Federal Court  Cour fédérale

**Date: 20221222**

**Docket: T-618-22**

**Citation: 2022 FC 1792**

[ENGLISH TRANSLATION]

**Montréal, Quebec, December 22, 2022**

**PRESENT: Mr. Justice Gascon**

**BETWEEN:**

**LOUISE LABROSSE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The applicant, Louise Labrosse, is seeking judicial review of a decision dated February 23, 2022, [Decision] in which the Canada Revenue Agency [CRA] concluded that Ms. Labrosse was ineligible for the Canada Recovery Benefit [CRB]. The CRA denied Ms. Labrosse's application on the grounds that she did not earn at least $5,000 in net self-employment income for 2019, for 2020 or in the 12-month period preceding the day on which

she made her application, and that she did not have a 50% reduction in her average weekly relative to the previous year for reasons related to COVID-19.

[2] Ms. Labrosse argues that the Decision is unreasonable because, in her view, the CRA did not properly calculate her net income and did not request relevant information regarding the reduction in her income. Ms. Labrosse also argues that, contrary to what the CRA concluded, she met the two criteria noted in the Decision. Ms. Labrosse seeks an order from the Court compelling the CRA not to include tax adjustments to determine her net self-employment income for the purposes of assessing her eligibility for the CRB. She also asks the Court to order the CRA to accept the filing of certain new documents in support of her position.

[3] For the following reasons, Ms. Labrosse's application for judicial review will be allowed in part. Both Ms. Labrosse and the Attorney General of Canada [AGC] argue, for different reasons, that the Decision is unreasonable. I share this view, and the Decision will therefore be referred to the CRA for reconsideration of Ms. Labrosse's CRB application by a new validation officer. However, the Court is not empowered to make the more specific orders sought by Ms. Labrosse, as the admissibility of new documents or the procedure for calculating Ms. Labrosse's net income are matters falling within the expertise and jurisdiction of the CRA.

## II. **Background**

### A. ***Facts***

[4] The CRA is the federal agency responsible for administering the CRB. This benefit was available for any two-week period beginning on September 27, 2020, and ending on October 23,

2021, to eligible employed and self-employed individuals who were directly affected by the COVID-19 pandemic (*Aryan v Canada (Attorney General)*, 2022 FC 139 [*Aryan*] at paragraph 2). The eligibility criteria for the CRB are set out and detailed in the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2 [CRBA]. One of the requirements is that the employee or self-employed person earn at least $5,000 in employment income or net self-employment income for 2019, for 2020 or in the 12 months prior to the date of his or her most recent application. In addition, the employee or self-employed person must have experienced a 50% reduction in his or her average weekly income relative to the previous year for reasons related to COVID-19.

[5] During 2021, Ms. Labrosse made the required applications to the CRA and received the CRB for seven two-week periods between November 8, 2020, and March 13, 2021.She received $900 on each occasion, for a total of $6,300.

[6] Ms. Labrosse was selected for a review of her eligibility for the CRB. On November 2, 2021, following the first review of her eligibility, Ms. Labrosse received a letter from the CRA stating that she was not eligible for the benefits received. This letter stated that Ms. Labrosse did not meet the minimum income criterion of $5,000 earned for 2019, for 2020, or in the 12-month period prior to the date of her most recent application.

[7] On November 28, 2021, Ms. Labrosse sent the CRA a written request for a second review. She communicated her disagreement with the way the CRA calculated her net self-employment income to determine eligibility for the CRB.

[8] The second review officer, Nadia Belley [Officer], contacted Ms. Labrosse by telephone on February 18, 2022. Ms. Labrosse confirmed that she has been a real estate broker since 1995

and did not report any net income in 2019 or 2020, as her expenses were higher than her income, once tax adjustments were taken into account. The Officer also noted that, even considering her gross income, in 2020, Ms. Labrosse had a higher income than she had in 2019.

[9] Moreover, on February 23, 2022, the CRA sent its Decision to Ms. Labrosse in a letter that stated that she was not eligible for CRB benefits as she did not earn at least $5,000 in net self-employment income for 2019, for 2020 or in the 12 months prior to her first application. The letter also stated that Ms. Labrosse was ineligible for a second reason, as she did not have a 50% reduction in her average weekly income relative to the previous year for reasons related to COVID-19. This is a criterion that was not mentioned in the first review.

[10] On March 21, 2022, Ms. Labrosse filed this application for judicial review of the Decision.

## B. ***Standard of review***

[11] It is well understood that the standard of review applicable in this case is the reasonableness standard (*He v Canada (Attorney General)*, 2022 FC 1503 [*He*] at paragraph 20; *Lajoie v Canada (Attorney General)*, 2022 FC 1088 at paragraph 12; *Aryan* at paragraphs 15–16).

[12] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and determine whether the decision is based on “an internally coherent and rational chain of analysis” that is “justified in relation to the facts and law that constrain the decision maker” *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraph 85. The reviewing court must

consider “the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified” (*Vavilov* at paragraph 15).

[13] It is not enough for the decision to be justifiable. Where reasons are required, the “decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies” [emphasis in original] (*Vavilov* at paragraph 86). Thus, a court conducting a reasonableness review considers both the outcome of the decision and the reasoning process that led to that outcome (*Vavilov* at paragraph 87).

[14] The party seeking judicial review bears the burden of showing that the decision was unreasonable. The reasonableness standard requires that a reviewing court defer to such a decision and conclusions made by administrative decision makers (*Vavilov* at paragraphs 13, 46, 75). A decision cannot be set aside on the basis of merely superficial or peripheral shortcomings; to be set aside, there must be sufficiently serious shortcomings in the decision, such as the failure of rationality internal to the reasoning process (*Vavilov* at paragraphs 100–01).

## III. **Analysis**

[15] In her application for judicial review, Ms. Labrosse argues that the Decision is unreasonable and asks the Court to order the CRA to consider certain documents and accept her definition of net income.

A. ***Reasonableness of Decision***

[16] Both Ms. Labrosse and the AGC are of the view, for different reasons, that the Decision is unreasonable. I agree.

[17] According to Ms. Labrosse, the CRA's definition of "net income" does not correspond to the definition of "net income" on the CRB information webpage [CRB webpage]. The CRB webpage indicates that net self-employment income is obtained after deducting expenses—without providing any additional details—while the net income used by the CRA to determine eligibility for the CRB is apparently that obtained after tax adjustments. Ms. Labrosse argues that the definition on the CRB webpage does not indicate that net self-employment income should take into account tax adjustments such as those on Form T2125 used to calculate self-employment income.

[18] Ms. Labrosse argues that her net income before adjustments for 2019 was $8,517.25; she states that was her income after deducting expenses normally incurred. It is only in Part 5 of Form T2125, which allows several adjustments applicable only in a tax context, that business-use-of-home expenses are deducted and reduce Ms. Labrosse's net income to $0 on her 2019 income tax return. According to Ms. Labrosse, it is not reasonable to expect a taxpayer to use this amount to determine eligibility for the CRB, as such an adjustment is calculated only for tax purposes and is not considered an "expense" incurred to earn income. Rather, it is a tax adjustment. Furthermore, the CRB webpage does not mention it at all.

[19] Ms. Labrosse also argues that the CRA did not use the means of communication available to it to contact her, which caused her serious harm leading to her being found to be ineligible. In

addition, Ms. Labrosse argues that she was unable to present her position to the CRA. Ms. Labrosse maintains that the CRA erred in considering the second criterion of the 50% reduction in income as it did not request additional supporting documents or information from her. According to her, the Officer never attempted to verify with her whether she met the 50% reduction in weekly income criterion, when this criterion had never been raised in the first review.

[20] For its part, the AGC maintains that the reasons for the Decision do not enable us to understand how the Officer determined Ms. Labrosse's net income or why the Officer used gross income instead of net income to conclude that there had been no 50% reduction in Ms. Labrosse's income. Furthermore, subsection 3(2) of the CRBA specifically provides that it is "revenue from the self-employment income less expenses incurred to earn that revenue" that must be considered for the purposes of eligibility for the CRB.

[21] The "Second Review Report", which is part of the reasons for the Decision (*He* at paragraph 30; *Aryan* at paragraph 22) states the following:

> [TRANSLATION]
> Decision:
>
> In 2019 T4A $26,578.13 GROSS
>
> In 2020 T4A $27,110.00 GROSS
>
> The taxpayer states that she had more expenses and no net income. Does not meet the minimum income criterion of $5,000 earned for 2019, for 2020, or in the last 12 months.
>
> Even considering Gross income, the taxpayer has a higher income in 2020 than in 2019.
>
> Not eligible for all CRB periods applied for and received.

[22] According to the AGC, and I share this view, these reasons are clearly insufficient to support the Decision. First, it is not clear why the Officer deviated from subsection 3(2) of the CRBA with respect to the calculation of net income and of the reduction in weekly income with respect to that net income. The Officer only refers to Ms. Labrosse's gross income, which was higher in 2020 than it was in 2019, without explaining how consideration of her gross income was relevant, while the applicable legislation clearly stipulates that it is net income that must be considered at this stage.

[23] It is true that the Officer states that the net income reported by Ms. Labrosse was zero in 2019 and 2020. In the circumstances, the Officer appears to believe that the consideration of gross income is to Ms. Labrosse's advantage, as the normally applicable criterion does not enable her to declare Ms. Labrosse eligible for the CRB. However, the Officer fails to address the arguments and documents provided by Ms. Labrosse as to how her net income was calculated. In her letter of November 28, 2021, Ms. Labrosse had expressed her disagreement with the way her net income was calculated and provided the CRA with details of her expenses and net income as a self-employed worker. However, there is nothing in the Decision or the Second Review Report to support the conclusion that the CRA considered Ms. Labrosse's arguments or the tables of business income and expense tables she submitted. The Decision is completely silent on this evidence. In the same vein, the Officer did not consider the text of the CRBA itself, which defines income from self-employment as "revenue from the self-employment less expenses incurred to earn that revenue" (CRBA at subsection 3(2)). What should guide the CRA in calculating self-employment income qualifying for the CRB is, first and foremost, the definition established by Parliament, which does not necessarily seem to reflect the concept of net income used in tax returns.

[24] Finally, the reasons for the Decision also do not enable the Court to understand why, before the Decision was made, the Officer did not request additional documents or information from Ms. Labrosse regarding the 50% reduction in her income. This criterion was not considered or mentioned in the first review of Ms. Labrosse's application. In such circumstances, the Decision cannot again be considered justified, intelligible and transparent (*Vavilov* at paragraph 95).

[25] In my view, the combination of all these elements is sufficient to find the Decision to be unreasonable and to justify the Court's intervention.

[26] The CRA was required to explain its Decision, and it did not in this case. In the wake of *Vavilov*, special attention must now be paid to the decision-making process and the justification for administrative decisions. One of the objectives advocated by the Supreme Court of Canada in the application of the reasonableness standard is to "develop and strengthen a culture of justification in administrative decision making" (*Vavilov* at paragraphs 2, 143). It is not enough for a decision to be justifiable, it must also be "justified, by way of those reasons, by the decision maker to those to whom the decision applies" [emphasis in original] (*Vavilov* at paragraph 86). Ultimately, a reviewing court "must develop an understanding of the decision maker's reasoning process" and ask "whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility" (*Vavilov* at paragraph 99). The reasons provided by administrative decision makers are the primary mechanism by which they show that their decisions are reasonable—both to the affected parties and to the reviewing courts (*Vavilov* at paragraph 81). Reasons serve to state "how and why a decision was made," demonstrate that "the decision was made in a fair and lawful manner" and shield against "the perception of

arbitrariness in the exercise of public power" (*Vavilov* at paragraph 79). In other words, it is the reasons that demonstrate that a decision is justified.

[27] But in Ms. Labrosse's case, the CRA's reasons do not justify the Decision in a transparent and intelligible way. Instead, they suggest that the CRA appears to have ignored the very language of the CRBA regarding net income and information found on the CRBA webpage, that it did not follow an internally coherent and rational chain of analysis, and that it failed to respond to Ms. Labrosse's arguments and documents. Therefore, the Decision does not conform to the relevant legal and factual constraints that bear on the outcome and the issue at hand (*Vavilov* at paragraphs 105–07).

[28] I acknowledge that the reasons for an administrative decision need not be exhaustive. Moreover, the reasonableness standard of review is not concerned with the decision's degree of perfection but rather with its reasonableness (*Vavilov* at paragraph 91). However, the reasons must still be intelligible and justify the administrative decision. An administrative decision maker has a duty to articulate its rationale in its reasons (*Farrier v Canada (Attorney General)*, 2020 FCA 25 [*Farrier*] at paragraph 32). Admittedly, the lack of detail given in a decision does not necessarily make it unreasonable, but the reasons must enable the Court to understand the basis of the contested decision and to determine whether the conclusion holds water. For the above reasons, I conclude that this is not the case with the Decision under review.

## B. ***Admissibility of evidence***

[29] Furthermore, Ms. Labrosse is attempting to present to the Court some evidence which, in her view, allows her to establish that she meets the criterion of a 50% reduction in her weekly

income. This evidence is provided in four annexes attached to her affidavit, annexes 16, 17, 18 and 20. A similar request was made for annexes 4, 5, 6, 7 and 9 to her affidavit, which contain documents relating to her income and expenses. The annexes in question include copies of Form T2125, Ms. Labrosse's statement of income and expenses for 2019 and 2020, and tables showing Ms. Labrosse's average weekly revenue for her brokerage. These documents were not before the CRA when the Decision was made. Currently, Ms. Labrosse is asking the Court to accept them and consider them in connection with her application for judicial review.

[30] As I explained at the hearing, the Court cannot accept these documents in a judicial review such as this one.

[31] It is settled law that, in applications for judicial review, the general legal rule is that a court on judicial review can only consider evidence that was before the administrative decision maker, except for limited exceptions (*Gittens v Canada (Attorney General)*, 2019 FCA 256 at paragraph 14; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*AUCC*] at paragraphs 19–20, *Aryan* at paragraph 42). Those limited exceptions extend to materials that (1) provide general background assisting the reviewing court in understanding the issues; (2) demonstrate procedural defects or a breach of procedural fairness in the administrative process; or (3) highlight the complete absence of evidence before the decision maker (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paragraph 98; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paragraphs 23–25; *AUCC* at paragraphs 19–20; *Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 at paragraphs 16–18). It is clear that the documents that Ms. Labrosse would like to file before the Court do not fall within any of these exceptions.

[32] I note that the essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence before the relevant decision maker (*Cozak v Canada (Attorney General)*, 2022 FC 1351 at paragraph 22). An application for judicial review is not an appeal.

[33] Since Ms. Labrosse's annexes were not presented to the Officer, the Court, in its judicial review, cannot examine them to determine the reasonableness or legality of the Decision (*Fortier v Canada (Attorney General)*, 2022 FC 374 at paragraph 17). They are not part of the record that is subject to judicial review. Furthermore, in the Court's order of July 19, 2022, Associate Justice Steele specifically refused the production of annexes 16, 17, 18 and 20 on the grounds that they did not meet the preliminary eligibility criteria for the application for judicial review. Ms. Labrosse did not appeal this order within the 10-day time limit prescribed by the *Federal Courts Rules*, SOR/98-106, and she can no longer challenge this decision.

[34] In any event, as I pointed out at the hearing, this does not change the fate of the Decision, as I do not need these annexes to conclude that it is unreasonable.

[35] Finally, as the AGC rightly stated in its written submissions, I add that, since this application for judicial review is allowed, Ms. Labrosse may submit these documents to the new validation officer reviewing her file and present her arguments in this regard. A distinction must be made between the record that the Court may examine in this judicial review and the file that Ms. Labrosse may present in the third review of her CRB application, which will follow this judgment. I pause for a moment to point out that, in its procedural document for its officers concerning the determination of eligibility for the CRB and other Canadian emergency benefits (which document is part of the certified tribunal record), the CRA itself states that, among the

acceptable evidence of self-employment income, there is a [TRANSLATION] “list of expenses supporting the net income result” and “any other supporting documents”.

C. ***Appropriate adjustments***

[36] The final issue to be addressed is Ms. Labrosse’s application for a court order compelling the CRA to calculate net income without considering tax adjustments. Ms. Labrosse also asked the Court to intervene so that the CRA accepts the filing of annexes 16, 17, 18 and 20.

[37] I must dismiss these applications because it is not the role of a court of justice, on judicial review, to make such orders. There are few cases in which a reviewing court may compel an administrative decision maker to opt for a specific conclusion or process. The usual remedy, when the Court cannot uphold an administrative decision, is to set it aside and refer it back to the decision maker for reconsideration. A court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker (*Vavilov* at paragraph 83; *He* at paragraph 35).

[38] In *Vavilov*, the Supreme Court pointed out that a reviewing court has some discretion and latitude as to the remedy to be granted when it quashes an unreasonable decision by an administrative decision maker, with the majority warning against the “endless merry-go-round of judicial reviews and subsequent reconsiderations” (*Vavilov* at paragraphs 140–42). Thus, it may sometimes be appropriate to refuse to remit a case to an administrative decision maker “where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose” (*Vavilov* at paragraph 142; *Mobil Oil Canada Ltd v Canada Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at

paragraphs 228–30; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 [*SOCAN*] at paragraphs 99–100). This can also be the case when correcting the error would not have changed the existing result and would have no practical significance, and where only one conclusion is actually possible (*MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 at paragraph 52; *Farrier* at paragraph 31; *Robbins v Canada (Attorney General)*, 2017 FCA 24 [*Robbins*] at paragraphs 16–22). This discretion to grant or not grant remedies exists in the contexts of both procedural errors and substantive defects (*SOCAN* at paragraph 99).

[39] However, as the Supreme Court clarified, this discretionary power of reviewing courts in the matter of remedies must be exercised with restraint because the choice of remedy must be "guided by the rationale for applying [the standard of reasonableness] to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court" (*Vavilov* at paragraph 140). Thus, where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons (*Vavilov* at paragraph 141; *SOCAN* at paragraph 99; *Robbins* at paragraph 17; *Laramée v Bénard*, 2022 FC 653 at paragraphs 46–52).

[40] Insofar as the standard of reasonableness is marked by deference and respect for the legitimacy and competence of administrative decision makers in their area of expertise, the discretion of the reviewing courts not to remit an unreasonable decision to the administrative decision maker for reconsideration must therefore be exercised carefully, sparingly and with prudence, and be limited to the rare cases where the context can only inevitably lead to a single

result and where the outcome leaves no doubt. These situations will more likely be exceptions (*Quele v Canada (Citizenship and Immigration)*, 2022 FC 108 at paragraphs 32–34; *Dugarte de Lopez v Canada (Citizenship and Immigration)*, 2020 FC 707 [*Dugarte de Lopez*] at paragraphs 29–35).

[41] In my view, this is not an exceptional situation where, having concluded that the Decision is unreasonable, I should exercise my discretion to dictate to the CRA how it should deal with Ms. Labrosse's new evidence and interpret the concept of net income in the context of the CRB. The administration of the CRB falls within the CRA's expertise. It is not the Court's role to direct the CRA as to how net income should be calculated, or to compel it to accept certain documents as part of its assessment. Such remedies are not appropriate in a judicial review under the reasonableness standard, which requires reviewing courts to show deference and respect for the competence of administrative decision makers in their area of expertise (*Dugarte de Lopez* at paragraph 32).

[42] It is up to the CRA, not the Court, to make these determinations in light of, of course, these reasons, the evidence before it and the language used by Parliament in subsection 3(2) of the CRBA. I cannot usurp the decision-making authority that Parliament has entrusted to the administrative decision maker on this issue. However, it should be noted that by proceeding as it did in the Decision, the CRA deprived Ms. Labrosse of an opportunity to have her CRB application reconsidered. The necessary remedy is to restore this opportunity to her by returning the case to the CRA for reconsideration (*Dugarte de Lopez* at paragraph 35).

## IV. **Conclusion**

[43] For the above reasons, the application for judicial review of the CRA's Decision is allowed in part. Under the reasonableness standard, the reasons for the Decision must demonstrate that the CRA's conclusions were based on an internally coherent and rational analysis and were justified in light of legal and factual constraints to which the administrative decision maker is subject. That is not the case here. However, the specific orders requested by Ms. Labrosse cannot be granted. Instead, in light of these reasons, the Decision is set aside and Ms. Labrosse's application for the CRB is referred to the CRA for a different officer to reconsider Ms. Labrosse's eligibility for the CRB.

[44] In light of these conclusions, it is not necessary to address the other issues raised in this application for judicial review.

**JUDGMENT in T-618-22**

**THIS COURT'S JUDGMENT is as follows:**

1. The application for judicial review is allowed in part.

2. The decision dated February 23, 2022, declaring the applicant ineligible for the Canada Recovery Benefit is set aside.

3. The applicant's request for a second review is referred to the CRA for reconsideration by a new validation officer on the basis of these reasons, taking into account in particular any new documents that the applicant may submit regarding the calculation of her net income.

4. No costs are awarded.

"Denis Gascon"
Judge

Certified true translation
Michael Palles

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-618-22 |
| **STYLE OF CAUSE:** | LOUISE LABROSSE v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | DECEMBER 20, 2022 |
| **JUDGMENT AND REASONS:** | GASCON J. |
| **DATED:** | DECEMBER 22, 2022 |

**APPEARANCES:**

| | |
|---|---|
| Louise Labrosse | FOR THE APPLICANT ON HER OWN BEHALF |
| Anna Kirk | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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|---|---|
| Attorney General of Canada<br>Montréal, Quebec | FOR THE RESPONDENT |