Federal Court  Cour fédérale

Date: 20171107

Docket: T-2162-16

Citation: 2017 FC 1006

Ottawa, Ontario, November 7, 2017

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

PATRICK CONNOLLY

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Under subsection 204.1(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA], a special tax is owed in respect of contributions made to registered retirement savings plans [RRSP] on amounts in excess of limits permitted by the ITA. For each month that the excess amounts remain in a RRSP, a tax of 1 percent is levied on the excess amount. A taxpayer is also

required to file annual returns in respect of excess contributions (T1-OVP) and is liable for interest and penalties for late filing.

[2] The ITA provides for relief from the tax and penalties and interest. Subsection 204.1(4) provides that where the excess contributions arose "as a consequence of a reasonable error" and "reasonable steps are being taken to eliminate the excess, the Minister may waive the tax". In addition, relief is available from penalties and arrears interest pursuant to subsection 220(3.1) of the ITA.

[3] The Applicant seeks a judicial review of the decision of a delegate of the Minister of National Revenue [the Minister's delegate or the Minister] dated November 30, 2016 [the Decision], denying requests both for relief from the special tax on RRSP excess contributions and the applicable interest and penalties for the 2003 to 2010 tax years. These total $57,831.42 as of August 29, 2016. For the reasons that follow, despite the efforts of the Court to provide the relief requested, the application is dismissed.

II. Response from Background

[4] The Applicant is 73 years of age.

[5] In 2003 and 2004, the Applicant contributed $30,000 and $15,000 respectively into a combination of personal and spousal RRSPs [the Over-Contributions]. The Applicant did not withdraw these contributions until 2010, at which time they totaled $44,854.

[6] When the Applicant made the contributions he had not filed a tax return since 1988. The Applicant relied on his accountant who had advised him that it was unnecessary to do so, as he did not owe any tax. This practice is neither illegal nor condoned by the Canada Revenue Agency [CRA]. As a result the Applicant did not have a recent notice of assessment, and as such was unaware of his RRSP contribution limit.

[7] The Applicant erroneously thought that he could make the maximum contribution to the RRSPs in those years. He was unaware that he did not have any contribution room as a result of pension contributions made through his employer. There is no evidence that the Applicant was advised by TD Bank of concerns about contribution limits or that he made inquiries about contribution limits.

[8] At the time of the Over-Contributions in 2003, 2004 and subsequently, the Applicant's mental state was affected by a series of distressing life events: in 1987, his 20-year-old son died in a motor vehicle accident involving a drunk driver; in 2003, there were serious health issues concerning his father-in-law who subsequently passed away; in 2004, he was constructively dismissed from his 19-year position with the City of New Westminster; and both he and his wife suffered from depression and anxiety.

[9] In 2005, the Applicant's accountant filed tax returns on his behalf for his 1997 to 2004 taxation years. The Applicant received the notices of assessment from his accountant for his 2003 and 2004 taxation years in 2005 with a cover letter advising that he had "unused RRSP contributions" to be carried forward. The statements, among other things, set out the taxpayer's

RRSP deduction limit, his amount of unused RRSP contributions available, and advice that if the amount of unused RRSP contributions available exceeded the RRSP deduction limit, then the taxpayer may be subject to a penalty tax. The accountant did not advise the Applicant that the unused RRSP contributions were Over-Contributions for which the Applicant would be penalized. The Applicant received assessments with similar information in each of the 2006 and 2007 years.

[10] The Applicant did not deduct the Over-Contributions from his income in his 2003 and 2004 returns and only claimed deductions for the 2005 to 2008 returns of $628, $0, $55 and $3180 respectively.

[11] In February 9, 2007, the CRA sent a letter [the 2007 Letter] advising the Applicant: a) that he may have had excess RRSP contributions from 2003 to 2005 subject to a tax of 1 % per month; b) of the deadline to pay the tax; c) that he was required to file a T1-OVP return for each year he had excess RRSP contributions, and that he could be required to pay arrears interest and late filing penalties; d) that he could withdraw the excess RRSP contributions at any time, but that any amount withdrawn had to be included as income on his tax return; e) that he could claim a deduction equal to the amount withdrawn (an “off-setting deduction”) if the excess RRSP contributions were withdrawn within a certain period of time; and f) if he was eligible to claim an off-setting deduction, he could withdraw the excess RRSP contributions without withholding tax by submitting a T3012A form to the CRA.

[12] After the Applicant received the 2007 Letter in February from the CRA, he immediately instructed his accountant to prepare documentation to be submitted to the CRA in order to resolve the problem, which included the T1-OVP returns to report the Over-Contributions, and T3012A forms to request the CRA's authorization for the RRSP issuer to refund the Over-Contributions to the Applicant without withholding tax. He was told by his accountant that the process was lengthy and complicated, and that it would take a significant amount of time to complete.

[13] On February 12, 2008, the Applicant's accountant sent the T1-OVP returns and T3012A forms, but only after the Applicant went to the accountant's office to inquire regarding the delay. At that time the accountant determined that the documents sat complete, but unsent, in the Applicant's tax file.

[14] In his submission for relief, the Applicant claimed that the February 2008 forms were apparently lost by the Minister. The CRA states that it has no record of receiving the forms and returns in 2008.

[15] By letter dated October 20, 2008, the CRA advised the Applicant that it had not received a reply to its letter of February 9, 2007, requesting that he file T1-OVP returns for the 2003 and later taxation years within 30 days, and advised that if it did not receive the outstanding T1-OVP returns it would arbitrarily assess them.

