Date: 20081105

Docket: T-1891-07

Citation: 2008 FC 1236

Ottawa, Ontario, November 5, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MARCEL YVON BEAULIEU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Even if investors were unaware that there was fraud, this is not enough to exempt them from liability:

> [60] I begin by noting that Ms. Lepage stated in her report that the Minister was not responsible for the actions of third parties and did not have to assume risks for investors. Although the applicant had a history of compliance with his tax obligations, it could not be said that the circumstances were beyond the control of the investors in the mining companies concerned, who assumed the risk of deductions to which they were not entitled. As the starting point for an analysis to be completed by assessing the specific facts concerning the applicant, this premise certainly seems reasonable to me.

(*Lalonde v. Canada (Canada Revenue Agency)*, 2008 FC 183, 2008 D.T.C. 6205.)

II. Judicial procedure

[2] This is an application for judicial review pursuant to subsection 152(4.2) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (ITA), of a decision made by Lucie Cloutier, Assistant Director, Audit Division of the Montérégie-Rive-sud Tax Services Office of the Canada Revenue Agency, dated October 1, 2007, refusing the application for taxpayer relief.

III. Facts

[3] In the course of 2001, the applicant, Marcel Yvon Beaulieu, representing himself, consented to an agreement with the Canadian Corporation Creation Center Inc. (CCCC) allowing him to access his locked-in retirement account (LIRA), which is a registered retirement savings plan (RRSP). Mr. Beaulieu mandated the CCCC to effect transfers of $25,616 from his LIRA. The National Business Investment in Trust, Inc. (NBI in Trust), a joint venture of CCCC, paid to Mr. Beaulieu amounts equivalent to approximately 70% of the funds transferred through three loan agreements amounting to $17,931. NBI in Trust held back 30%, namely $7,685 for administrative needs as well as to forward the taxes payable to various levels of government.

[4] During the month of September 2005, Mr. Beaulieu received a reassessment from the Canada Revenue Agency (CRA) for the 2001 taxation year. The reassessment added to Mr. Beaulieu's revenues the total of the amounts withdrawn from the LIRA which had been transferred to the CCCC, i.e. $25,616. The CRA waived the interest payable for the period from July 15, 2002 to September 15, 2005, namely the date of the reassessment for the 2001 taxation

year. Mr. Beaulieu must now repay $5,132.79 to the CRA. This is the amount contested by Mr. Beaulieu in this application.

[5] It was on receipt of the reassessment in September 2005 that Mr. Beaulieu learned that he had been the victim of fraud and that NBI in Trust had not paid his taxes as promised. Following his own research on the Internet, Mr. Beaulieu discovered that in July 2001, the Office of the Superintendent of Financial Institutions Canada (OSFI) had published a Monthly Warning Advisory stating that NBI in Trust was not an authorized deposit institution. In August 2001, the Financial Services Commission of Ontario (FSCO) revoked the registration of the CCCC retirement plan. Further, the Deputy Superintendent of retirement plans was named as administrator of the plan with the task of winding up. The FSCO filed 55 counts against the administrators and promoters of the CCCC under the *Pension Benefits Act*, R.S.O. 1990, c. P.8, in regard to a fraudulent pension unlocking scheme. All of this occurred in the second half of 2001, after Mr. Beaulieu had already made his transactions with the CCCC.

[6] On July 10, 2006, Mr. Beaulieu sent to the CRA a notice of objection in accordance with subsection 165(1) of the ITA in regard to the reassessment dated September 15, 2005. Mr. Beaulieu then stated that his objection was delayed as a result of the fact that he had been improperly advised by the accounting firm with which he dealt. In a letter dated July 28, 2006, written by Joane Desfossés, team leader of the Appeal Division of the Tax Services Office of Laval, the CRA informed Mr. Beaulieu that the notice of objection had not been filed within the 90 days following the date of transmission of the notice of reassessment. It informed him of his right to apply for an

extension of time to file the objection. Mr. Beaulieu claims that he never received this letter or that he misplaced it.

[7] On March 28, 2007, following a call to customer service at the CRA, an officer sent Mr. Beaulieu a copy of the letter sent by Ms. Desfossés to Mr. Beaulieu. However, the time limit for Mr. Beaulieu's application for an extension of time had lapsed.

