Date: 20090128

Docket: A-141-08

Citation: 2009 FCA 23

CORAM: **SEXTON J.A.**
EVANS J.A.
RYER J.A.

BETWEEN:

CANADA REVENUE AGENCY

Appellant

and

M. DIANNE TELFER

Respondent

Heard at Toronto, Ontario, on December 9, 2008.

Judgment delivered at Ottawa, Ontario, on January 28, 2009.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: SEXTON J.A.
RYER J.A.

Date: 20090128

Docket: A-141-08

Citation: 2009 FCA 23

CORAM: **SEXTON J.A.**
EVANS J.A.
RYER J.A.

BETWEEN:

CANADA REVENUE AGENCY

Appellant

and

M. DIANNE TELFER

Respondent

REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] This is an appeal by the Canada Revenue Agency ("CRA") from a decision of the Federal Court (2008 FC 218) in which Deputy Judge Frenette allowed an application for judicial review by Ms Dianne Telfer to set aside a decision of the Minister not to waive the interest owed by Ms Telfer on unpaid taxes. The Judge referred the matter back to the Minister for redetermination.

[2] It is common ground that unreasonableness is the standard of review applicable to the exercise of the Minister's discretion under subsection 220(3.1) of the *Income Tax Act*. In my view,

the Minister's decision not to waive the interest on the facts of this case was not unreasonable, and the Deputy Judge was therefore wrong to have intervened. Accordingly, I would allow the appeal, set aside the Federal Court's order, and dismiss Ms Telfer's application for judicial review.

B. FACTUAL BACKGROUND

[3] The facts relevant to this appeal can be stated quite shortly. Ms Telfer was reassessed by the Minister for her taxation years 1993 to 1999 inclusive (except 1995) and was not allowed to deduct losses from her investment in a limited partnership. She objected to these assessments in Notices of Objection dated July 31, 2000 and May 19, 2001.

[4] The Minister acknowledged receipt of the Notices and advised Ms Telfer that interest would continue to accumulate on any amount of unpaid tax. The Minister added that Ms Telfer could avoid or reduce the interest by paying, in whole or in part, the tax liability that she was disputing.

[5] On January 15, 2002, the Minister wrote to Ms Telfer again, this time to say that she could agree in writing to have her Notices of Objection held in abeyance pending a decision in a test case, *Brown v. The Queen*, which raised issues directly relevant to Ms Telfer's tax liability. Somewhat curiously, the letter also stated that her objections were being held in abeyance (even though she had not indicated that she consented) pending the determination of *Brown*.

[6] Ms Telfer neither agreed in writing that her Notices should be held in abeyance, nor expressed any disagreement with this course of action. Further, she did not exercise her right to

pursue her appeal to the Tax Court 90 days after filing her Notices of Objection: paragraph 169(1)(*b*). Collection activity was suspended while the Notices were being held in abeyance.

[7] In the same letter, the Minister reiterated that interest would continue to accumulate if she did not pay the balance and noted that, if she paid, and her objections were ultimately successful, the Minister would repay any overpayments, with interest. The Minister set out and itemized the amounts of tax, and penalties and interest which Ms Telfer then owed.

[8] The *Brown* litigation was concluded in January 2004 when the Supreme Court of Canada denied the appellant leave to appeal: *Brown v. The Queen* (2001), D.T.C. 1094 (T.C.C.), aff'd. 2003 FCA 192, leave to appeal to the S.C.C. refused, 29843 (January 22, 2004). Soon after, the Minister made an offer to settle Ms Telfer's tax liability, which, after taking legal advice, she accepted in September 2004, more than three years after filing her Notices of Objection. In accordance with the terms of the settlement, the Minister, on March 21, 2005, confirmed the reassessments for the taxation years 1993 and 1994, and reassessed her for the years 1996 to 1999.

[9] In a letter dated September 22, 2006, Ms Telfer asked the Minister to give her "some relief" on the interest of $10,467 then owing on her unpaid tax debt, because she had no income and it had taken a long time for the department to settle her liability. Her request was refused in a letter dated February 19, 2007, on the ground that there was no evidence of departmental delay. The notes and recommendation on which the decision was based set out the relevant facts.