[16] On January 5, 2009, the Applicant received notices of assessment of Part X.1 tax and late filing penalties in respect of his 2003 to 2007 taxation years. The assessments imposed tax equal to 1% of the Over-Contributions per month under subsection 204.1(2.1) of the ITA. It is noted here that on October 6, 2009, after an objection by the Applicant, the Minister reassessed the tax in respect of the 2003 and 2004 tax years. This tax and the related late filing penalties and interest thereon form one part of the Applicant's request for relief.

[17] On January 21, 2009, the accountant sent the T1-OVP returns for 2003 to 2007 taxation years along with the T3012A forms for the 2003 and 2004 taxation years.

[18] In March 2009, the Applicant objected to the January 5, 2009 T1-OVP assessments for 2003 through 2007. By letter dated August 27, 2009, the CRA advised the Applicant that the 2003 and 2004 T1-OVP assessments would be varied, while confirming the 2005 through 2007 T1-OVP assessments.

[19] By letter dated September 10, 2009 in response to the T3012A forms for the 2003 and 2004 taxation years filed by the Applicant, the Minister denied the request to withdraw the Over-Contributions without withholding by the RRSP issuer because the Applicant had missed the deadline to file the T3012A forms. The Minister indicated that the deadline to file such forms was December 31, 2006. The Minister also encouraged the Applicant to file his 2008 T1-OVP return.

[20] Shortly thereafter, the Applicant withdrew the Over-Contributions from the RRSPs. He included the amount of the Over-Contributions in his income in his 2010 tax return in accordance with subsection 146(8) of the ITA and claimed a corresponding deduction for the un-deducted Over-Contributions pursuant to subsection 146(8.2).

[21] By reassessment of the Applicant's 2010 taxation year on October 31, 2011, the Minister denied the deduction under subsection 146(8.2). The Applicant objected and ultimately appealed to the Tax Court of Canada in respect of his 2010 taxation year. On April 5, 2013, Mr. Justice Bocock held [Tax Court Judgment] that the Applicant had met the technical requirements of the ITA in order to claim a deduction in respect of the 2004 Over-Contributions ($15,000), but had not done so in respect of the 2003 Over-Contributions ($30,000) because the Applicant had missed the deadline for withdrawal of the 2003 Over-Contributions. The Tax Court therefore allowed the appeal in part. In doing so, Mr. Justice Bocock made the following findings of fact and law:

> i. The Applicant made the Over-Contributions without attempting to deduct them from his income in 2003 and 2004 and without having received any relevant queries from his retained accountant or investment advisor with respect to his contribution limits;
>
> ii. The Applicant made the Over-Contributions without recognizing that he did not know the complex rules of RRSP contribution limits and related issues, which an average taxpayer could not likely ever know;
>
> iii. Since the Applicant had not attempted to claim deductions from his income in the relevant years in respect of the Over-Contributions, there was no indication in the 2005 notices of assessment that Over-Contributions had been made beyond the following standard language:
>
> iv. By contrast, if the Applicant had claimed deductions, there might have been a more conspicuous disallowance of the

deductions. This explains the Applicant's failure to take action in 2005.

v. The Applicant, upon receipt of the 2007 Letter, did everything he could, through his "problem-prone" accountant, to get to the bottom of the problem and resolve it. His accountant was "lamentably slow" in dealing with the issue.

vi. The CRA reassessed the Applicant's 2004 taxation year in 2008, but did not send the reassessment to him.

vii. As a result of the 2008 reassessment (the date of which was relevant in computing the deadline to file the T3012A), December 31, 2006 was not the correct deadline to file the T3012A in respect of 2004; the Applicant had the legal right to file the T3012A and withdraw the over-contribution in respect of 2004 on the dates he did so.

[22] Mr. Justice Bocock was highly supportive of the Applicant receiving relief from the consequences of his over contributions. In the course of the Tax Court Judgment, he cited *McNamee v The Queen*, 2009 TCC 630 [*McNamee*], which stated that the "very complex [RRSP] legislation should not be used to penalize the innocent and uninformed, which Mr. McNamee and 99 percent of taxpayers would be." He discussed other case law, including *Dimovski v Her Majesty the Queen*, 2011 FC 721 [*Dimovski*], which he considered relevant to a request for relief. He strongly suggested that the Minister examine all of the Applicant's attempts to correct the matter, as such considerations would be relevant in determining whether relief ought to be granted on any request under subsection 204.1(4) of the ITA.

[23] On or about December 19, 2013, the CRA received the Applicant's first request for relief.

[24] By letter dated September 29, 2014, the CRA requested that the Applicant file T1-OVP returns for his 2008, 2009 and 2010 taxation years. As of June 19, 2015, the CRA had not received these returns. As such, on June 19, 2015, the Minister assessed the Applicant for tax, arrears interest and late-filing penalties in respect of the RRSP contributions for 2008, 2009 and 2010.

[25] In August 2015, the Applicant filed a T1-OVP return for the 2010 taxation year and objected to the June 19, 2015 T1-OVP assessment for 2010. On March 9, 2016, the Minister allowed the objection and accordingly reassessed the Applicant in respect of the RRSP contributions for 2010. This reassessment is the second part of the Applicant's request for relief which formed part of his resubmitted final claim for relief of February 3, 2016.

