Federal Court  Cour fédérale

Date: 20220602

Docket: T-1345-21

Citation: 2022 FC 806

Ottawa, Ontario, June 2, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

MONIE RAHMAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Director General of the Minister, Legislative Policy and Regulatory Affairs Branch [Minister's Delegate or Minister] declining to recommend the Applicant's request for a remission order to the Governor in Council under subsection 23(2) of the *Financial Administration Act*, RSC, 1985, c F-11 [*FAA*], dated May 19, 2021 [Decision]. The Applicant requested remission of tax relating to her 2006 and

2007 tax years on the basis of financial setback with extenuating circumstances, and on the basis of extreme financial hardship. She also claimed those years should be treated in the same manner as her 2008 to 2018 tax years for which her tax amount owing was significantly reduced by the Canada Revenue Agency [CRA] through the Minister's exercise of discretion under subsection 152(4.2) of the *Income Tax Act,* RSC, 1985, c 1 (5th Supp) [*ITA*].

II. Facts

[2] The Applicant is an unemployed, 49-year-old married woman, currently residing in the Province of Alberta. She is a Canadian citizen but moved to the State of Utah in 2006 where she worked as a day trader on Canadian and US stock exchanges. Prior to the Applicant's non-compliance with her tax obligations in Canada, she and her husband were charged with insider trading in 2007.

[3] In fact the Applicant failed to file and Canadian tax returns for the 2005 to 2010 taxation years until many years later. Because the Applicant was not up-to-date with her annual T1 filing obligations, the CRA Non-Filer Non Registrant [NFNR] Section began to take action on her outstanding income tax accounts. Between January 2009 and November 2010, the CRA sent the Applicant notices requesting she file her outstanding tax returns for the 2005 to 2008 taxation years. The notices were sent to her address on file at the time but by December 2010, most of the notices were returned indicating "Moved/Unknown". The CRA also attempted to contact the Applicant by telephone, without success.

[4] In June 2012, a CRA officer from the NFNR Section wrote the Applicant regarding her unfiled tax returns which, by that time included the 2005 to 2010 taxation years. The following month, the Applicant contacted the CRA officer by phone. She explained she was having legal troubles regarding insider trading charges brought against her. She informed the officer she would file her outstanding tax returns after the hearing was completed. The CRA officer informed her of her obligation to file her tax returns when requested by the CRA. The Applicant stated she understood and would be filing them within 30 days because she said the hearing was set to begin shortly.

[5] At no point during this call did the Applicant mention medical conditions nor did she cite any medical conditions as reason for her inability to file her taxes.

[6] The Applicant did not file her tax returns as she had agreed.

[7] Both the Ontario Securities Commission [OSC] and US Securities and Exchange Commission [SEC] filed insider trading charges against the Applicant and her spouse and each imposed penalties against them. On August 22, 2012, the Applicant and her spouse were found guilty of insider trading that took place in 2007 on which approximately $1 million was earned. The account holding those funds was frozen and the OSC disgorged the remaining funds from the Applicant’s trading account.

[8] In April 2013, a CRA officer wrote the Applicant to once again request she file her outstanding tax returns. The letter told her if she did not file her tax returns or contact the NFNR

officer by May 17, 2013, the CRA could issue assessments under subsection 152(7) of the *ITA* based on information available on file.

[9] The Applicant failed to contact the NFNR officer or file her taxes. Therefore, on January 22, 2015, the CRA issued assessments under subsection 152(7) of the *ITA* for the 2005 to 2010 taxation years. The CRA sent the Applicant notices of assessment for each of those taxation years and each of those notices included an explanation informing her that if she disagreed with the amounts assessed, she should file a paper return.

[10] The CRA also sent the Applicant a statement of account on January 22, 2015 advising the outstanding balance of unpaid income tax, interest and penalties was in the aggregate amount of $15,292,956 for the 2005 to 2010 taxation years.

[11] It appears the Applicant received these documents, but for whatever reason it appears she did not retain income tax counsel for another three years. CRA had obtained her correct mailing address in or around 2012.

[12] In any event, the jurisprudence establishes taxpayers have the duty to keep CRA up to date with their correct mailing address, which she failed to do. In fact she did nothing about her Canadian income tax obligations for another three years.

[13] The CRA began collection action soon after issuing the above assessments. CRA collection officers attempted to contact the Applicant by telephone and via letters, however, she

did not respond. Notably she did not make any voluntary payments towards her outstanding tax debt. Therefore CRA collection officers took further measures in an attempt to locate income or asset sources. The only asset CRA located was a property in British Columbia jointly owned with her spouse. The CRA registered a judgment against that property in the amount of $347,000.00.