[10] In a letter dated March 26, 2007, Ms Telfer requested a second-level administrative review of the first decision, relying again on her lack of income and the delay by the CRA in dealing with her Notices of Objection while waiting for the result of *Brown*. In a letter dated May 23, 2007, her request was denied. This is the decision under review in these proceedings.

[11] The decision letter stated that the basis of Ms Telfer's request was departmental delay in resolving the Notices of Objection and that, since there was no evidence of any delay on the part of the department and she had been kept fully informed of the situation, her request would be refused. In particular, it noted that she had been advised that the Notices were being held in abeyance pending the determination of the *Brown* litigation and that interest would continue to mount on the sum owing if she did not pay it. Ms Telfer was also reminded that, soon after the result of the *Brown* litigation was known, the Minister made an offer to settle, which she accepted.

[12] The letter also informed Ms Telfer that her request for interest relief on the ground of financial hardship had been transferred to the fairness committee of the CRA's Collections Department in a different office, which had an expertise in determining such matters. The financial hardship aspect of Ms Telfer's request for relief is not relevant for present purposes.

[13] The facts surrounding Ms Telfer's case were set out more fully in the summary prepared within the CRA, on which a recommendation to refuse her request was based. The recommendation explained the departmental view that, pursuant to its guidelines, discretion will normally only be exercised in favour of a taxpayer who has failed to pay a tax debt as a result of "extraordinary

circumstances beyond their control". It concluded that this was not the case here. There had been no delay because Ms Telfer had agreed that her Notices of Objection should be held in abeyance and that she had been advised that, meanwhile, she was liable to pay the interest accumulating on her tax debt.

C. LEGISLATIVE FRAMEWORK

[14] The statutory provisions of immediate relevance to this appeal are as follows:

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

161.(1) Where at any time after a taxpayer's balance-due day for a taxation year *(a)* the total of the taxpayer's taxes payable under this Part and Parts I.3, VI and VI.1 for the year exceeds *(b)* the total of all amounts each of which is an amount paid at or before that time on account of the taxpayer's tax payable and applied as at that time by the Minister against the taxpayer's liability for an amount payable under this Part or Part I.3, VI or VI.1 for the years, the taxpayer shall pay to the Receiver General interest at the prescribed rate on the excess, computed for the period during which that excess is outstanding. 165.(3) On receipt of a notice of objection under this section, the Minister shall, with all due dispatch, reconsider the assessment and vacate, confirm or vary the assessment or reassess, and shall thereupon notify the taxpayer in writing of	161.(1) Dans le cas où le total visé à l'alinéa *a)* excède le total visé à l'alinéa *b)* à un moment postérieur à la date d'exigibilité du solde qui est applicable à un contribuable pour une année d'imposition, le contribuable est tenu de verser au receveur général des intérêts sur l'excédent, calculés au taux prescrit pour la période au cours de laquelle cet excédent est impayé : *a)* le total des impôts payables par le contribuable pour l'année en vertu de la présente partie et des parties I.3, VI et VI.1; *b)* le total des montants représentant chacun un montant payé au plus tard à ce moment au titre de l'impôt payable par le contribuable et imputé par le ministre, à compter de ce moment, sur le montant dont le contribuable est redevable pour l'année en vertu de la présente partie ou des parties I.3, VI ou VI.1.

the Minister's action.	165. (3) Sur réception de l'avis d'opposition, le ministre, avec diligence, examine de nouveau la cotisation et l'annule, la ratifie ou la modifie ou établit une nouvelle cotisation. Dès lors, il avise le contribuable de sa décision par écrit
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.

D. ISSUES AND ANALYSIS

[15] While counsel for Ms Telfer raised several points in his memorandum, the oral argument focused primarily on the following question. Was the Minister's refusal to exercise the discretion conferred by subsection 220(3.1) liable to be set aside on an application for judicial review on the ground of unreasonableness because the Minister had failed to take into account, or to give sufficient weight to, the fact that it was in the interests of both parties to hold Ms Telfer's Notices in abeyance pending the determination of the *Brown* litigation?

(i) Federal Court's decision

[16] The Minister alleges that, while the Applications Judge properly identified unreasonableness as the standard of review, an examination of his reasoning indicates that he did not in fact apply this standard. Rather, counsel said, the Judge substituted his view for that of the Minister on the "fairness" of the decision to deny Ms Telfer interest relief. In other words, the Judge reviewed the Minister's decision on a standard of correctness, not reasonableness. Accordingly, counsel argued, this Court must determine for itself whether the Minister's decision was unreasonable.