[26] Legislative provisions 204.1(4) and 220(3.1) read as follows:

Waiver of tax	**Renonciation**
204.1(4) Where an individual would, but for the subsection, be required to pay a tax under subsection (1) or (2.1) in respect of a month and the individual establishes to the satisfaction of the Minister that (a) the excess amount or cumulative excess amount on which the tax is based arose as a consequence of reasonable error, and (b) reasonable steps are being taken to eliminate the excess,	**204.1(4)** Le ministre peut renoncer à l'impôt dont un particulier serait, compte non tenu du présent paragraphe, redevable pour un mois selon le paragraphe (1) ou (2.1), si celui-ci établit à la satisfaction du ministre que l'excédent ou l'excédent cumulatif qui est frappé de l'impôt fait suite à une erreur acceptable et que les mesures indiquées pour éliminer l'excédent ont été prises.

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.

III. The Minister's Decision dated November 30, 2016 Denying the Requests for Relief

[27] With respect to the relief from the special tax, the Minister's delegate summarized her reasoning regarding the Applicant's failure to meet the requirement to demonstrate "reasonable error", as follows:

> The term "reasonable error" is not defined by law; however, the CRA uses the following guidelines to evaluate requests for a waiver/cancellation of the Part X.1 tax. The CRA considers "reasonable error" to mean, first and foremost, that the excess arose because of a mistake, and that the taxpayer did not intentionally over-contribute. A "reasonable error" is further defined as an extraordinary

> circumstance that a taxpayer had not previously encountered that were (*sic*) beyond the taxpayer's control and that led to the excess [that] would, in most cases, indicate that the excess arose due to a reasonable error. In your case, a lack of awareness or receiving poor advice from your accountant or financial institution do (sic) not meet this criteria.
>
> [Emphasis added]

[28] With respect to the emotional distress of the Applicant as a factor supporting waiver of the tax, the Minister's delegate rejected the submission, as follows:

> We understand that you suffered emotional distress for a number of years, however, based on the information you provided, emotional distress was not a mitigating factor in the over-contribution situation, nor did it directly contribute to your inability to comply with the filing of your T1-OVP returns, or making payments, in a timely manner.

[29] With respect to whether "reasonable steps were taken to eliminate the excess", the Minister's delegate determined this phrase to mean that steps were being taken to eliminate the excess "as quickly as possible". Although advised in 2005 and 2007 of his unused RRSP contributions that could be subject to tax, and being informed that he could withdraw the excess contributions directly from his financial institution, the Applicant took no steps to remedy the situation. He ultimately withdrew them in 2010. The taxpayer continues to be responsible for his or her tax obligations despite choosing a third party to provide tax or financial advice; an error made by a third-party is an issue to be resolved between the individual and the third-party.

[30] In addition, in addressing both "reasonable error" and "reasonable steps", the Minister's delegate referred the matter of the Applicant's reliance upon third parties as follows:

> When an individual chooses a third party to provide tax or financial advice, the individual continues to be responsible for his or her tax obligations. The CRA is not responsible for any poor or incorrect advice you may have received from your accountant concerning your tax returns or not receiving tax information regarding your eligibility to make RRSP contributions from your financial institution. An error made by a third-party is an issue to be resolved by the individual and the third-party.

[31] Contrary to the conclusion of the Tax Court, the Minister's delegate disagreed that the Applicant was eligible for the 2004 tax deduction waiver after 2006 because of CRA's internal 2008 reassessment. The reassessment was required because the Applicant did not report his RRSP contributions of $22,000 in the correct year, and was in any event made after December 31, 2009, being the limitation date for withdrawal of the 2004 contributions. The Minister's delegate admitted in cross-examination that she did not understand or rely on the Tax Court Judgment in rendering the Decision.

[32] With respect to the relief sought of the interest and penalties for late filing pursuant to subsection 220(3.1), (which provision contains no reference to reasonable conduct by the taxpayer), the Minister's delegate found that the Applicant could not show that the penalties and interest were the result of circumstances beyond his control, such as illness, accident, serious emotional distress, a natural disaster, or action of the CRA, in effect relying on the same factual conclusions as applied to reject the special tax relief under subsection 204.1(4).

IV. The Parties' submissions

A. *Applicant's Submissions*

[33] The Applicant argues that "[t]he text of subsection 204.1(4) makes plain and clear that it does not require the existence of extraordinary circumstances beyond a taxpayer's control, nor does it require that excess contributions be withdrawn as soon as possible, in order to allow relief" [emphasis added].

[34] The Applicant argues that the interpretation of the word "reasonable" has a well-established meaning in the general law, in numerous contexts outside of the ITA or the interpretation given it in the tax waiver guidelines [Guidelines]. He submits that in light of the "plain meaning of reasonable" taken from the dictionaries and supported in the jurisprudence cited, a reasonable error "should be understood as an error that would be considered by an ordinary objective person with knowledge of all relevant facts not to be absurd or ridiculous, but to be an error that an otherwise rational and sensible person would make in the circumstances."

[35] With respect to "reasonable steps", the Applicant submits that these should be understood as measures that an ordinary objective person would consider sensible and appropriate in the circumstances; not a timeframe of "as soon as possible". Moreover, in dealing with the meaning of "reasonable time" he cites the decision in *Silden v Canada (MNR)*, 90 DTC 6576 at 6582 as follows:

> Whenever a statute prescribes a reasonable time, or any other reasonable measure or conduct, one can be sure that what is meant is not a rigidly specific, eternal, universal standard or verity. What is meant is a situational concept; that is "what time is reasonable in the circumstances?"

[36] In terms of context and purpose of subsection 204.1(4), the Applicant submits that because the waiver provision is part of a complex scheme regulating RRSPs, Parliament recognized the complexity of the scheme was such that the average taxpayer could not understand the legislation. To support this argument, he cites the decision of *McNamee* at para 13, referred to above by Justice Bocock that "complex [tax] legislation should not be used to penalize the innocent and uninformed, which Mr. McNamee and 99 % of the taxpayers would be".