[14] In March 2018, the CRA received a request from the Applicant under the taxpayer relief provisions [TRP] pursuant to subsection 152(4.2) of the *ITA*. She asked for a refund or reduction of amount payable beyond the normal three-year assessment period for the Applicant's 2006 to 2010 taxation years. The Applicant requested reductions to her taxable capital gains and provided documents to support acquisitions and proceeds of disposition and detailed monthly brokerage statements.

[15] On January 29, 2020, as a result of the March 2018 TRP request, the CRA reassessed the 2008 to 2010 taxation years which resulted in credits of $3,274,325. Those credits reduced her tax debt for each of those taxation years. However, the CRA did not adjust the 2006 and 2007 taxation years because the ten-year statutory deadline to obtain a refund beyond the limitation period under the TRP expired on December 31, 2016 and December 31, 2017, respectively.

[16] On May 8, 2020, the Applicant through her counsel made written submissions requesting a remission order under subsection 23(2) of the *FAA* in relation to taxes, interest and penalties. Her counsel's letter relied on CRA's Remission Guidelines which sets out criteria that may be considered in remission orders. If the requested remission order was granted, the Applicant

would have no income tax payable and might receive a small refund for the 2006 and 2007 taxation years.

III. Decision under review

[17] On May 19, 2021, the Minister's Delegate declined to recommend the Applicant's request for a remission order to the Governor in Council under subsection 23(2) of the *FAA.* Importantly, the Decision noted, "Remission is a rare and extraordinary avenue. It has the effect of essentially exempting a particular taxpayer from the same tax laws established for all Canadians." The Decision went on to say that "each request for remission is reviewed on a case-by-case basis, and is considered on its own merits based on the relevant facts and circumstances unique to each case."

[18] The Applicant had submitted it was unfair that the 2006 and 2007 taxation years were not reassessed because the income sources were the same as the following taxation years (2008, 2009 and 2010) which had been reassessed under the TRP. The Minister's Delegate explained that while the CRA had granted relief under the TRP, this alone does not indicate further relief may be supported via a remission order under the *FAA*. The taxpayer relief provisions of the *ITA* and a remission order under the *FAA* are two separate and distinct mechanisms for possible relief. Each is separate and a remission request is subject to its own review and considerations. In my view these assertions were reasonably open to this decision maker.

[19] The remission Decision also examined the facts and circumstances of the Applicant as set out in her counsel's letter, based as they were on the Remission Guidelines, including, financial

setback with an extenuating factor, extreme financial hardship, and incorrect action or advice on the part of CRA officials, as follows.

A. *Financial setback with an extenuating factor*

[20] The Minister's Delegate explained remission may be considered if extenuating circumstances outside a taxpayer's control prevented them from meeting their tax obligations and payment of the resulting tax debt would strain their limited financial resources. The Minister addressed the Applicant's submissions as follows:

- The Applicant alleged she was unable to work since 2007, having spent many days bedridden with asthma, bone issues and severe arthritis. However, no supporting documents were provided to demonstrate how any of these conditions rendered her incapable of understanding or addressing her filing and tax obligations, or from seeking assistance to ensure the obligations were met. Moreover, based on the reassessments to her 2008 to 2010 tax returns, in fact she did work because she earned total income of $455,161, $20,241 and $136,171, in the 2008, 2009 and 2010 taxation years, respectively.

- The Applicant states she did not understand her filing and reporting obligations. However the Decision noted the CRA sent numerous communications over several years about her requirement to file. If she had any difficulty understanding her tax obligations she could have asked the CRA for clarification or sought professional advice. Moreover, the Applicant would have had until January 22, 2018 to file amended returns or to request an adjustment to her 2006 and 2007 taxation years within the normal assessment period – however the Applicant did not do so.

- The Applicant states she was under the impression she did not have to report income seized by OSC in 2012; however, she failed to report any of her income from 2005 to 2010. The Applicant chose to trade securities and it was her responsibility to ensure she informed herself of the tax obligations related to those activities. Further, she received

notices of assessment with respect to the 2007 taxation year that included taxable capital gains related to the income seized by OSC.

- Overall, while payment of the Applicant's tax debt would cause a financial setback, the Minister's Delegate found no extenuating factors to support her claim for remission.

B. *Extreme Financial Hardship*

[21] The Minister explained a remission review will consider whether payment of a tax debt will cause a person extreme financial hardship. Based on information available, the Applicant's family income was above the low income cut-offs [LICO] from 2006 until at least 2012. In this respect I note that the Applicant filed no back up or supporting evidence such as a statement of her income and expenses, or a statement of her assets and liabilities.

[22] The Minister also explained a remission review takes into consideration whether the collection of the outstanding tax debt would deprive a taxpayer of the ability to meet their basic needs. Based on an assessment of the Applicant's financial circumstances, the CRA said it is only actively collecting the portion of the debt for which she has the resources to pay. As noted the Applicant filed neither a statement of her income and expenses, nor evidence of her assets and liabilities to support her assertions in this respect. Other than maintaining security against the jointly owned property in British Columbia, and withholding refunds or credits to apply to her tax debt, the CRA is taking minimal collection action. I note that while the Applicant objects to this finding, she did not file evidence to support assertions in this respect notwithstanding the onus was on her to do so.

