Federal Court Cour fédérale

Date: 20240809

Dockets: T-85-22, T-2082-22

Citation: 2024 FC 1247

Ottawa, Ontario, August 9, 2024

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

ONEX CORPORATION, ONEX CARESTREAM FINANCE LP and 1727655 ONTARIO INC.

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Table of Contents

I. Overview 2

II. Background Facts 5

III. Decisions of the Minister 7

A. CRA Decision in T-85-22 7

B. CRA Decision in T-2082-22 9

IV. Issues 11

V. Standard of Review 12

VI. Analysis 18

A. The CRA failed to consider any remedial interpretation of subsections 220(2.1) and 220(3) of the ITA 18

(1) Additional CRA reasons in relation to subsection 220(2.1) of the *ITA* 33

(2) Additional CRA reasons in relation to subsection 220(3) of the *ITA* 38
(3) Other plausible remedial interpretation of subsection 220(2.1) and subsection 220(3) available to the CRA 43
B. The Minister's exercise of discretion under subsection 220(3) 49
(1) CRA decision on the exercise of the Minister's discretion 49
(2) Onex's arguments on the unreasonableness of the CRA's exercise of discretion..... 51
(3) The Respondent's arguments on the reasonableness of the CRA's decision 52
(4) The Minister failed to consider relevant elements in the exercise of their discretion 52
VII. Conclusion 58
VIII. Costs 59

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Onex Corporation, Onex Carestream Finance LP and 1727655 Ontario Inc. [together "Onex"] seek judicial review of two decisions of the Minister of National Revenue [Minister] in which the Minister refused Onex's requests under subsections 220(2.1) and 220(3) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*] to allow Onex to benefit from certain amendments to the *ITA*'s complex foreign accrual property income [FAPI] regime.

[2] Prior to 2014, Onex put in place complex structures to receive tax-free dividends from a foreign affiliate. In 2014, Parliament enacted the *Economic Action Plan 2014 Act,* No 2 SC 2014, c 39 [Bill C-43], that amended the FAPI regime with respect to certain business structures involving partnerships, such as the one established by Onex [the Amendments]. Subsection 21(15) of Bill C-43 set out the coming-into-force [CIF] of the new rules and provided that it would apply

to taxation years after July 12, 2013, unless the taxpayer elected, under Bill C-43, to have the Amendments deemed to have come into force on January 1, 2010 [the Election].

[3] Onex, having already established a complex structure that, in their view, allowed them to achieve the purpose of the Amendments, concluded that they already benefitted from the measures adopted through the Amendments and that the Election was redundant in their case. Instead of electing to have the Amendments apply retroactively to 2010, and re-filing their 2012 and 2013 T5013 tax returns [T5013 returns], Onex simply continued with their previous practice.

[4] In June 2020, the Canada Revenue Agency [CRA] reassessed Onex's 2012 and 2013 taxation years, resulting in an addition of $102 million and $92 million to their taxable income respectively for those years. It is not contested between the parties that, had Onex filed the Election in due course and had the Amendments applied retroactively, the CRA would not have reassessed Onex for the 2012 and 2013 taxation years.

[5] To correct the issue, Onex requested the authorization of the Minister, under subsection 220(2.1) of the *ITA*, to waive the requirement to file the Election, in order for Onex to benefit from the Amendments for the 2012 and 2013 taxation years. Alternatively, Onex sought permission to file new returns for those years, under subsection 220(3), where Onex would amend its earlier 2012 and 2013 returns and also file the Election required by Bill C-43.

[6] The CRA, acting on behalf of the Minister, rejected Onex's requests (in these reasons, any reference to the CRA includes the Minister, as the CRA was acting on behalf of the Minister). The

CRA found that the Minister did not have the authority to waive the Election under subsection 220(2.1) of the *ITA*. The CRA also found that the Minister did not have the authority to allow Onex to file new returns to extend the time to make the Bill C-43 Election under subsection 220(3), because Onex had already filed T5013 returns for 2012 and 2013. Finally, the CRA found that even if the Minister had the discretion to accept the filing of new T5013 returns for 2012 and 2013, along with the filing of the Election required by Bill C-43 under subsection 220(3), they would not have exercised their discretion to allow Onex to do so.