[37] The Applicant further cites the decision of 3500772 *Canada Inc v Canada (National Revenue)*, 2008 FC 554 [3500772 Canada], where the Court found that it was an incorrect appreciation of the Guidelines with respect to relief from penalty and interest levies, under subsection 220(3.1) of the ITA, that required the existence of "extraordinary circumstances" in order for relief to be granted.

B. *Respondent's Submissions*

[38] The Minister's counsel submitted that "reasonable error" could not be based upon ignorance of the law or reliance upon third party conduct, citing case law that is considered below. A similar submission was advanced rejecting the justification of the delay in taking "reasonable steps" due to third-party conduct.

[39] The Minister possesses an extremely wide discretion under subsection 204.1(4) of the ITA. As was noted by this Court in *Kapil v Canada Revenue Agency and Attorney General of Canada*, 2011 FC 1373 at para 28 [*Kapil*] that "[e]ven if both prongs [of subsection 204.1(4)]

are met, the discretion to waive remains with the Minister." Furthermore, the Applicant does not suggest that the Guidelines in the present matter pre-empted the exercise of the discretion of the Minister's delegate. The Guidelines applicable both to subsections 204.1(4) and 220(3.1) of the ITA recommend consideration be given to the existence of "extraordinary circumstances" beyond the control of the taxpayer. As the Guidelines are beneficial and appropriate, the Court should find that there are no issues that would render them invalid or formed a basis to set aside the Decision The Minister's counsel submitted during the hearing that "reasonable error" could not be based upon ignorance of the law or reliance upon third party conduct, citing case law that is considered below. A similar submission was advanced rejecting the justification of the delay in taking "reasonable steps" due to third-party conduct.

[40] With reference to *3500772 Canada*, the Minister disagrees that this Court has concluded that the element of extraordinary circumstances is problematic. Instead the Court concluded the decision-maker cannot rely automatically on the Guidelines, including the element of "extraordinary circumstances", without considering all the information before her.

V. Issues

[41] The following issues are raised in this matter:

1. The applicable standard of review;

2. Whether the Minister, through the CRA:

    a. made errors of law in interpreting subsection 204.1(4);

b. made erroneous findings of fact in a perverse and capricious manner and without regard for the material before her (namely, the Tax Court Judgment); and

c. rendered an unreasonable decision; and

3. Whether the Decision was made in a procedurally unfair manner.

VI. Standard of Review

[42] The Applicant argues that the Guidelines, and therefore the Decision, are in conflict with subsection 204.1(4) of the ITA. The Respondent, although arguing that the standard should be reasonableness, acknowledges that the Guidelines need not be followed where they contradict a statutory provision: *Ainsley Financial Corp v Ontario (Securities Commission)*, [1994] OJ No 2966 (ONCA). As this is framed as a matter of statutory interpretation where the CRA has no relative expertise *vis-à-vis* the courts, the issue should be assessed on a standard of correctness: *MNR v Redeemer Foundation*, 2006 FCA 325 at para 24, affirmed without comment on this point by the Supreme Court, 2008 SCC 46; and *Bozzer v Canada*, 2011 FCA 186 at para 3.

[43] No interpretation issue is raised concerning subsection 220(3.1) for relief from interest and penalties *vis-à-vis* Guidelines, nor with respect to the other issues concerning the Decision which is to be evaluated on a standard of reasonableness, per *Dunsmuir v New Brunswick*, 2008 SCC 9. These are discretionary decisions and as such, are to be accorded deference: *Kapil*, *supra* at para 19 and cases cited therein.

VII. Analysis

A. *The Interpretation of "reasonable" in Subsection 204.1(4)*

(1) Mistake of law and reliance on third party advisors

[44] The Applicant contends that the Minister's delegate made substantive errors of law in interpreting subsection 204.1(4) in her interpretation as to what constitutes "reasonable error" and "reasonable steps", being the requirements that must be met in order to be relieved of the special tax.

[45] It is common ground that these requirements are conjunctive, meaning that both criteria of reasonable error and reasonable steps are to be met in a particular case.

[46] The relevant portion of the Minister's Decision letter defining reasonableness in subsection 204.1(4) adheres to the Guidelines as follows:

> Reasonable error means that you did not intend to over-contribute to your RRSP and that it happened because of extraordinary circumstances beyond your control.
>
> Reasonable steps means that you have taken steps to eliminate the excess as quickly as possible.
>
> [Emphasis added]

[47] As noted from the factual summary above, the Applicant argues that the term "reasonable" is defined in the jurisprudence to relate to the ordinary taxpayer placed in his circumstances, and not subject to some extraneous limitation justifying relief from the special tax

to extraordinary circumstances beyond his control. He relies on factual conclusions of the Tax Court Judgment to demonstrate that he acted as would the reasonable taxpayer who could make "the Over-Contributions without recognizing that he did not know the complex rules of RRSP contribution limits and related issues, which an average taxpayer could not likely ever know". The Applicant also admits that he did so "without having received any relevant queries from his retained accountant or investment advisor with respect to his contribution limits". Similarly, with respect to "reasonable steps" the Court finds that he "did everything he could through his 'problem-prone' accountant to get to the bottom of the problem and resolve it. His accountant was 'lamentably slow' in dealing with the issue".