[23] Overall, the Minister found remission of the correctly assessed tax, penalties and interest cannot be supported on the basis of the alleged extreme financial hardship. These are factual determinations and on this record the findings are to be afforded deference particularly where the Applicant made no material effort to establish her claim based on her actual income, expenses, assets or liabilities, i.e., on her circumstances.

C. *Incorrect action or advice on the part of CRA officials*

[24] The Applicant states her 2006 and 2007 taxation years were treated differently from her 2008 to 2018 taxation years because she was able to file amended tax returns for those later years. However, the Minister explained the CRA is precluded from adjusting the 2006 and 2007 tax returns because the Applicant did not file amended returns within statutory timelines.

[25] The Applicant failed to file tax returns over several years and did not respond to the CRA's requests and demands to file. Therefore, CRA officials took action and assessed those years under subsection 152(7) of the *ITA* based on information it had available. If she disagreed, she could have filed amended tax returns or a notice of objection within statutory timelines. However, she chose not to and the CRA has no discretion under the *ITA* to extend those deadlines. Therefore, the Minister found it would be inappropriate to extend, via a remission order, a statutory limitation period that applies to all taxpayers where no extenuating circumstances exist.

IV. Issues

[26] Respectfully, the issues are:

a) Is the Decision reasonable?

b) Is the Decision contrary to principles of procedural fairness?

V. Standard of Review

A. *Reasonableness*

[27] The parties agree the substantive review of the Decision should be conducted using the reasonableness standard. Given the discretionary nature of a decision made under subsection 23(2) of the *FAA*, considerable deference is owed (see *Escape Trailer Industries Ltd. v Canada (Attorney General),* 2019 FC 31 [per Mason J] at para 17, aff'd 2020 FCA 54*; Twentieth Century Fox Home Entertainment Canada Limited v Canada (Attorney General),* 2012 FC 823 [per Phelan J] at para 18, aff'd 2013 FCA 25; *Axa Canada Inc v Canada (Minister of National Revenue),* 2006 FC 17 [per Noël J] at paras 23-24).

[28] Regarding reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers,* 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in

> relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[29] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies," and provides guidance that the reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears

> on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
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> [Emphasis added]

[30] Furthermore, *Vavilov* makes it clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
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> [Emphasis added]

[31] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis"

> (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

[32] The Federal Court of Appeal recently held in *Doyle v Canada (Attorney General),* 2021 FCA 237 [*Doyle*] that the role of this Court is not to reweigh and reassess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
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> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

B. *Procedural Fairness*

[33] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That said, I note in *Bergeron v Canada (Attorney General),* 2015 FCA 160, per Stratas JA at para 69,

the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [per Rennie JA]. In this connection I also note the Federal Court of Appeal's recent decision holding judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[34] I also understand from the Supreme Court of Canada's teaching in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions <u>other than a review related to a breach of natural justice and/or the duty of procedural fairness</u>), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
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> [Emphasis added]

[35] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

VI. Relevant sections of the Law

[36] Subsection 23(2) of the *FAA* states:

Remission of taxes and penalties	**Remise de taxes ou de pénalités**
(2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.	**(2)** Sur recommandation du ministre compétent, le gouverneur en conseil peut faire remise de toutes taxes ou pénalités, ainsi que des intérêts afférents, s'il estime que leur perception ou leur exécution forcée est déraisonnable ou injuste ou que, d'une façon générale, l'intérêt public justifie la remise.

[37] 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	**152(4.2)** Malgré les paragraphes (4), (4.1) et (5), pour déterminer, à un moment

— at any time after the end of the normal reassessment period, of a taxpayer who is an individual (other than a trust) or a graduated rate estate, 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 10 calendar years after the end of that taxation year,

donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable — particulier (sauf une fiducie) ou succession assujettie à l'imposition à taux progressifs — 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;

(b) redetermine the amount, if any, deemed by subsection 120(2) or (2.2), 122.5(3) or (3.001), 122.51(2), 122.7(2) or (3), 122.8(4), 122.9(2), 122.91(1), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year or deemed by subsection 122.61(1) to be an overpayment on account of

b) déterminer de nouveau l'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3) ou (3.001), 122.51(2), 122.7(2) ou (3), 122.8(4), 122.9(2), 122.91(1), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année ou qui est réputé, par le paragraphe 122.61(1), être un paiement en trop au titre des sommes

the taxpayer's liability under this Part for the year.	dont le contribuable est redevable en vertu de la présente partie pour l'année.
[Emphasis added]	[Je souligne]

[38] Subsection 152(7) of the *ITA* states:

Assessment not dependent on return or information	**Cotisation indépendante de la déclaration ou des renseignements fournis**
152(7) The Minister is not bound by a return or information supplied by or on behalf of a taxpayer and, in making an assessment, may, notwithstanding a return or information so supplied or if no return has been filed, assess the tax payable under this Part.	**152(7)** Le ministre n'est pas lié par les déclarations ou renseignements fournis par un contribuable ou de sa part et, lors de l'établissement d'une cotisation, il peut, indépendamment de la déclaration ou des renseignements ainsi fournis ou de l'absence de déclaration, fixer l'impôt à payer en vertu de la présente partie.
[Emphasis added]	[Je souligne]

VII. Analysis

A. *Preliminary matter: admissibility of affidavit tendered on judicial review*

[39] The Applicant filed an extensive affidavit in this Court. However, new evidence on judicial review is generally not permitted, although there are exceptions including some background information and matters of procedural fairness: *Association of Universities and*

Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22 [per Stratas JA] at para 20.

[40] At the hearing, I was not asked to strike any particular portion of the Applicant's affidavit; however, the Respondent raised the issue of the admissibility of the Applicant's affidavit in light of it containing information that was not before the decision-maker. In particular, the affidavit filed tends to emphasize her medical issues differently than she did in her counsel's submission letter of May 8, 2020 requesting remission. In my view, a Decision like this should be read in light of and in conjunction with the Applicant's actual request. Therefore, I will not rely on the contents of the Applicant's affidavit except in its most general and non-controversial aspects.

B. *Is the Decision reasonable?*

[41] To begin with, constraining jurisprudence establishes remission of taxes, interest or penalties owing is an exceptional and extraordinary measure: *Aronson v Canada (Attorney General),* 2021 FC 1451 [per Go J] at para 41 [*Aronson*]; *Meleca v Canada (Attorney General),* 2020 FC 1159 [per Little J] at para 21, citing *Fink v Canada (Attorney General)*, 2019 FCA 276 [per Dawson JA, Stratas and Mactavish JJA concurring], at para 1; *Escape Trailer Industries v Canada (Attorney General),* 2020 FCA 54 [per Locke JA, Rennie and de Montigny JJA concurring].

[42] As held by Justice Phelan in *Twentieth Century Fox Home Entertainment Canada Ltd. v Canada (Attorney General),* 2012 FC 823 [*Twentieth Century FC*], aff'd in 2013 FCA 25

[*Twentieth Century FCA*], in assessing unreasonableness, the Court must take account of the highly discretionary nature of the scheme for the remission of tax – an exceptional remedy to which an applicant is not entitled (see *Waycobah First Nation v Canada (Attorney General),* 2010 FC 1188 [*Waycobah FC*] at paras 29-30, aff'd in 2011 FCA 191 [*Waycobah FCA*]).

[43] Moreover, in *Waycobah FCA*, the Federal Court of Appeal emphasized the breadth of the Minister's discretion under subsection 23(2) of the *FAA*:

> [18] Nor does the language of subsection 23(2) itself ("unreasonable or unjust" or "otherwise in the public interest") indicate that Parliament intended that a debt should normally be remitted if payment would cause extreme hardship. These are open-ended terms that enable the Minister to take into account the wider impact of recommending remission, including, for example, the public interest in the integrity of the tax system and its proper administration, and fairness to other taxpayers. The decision-maker must balance the competing interests to determine whether, in light of the particular facts, collection of the tax would be unreasonable, unjust or otherwise not in the public interest.

(1) Power to grant remission

[44] In 2018 the Applicant made a taxpayer relief provision [TRP] request pursuant to subsection 152(4.2) of the *ITA* for a refund or reduction of amounts payable beyond the normal three-year assessment period for the Applicant's 2006 to 2010 taxation years. As a result of the TRP request, the CRA reassessed the 2008 to 2010 taxation years; however, it did not adjust the 2006 and 2007 taxation years because the ten-year statutory deadline to obtain a refund beyond the limitation period under the TRP had expired.

[45] The 2006 and 2007 Notices of Assessment stated the Applicant owed $4,201,068.58 in unpaid income taxes from the 2006 taxation year and $4,947,381.72 for the 2007 taxation year. The Minister imposed $500,373.28 in penalties to the 2006 taxation year and $841,054.89 for the 2007 taxation year. Since these assessments were issued, the Applicant's income tax liability has accrued $2,860,971.95 in interest with respect to the 2006 taxation year and $5,278,814.65 in interest with respect to the 2007 taxation year as of June 23, 2021. Had the CRA accepted the tax returns filed for 2006 and 2007 and treated them as it did the subsequent years, the Applicant might have been entitled to a refund of $66 and $150 for the 2006 and 2007 taxation years, respectively.