[17] Counsel for the Minister may well be right in his analysis of the Judge's decision. It is difficult to extract from the Judge's reasons what error he thought the Minister had committed, other than that the result was unfair. However, in my opinion, it is not necessary for this Court to decide the potentially difficult question of whether the Judge failed to "apply" the appropriate standard of review or applied it incorrectly.

[18] Despite some earlier confusion, there is now ample authority for the proposition that, on an appeal from a decision disposing of an application for judicial review, the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard.

[19] The law is stated clearly by Rothstein J.A. (as he then was) in *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, [2006] 3 F.C.R. 610, 2006 FCA 31.

> [13] In *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at paragraph 43, the Supreme Court dealt with the role of a Court of Appeal reviewing a decision of a subordinate court which itself was conducting a judicial review of a decision of an administrative tribunal. The Supreme Court found that "the normal rules of appellate review of lower courts as articulated in *Housen, supra*, apply". The *Housen* approach (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235) provides that on a question of law the appellate court reviews the subordinate court decision on a standard of correctness (paragraph 8). On all other issues, the standard of review is palpable and overriding error (paragraphs 10, 19 and 28).
>
> [14] However, in more recent cases, the Supreme Court has adopted the view that the appellate court steps into the shoes of the subordinate court in reviewing a tribunal's decision. See for example *Zenner v. Prince Edward Island College of Optometrists*, [2005] 3 S.C.R. 645, 2005 SCC 77 at paragraphs 29-45 *per* Major J. See also *Alberta (Minister of Municipal Affairs) v. Telus Communications Inc.* (2002), 218 D.L.R. (4th) 61 at paragraphs 25-26 *per* Berger J.A. The appellate court determines the correct standard of review and then decides whether the standard of review was applied correctly: see *Zenner* at paragraphs 29-30. In practical terms, this means that the appellate court itself reviews the tribunal decision on the correct standard of review.

(ii) ground of review

[20] Counsel for the Minister argued that the Judge failed to identify a ground of review on which the Court was entitled to interfere with the Minister's exercise of discretion under subsection 220(3.1).

[21] At one time, courts regarded *ultra vires* as the only ground of review available at common law for the exercise of statutory discretion. Administrative action could be held to be *ultra vires* if the repository of discretion committed one of the errors from the familiar catalogue, such as taking into consideration the irrelevant or ignoring the relevant, exercising the power for an improper purpose, or unlawfully failing to exercise the power by, for example, fettering its exercise. In English law, the various errors for which a discretionary decision may be reviewed have sometimes

been generalized as review on the ground of unreasonableness: *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, [1949] 1 K.B. 223 (Eng. C.A.).

[22] In Canada, the more descriptive "abuse of discretion" seems now to be the preferred formulation of the ground on which courts review the exercise of administrative discretion: see especially, *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R 281, 2001 SCC 41, at paras. 52-54. While the various categories of *ultra vires* error remain relevant as means of establishing that an abuse of discretion has occurred, reviewing courts are also to take a more holistic approach to review. Thus, in order to reflect the deference due to the decision-maker to whom the legislature has delegated discretion, a court should not necessarily assume that it may substitute its view on, for example, issues of propriety of purpose and the relevance of the factors considered: see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 53 and 56; *Dr. Q v. British Columbia (College of Physicians and Surgeons)*, [2003] 1 S.C.R. 226, 2003 SCC 19, at paras. 24-25 ("*Dr. Q*").

[23] The *Federal Courts Act*, R.S.C. 1985, c. F-7, subsection 18.1(4), does not specifically identify the ground on which the Court may grant an application for the judicial review of the exercise of a statutory discretion by a federal board, commission or other tribunal, such as that conferred on the Minister by subsection 220(3.1). However, the grounds of review set out in subsection 18.1(4) are potentially applicable to discretionary administrative action, including error of law (paragraph 18.1(4)(*c*)) and the residual ground of review in paragraph 18.1(4)*(f)* ("acted in any other way that was contrary to law").

(iii) standard of review

[24] Unreasonableness is the standard of review normally applicable to the exercise of discretion: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at para. 51 ("*Dunsmuir*"). Indeed, this Court had previously held in *Lanno v. Canada (Customs and Revenue Agency)*, 2005 DTC 5245, 2005 FCA 153, that unreasonableness *simpliciter* (one of the two deferential standards then applied by the courts) was the standard of review applicable to a decision made under subsection 220(3.1).

[25] When reviewing for unreasonableness, a court must examine the decision-making process (including the reasons given for the decision), in order to ensure that it contains a rational "justification" for the decision, and is transparent and intelligible. In addition, a reviewing court must determine whether the decision itself falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Dunsmuir* at para. 47.

[26] In elaborating the concept of judicial deference connoted by the standard of unreasonableness, the Court also said in *Dunsmuir* (at para. 49):

> In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision-makers, for the processes and determinations that draw on particular expertise and experience and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[27] In the present case, counsel conceded that, on the facts, it might be reasonably open to the Minister to deny Ms Telfer's request for interest relief. Rather, the complaint is that the Minister failed to consider, or to give sufficient weight to, relevant facts, particularly the delay resulting from

the CRA's holding her Notices of Objection in abeyance pending a decision in the *Brown* litigation, a course of action that was the fault of neither party and benefited both as a result of the settlement of Ms Telfer's tax liability in light of the *Brown* decision.

[28] Nor is Ms Telfer's allegation that the Minister committed an error of law by misinterpreting subsection 220(3.1), as might have been the case if the Minister had stated that holding Notices of Objection in abeyance pending the decision in other litigation could never be the basis for granting relief. Rather, counsel's argument seems to be that, because the reasons for the CRA's decision did not deal expressly with the particular characteristics of the circumstances in which Ms Telfer's Notices were held in abeyance, they lacked the requisite degree of "justification, transparency and intelligibility" demanded by the standard of unreasonableness.

(iv) application of the unreasonableness standard

[29] While the formulation of the standard of unreasonableness as applied to the process for making discretionary decisions is invariable, its application is context-specific: compare *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 435 at paras. 21-22, where the Court "contextualized" the application of the unreasonableness standard to a tribunal's findings of fact. In determining whether the decision-making process in this case provided adequate justification, transparency, and intelligibility in order to render the decision reasonable, I have taken into account the following considerations.

[30] First, while referring to the fact that her Notices of Objection were held in abeyance pending the outcome of other litigation, Ms Telfer's request for a second-level administrative review of the initial refusal to grant relief characterized the basis for relief as departmental "delay". I note that Ms Telfer was legally represented in this appeal and had been assisted by different counsel in her dealings with the CRA in connection with her subsection 220(3.1) request. The allegation of departmental delay in Ms Telfer's request (with the implicit suggestion of fault on the part of the CRA) is significantly different from the basis of relief that, counsel alleged, the Minister had unlawfully failed to consider, namely that neither party was at fault and both benefited from the decision to hold the Notices in abeyance pending the result of the *Brow*n case.

[31] 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.

[32] Second, it is clear from the decision letter sent to Ms Telfer, and from the internal report and recommendation on which it was based, that the CRA had not overlooked the circumstances that resulted in the lapse of more than three years between the time that Ms Telfer filed her Notices of Objection and the settlement of her tax liability. The background facts are accurately summarized in the supporting documents, including the decision to hold the Notices in abeyance pending the determination of the related *Brown* litigation. The recommendation, but not the decision letter itself, stated that Ms Telfer had "agreed" that the Notices be held in abeyance. It would have been more

accurate to have described Ms Telfer as having acquiesced, but nothing, in my view, turns on this nuance.

[33] In these circumstances, Ms Telfer can hardly say that the Minister overlooked any relevant facts. The most that can be said is that the Minister failed to give sufficient weight to the fact that her tax liability was not settled until *Brown* was decided. Since deciding what weight to accord to a particular fact is at the heart of exercising discretion, it will normally be difficult to persuade a court that an administrative decision-maker has acted unreasonably in this regard.

[34] Third, the nature of the discretion is another aspect of the context for determining whether an impugned decision is unreasonable. In this case, the refusal to grant relief against accumulated interest did not infringe any right or expectation of Ms Telfer's. On the contrary, she was invoking the Minister's extraordinary statutory discretion to grant her an exemption from a basic principle of the tax system, namely, that taxpayers are liable to pay taxes owing by April of the following year, failing which, they must pay interest, at the prescribed rate, on any amount owing.

[35] Those who, like Ms Telfer, knowingly fail to pay a tax debt pending a decision in a related case normally cannot complain that they should not have to pay interest. If they had promptly paid the sum claimed to be due, and were later found not liable to pay it, the Minister would have had to repay the overpayment, with interest: see *Comeau v. Canada (Customs and Revenue Agency)*, 2005 FCA 271, 2005 D.T.C. 5489, at para. 20. The relatively high rate of interest charged to the taxpayer is no doubt intended, for the benefit of all taxpayers, to encourage the prompt payment of tax debts.

[36] *Information Circular IC07-1 – Taxpayer Relief Provisions*, dated May 31, 2007, makes available to the public the guidelines developed by the Minister, within which the statutory discretion under subsection 220(3.1) will normally be exercised. While the guidelines do not purport to be exhaustive of the situations in which relief may be granted, they indicate that discretion will be exercised in favour of the taxpayer "in exceptional circumstances beyond (the taxpayer's) control".

[37] In *Cole v. Canada (Attorney General)*, 2005 DTC 5667, 2005 FC 1445, it was said that delay caused by litigation may justify the grant of relief under subsection 220(3.1). However, unlike the situation in *Cole*, the Minister in the present case took into consideration the whole period of the delay, including the time taken awaiting the decision in *Brown*.

[38] Counsel argued that the Minister unlawfully fettered his discretion by refusing to exercise it in favour of Ms Telfer, because the facts did not fall within an existing guideline. I disagree. I see no evidence in either the terms of the guidelines or the decision letter to support this suggestion. After all, in basing her request on departmental delay, Ms Telfer was not asking the Minister to consider something not dealt with in the guidelines.

[39] Counsel also argued that it was unfair for the Minister to deal separately with Ms Telfer's allegation that she should be given relief on the ground of financial hardship. I do not agree. It seems to me quite appropriate that the CRA should refer this aspect of requests under subsection 220(3.1) to an office with expertise in considering claims of this kind.

(v) conclusion

[40] The above considerations, as well as the unstructured nature of the Minister's statutory power under subsection 220(3.1), militate against a court's subjecting the decision-making process to close scrutiny. Despite the Minister's statutory duty to consider a taxpayer's Notice of Objection "with all due dispatch" (subsection 165(3)), it will require circumstances more compelling than those in the present case to persuade a reviewing court that the Minister acted unreasonably in the course of deciding not to give to a taxpayer what would effectively be an interest-free loan.

[41] In short, I am not persuaded that the Minister's decision lacked the degree of "justification, transparency and intelligibility" required by the unreasonableness standard of review. The precise point relied on by counsel before this Court was not squarely put to the minister; instead, in her letter Ms Telfer simply alleged "delay". In any event, it is clear from both the Minister's letter, and the supporting documents, that he was well aware of all the relevant facts and cannot be said to have excluded them from his consideration.

[42] Finally, the Court in *Dunsmuir* (at para. 47) noted that, although the primary focus of judicial review for unreasonableness is the "justification, transparency and intelligibility" of the decision-making process, a reviewing court should also consider whether the outcome itself is unreasonable. In light of both the facts of the case and the applicable law, the Minister's decision "falls within a range of possible, acceptable outcomes defensible in respect of the facts and the law" and is thus not unreasonable.

E. CONCLUSIONS

[43] For all these reasons, I would allow the appeal with costs both here and below, set aside the order of the Federal Court, and dismiss the application for judicial review.

"John M. Evans"
J.A.

"I agree
J. Edgar Sexton J.A."

"I agree
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-141-08
STYLE OF CAUSE:	Canada Revenue Agency and M. Dianne Telfer
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 9, 2008
REASONS FOR JUDGMENT BY:	Evans J.A.
CONCURRED IN BY:	Sexton J.A. Ryer J.A.
DATED:	January 28, 2009

APPEARANCES:

Nancy Arnold Kevin Dias	FOR THE APPELLANT
Clifford Rand Susan Thomson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPELLANT
Stikeman Elliott LLP Toronto, Ontario	FOR THE RESPONDENT