[48] However, the Applicant appears to have not recognized that Minister's delegate rejected the Applicant's claims for relief primarily on grounds of ignorance of the law and reliance upon a third party advisor, concluding that "a lack of awareness or receiving poor advice from your accountant or financial institution do (*sic*) not meet this criteria" [extraordinary circumstances beyond the Applicant's control]. Similarly, she concluded that the Applicant could not rely on the failures of his financial advisor to demonstrate taking "reasonable steps", because "an error made by a third-party is an issue to be resolved by the individual and the third-party". These conclusions were further substantiated by other supporting reasons in the decision.

[49] In seeking relief from the special tax, the Applicant limited his submissions to challenging the language found in the "Information Circular Request to waive Part X .1 tax - 19(23)7.3" [named as "the Guidelines" in this matter]. This document is not to be confused with the Information Circular entitled "Guidelines for waiving tax 19(23)7.23" [the 19(23)7.23

Guidelines], which were provided to the Applicant during cross examination of the Minister's delegate. The 19(23)7.23 Guidelines stipulate that ignorance of law and reliance on third parties are not grounds for waiving the special tax, as follows:

> *Ignorance of the law*
>
> Ignorance of the law should not be accepted as a basis for granting a waiver. If the excess arose through neglect, carelessness, or lack of awareness on the part of the taxpayer, the tax should not be waived. For examples, the fact that a taxpayer was not aware of the tax on RRSP/PRPP excess contributions or that the taxpayer was not aware of filing requirement does not constitute by itself acceptable reasons for waiving the tax.
>
> *Third parties (financial institutions, employers, financial advisors)*
>
> A third party is defined as a representative acting on behalf of the taxpayer/employer.
>
> Taxpayers are responsible for meeting their obligations under the legislation the Agency administers.
>
> If the taxpayer states that an RRSP/PRPP contribution receipt was prepared incorrectly or funds were deposited in a registered plan in error, inform the taxpayer that the tax cannot be waived

[50] The Respondent relies upon the long-standing principle of the courts that the taxpayer bears the onus of knowing the law, and that as a result any argument of the individual being ignorant of Canadian law fails: see for example *Gagné v Attorney General of Canada*, 371 FTR 150; *Kapil*, *supra* at paras 22−24; *Dimovski*, *supra* at para 17, which latter decision included the following statement:

> The Canadian tax system is based on self-assessment, which means that it is up to each individual to ensure that they conduct their financial affairs in accordance with the

> *Income Tax Act*: *R v. McKinley transport Limited*, [1990] 1 SCR 627.

[51] The Minister's delegate is correct that persons who participate in a deferred income plan such as an RRSP are expected to demonstrate a certain level of knowledge related to that investment. The reasonable taxpayer must exhibit the qualities of due diligence, which given the complexity of the Canadian taxation system entails a reasonable recognition of the person's own limitations and the need to seek out help.

[52] Similarly, the Court has consistently refused to acknowledge any concept of waiver of taxes, penalties or interest based on the conduct of third parties: *Fleet v Canada (Attorney General)*, 2010 FC 609 at para 29 as follows:

> [29] It is apparent to me that at least part of the reason why Mr. Fleet did not take any of these steps is that he relied on his advisors and became an unfortunate victim of their errors or omissions. However, the law is well established that taxpayers are "directly responsible for the actions of those persons appointed to take care of [their] financial matters" (*Babin v. Canada (Customs & Revenue Agency*), 2005 FC 972 (CanLII), at para. 19; *Northview Apartments Ltd. v. Canada (Attorney General*), 2009 FC 74 (CanLII), at paras. 8 and 11; *PPSC Enterprises Ltd. v. Minister of National Revenue*, 2007 FC 784 (CanLII), at para. 23; and *Jones Estate v. Canada (Attorney General*), 2009 FC 646 (CanLII), at para. 59) and that they "are expected to inform themselves of the applicable filing requirements" (*Sandler v. Attorney General of Canada*, 2010 FC 459 (CanLII), at para. 12).

[53] When these defences are raised, the interpretive issue regarding subsection 204.1(4) is not simply whether limiting relief to "extraordinary circumstances" is "reasonable". A

preliminary issue requires convincing the Court to accept a very liberal construction of subsection 204.1(4) such that relief could be granted based upon a “reasonable error of law” and “reasonable reliance on an imprudent third party advisor to take reasonable steps to eliminate excess contributions”. Furthermore, the Federal Court of Appeal has concluded that there is no such doctrine as a “reasonable mistake of law”: see *Corporation de l’École Polytechnique v Canada*, 2004 FCA 127 at paras 32−33 and 37 [*Polytechnique*]:

> [32] The question first arose in criminal law because of section 19 of the *Criminal Code*, which lays down the rule that "ignorance of the law... is not an excuse". That rule has been imported into and applied in statutory and regulatory law: see *R. v. MacDougall*, 1982 CanLII 212 (SCC), [1982] 2 S.C.R. 605, at 612. There is no distinction between mistake of law and ignorance of the law as such: *Molis v. The Queen*, 1980 CanLII 8 (SCC), [1980] 2 S.C.R. 356. Both in criminal law and in statutory and regulatory law, its justification can be found in the following factors set out by Prof. Don Stuart, Canadian Criminal Law, A Treatise, 3d ed., 1995, at pp. 295 to 298:
>
> > 1. Allowing a defence of ignorance of the law would involve the courts in insuperable evidential problems.
> >
> > 2. It would encourage ignorance where knowledge is socially desirable.
> >
> > 3. Otherwise every person would be a law unto himself, infringing the principle of legality and contradicting the moral principles underlying the law.
> >
> > 4. Ignorance of the law is blameworthy in itself.
>
> [33] For the purposes of this short review of the principles applicable to mistakes of law, and without seeking to be exhaustive, we may distinguish four types of mistake of law: the mistake of law made in good faith and the reasonable mistake of law, which we discuss together