[46] The Applicant admits the 2006 and 2007 taxation years were not within this statutorily prescribed ten-year window. However she submits the power to remit tax by way of a remission order under section 23 of the *FAA* does not contain any such a ten-year limitation, and a successful remission Order may therefore in effect override the 10-year limitation period in the *ITA*. I agree there are no words in section 23 setting a time-based limitation period.

[47] The Applicant submits section 23 of the *FAA* is meant to address any unfairness or unreasonableness that may arise as a result of the application of the limitations described in the *ITA*. The Applicant submits the Minister has the power to grant remission pursuant to subsection 23(2) of the *FAA* and essentially argues the Minister should have exercised this power, as well as discretion to grant remission in her case.

[48] The Respondent submits, and I agree the Applicant is attempting to use the remission process under the *FAA* to effectively extend the statutory deadlines for *ITA* tax disputes that apply to other Canadians. The crux of the Applicant's remission order application is her belief she could have successfully reduced her 2006 and 2007 Tax Debts had she challenged the assessments within the statutory time limits, either through the appeals process or by requesting an adjustment under subsection 152(4.2) of the *ITA*. However, in my respectful view, remission is not a normal or usual mechanism by which to challenge a tax assessment and therefore, should not be used as a commonplace or expected override of statutory appeals or subsection 152(4.2) *ITA* processes. Otherwise, the integrity and efficacy of the tax system would be undermined; it is only available in exceptional and extraordinary circumstances as the jurisprudence establishes.

[49] The jurisprudence of this Court is against the Applicant's submissions. The Respondent relies on *Twentieth Century FC* per Phelan J., which upheld the Minister's decision to deny remission holding there was nothing arbitrary, unfair or unreasonable about requiring taxpayers to observe limitation periods under the *ITA*. I agree with this proposition. In my respectful view the following from *Twentieth Century FC* is applicable in the case at bar:

> [37] The Applicant suggests that there is a fundamental unfairness in the government retaining as taxes monies that it was not entitled to. It can do so because the Applicant missed limitation periods.
>
> [38] Limitation periods cut both ways. There are times where, absent fraud or similar misconduct, the Crown is precluded from collecting taxes which would otherwise be payable except for a limitation period. There are other times, such as this, where the limitation period disadvantages a taxpayer. This state of affairs does not make the A/Commissioner's decision arbitrary, unfair or unreasonable.

[50] I also note *Internorth Ltd. v Attorney General of Canada*, 2019 FC 574 [per Diner J] where the Minister considered whether the applicant had demonstrated it could not have reasonably been expected to take action within the statutory limitation periods. In dismissing the application, the Court noted that Internorth disputed the correctness of the tax assessment at issue after failing to pursue a statutory appeal and held at para 35, "The Court's role on judicial review is to determine whether the Minister's Delegate's Decision is reasonable, not whether he correctly decided the remission request, or whether the liability should have been imposed in the first place" [emphasis in original]. These words are equally applicable in the case at bar.

[51] In the case at bar, the Applicant submits her 2006 and 2007 tax returns should be assessed in the same manner as her 2008 to 2010 taxation years. However, in doing so, she is erroneously focusing on whether the assessment were correct as opposed to whether the Decision is reasonable. Respectfully, the Minister reasonably considered whether the Applicant could have taken action within the required time limits to resolve the problem through the usual channels. She could have, and did not. I see no unreasonableness in this aspect of the Decision.

(2) Consideration of extenuating factors

[52] The Applicant submits the Decision is unreasonable because the factors considered by the Minister are limited to those covered in the CRA Remission Guidelines and were considered without reference to the broad power and discretion given to the Minister under subsection 23(2). The Remission Guidelines provide some factors to consider when determining whether remission is in the public interest; the Applicant takes issue with the Minister referring only to

the factors set out in the Guidelines, as well as the Minister's assessment of the factors within the Decision.

[53] In response, the Respondent submits the Decision expressly sets out that while CRA officials generally look to the grounds in the Remission Guidelines to determine if remission may be supported, the particular fact circumstances of the Applicant's case were indeed examined to determine whether, in accordance with section 23 of the *FAA*, it is unjust or unreasonable to collect the tax or penalty, or whether it is in the public interest to recommend remission. In my view, this examination reasonably included a review of her alleged extenuating circumstances.

[54] First, the Applicant submits the Minister should have considered the fact that "the real tax liability is NIL" (she would have been entitled to a refund for 2006 and 2007 if they had been reassessed). There is no consideration of the fact that this outcome is the result of a statutory limitation in the power granted to the CRA. Therefore, the Applicant submits such an outcome renders the Decision unjust and unfair. In response, the Respondent submits a TRP of the *ITA* and remission under the *FAA* are two separate and distinct mechanisms for possible relief, and I agree with the reasonableness of this submission. Therefore, in my respectful view it was reasonable for the Minister to consider, in the context of this remission order request, whether the Applicant could have taken action within the statutory timelines imposed under the *ITA.* Compliance with the normal laws applicable to all taxpayers is simply one of many factors for consideration under the *FAA*, and it seems to me this is one that was reasonably held against the

Applicant who had many opportunities to report and file but did nothing for more than a decade. I see no unreasonableness in these factual circumstances.

