sent in on time since 2007, but are not signed by the Applicant. This seems inconsistent with the conclusion reached by the reviewer in the first instance:

Discussed account with Director. It was felt that as the courts have determined that the taxpayer is not a dependent adult and should be responsible for his taxes. Taxpayer has not taken steps to start taking care of the debt at this time.

[47] The review of fairness decisions require the Court to engage in a "somewhat probing examination" to determine whether the reasons for a decision, when taken as a whole, support the decision (*334156 Alberta Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, 2006 FC 1133, 300 F.T.R. 74 at para. 7). In the present case, it is certainly open to the Minister to determine that the Applicant does not warrant taxpayer relief. However, the reasons, as they stand demonstrate a misapprehension of the Applicant's circumstances that is out of sync with the spirit and intent of the fairness provisions of the Act.

B. *Procedural Fairness*

[48] Following the first judicial review, the Court ordered that the decision be referred back for reconsideration by a delegate not previously involved. The Applicant submits that this instruction was intended to allow an individual unfettered by previous experience with the matter to bring a fresh and unbiased approach to the review of the request. The Applicant contends that, despite this instruction, the delegate preparing the Decision was heavily influenced by the prior decision, and approached the matter on the basis that the prior decision would only be varied if the additional matter to be considered was determinative. The Applicant bases this claim on the fact that of the eight paragraphs in the Decision, six of them are identical, word for word, with the prior decision.

[49] The Respondent argues that the decision was the result of a review of all information and documentation relating to the Applicant's request for relief, including the earlier decisions of the Minister's delegates. In the Respondent's view this does not breach any rules of procedural fairness. Each delegate, the Respondent argues, came to his or her own determination.

[50] Having reviewed the record, it is clear that the delegate engaged in her own analysis. I cannot come to the conclusion that the delegate's discretion was fettered in any way.

V. Conclusion

[51] In consideration of the above conclusions, this application for judicial review is allowed and the matter referred back to the Minister for redetermination by a delegate not previously involved in the review of the Applicant's request.

[52] The Applicant is entitled to his costs.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and costs are awarded to the Applicant.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-952-09

STYLE OF CAUSE: BRADLEY A. YACHIMEC v.
THE MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: EDMONTON

DATE OF HEARING: DECEMBER 8, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** NEAR J.

DATED: DECEMBER 24, 2010

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