> and which are not allowed as defences, the officially induced mistake of law and the invincible mistake of law.
>
> […]
>
> [37] Academic analysis has frequently criticized in vain the strictness of the rule of law applicable to mistake of law. In his Treatise, *supra*, Prof. Stuart wrote in this regard at page 324:
>
> > The proposition that ignorance of the law is no excuse is based on the conclusive presumption that everybody knows the law. This implies that the law exists in a body of discernable rules which the ordinary person remembers or is capable of discovering. If this proposition was ever valid, it is certainly laughable in our present complex society in which there is a vast proliferation of laws of every description, including statutory provisions, obscure regulatory ones and intricate judge-made law.
> >
> > Taxation statutes are certainly excellent representatives of this description given by Prof. Stuart of the existing legislative situation.
>
> [Emphasis added]

[54] The Court is also not in agreement with the Applicant's submission that the legal interpretation of the word "reasonable" always has a "well-established meaning in the general law in numerous contexts outside of the Act". The reasonable objective observer used as a benchmark throughout our legal system is very often endowed with specific qualities intended to provide outcomes that reflect the policies underlying the legislation or circumstances in question. For example, it is well understood that the overly-prudent reasonable person in negligence law is applied with the view to increasing the exposure of defendants who are most often insurers. This

supports the policy of loss-spreading through insurance as opposed to leaving the plaintiff to bear the loss without indemnification.

[55] The Minister's delegate did not unreasonably conclude that the Canadian tax system is based on a policy of self-assessment. This means that it is up to individuals to ensure that they conduct their financial affairs in accordance with the ITA: *R v McKinlay Transport Ltd,* [1990] 1 SCR 627. Taxpayers who participate in a deferred income plan such as an RRSP are expected to demonstrate a certain level of knowledge related to that investment. Accordingly the fictitious reasonable taxpayer used to assess the Applicant's conduct would normally be expected to exhibit the qualities of due diligence.

[56] The complexity of the Canadian taxation system entails a reasonable recognition by the ordinary taxpayer of his or her limited knowledge of taxation principles, and with this the associated need to seek out appropriate advice when facing complex taxation situations: *Dimovski, supra*. For policy reasons therefore, the fictitious objective reasonable taxpayer used to assess reasonable error and reasonable steps of applicants seeking waiver of the special tax has always been assumed to be diligent in protecting his or her own interests. This results in outcomes that will normally deny reliance upon ignorance of the law in making the Over-Contributions, or in being able to rely on the errors of third-party advisors to justify the failure to comply with the ITA.

[57] Moreover, while the Applicant may argue that the criterion of "extraordinary circumstances beyond the taxpayer's control" is too narrow an interpretation of "reasonable

error", the practical reality is that once the circumstances of mistake of law or reliance upon third-party advisors are rejected, little remains except situations that are exceptional. This conclusion similarly applies to "reasonable steps", which in practical terms for the same reason requires exceptional justification entailing circumstances being beyond the control of the taxpayer.

B. *A helping hand for the Applicant*

[58] In rejecting the Applicant's arguments, the Court does not wish to leave the impression that the outcome sits well with it, or that it does not share considerable empathy for the Applicant's situation, similar to that evinced by Justice Bocock. As a result, the Court considered means to assist the Applicant out of his predicament. This entailed developing a set of submissions that could perhaps advance his situation, but for the outstanding jurisprudence, and particularly the Federal Court of Appeal decision in *Polytechnique* excluding any concept of reasonable error of law. While no court sets out to encourage an appeal of its decision, nevertheless if one is taken the following submissions might prove of some use in arguing for a more liberal and literal interpretation of subsection 204.1(4):

i. a presumption for a literal interpretation, i.e. of "reasonable", in favour the taxpayer exists where otherwise the interpretation cannot be properly settled, per Ruth Sullivan,, *Sullivan on the Construction of Statutes*, 6th ed (LexisNexis, 2014) at sections 21.11−21.16.

ii. contextual logic suggests that if "exceptional circumstances" is the test for subsection 220(3.1) where the Minister's discretion is extremely broad, it cannot also be the test for relief under subsection 204.1(4) where the Minister should normally grant relief in "reasonable" circumstances;

iii. the policy factors referred to in the *Polytechnique* decision against a reasonable mistake of law appear to have no application to the Applicant's circumstances;

iv. the focus of "reasonable steps" is on the taxpayer's conduct, not the process followed by third-party advisors;

v. the policy of not indemnifying third-party agents for their errors in providing services to the client is not applicable when the Applicant has no recourse against the advisor who would not have to indemnify him because of his "unreasonable error" in making the contributions;

vi. the 19(23)7.23 Guidelines provide that deferring the withdrawal of excess contributions may be conditional upon the determination of whether the error was reasonable: "If the Agency has determined that the excess arose due to reasonable error, and if the excess has not already been eliminated, the taxpayer has two months from the date of the Agency's letter to withdraw the funds and submit proof." [Emphasis added];

vii. subsection 204.1(4) is a relief provision intended to import equitable flexibility into an otherwise inflexible tax regime;

viii. reasonableness speaks to proportionality that should allow for outcomes in addition to the all or nothing rulings that deny or allow complete relief; and

ix. contributions to an RRSP are not mandatory unlike the payment of taxes, but voluntary and are intended to achieve benefits for society by encouraging savings and investment, in addition to providing financial support to non-unionized taxpayers in their retirement years; and

x. the extremely harsh outcome in this matter is inconsistent with the intention of Parliament in establishing a program to provide taxpayers with financial security in their retirement.