[55] In this respect, the Applicant could have complied with the normal rules for Canadian taxpayers (subject to her medical claims which I will deal with shortly) but did not. For example if her 2006 and 2007 tax returns had been filed in 2012 when the Applicant spoke with CRA and agreed to file them in 30 days, the result might have been different. CRA obtained her correct mailing address in or around 2012. But she took no action in 2015 even after the Notices of Assessment were sent to her. The Applicant received these documents, but did not retain counsel for another three years, i.e., not until 2018. Notably, the jurisprudence of this Court establishes a taxpayer has the duty to keep CRA up to date with their correct mailing address: *Jiang v Canada (Attorney General)*, 2019 FC 629 [per Campbell J] at para 11-13 [*Jiang*]. I find nothing unreasonable in the identification and weighing of the evidence by the Minister's Delegate in this connection; it comports with constraining jurisprudence and was open on the record.

[56] Second, the Applicant submits the Minister's Delegate erred in their assessment of her medical condition. The Applicant said in counsel's May 8, 2020 letter, "since 2007, she was unable to work, and has spent many days bedridden with asthma, bone issues and severe arthritis" and "it is an absolute injustice for an unemployed and severely ill women, to be left suffering such extreme hardship."

[57] In this connection, I note in addition to the Decision there is an underlying document prepared for review by the Minister's Delegate, namely a Remission Request Report [Report].

The Applicant challenges the underlying Report. The Report found there should be “a direct correlation between an illness and a taxpayer’s inability to meet their tax obligations and appropriate substantiation to support such a conclusion”; the Decision made the same determination.

[58] With respect, I am unable to find this conclusion unreasonable given the Applicant failed to provide any substantiating documentation regarding her medical condition: she filed no medical report linking her alleged condition(s) to her failure to file annual returns from 2005 to 2010. Moreover, asthma, bone issues and severe arthritis are specific medical diagnoses which I am not capable of making; they are diagnoses only a medical doctor may make. The Applicant filed no medical evidence to support her medical claims. With respect, in my opinion medical evidence could have been was not led to establish diagnoses of asthma, bone issues and severe arthritis but was not: *R v Mahon*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9 [per Sopinka J]; *Masterpiece Inc. v Alavida Lifestyles Inc.*, 2011 SCC 27 [per Rothstein J] at para 75.

[59] Additionally and in any event even if she has the conditions claimed, she filed nothing to either directly or indirectly link the conditions she claims to have, to her failure to file returns from 2007 and 2008. It seems to me such filing would have been filed as a matter of common sense to link the condition to the otherwise unexplained failure to file.

[60] The Court is asked to find the Minister’s Delegate acted unreasonably, but is frankly unable to do so without some expert evidence in support of the link the Applicant asks the Court to make. Without that link the Court is unable to conclude as the Applicant requests. In addition,

I note this Court is not to reweigh or reassess the evidence per *Vavilov* [125] and *Doyle* above; the Decision is entitled to respectful deference per *Vavilov* [84].

[61] The Applicant submits she was not aware "documentary proof" was needed from her to support her medical condition allegations. However, I am unable to accept this submission for two reasons. First, it is commonplace and I take judicial notice of the fact that individuals seeking medical exemptions from workplace and other obligations usually need to obtain a doctor's note of some sort. I can see no reason why the same simple basic evidence should not be provided in support of a taxpayer's claim for relief from some $16 million in income tax, penalties and interest. In addition, the requirement for substantiating documentation is set out in CRA's Remission Guidelines.

[62] Therefore I find the Decision reasonably found the Applicant "did not provide substantiating documentation on how any of these conditions rendered her incapable of understanding or addressing her filing and tax obligations, or from seeking assistance to ensure the obligations were met."

[63] In this respect, the Applicant also takes issue with the Minister's reliance on the OSC and SEC actions because she did not provide the charges and decisions, meaning CRA sought out and obtained this information. Therefore, the Applicant submits if the Minister went out of their way to locate and review these documents, "they should have at least attempted to request additional medical documentation from the Applicant." With respect there is no merit in this submission. The approach of the Minister's Delegate was reasonable considering there should be

a direct correlation between an illness and a taxpayer's inability to meet his or her obligations, a point noted already, and the undoubted proposition the onus was on the Applicant to establish her claim for extraordinary relief, which she simply did not meet.