IV. Decision that is the subject of the application

[8] On June 13, 2007, Mr. Beaulieu sent his first application for relief seeking the reopening of the 2001 taxation year even though the time limit for doing so had lapsed. Mr. Beaulieu argued that the tax payable had been deducted by NBI in Trust through a source deduction of a percentage [TRANSLATION] "that was never sent to the government." Mr. Beaulieu stated that he was unaware that the amounts collected were part of a fraudulent scheme because he relied on the fact that the CCCC had a registration number from the CRA's registered pension plan.

[9] In a letter dated July 30, 2007, signed by Annie Plouffe, the CRA refused Mr. Beaulieu's application for relief on the basis that there was no situation allowing her to vary his income tax return for the 2001 taxation year. In the report on the taxpayer relief provisions filed by the review committee, the committee determined that the CRA's Registered Plans Directorate had confirmed in writing that the registration of the registered pension plan obtained by the CCCC had been revoked on July 24, 2000. Accordingly, the committee considered that the transfer of funds from the LIRA in favour of the CCCC relief provisions was not a RRSP transfer to a qualified registered pension

plan. The transfer did not correspond to a transfer to a registered pension plan within the meaning of subsection 146(16) of the ITA. The committee determined: [TRANSLATION] "As a result, the LIRA previously held with the CCCC is considered to have been deregistered and withdrawn. On this very basis, the amount of the withdrawal must be included in Mr. Beaulieu's revenues pursuant to subsection 146(8) and paragraph 56(1)(*h*) of the *Income Tax Act*."

[10] Following these findings, the committee recommended that the reassessment dated September 15, 2005, be upheld. In a letter dated July 30, 2007, the CRA informed Mr. Beaulieu that he could contact the Director of the Tax Services Office to request that the decision be reconsidered.

[11] On September 5, 2007, the CRA received a second application for relief from Mr. Beaulieu again contemplating the variance of his income tax return for the 2001 taxation year. In this second application for relief, Mr. Beaulieu reiterated the facts stated in his first application and added that NBI in Trust had [TRANSLATION] "a fraudulent practice in four provinces."

[12] The mandate to examine the application for relief, dated August 31, 2007, was conferred to Denis Audet of the Montérégie-Rive-sud Tax Services Office of the CRA. In his recommendation, Mr. Audet identified the factors that he considered in making his recommendation. He examined the entire record of Mr. Beaulieu, including the documents involving the fraud by the CCCC.

[13] Mr. Audet made the same finding as the review committee for the first application for relief: i.e. that the transfers of funds from Mr. Beaulieu's LIRA to the CCCC were not transfers to a

registered pension plan within the meaning of subsection 146(16) of the ITA. The total amount of the withdrawals from Mr. Beaulieu's LIRA in 2001 therefore had to be included as revenues pursuant to subsection 146(8) and paragraph 56(1)(*h*) of the ITA. Accordingly, Mr. Beaulieu did not establish any circumstances justifying the variance of the reassessment dated September 15, 2005.

[14] By letter dated October 1, 2007, following Mr. Audet's recommendation, Ms. Cloutier, dismissed the application for relief contemplated by this application.

V. Issue

[15] Did the Minister improperly exercise the discretionary power conferred to him under subsection 152(4.2) of the ITA when he dismissed the applications for relief made by the applicant?

VI. Standard of review

[16] What standard of review applies to the decision made by the CRA dismissing the application for taxpayer relief? *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, states that there are two stages in the judicial review process. At the first stage, the review court verifies whether the case law satisfactorily establishes the degree of deference corresponding to a category of specific questions.

[17] There is already a category corresponding to this case. In *Hillier v. Canada (Attorney General)*, 2001 FCA 197, 273 N.R. 245, the Court applied the standard of reasonableness to the decision made by a tax officer regarding a discretionary exemption contemplated by another part of

the "relief provisions" (Also, *Comeau v. Canada (Customs and Revenue Agency)*, 2005 FCA 271, 361 N.R. 141 at paragraph 17). The Federal Court of Appeal confirmed in *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153, 334 N.R. 348, at paragraph 7, that this standard of review applies to decisions rendered under subsection 152(4.2) of the ITA.