C. *3500772 Canada no longer applies for interpretation of "extraordinary circumstances"*

[59] The Court concludes that the arguments of the parties over *3500772 Canada* no longer have application inasmuch as the Guideline for subsection 220(3.1) has been modified so as to

eliminate any argument that basing a decision on exceptional circumstances is an erroneous appreciation of the Guidelines.

[60] At paragraph 40 of *3500772 Canada*, the Court concluded that the conditions for relief required the circumstances to be "beyond the taxpayer's control", with the factor of "extraordinary" being relevant, but not essential, concluding as follows:

> [T]he circumstances warranting relief may well be characterized as 'extraordinary'; however, it is because they are beyond the taxpayer's control that relief may be granted under the Guidelines. The circumstances need not necessarily be 'extraordinary'.

[61] Accordingly, the Court concluded at paragraph 41 that the decision-maker, who deposed that "extraordinary circumstances" must be present for the Minister to exercise his discretion, had adopted an "erroneous appreciation of the Guideline".

[62] While the Respondent is correct that the ratio of the decision was the officer's failure to consider all relevant factors, it was nevertheless based on a conclusion that "extraordinary circumstances" was not an essential criterion for application of subsection 220(3.1). The Applicant was using this argument because the term "extraordinary circumstances" is found in the Guidelines for both subsections 220(3.1) and 204.1(4).

[63] However, *3500772 Canada* was based upon an interpretation of the Guidelines described as Information Circular 92-2, which can be seen from the excerpt reproducing the former Guidelines below, which is taken from paragraph 39 of *3500772 Canada*:

> 5. Penalties and interest may be waived or cancelled in whole or in part where they result in circumstances beyond a taxpayer's or employer's control. For example, one of the following extraordinary circumstances may have prevented a taxpayer […]
>
> [Emphasis in original]

[64] The Information Circular IC07-1 for subsection 220(3.1) applying in this matter replaced the former version effective May 31, 2007 [the 2007 Guideline]. Paragraph 23 of the 2007 Guideline describes "extraordinary circumstances" as one of three situations whereby relief from penalty and interest may be warranted. Thereafter, paragraph 25 expands on the factor of "extraordinary circumstances" as seen in both provisions, as follows:

> *Circumstances that may warrant relief from penalties and interest*
>
> 23. The minister of national revenue may grant relief from penalties and interest where the following types of situations exist and justify a taxpayer's inability to satisfy a tax obligation or requirement: a) extraordinary circumstances b) actions of the CRA c) inability to pay or financial hardship.
>
> […]
>
> *Extraordinary circumstances*
>
> 25. Penalties and interest may be waived or canceled in whole or in part where they result from circumstances beyond a taxpayer's control. Extraordinary circumstances that may have prevented 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…. (d) serious emotional or mental distress such as death in the immediate family.
>
> [Emphasis added]

[65] In the Court's view, the portion of the Guidelines for subsection 220(3.1) reproduced above establishes that reasonable error requires taxpayers to demonstrate exceptional

circumstances beyond their control, i.e. both criteria being necessary. It follows therefore, that the Applicant cannot advance the argument that the interpretation of the Guidelines for subsection 204.1(4) requiring "extraordinary circumstances" is incorrect based upon the reasoning in *3500772 Canada*.

[66] These conclusions further support the Court's decision that the Minister's delegate did not err in relying upon the Guidelines to interpret subsection 204.1(4) of the ITA.

D. *Erroneous findings of fact*

[67] The remainder of the reasons deal with the Applicant's other submissions, starting with his contention that the Minister's delegate made erroneous findings of fact in failing to adopt the facts and legal determinations of the Tax Court. As noted, the Tax Court Judgment included comments urging the granting of relief under subsection 204.1(4), strongly exhorting the Minister to conclude that the Over-Contributions arose as a consequence of reasonable error and that reasonable steps were taken to eliminate the Over-Contributions. The Tax Court Judgment even went so far as to consider the decision in *Dimovski* with the view of distinguishing it on the basis that the Applicant "did everything he could through his, albeit problem prone advisor to get to the bottom of the problem and resolve it".

[68] I agree with the Respondent's submission that the comments of the Tax Court judge are *obiter dictum* and not binding. More importantly, they do not respond to the main cause for rejection of the Applicant's claim for relief based on the Applicant's mistake of taxation law, and

the apparent failures of his advisors to provide proper advice in taking reasonable steps to eliminate the over contributions.

[69] The Applicant also argues that the Minister's delegate ought to have accepted the findings in the Tax Court Judgment that the taxpayer acted quickly to eliminate the Over-Contributions. This ignores the fact that the delay in acting appears to have been caused by his advisor, which tax law does not countenance as a matter beyond the taxpayer's control.

[70] Similar comments apply to the Applicant's submission that the deadline of December 31, 2006 was directly contrary to the binding legal conclusion of the Tax Court Judgment, in respect of the deduction for the 2004 contributions. There remains the Applicant's lack of reasonable error in making the contributions which stands in the way of relief, even if the contention of reasonable steps having been taken could be established.

[71] The Tax Court conclusions relate to the eligibility for the deduction for refund of unused RRSP contributions. The penalty tax of 1% per month still applies during the period of over contribution. They also do not apply to the 2003 contributions. Although not appealed, the Court is concerned with the Tax Court Judgment in the reliance on the internal 2008 unsent reassessment to justify extending the period to claim a deduction. The reassessment was required because the Applicant had not reported his contribution in the correct year. It does not appear that the Tax Court was aware of this fact. It would be illogical for a taxpayer to benefit by his or her failure to adhere to reporting requirements.