[64] The Respondent also relies on *Aronson v Canada (Attorney General)*, 2021 FC 1451 where Justice Go held:

> [46] Moreover, I find the Decision did have adequate regard to the Applicant's medical evidence. The Decision noted that in order for the Applicant's health problems to be considered an extenuating factor for remission purposes, "there should be a direct correlation between an illness and a taxpayer's inability to meet his or her tax obligations, as well as appropriate substantiation to support such a conclusion". This finding mirrors the section in the Manual dealing with "financial setback with an extenuating factor", and stating that such factor "may apply in cases where there is a direct link between a person's serious illness and their inability to meet their tax of filing obligations".
>
> [Emphasis added]

[65] Certainly the Applicant had every opportunity to present her case fully. The burden was on her to make her case (see *Aronson, supra* at para 52). She had counsel and knew the principles relating to remission orders; she failed to adequately address them. This is not unreasonableness on the part of the Minister.

[66] In terms of her alleged financial hardship extreme or otherwise, it is notable the onus was on her to establish her extreme financial hardship. It seems to me this is another matter the Applicant failed to do. Notably, she did not file any supporting documentation in this respect not even a simple statement of her income and expenses or even a statement of her assets and liabilities. In my respectful view, the Applicant may not fault the Minister for not accepting her

allegations, when she did not provide basic financial information to support her claim for extraordinary relief.

[67] The Respondent also notes that in connection with the telephone call of July 6, 2012, there is no record the Applicant mentioned her medical factors nor did she cite her medical conditions as a reason for her inability to file her taxes.

[68] Third, the Applicant submits the Minister erred in their assessment of her financial setback and hardship, failing to appreciate the unfair and extreme financial consequences of refusing relief. The Applicant states she has assets, tied up in joint ownership of her home of $37,000, which is a fraction of the tax debt of over $16 million. Moreover, she has no income and will continue to have no income. Therefore, the only reasonable conclusion is that she is facing extreme financial hardship and setback if the tax debt is enforced, which she submits "is clearly one situation for which the power to remit tax, interest, and penalties under s. 23(2) of the *FAA* were granted."

[69] However, I find the Minister's consideration of whether the Applicant has the means to pay her debt is reasonable. Relief cannot be granted to every applicant. There should be and are guidelines to be factored into decisions in this connection. Here, the Remission Guidelines explain that "extreme hardship" is hardship of such severity that the person's current and anticipated resources are not adequate to resolve it, see *Aronson, supra* at para 50-51. In the case at bar, the Minister noted a remission review under this ground will examine factors such as a person's annual family income for the year for which remission is requested and for each

subsequent year compared to the LICO established by Statistics Canada. The Minister considered the Applicant's annual family income from 2006 to at least 2012 was actually above LICO. The Minister reviewed the tax returns and information slips available in CRA systems for her spouse for those years, and concluded the CRA was only actively collecting the portion of the debt for which the Applicant has resources to pay. In my view this was a reasonably consideration and finding.

[70] And again the Applicant chose not to file supporting documentation, not even a simple statement of her income and expenses, or a statement of her assets and liabilities. It seems to me and with respect the Applicant simply failed to meet the high onus on an applicant to establish the merits of a claim under subsection 23(2) of the *FAA*. This too was a factual determination open to the Minister on this record, one which I am unable to find unreasonable in these circumstances.

[71] Other than maintaining security against the jointly owned property in British Columbia, and withholding refunds or credits to apply to her tax debt, I also note the CRA is taking minimal collection action against the Applicant. This is not disputed. Specifically she and her husband have earnings in excess of the Low Income Cut Off [LICO] for income tax collection according to the Minister. I owe and give this factual determination respectful deference, and given the lack of contrary evidence. I am unable to find unreasonableness in the treatment of these factors in the Decision.

[72] Fourth, the Applicant submits the Minster erred in their assessment of the CRA's failure to notify her of her failure to meet tax filing obligations and income tax liability. Respectfully, the Record does not support this submission and I agree with the Minister this does not constitute an extenuating circumstance. As already noted, taxpayers are obliged to keep CRA informed as their addresses change (*Jiang, supra*), which is normally done on the annual filings all other Canadian taxpayers are required to file annually. In this case, the required filings were not done and the taxpayer must accept the consequences. There is no merit to the argument the Minister acted unreasonably in failing to notify the Applicant.

[73] In light of what I consider the Minister's thorough and reasonable considerations of the Applicant's extenuating factors, in light of constraining jurisprudence, in view of the Applicant's letter of May 8, 2020, and the facts of this case, I have concluded the Minister's Decision is transparent, intelligible and justified thereby meeting the *Vavilov* requirements for reasonableness.

C. *Is the Decision contrary to principles of procedural fairness?*

[74] The Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] sets out the principles of procedural fairness. Specifically, an applicant must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered:

> 32 Balancing these factors, I disagree with the holding of the Federal Court of Appeal in *Shah, supra*, at p. 239, that the duty of fairness owed in these circumstances is simply "minimal". Rather, the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected

> by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

[75] This Court in *Waycobah FC, supra*, discussed procedural fairness in the context of remission applications under the *FAA*, and noted the duty of fairness is at the lower end of the scale:

> [54] Moreover, a decision to recommend or not to recommend remission is very different from a judicial decision, since it involves a considerable amount of discretion and requires the consideration of multiple factors. In addition, the remission of tax is an exception to the general principles of taxation law and it clearly does not amount to a right for the person affected, even if it can obviously have a significant impact on that person's life. When considered together, these factors militate for a duty of fairness at the lower end of the scale.
>
> [Emphasis added]

[76] The Applicant submits the Decision is procedurally unfair for two reasons. First, because the decision maker did not afford her the opportunity to know the case to meet or to be heard. Second, because the reasons provided are insufficient and unintelligible.

(1) Right to know the case to meet and to be heard

[77] An administrative decision maker must provide the person affected with knowledge to know the case to meet, as well as a right to be heard (see for example, *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1). The Applicant submits the Minister required documentary evidence to demonstrate how her being bedridden with asthma, bone issues and severe arthritis,

rendered her incapable of understanding or addressing her filing and tax obligations, or from seeking assistance to ensure the obligations were met. However, the Minister never informed of the need for documentary proof, thereby depriving the Applicant of a right to know the case to meet and to be heard on those matters.

[78] Respectfully, I note the Decision does not hinge on whether the Applicant provided documentary evidence in support of her claim that asthma, bone issues and severe arthritis, rendered her incapable of understanding or addressing her filing and tax obligations. Rather, the Decision notes her lack of substantiating documentation. The burden was ultimately on the Applicant to make her case, see *Aronson, supra* at para 52, a point that was fairly conceded by the Applicant.

[79] It is commonplace for those seeking exemptions from workplace obligations to obtain doctors notes, and as discussed above, neither the Minister nor the Court was given any evidence linking her asserted medical conditions to the failure to file income tax returns. With respect, and in addition, the need to file such documentation is set out in the Remission Guidelines referred to in the Applicant's letter requesting a remission order dated May 8, 2020. The onus was on her to link her asserted conditions to her claim for the extraordinary remission order. There was no breach of procedural fairness.

[80] It is also well established that a decision to grant or refuse remission is highly discretionary in nature and is an exceptional remedy to which an applicant is not entitled (*Waycobah FCA* at para 36). Moreover, the *FAA* does not specify the procedure to be followed

by the Minister in arriving at a recommendation, allowing the Minister to choose the procedure to be followed (*Waycobah FCA* at para 30). Therefore, in my view the duty of fairness affords individuals an adequate, not the optimum, opportunity to inform the decision-maker of their case (*Waycobah FCA* at para 32).

[81] In my view in this case, the Minister afforded the Applicant a fair and just process. The Minister was not required to notify the Applicant of the need to establish a correlation between her medical conditions and her inability to meet her tax obligations: that was something she should have anticipated as commonplace in seeking exemptions for medical reasons, and which was in any event in the Remission Guidelines she referred to in her letter of May 8, 2020. The Applicant through counsel had the opportunity to present her case fully in whatever manner they saw fit. The Decision responds to their letter and as found, does so reasonably. Her request specifically states remission may be granted where an applicant can demonstrate extenuating circumstances or factors. The Applicant was aware of the case she had to meet. Failure to meet the onus, which was on her, does not constitute a breach of procedural fairness.

(2) Adequacy of reasons

[82] The Applicant submits the reasons for the Decision are inadequate; however this is not a procedural fairness issue as framed by the Applicant. This is but another factor which, on judicial review, is part and parcel of the reasonableness analysis per *Vavilov* at para 304. In my respectful view, the Decision comes to grips with the submissions in the May 8, 2020 letter. It respects constraining law and the record as put forward by the Applicant and before the Minister. It is transparent and intelligible. There is no merit in the submission the reasons are inadequate.

VIII. Conclusion

[83] In my respectful view, the Applicant has not shown that procedural fairness was breached nor that the decision of the Minister's Delegate was unreasonable. In my view, the Decision is transparent, intelligible and justified based on the facts and law before the Minister's Delegate.

IX. Costs

[84] The Applicant if successful requests all inclusive costs in the lump sum amount of $10,600.00, noting a lesser amount might be acceptable. The Respondent if successful requests all inclusive costs in the lump sum amount of $4,000.00, an amount I find reasonable.

[85] At the hearing, the Applicant agreed to the Respondent's submissions on costs. In my view, costs should be awarded to the successful litigant because there is no reason to depart from that general rule. Therefore, I will order the Applicant to pay the successful Respondent costs in the all inclusive lump sum of $4,000.00.

JUDGMENT in T-1345-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The Applicant shall pay the Respondent costs in the all inclusive lump sum of $4,000.00.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1345-21
STYLE OF CAUSE:	MONIE RAHMAN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
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JUDGMENT AND REASONS:	BROWN J.
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APPEARANCES:

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