[18] In *Barron v. Canada (Minister of National Revenue - M.N.R.)*, 97 D.T.C. 5121, [1997] F.C.J. No. 175 (QL), the Federal Court of Appeal states the reasons serving as the basis for reviewing the exercise of the discretionary power by the Minister's delegate. Indeed, the judge flags and reiterates the comments of Mr. Justice Louis Pratte:

> [79] . . . when an application for judicial review is directed against a decision made in the exercise of discretion, the reviewing Court is not called upon to exercise the discretion conferred upon the person who made the decision and "the Court may intervene and set aside the discretionary decision upon review only if that decision was made in bad faith, if its author clearly ignored some relevant facts or took into account irrelevant facts or if the decision is contrary to law.

(As quoted by Mr. Justice J. François Lemieux in *Wyse v. Canada (Minister of National Revenue - M.N.R.*), 2007 FC 535, 313 F.T.R. 161; also, *Plattig v. Canada (Attorney General)*, 2003 FC 1074, 239 F.T.R. 290 at paragraph 22.)

[19] In a similar case, Mr. Justice Michel Beaudry stated: "The Court will intervene only where the decision is based on an unreasonable explanation. The Court must assess whether the reasons for the decision are tenable." (*Gagné v. Canada (Attorney General)*, 2006 FC 1523, 2007 D.T.C. 5087 at paragraph 15.)

[20] Subsection 152(4.2) of the ITA confers to the Minister the discretionary power to reassess the tax payable by a taxpayer after the lapse of the normally allotted time limit for reassessment on the taxpayer's application. The terms "fairness provisions " and "fairness legislation " are generally used to describe the relief that is the subject of the Information Circular 07-1 "Taxpayer Relief Provisions" (IC07-1) will gradually be replaced by the term "Taxpayer Relief Provisions." This provision enables the Minister to grant a reduction in the tax payable or reimburse a taxpayer when the taxpayer was unable to comply with the time limits established by law.

[21] Subsection 152(4.2) of the ITA states:

Reassessment with taxpayer's consent	**Nouvelle cotisation et nouvelle détermination**
152. (4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining, at any time after the end of the normal reassessment period of a taxpayer who is an individual (other than a trust) or a testamentary trust in respect of a taxation year, the amount of any refund to which the taxpayer is entitled at that time for the year, or a reduction of an amount payable under this Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is ten calendar years after the end of that taxation year,	**152**. (4.2) Malgré les paragraphes (4) (4.1) et (5), pour déterminer, à un moment donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable — particulier, autre qu'une fiducie, ou fiducie testamentaire — pour une année d'imposition le remboursement auquel le contribuable a droit à ce moment pour l'année ou la réduction d'un montant payable par le contribuable pour l'année en vertu de la présente partie, le ministre peut, si le contribuable demande pareille détermination au plus tard le jour qui suit de dix années civiles la fin de cette année d'imposition, à la fois:

(*a*) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year; and	*a*) établir de nouvelles cotisations concernant l'impôt, les intérêts ou les pénalités payables par le contribuable pour l'année en vertu de la présente partie;

[22] This provision confers broad discretion for exercising its power. In a recent decision by this Court regarding another related provision of the ITA, Mr. Justice Douglas Campbell explained the standard of review of reasonableness: ". . . if the Decision is not defensible in respect of the facts . . . and the law . . . it is unreasonable." (*Nixon v. Canada (Minister of National Revenue - M.N.R.*), 2008 FC 917, [2008] F.C.J. No. 1146 (QL) at paragraph 2.) For a decision to be unreasonable, it must be determined that it is improper within the meaning of subsection 18.1(4) of the FCA.

[23] The guidelines confirm this interpretation of the standard of reasonableness in this context. In order to help its officers in making the decisions required under the Taxpayer Relief Provisions, the CRA revised a policy found in Information Circular 07-1 "Taxpayer Relief Provisions" (IC07-1). This new policy, revised on May 31, 2007, replaced the former Information Circular IC92-3 "Guidelines for Refunds Beyond the Normal Three Year Period." Paragraph 6 of IC07-1 indicates that they are only guidelines: "They are not intended to be exhaustive, and are not meant to restrict the spirit or intent of the legislation." Nevertheless, officers who apply subsection 152(4.2) of the ITA must follow the guidelines. Paragraph 71 of IC07-1, the CRA describes the requirements of subsection 152(4.2) of the ITA:

71. The CRA may issue a refund or reduce the amount owed if it is satisfied that such a refund or reduction would have been made if the return or request had been filed or made on time, and provided that the necessary assessment is correct in law and has not been already allowed.	**71.** L'ARC peut émettre un remboursement ou réduire le montant dû si elle est convaincue qu'un tel remboursement ou une telle réduction aurait été accordé si la déclaration ou la demande avait été produite ou présentée à temps et à condition que la cotisation à établir soit conforme à la Loi et qu'elle n'ait pas déjà été accordée**.**

[24] Finally, paragraph 73 of IC07-1 defines the boundaries of subsection 152(4.2) of the ITA:

73. The purpose for requesting an adjustment under subsection 152(4.2) is not to dispute or disagree on the correctness or validity of a previous assessment. The ability of the CRA to allow an adjustment to amounts for a statute-barred tax year should not be used as a means to have issues reconsidered, such as an audit reassessment, where the individual or testamentary trust chose not to challenge the issues through the normal objection/appeals processes or where the issues were already dealt with under the objection/appeal.	**73.** Le but d'une demande de rajustement en vertu du paragraphe 152(4.2) n'est pas de contester ou de remettre en question l'exactitude ou la validité d'une cotisation antérieure. La capacité de l'CRA de permettre un rajustement de montants pour une année d'imposition frappée de prescription ne devrait pas être utilisée pour effectuer un nouvel examen des points en cause, tel qu'une nouvelle cotisation à la suite d'une vérification, lorsque le particulier ou la fiducie testamentaire a choisi de ne pas contester les points en cause au moyen des processus d'objection et d'appel normaux ou lorsque les points en cause ont déjà été traités dans le cadre d'une objection ou d'un appel.

VII. Analysis

[25] The applicant did not submit any legal arguments, but it is the Court's understanding that Mr. Beaulieu is essentially arguing that the Minister failed to take into account all of the evidence before him. It appears that Mr. Beaulieu submits that the Minister did not taken into account the evidence to the effect that the FSCO proposed that the registration of CCCC's pension plan be revoked only in August 2001. Further, it appears that Mr. Beaulieu is arguing that the Minister did not act fairly. Mr. Beaulieu relied on the CCCC's registration number obtained from the registered pension plan of the CRA. Accordingly, he paid amounts to the CCCC to pay his tax.

[26] On the other hand, the respondent observes that there cannot be a variance unless it is consistent with the provisions of the ITA. The respondent submits the following question: [TRANSLATION] "even if the applicant had filed an objection in the time limit provided at paragraph 165(1)(*a*) of the ITA, the reassessment established on September 15, 2005, would have been confirmed." Therefore, the first question that arises on assessing the reasonableness of the decision is whether the reassessment of September 15, 2005, is consistent with the law. In the affirmative, there was therefore no circumstance justifying variation, and therefore there was no situation justifying a variance of the reassessment dated September 15, 2005.

[27] The respondent alleges that the transfer of funds from Mr. Beaulieu's LIRA to the CCCC was not a transfer to a registered pension plan within the meaning of subsection 146(16) of the ITA. This proposal is based on their determination that the registration of the registered pension plan obtained by the CCCC had been revoked on July 24, 2000. Accordingly, the transfer of funds was

subject to the application of subsection 146(8) paragraph 56(1)(*h*) of the ITA. Both of these provisions oblige taxpayers to add to their revenue the amount of funds withdrawn from registered plans. Mr. Beaulieu therefore had to add the amount of funds withdrawn to his revenues for the 2001 taxation year.

Application of the standard of review to the facts: Did the Minister's delegate take into account all of the relevant considerations?

[28] In his affidavit, Mr. Audet listed the factors that he had considered. However, even if he considered all of the relevant documents, there is a conflict in the facts. The question raised by the documents is the following: was the registration of the CCCC pension plan revoked in 2000, i.e. before Mr. Beaulieu withdrew funds from his LIRA account, or during the second half of 2001, i.e. after Mr. Beaulieu had proceeded to withdraw the funds from his LIRA? If the registration of the CCCC pension plan had been revoked in 2000, even if Mr. Beaulieu contends the contrary, the amount that he withdrew from his LIRA must be added to his revenues for the 2001 taxation year. To the contrary, if the registration of a CCCC pension plan had been revoked in the second half of 2001, as Mr. Beaulieu claims, the withdrawal from his LIRA was valid within the meaning of the ITA.

[29] It is well established that only the information that was submitted to the decision-maker may be examined by a review court in the context of an application for judicial review. Accordingly, the Court must not consider new evidence. The evidence filed before the officer, Mr. Audet, regarding the date of the revocation of the registration of the CCCC included the taxpayer relief provisions report prepared by a CRA review committee, i.e. the basis of the first CRA decision. In this report,

the committee wrote: [TRANSLATION] “On April 7, 2005, we obtained the written confirmation from the Registered Plans Directorate dated July 24, 2000, to the effect that the registration of the RPP obtained by the CCCC had been revoked.” This written confirmation from the Registered Pension Plan Directorate was not in the Court’s record.

[30] Considering the level of deference that the Court must afford to the administrative decision-maker, it is not a question of whether the Court would have arrived at another conclusion. What must be considered is whether the decision dated October 1, 2007, is supported by the evidence. In this case, it appears that the officer adequately considered the committee’s report and the findings therein.

[31] Finally, Mr. Beaulieu asked that the CCCC funds administered by the Deputy Superintendent of Ontario pension plans be used to pay the tax that he owes. This Court does not have the power to make such an order for two reasons. Subsection 18.1(3) FCA explains that the powers of the Federal Court before an application for judicial review apply only to the federal board, commission or tribunal at issue. The Court does not have the jurisdiction to order a third party to this action to pay Mr. Beaulieu’s tax. Further, in the case where the standard of review is that of reasonableness, even if the Court establishes that the Minister did not properly exercise his discretionary power, the Court cannot substitute the CRA decision with its own. The Court has the obligation to refer the decision to the administrative tribunal for reconsideration by another delegated officer (*Lalonde*, *supra*, at paragraph 72; also, IC07-1 at paragraph 107.)

VIII. Conclusion

[32] Mr. Beaulieu did not file evidence to the effect that the decision of Ms. Cloutier failed to consider relevant facts, that she considered irrelevant facts, or that the decision erred in law. Ms. Cloutier did not err in exercising her discretionary power.

[33] Indeed, Mr. Beaulieu is not disputing the lawfulness of the taxation of the amounts withdrawn from his LIRA, but is asking rather that the CCCC funds administered by the Deputy Superintendent of Ontario pension plans be used to pay the tax owing. This Court does not have the power to make such an order.

[34] Further, some aspects of *Lalonde*, *supra*, are similar to this case. In *Lalonde*, the promoters of a tax shelter were found guilty of *inter alia* knowingly allowing investors to claim ineligible expenses when they knew that the financing arranged was not flow-through financing within the meaning of the ITA. Even if the investors were unaware that this was fraudulent, it was not enough to exempt them from liability:

> [60] I begin by noting that Ms. Lepage stated in her report that the Minister was not responsible for the actions of third parties and did not have to assume risks for investors. Although the applicant had a history of compliance with his tax obligations, it could not be said that the circumstances were beyond the control of the investors in the mining companies concerned, who assumed the risk of deductions to which they were not entitled. As the starting point for an analysis to be completed by assessing the specific facts concerning the applicant, this premise certainly seems reasonable to me.

[35] Although the result is unfortunate for Mr. Beaulieu and although it could have been decided otherwise, there is no basis justifying an intervention by the Court. The decision made by the Assistant Director of the Audit Division of the Tax Services Office of the Montérégie-Rive-sud of

the Canada Revenue Agency is reasonable and there is therefore no scope for review.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed without costs.

Michel M.J. Shore
Judge

Certified true translation

Kelley Harvey, BA, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD:

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