E. *Unreasonableness of the decision*

[72] The Applicant argues that the unreasonableness of the Decision to refuse relief from the special tax is demonstrated by the combination of factors relating to the failure to properly interpret the meaning of reasonableness in subsection 204.1(4), and to consider the findings of the Tax Court in light of the inequitable consequences that befall the Applicant resulting from his innocent Over-Contributions. The first two factors have already been dealt with and rejected.

[73] The Applicant did not advance any serious argument that the evidence regarding the Applicant's psychological indisposition was a factor contributing to his actions. The CRA recognized that the emotional distress of the Applicant could have constituted an exceptional consequence beyond the taxpayer's control as a ground for waiver of the tax. It requested further information from the Applicant to support this claim. While further proof was provided of his depression, there was no evidence demonstrating the causal connexion of his mental distress with the decisions to make the contributions or, albeit though his financial advisor, the delay in taking steps to eliminate the excess contributions.

[74] The Applicant did not seriously challenge the Decision to apply the interest and penalty provisions pursuant to subsection 220(3.1). The Applicant's position was that had relief been granted for the special tax, it would equally apply to the interest and penalty charges. The same obstacles for obtaining relief from these charges apply and serve to deny waiver of the special tax.

[75] On the other hand, the Court agrees that the consequences of eradicating the Applicant's contributions along with additional losses imposed on him from the accumulating interest and penalties seems unreasonably harsh and disproportionate as a result of an innocent over contribution to an RRSP that an unknowing taxpayer could readily make. Indeed, the consequences appear to be the opposite of a regime established by Parliament with the intention of assisting taxpayers in their retirement years. Such unfortunate consequences have always been the problem confronting the courts in these cases, but they do not render the decision unreasonable. Any severity in the application of the law also cannot be attributed to the CRA, which is constrained to apply the law, even in the face of outcomes that seem severe.

F. *The Decision was made in a procedurally unfair manner*

[76] The Applicant argues that Minister's failure to consider the Tax Court Judgment, and rejection or ignorance of some of the Tax Court Judge's relevant findings constitutes a breach by the Minister of her duty of procedural fairness to the Applicant. Given the rejection of the applicability of the Tax Court Judgment to this matter, this submission must be rejected.

G. *Contributions to RRSPs can represent a hidden trap for taxpayers*

[77] The limitations on obtaining relief caused by the principles of mistake of law and non-reliance on third parties, in addition to the requirement that the taxpayer demonstrate both "reasonable error" and "reasonable steps", means that it will be a very rare occasion when subsection 204.1(4) can provide relief to taxpayers. Even if Mr. Connolly could have demonstrated that his emotional distress affected his decision in making the Over-Contributions,

he would still be caught by mistakes of his advisors in failing to eliminate the excess in a timely matter, and this regardless of the reasonableness of his reliance upon his advisor or his own diligence in having him take action. Similarly, without the waiver of the special tax, the conditions to obtain relief from interest and penalty charges under subsection 220(3.1) are similarly restricted by the need to prove that the circumstances were beyond the taxpayer's control.

[78] This reality means that the optimal outcome that a taxpayer can hope to achieve when facing a mistake related to over-contribution, is a reasonably modest bill of costs from a taxation professional retained to undertake the complex and time consuming procedure to withdraw the excess in a timely fashion and without having the amounts added to his income for that year when withdrawn. If not withdrawn in time, only a successful indemnification claim against the advisor remains for any responsibility in making the over contribution or failing to take reasonable steps to eliminate the excess. This is not a prospect that most taxpayers wish to engage in, or that necessarily will prove fruitful when the taxpayer was responsible for the over contribution in the first place.

[79] Seen in this light, over-contributions to RRSPs are a potential trap that may cause significant losses of retirement investments by uninformed taxpayers. This is obviously not what Parliament intended by establishing the RRSP regime. They also represent an administrative burden to the CRA which is faced with dealing with the consequences of over contributions by taxpayers.

[80] In such circumstances, the Court questions whether stronger non-intrusive measures might not be adopted to prevent over-contributions from occurring in the first place. Such a reasonable measure could be as simple as a requirement that forms used by financial institutions to make contributions include a prominent warning from the CRA, requiring signed acknowledgement by the contributor, against making contributions to RRSPs if the individual is unaware of his or her contribution limits. A measure of this nature could help discourage over-contributions by the taxpayers, such as occurred in this instance. It could also engage financial institutions to assist clients determine their limits in order to receive their contributions.

[81] Unfortunately, this suggestion will not benefit the Applicant, whose application regretfully must be dismissed for the reasons provided.

VIII. Conclusion

[82] The application for judicial review is dismissed.

[83] Given that the Applicant has sustained significant and exceptional financial losses to his and his spouse’s retirement finances, an order for costs is inappropriate.

JUDGMENT FOR T-2162-16

THIS COURT'S JUDGMENT is that the application is dismissed without costs.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2162-16
STYLE OF CAUSE:	PATRICK CONNOLLY v. MNR
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 14, 2017
JUDGMENT AND REASONS:	ANNIS J.
DATED:	NOVEMBER 7, 2017

APPEARANCES:

Jennifer Flood	FOR THE APPLICANT
Melissa Nicolls	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Thorsteinssons LLP Tax Lawyers Vancouver, British Columbia	FOR THE APPLICANT
Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT