

Federal Court



Cour fédérale

**Date: 20230105**

**Docket: T-649-22**

**Citation: 2023 FC 21**

**Ottawa, Ontario, January 5, 2023**

**PRESENT: The Honourable Mr. Justice Pamel**

**BETWEEN:**

**ISAAC SMEELE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The applicant, Mr. Isaac Smeele, a self-represented litigant, seeks judicial review of a decision by a benefits validation officer [Officer] of the Canada Revenue Agency [CRA] according to which Mr. Smeele was not eligible to receive the Canada recovery benefit [CRB] provided under section 3 of the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2 [Act].

Paragraph 3(1)(d) of the Act provides that a person, in order to be eligible for the CRB for a given two-week period, must have earned at least \$5000 of gross employment or net self-

employment income [minimum income threshold] in 2019, in 2020, or in the 12 months prior to the date of his or her first CRB application. The Officer found that Mr. Smeele had not met the minimum income threshold and was thus not eligible for the CRB.

[2] I am very sympathetic towards Mr. Smeele's situation; it is no doubt difficult for him and his young family. However, for the reasons set out below, under the circumstances, I cannot find any reviewable error in the Officer's decision. I am afraid I must dismiss Mr. Smeele's application for judicial review.

## II. Facts

[3] The CRB was introduced at the end of the Canada Emergency Response Benefit program, on September 26, 2020, and was designed to offer financial support to eligible Canadians directly affected by COVID-19. Mr. Smeele is a professional artist and applied for the CRB on October 12, 2020; he received CRB payments of \$1,000 for the seven two-week periods between September 27, 2020 and January 2, 2021. On January 12, 2021, Mr. Smeele's file was selected for an eligibility review and was assigned to a benefits compliance officer [First Reviewer].

[4] In late January 2021, Mr. Smeele provided the CRA with documents to support his claim of meeting the minimum income threshold; these documents included a transaction history showing a total of \$5,467.13 of revenue related to the rental of his Airbnb property in 2019, as well as \$1,943 of revenue generated from the rental of his automobile that same year. The problem was that when he initially filed his tax return for 2019 back in the spring of 2020,

Mr. Smeele had reported a net professional loss of \$1,240, with no mention of the over \$7,400 in revenue that he is now claiming to have earned in 2019. In any event, he also provided the CRA with a letter explaining that he had recently discovered an error with his tax return for that year and that he was applying for an adjustment. In fact, on January 19, 2021, Mr. Smeele filed a request for an adjustment to his 2019 income tax return, reporting a net self-employment income of \$5,236. A few months later, Mr. Smeele filed his 2020 income tax return, reporting a net loss of \$12,815 from self-employment.

[5] The First Reviewer denied Mr. Smeele's CRB application by letter dated August 5, 2021, finding that Mr. Smeele had not met the minimum income threshold and had not had a 50% reduction in his average weekly income compared to the previous year on account of the COVID-19 pandemic, as required by paragraph 3(1)(f) of the Act.

[6] Mr. Smeele applied for a second review of his CRB eligibility, and his file was assigned to another benefits compliance officer [Second Reviewer]. The Second Reviewer informed Mr. Smeele in October 2021 that the income from his Airbnb property as well as the rental of his automobile was not self-employment income but rather rental income, and thus did not qualify towards his minimum income threshold; Mr. Smeele was therefore not eligible for the CRB. Mr. Smeele was also informed that even if part of his revenue from the Airbnb property could be attributable to extra services (services that may constitute income), the income generated through those extra services would not reach the minimum income threshold given his reported earnings of \$5,236 for the 2019 taxation year, which are mostly made up of ineligible Airbnb and

automobile rental income. By letter dated November 3, 2021, the Second Reviewer therefore denied Mr. Smeele's CRB application.

[7] Mr. Smeele sought judicial review of the Second Reviewer's decision, but discontinued his application when the CRA agreed, on January 21, 2022, to provide him with a third review in order to consider new information that Mr. Smeele wanted to submit. Mr. Smeele's further documents, submitted on February 17, 2022, included an archived CRA special release interpretation bulletin entitled "Rental of Real Property by Individual" (Interpretation Bulletin IT-434RSR). The purpose of the document was to reflect changes in the *Income Tax Act* and the *Income Tax Regulations* and to update references to other interpretation bulletins. In the document, it is stated that a paragraph of another interpretation bulletin, IT-434R, has been revised to read, in part, as follows:

The operator of a rooming or lodging house, hotel or motel would normally be considered to be carrying on a business where, in addition to the basic services that relate to the operation and maintenance of the property as described in 5, extra services such as the supply of cleaning and maid services, linens, washroom supplies, dining facilities, etc., are provided for the convenience and comfort of guests.

[8] Mr. Smeele also submitted affidavits from himself, his partner, and his sister, indicating that he provided the following services to his Airbnb guests. He stated the following in his affidavit:

- a. Cleaning before and during the guests' stay.
- b. Meeting with guests before their stay to discuss restaurants, sightseeing, and upcoming local events.
- c. Food items such as coffee, tea, condiments, cooking oils.

- d. Fresh linens and towels before and during guests' stay.
- e. Bathroom items including fresh organic shampoo, conditioner, soap, paper towels, toilet papers.
- f. 24-hour security system that recorded footage when individuals came to the door.
- g. 24-hour phone support if any issues arose.
- h. Fresh cut flowers and chocolates for longer bookings.

On the basis of these submissions, Mr. Smeele argued that his Airbnb income was self-employment income and not rental income.

[9] By letter dated March 18, 2022, the Officer refused Mr. Smeele's CRB application following the third review, again because he did not meet the minimum income threshold; according to the Officer, Mr. Smeele's reported income for 2019 consisted only of rental income. Also, and as regards the Airbnb property, the Officer noted that the documents submitted by Mr. Smeele showed the following breakdown:

Total host fee on slip is \$131.79  
Total cleaning fee \$420  
Total paid out amount is \$5467.13

[10] The Officer determined that the host fee and cleaning fee together – even if they were to be considered as self-employment income separate from rental income – did not meet the minimum income threshold, and no other breakdown of income was provided to account for any of the extra services that Mr. Smeele purportedly provided. Therefore, the Officer concluded that

Mr. Smeele did not qualify for the CRB. It is this third-level decision that forms the subject matter of the present application for judicial review.

### III. Issue and Standard of Review

[11] During the hearing before me, and as a preliminary matter, the Attorney General of Canada requested that the style of cause be amended to name the Attorney General of Canada as the proper respondent in this matter. I agree, and will so order.

[12] The only issue before the Court is whether the Officer reasonably determined that Mr. Smeele was not eligible for the CRB because he did not meet the minimum income threshold. The standard of review applicable to the Officer's decision is reasonableness (*Hayat v Canada (Attorney General)*, 2022 FC 131 at para 14; *Aryan v Canada (Attorney General)*, 2022 FC 139 at para 16).

### IV. Analysis

[13] The initial problem is that Mr. Smeele frames his judicial review upon a set of facts and arguments that were not before the Officer. Before the CRA, the issue was whether the income that Mr. Smeele generated through the operation of an Airbnb could be considered self-employment income rather than rental income – the latter not qualifying as income to meet the minimum income threshold requirements of the Act. Initially, Mr. Smeele reported a net professional loss of \$1,240 when filing his 2019 taxes, but he only sought to amend his 2019 tax return in January 2021, one week following his CRB file being selected for review. The amendment provided for a net self-employment income of \$5,236 – mostly made up of the

income from the Airbnb property – which, if accepted, would meet the minimum income threshold of the Act.

[14] Throughout the review process, the argument put forward by Mr. Smeele to the CRA was that the amount derived from the rental of his Airbnb property constituted self-employment income; he pointed to Interpretation Bulletin IT-434RSR, which suggested that if additional services are provided to guests in a rental property, the income from such property may be considered self-employment income in certain circumstances. Mr. Smeele provided evidence of Airbnb rental confirmations and income, which included fees – separate from the rental of the property – charged for hosting and cleaning in the amounts of \$131.79 and \$420 respectively. Mr. Smeele also provided affidavits listing what were described as extra services, and argued that the entire income from the property constituted self-employment income; although he was an artist by profession, his Airbnb property was also part of his professional income.

[15] The Officer determined, on the basis of Mr. Smeele’s submissions and the notes of the First Reviewer and the Second Reviewer, that the income from the Airbnb property constituted rental income and that the additional services provided did not change such a finding – even in light of Interpretation Bulletin IT-434RSR, which the Officer clearly considered.

[16] Before me, however, Mr. Smeele took a completely new line of attack; no mention is made of the argument regarding how to account for the income from the Airbnb property. Rather, Mr. Smeele now claims that he forgot to include as part of his 2019 income the sale of a large work of art for \$6,000 in December 2019. Mr. Smeele provides as part of his record an

affidavit from the purported client confirming the purchase of the artwork, but no bank statement showing that payment was received (I should mention that although the affidavit states that the artwork was sold in December 2019, Mr. Smeele's written representations mention January 2019 as the month of sale – nothing turns on this inconsistency). At the hearing, I asked Mr. Smeele how many pieces of art he had sold in 2019. He responded by highlighting that large piece, which he claimed was sold in January 2019, as well as some smaller prints sold later in the year. However, when it came time to file his 2019 tax returns in early 2020, the sales of the works of art were somehow forgotten. Mr. Smeele states that his partner took care of their taxes and that the income from those works of art was missed – an honest mistake.

[17] I explained to Mr. Smeele that short of exceptional circumstances or a miscarriage of justice, which I cannot see is the case here, I must decide the reasonableness of the Officer's decision on the basis of the information and documents that were before the Officer at the time the decision was made. Therefore, it would be difficult for me to find that the decision was unreasonable on account of the Officer not having taken into consideration a line of argumentation and documents that were not before him or her at the time that the decision was made.

[18] The discussion then turned to Mr. Smeele arguing, as he did before the Officer, that he considered his income from his Airbnb to be self-employment income based upon Interpretation Bulletin IT-434RSR, which was clearly before the Officer when he or she rendered the decision. Mr. Smeele's evidence set out the different services that he and his partner provided to the guests; however, in the end, the Officer found that those services, such as providing extra room



cleanings, meeting the guests and recommending things to do in the area or where to eat, were insufficient to render Mr. Smeele's Airbnb income self-employment income as opposed to rental income. I see nothing unreasonable with such a finding (see *McInnes v Canada*, 2014 TCC 247, for the proposition that the income generated from a rental of property with services similar to those clearly stated in the record is considered rental income).

[19] In addition, the only monetary breakdown for extra services provided to the Officer appeared in the Airbnb documentation and included hosting and cleaning fees, the total of which – even if Mr. Smeele was able to segregate the income generated from the extra services as income independent of the rental income – was less than \$5,000.

[20] Before me, Mr. Smeele's partner, Ms. Pemberton-Smith, who had filed an affidavit setting out the extra services provided to the guests so as to argue that the entire income derived from the Airbnb was self-employment income, made an impassioned plea that the CRA had not considered what the couple was creating with the Airbnb property: a space for artists to gather and to share their work. The Airbnb unit was more than just a side investment to their professions as artists; it was a true endeavour that they were investing time and money to build – in their eyes, a true business.

[21] Putting aside that Ms. Pemberton-Smith's assertions were not supported by affidavit, this bigger picture of what the couple seem now to have been creating shows up nowhere in the material before the Officer – all that the Officer had before him or her was a list of "extra" services that were supposedly provided and that were meant to establish that the running of the

Airbnb was not just a side investment for the couple, but rather a true business. Mr. Smeele states that on the basis of his reading of Interpretation Bulletin IT-434RSR, he only had to list such extra services for their Airbnb property to be considered a business, and for the income from that property to be considered self-employment income rather than rental income. Unfortunately, that was all that the Officer was working with, and in the end, he or she determined that such extra services did not cause the income from the Airbnb to migrate beyond rental income.

[22] Had Mr. Smeele included in his submissions before the CRA a more fulsome expression of what business model he was working on and what he and his partner were trying to create with their Airbnb, as Ms. Pemberton-Smith did before me, the decision of the Officer may well have been different. But he did not, and I cannot find fault in the Officer for not having arrived at such a broader understanding of Mr. Smeele's initiative from the very minimal evidence before him or her. Nor am I prepared to state that the Officer should have dug deeper and asked more questions so as to find a reason to justify Mr. Smeele qualifying for the CRB. The burden of making out one's case rests with the claimant, and a decision-maker, absent issues of procedural fairness, which do not arise here, is under no obligation to make the claimant's case.

V. Conclusion

[23] The application for judicial review is dismissed. No costs are to be awarded.

**JUDGMENT in T-649-22**

**THIS COURT'S JUDGMENT is that:**

1. The style of cause is amended to name, as respondent, the Attorney General of Canada.
2. The application for judicial review is dismissed, without costs.

"Peter G. Pamel"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-649-22

**STYLE OF CAUSE:** ISAAC SMEELE v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** MONTREAL, QUEBEC

**DATE OF HEARING:** DECEMBER 8, 2022

**JUDGMENT AND REASONS:** PAMEL J

**DATED:** JANUARY 5, 2023

**APPEARANCES:**

Isaac Smeele

FOR THE APPLICANT  
(On his own behalf)

Éliane Mandeville

FOR THE RESPONDENT

**SOLICITOR OF RECORD:**

Attorney General of Canada  
Montreal, Québec

FOR THE RESPONDENT