[7] For the following reasons, the CRA's decisions are unreasonable. While the CRA did apply the principles of statutory interpretation, it failed to consider the context within which subsection 220(2.1) and subsection 220(3) of the *ITA* were adopted, that the subsections are remedial in nature, and that those subsections were adopted as part of a "Fairness Package" adopted by Parliament to grant the Minister extensive discretion to provide remedies for undue hardship resulting from the application of the *ITA*. The CRA also failed to consider section 12 of the *Interpretation Act*, RSC 1985, c I-21 [*Interpretation Act*], requiring that every enactment be deemed remedial and given fair, large and liberal interpretation to best ensure the attainment of its objectives.

[8] As for the CRA's decision to refuse to exercise the Minister's discretion, the CRA failed to consider and weigh the extensive consequences facing Onex in the circumstances; including Onex's arguments that, through their structures, they always reasonably intended to benefit from the substantive result later also achieved under Bill C-43 (even without the filing of the Election), that Onex's 2012 and 2013 tax returns had already been filed prior to the enactment of the

Amendments and therefore had to be amended, that Onex's request was not an attempt at retroactive tax planning, and that Onex has a history of tax compliance.

II. Background Facts

[9] In computing their income for the purposes of the *ITA* for their 2012 and 2013 taxation years, Onex was subject to the *ITA*'s FAPI regime. In order to address these complicated rules, Onex established a structure allowing them to receive amounts distributed as tax-free dividends, and at the same time be able to deduct the interest paid to a lender to finance their investments.

[10] In 2014, Parliament enacted Bill C-43. Bill C-43 amended the FAPI regime with respect to certain business structures involving partnerships, such as the one at issue in these applications. Bill C-43 applied in respect of the taxation years of foreign affiliates of a taxpayer that end after July 12, 2013. Bill C-43 also included an option, at the election of the taxpayers, to have the Amendments come into force on January 1, 2010.

[11] To make the Election under the CIF provision of Bill C-43, a taxpayer needed to elect in writing for the application of the Amendments to all of their foreign affiliates and file the Election with the Minister, along with consequential changes to their T5013 returns if those returns had already been filed.

[12] It is not contested that had Onex filed the Election contemplated by Bill C-43, the CRA would not have reassessed them for their 2012 and 2013 taxation years, and that if the Minister had allowed Onex to file the Election, this would have resolved the tax dispute between the parties.

[13] However, Onex decided not to elect to have the Amendments apply retroactively. In their view, and after having consulted taxation advisors, making the required Election was redundant in their case, as their structures already achieved the legislative benefit that Parliament intended to extend to other taxpayers under Bill C-43. Moreover, Onex's T5013 returns for the 2012 and 2013 taxation years had already been filed, and therefore filing the Election would also have required amending Onex's tax returns. Finally, in Onex's view, an Election would have placed them in the same tax position that they were already at as a result of the structures that they had established, and which in their view were consistent with the *ITA* and published CRA guidance.

[14] In June 2020, almost five years after the deadline to file the Election under Bill C-43, the CRA reassessed Onex for their 2012 and 2013 taxation years.

[15] While Onex continues to believe that their interpretation of the *ITA* is correct and that they do not need to rely on the Amendments, Onex requested, on July 9, 2020, the authorization of the Minister to waive the requirement to file the Election, under subsection 220(2.1) of the *ITA*. Indeed, had Onex filed the Election in due course, the CRA would not have reassessed their 2012 and 2013 taxation returns.

[16] On December 16, 2021, the CRA refused to waive the requirement to file the Election under subsection 220(2.1) of the *ITA*.

[17] On March 1, 2022, Onex requested that the Minister exercise their discretion under subsection 220(3) of the *ITA* to essentially re-file their T5013 returns for the 2012 and 2013

taxation years with consequential amendments as a result of Bill C-43, which would also have enabled Onex to file the Election along with their new amended T5013 returns.

[18] On September 9, 2022, the CRA refused Onex's request to be granted permission to file a new return along with the Election.

III. Decisions of the Minister

A. *CRA Decision in T-85-22*

[19] The CRA relied on the principles of statutory interpretation to construe subsection 220(2.1) and rule that it did not grant discretion to the Minister to waive the filing of the Election. In the CRA's view, subsection 220(2.1) allows the Minister to waive the filing of a document that is prescribed by "any provision of [the *ITA*]." However, because the Election in this case originates from subsection 21(15) of Bill C-43 and not the *ITA*, the Minister has no discretion to waive the filing of the Election. Moreover, the CRA opined that the filing requirement had to be found in the *ITA* and not in an "amending legislation" such as Bill C-43.

[20] The CRA also opined that if subsection 220(2.1) allowed the waiver of an election in this case, it would allow the waiver of an election that is not contemplated under subsection 220(3.2) of the *ITA* and section 600 of the *Income Tax Regulations*, CRC, c 945 [Regulations]. Subsection 220(3.2) of the *ITA* grants to the Minister the discretion to extend the time for making an election or to amend or revoke an election, that is prescribed under section 600 of the Regulations. However, the Election contemplated in this case, originating from Bill C-43, is not included in

section 600 of the Regulations. Therefore, no extension of time is available under the *ITA* for the Election required under Bill C-43.

[21] Applying the implied exclusion rule of statutory interpretation, the CRA ruled that subsection 220(2.1) cannot be interpreted in a manner that would conflict with the specific intention of Parliament that allows the filing of a late election in some specific cases (those covered under section 600 of the Regulations), but not the one in which Onex is involved under Bill C-43 (relying on Ruth Sullivan, "Statutory Interpretation in a New Nutshell" (2003) 82:1 Can Bar Rev 51 at 60). Indeed, according to the CRA, the waiver of the filing of an election would negate Parliament's intention to only allow late filings in specific cases, to which are attached a penalty contemplated under subsection 220(3.5). Allowing Onex's waiver request would therefore contradict Parliament's intent, because it would allow Onex to access the same remedy applying to the late filing of an election, but for a type of election that is not contemplated under subsection 220(3.2), and, moreover, without the penalty provided under subsection 220(3.5). Those conflicts are incompatible with the scheme established under section 220 of the *ITA*.

[22] Finally, the CRA relied on *Canada v Nassau Walnut Investments Inc*, [1997] 2 FC 279 at para 31, 1996 CanLII 4097 (FCA) [*Nassau*] for the proposition that subsection 220(2.1) and the waiver of the filing of an election could not apply in this case, because an election involves that "the taxpayer must make a <u>decision</u> to forego one option in favour of another on the basis of an assessment of tax risks" [emphasis added], and there was no "decision" made by Onex in this case.

B. *CRA Decision in T-2082-22*

[23] The CRA denied Onex's request under subsection 220(3) to extend the time for Onex to "make" their 2012 and 2013 T5013 returns and file the Election, on the basis that Onex had already filed their T5013 returns and therefore, no extension was needed to "make" a return.

[24] Onex asserted that when the Minister exercises their discretion under subsection 220(3) to extend the time to file a T5013 return under paragraph 221(1)(d) of the *ITA* and section 229 of the Regulations, the Minister automatically extends the time for filing the Election under the CIF provision. The CRA agreed with that argument, because in *Bonnybrook Park Industrial Development Co Ltd v Canada (National Revenue)*, 2018 FCA 136 [*Bonnybrook*], the Federal Court of Appeal [FCA] held that subsection 220(3) had a broad application, giving the Minister the authority to provide relief from the strict filing requirements throughout the *ITA*, and that subsection 220(3) gave the Minister the discretion to extend the time for filing a return, including a partnership information return, under the *ITA*. Moreover, the CRA held that to the extent that a deadline to file a return such as a T5013 return was extended, "the deadline for a form or an election that is tied to the actual filing of that return by a taxpayer's filing due date (as defined in subsection 248(1)), would also be extended" [emphasis added] (CRA decision, Applicants' Record, at 60).

[25] However, the CRA disagreed that subsection 220(3) directly or indirectly grants discretion to the Minister to accept the late filing of the Election in this case under the CIF provision of Bill C-43 for the 2012 and 2013 fiscal years because the CIF provision of Bill C-43 is not "tied" to the return, as Bill C-43 did not require the Election to be filed with the return or an amended return (a

simple notification in writing was sufficient). The request of Onex was therefore not captured under the Minister's discretion pursuant to subsection 220(3). Moreover, in this case, the CRA opined that the Election was not a return, but rather an election, which represents a choice to be made by the taxpayer. Therefore, subsection 220(3) has no application in this case.

[26] Applying the "modern principle" of statutory interpretation, the CRA concluded that subsection 220(3) of the *ITA* has no application and the Minister has no discretion to extend the time to make the Election. First, based on its wording, subsection 220(3) authorizes the Minister to extend, at any time, the due date of a return that is required under the *ITA*. Other than the question of whether there could be a nuanced difference between "making" or "filing" a return, the text is clear. There is no reference to any election in subsection 220(3). Second, the text of the CIF provision of Bill C-43 is also clear and supports that conclusion. There appears to be no discussion of the inclusion of ministerial discretion to extend the time for filing the Election under Bill C-43, and the Election is not found within section 600 of the Regulations or elsewhere permitting late filings of elections. The text and its history suggest that the Election under Bill C-43 was deliberately excluded from the Minister's discretion to extend the time for filing under section 600 of the Regulations. Third, the implied exclusion rule along with the rule against tautology supports the CRA's conclusion because a general provision such as subsection 220(3) cannot override a specific provision such as subsection 220(3.2), which provides ministerial discretion to extend the time for certain elections (relying on *Canada (National Revenue) v ConocoPhillips Canada Resources Corp*, 2017 FCA 243 at paras 48–49 [*ConocoPhillips*]; *Clover International Properties (L) Ltd v Canada (Attorney General)*, 2013 FC 676).

[27] Consequently, an interpretation giving the authority to the Minister under subsection 220(3) to indirectly extend the due date of an election beyond the scope of application of subsection 220(3.2) would not be supported by the modern rules of statutory interpretation as it would not be "harmonious" with the overall scheme of the *ITA* and would negate the specific and detailed limitations dictated by Parliament in respect of elections, as provided under subsection 220(3.2). Indeed, in the CRA's opinion, concluding that subsection 220(3) gives the Minister the power to make an indirect extension of the Election filing deadline, that would not otherwise be permissible under subsection 220(3.2) which limits the types of elections that may be subject to the Minister's discretion, would make the prescribed list of set out in section 600 of the Regulations redundant.

[28] Moreover, such an extensive interpretation of subsection 220(3) would also entail the Election being filed late without any penalty, contrary to the penalty provided under subsection 220(3.5) following the exercise of the Minister's discretion to permit the late filing of an election under subsection 220(3.2).

IV. Issues

[29] The issues in these applications are whether:

a) the Minister's decisions finding that they had no power to waive the filing of the Election under subsection 220(2.1) of the *ITA* or to allow Onex to re-file their 2012 and 2013 T5013 tax returns under subsection 220(3) of the *ITA* in order to also permit them to file the Election, are reasonable; and

b) if the Minister did have the power to allow the re-filing of the 2012 and 2013 T5013 tax returns under subsection 220(3) of the *ITA*, was it reasonable for the CRA to refuse to do so.

V. Standard of Review

[30] Onex submits that the standard of review for the first issue in these applications is the standard of correctness. This issue concerns the scope and interpretation of subsections 220(2.1) and 220(3) of the *ITA* which, in Onex's view, satisfies the definition of a general question of law of central importance to the legal system as a whole. These subsections concern the Minister's discretion to provide relief in cases of extensive procedural or administrative harshness in the application of the tax legislation, which underpins the fundamental principle of fairness of the tax system. For this reason, the implications of this issue are such that they require uniform and consistent answers, and should therefore be reviewed under the correctness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 59–60 [*Vavilov*]).

[31] I disagree.

[32] In *Vavilov*, the Supreme Court of Canada [SCC] held that the presumptive standard of review for all administrative decisions is the deferential standard of reasonableness (*Vavilov* at para 23). Courts will derogate from that presumption only when there is a clear indication of legislative intent, or when correctness review is required by the rule of law (*Vavilov* at paras 10, 17, 69).

[33] In this case, there is no clear indication of legislative intent to derogate from the standard of reasonableness. Parliament has neither prescribed a different standard of review, nor a statutory right of appeal, for decisions made pursuant to subsections 220(2.1) and 220(3) of the *ITA*.

Likewise, these applications do not raise any "questions for which the rule of law requires consistency and for which a final and determinate answer is necessary" (*Vavilov* at para 53).

[34] The rule of law requires the application of the correctness standard of review in matters such as: constitutional questions, general questions of law of central importance to the legal system as a whole, questions regarding the jurisdictional boundaries between two or more administrative bodies, and questions arising when courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute (*Vavilov* at para 17; *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at para 40).

[35] Onex's position that the issue at hand is a general question of law of central importance to the legal system as a whole cannot be sustained. At paragraph 59 of *Vavilov*, the SCC describes a general question of law of central importance to the legal system as a whole as a question of "fundamental importance and broad applicability," with "significant legal consequences for the justice system as a whole or for other institutions of government." Questions that simply address a general issue of "wider public concern," or that touch on an important issue when framed in a general or abstract sense, are not general questions of law of central importance to the legal system as a whole, and are not subject to the correctness standard of review. In light of the SCC's teachings, I am not persuaded that the issue pertaining to the interpretation of subsections 220(2.1) and 220(3) of the *ITA* is a general question of law of central importance to the legal system as a whole. It is rather a narrower question of law applicable in matters of taxation that, while important, does not have implications that "impact the administration of justice as a whole"

(*Vavilov* at para 59; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 47 [*Mason*]).

[36] In light of the foregoing, the standard of review applicable to the interpretation of the Minister's discretion under subsections 220(2.1) and 220(3) of the *ITA*, and to the merits of the CRA's decisions, is that of reasonableness (*Vavilov* at paras 10, 25; *Mason* at paras 7, 39–44).

[37] Following this standard, *Mason*, relying on *Vavilov*, teaches that the reviewing court must first look to the reasons of the administrative decision maker in order to assess the justification for the decision. Moreover, the SCC reiterates the need to "develop and strengthen a culture of justification" (*Mason* at paras 8, 58–60, 63; *Vavilov* at paras 14, 81, 84, 86).

[38] In *Mason*, the SCC explains how a reviewing court must conduct a judicial review of a decision. A decision may be unreasonable if the reviewing court identifies a fundamental flaw, either because of a lack of internal logic in the reasoning or because of a lack of justification given the factual and legal constraints affecting the decision (*Mason* at para 64).

[39] The SCC identifies a series of factual and legal constraints that the decision maker must examine and justify, depending on the applicable context, in order for the decision to be sufficiently justified within the meaning of *Vavilov*. The burden of justification varies, but the decision maker must be "aware" of the essential elements, "sensitive to the issue before [them]" and "meaningfully grapple with key issues or central arguments raised by the parties" (*Mason* at paras 74, 97; *Vavilov* at para 128). The decision maker must consider the main arguments and

evidence of the parties and give reasons as to why particular arguments were accepted or dismissed, and the evidence that was accepted or rejected in the decision-making process (*Mason* at paras 73–74*; Vavilov* at paras 126–128). Moreover, an exercise of discretion may be unreasonable when the decision maker "considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion" (*Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8 at para 41).

[40] In particular, the decision maker must ensure that they consider the principles of statutory interpretation, the applicable statutory, common law or international law rules, the evidence and main arguments of the parties, the practices and previous decisions of the administrative tribunal, and the potential and possibly severe consequences of the decision on the party concerned or on a broad class of persons, as well as the overall issues. Failure to give proper consideration to any of these factors, or to provide adequate reasons for the decision, may constitute a serious deficiency that causes a reviewing court to "lose confidence in the outcome reached" by the decision maker (*Mason* at paras 66, 69; *Vavilov* at paras 106, 122).

[41] When the decision maker sets out their reasons, it is not enough for the decision to be justifiable; it must be justified by reasons that establish the transparency and intelligibility of the decision-making process (*Mason* at paras 59–60; *Vavilov* at paras 81, 84, 86). The Court must determine whether, by examining the reasoning followed and the result obtained, the decision is based on an internally coherent and rational chain of analysis that can be justified in light of the legal and factual constraints to which the decision maker is subjected (*Mason* at paras 8, 58–61; *Vavilov* at paras 12, 15, 24, 85–86). The decision will be unreasonable if it lacks internal logic or

if the reviewing court is unable to follow the decision maker's reasoning without "encountering any fatal flaws in its overarching logic" (*Mason* at para 65, citing *Vavilov* at para 102).

[42] On the other hand, the reviewing court must not create its own yardstick and then use it to measure what the decision maker did (*Mason* at para 62; *Vavilov* at para 83). Nevertheless, reasonableness review is not a "rubber-stamping" process, it is a robust form of review (*Mason* at paras 8, 63; *Vavilov* at paras 12–13).

[43] Accordingly, on judicial review under the standard of reasonableness, the reviewing court must assess the reasons for the decision "holistically and contextually" in light of the history and context of the proceedings, the evidence adduced, and the main arguments of the parties (*Mason* at para 61; *Vavilov* at paras 91, 94, 97). The Court's role is not to reweigh the evidence presented to the decision maker, to question their exercise of discretion, or to make its own interpretation of the law. It is up to the decision maker to fulfil these roles. As long as the decision maker's interpretation of the law is reasonable and the reasons for their decision are justifiable, coherent and intelligible, the court must show deference (*Vavilov* at paras 75, 83, 85–86, 115–124).

[44] Regardless of the approach taken by the decision maker, the task of the reviewing court is to ensure that the statutory provision is interpreted in accordance with the "modern principle" of statutory interpretation, which focuses on the overall context of the statute, following the ordinary and grammatical meaning of the words chosen by Parliament, and harmonizing with the spirit of the statute, its purpose, the context, and Parliament's intention (*Mason* at paras 67, 69–70, 83; *Vavilov* at paras 110, 115–124; *Canada Post Corporation v Canadian Union of Postal Workers*,

2019 SCC 67 at para 42; *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at paras 20, 36 [*Alexion*]; *Le-Vel Brands, LLC v Canada (Attorney General)*, 2023 FCA 66 at para 16; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 1998 CanLII 837 (SCC); *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26 [*Bell Expressvu*]; Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87). An interpretation that involves a "results-oriented analysis" and is done in an expeditious manner is unreasonable (*Alexion* at para 37, citing *Vavilov* at paras 120–121; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para 42).

[45] In this case, it is up to the CRA, and not the Federal Court, to interpret the scope of the exercise of the discretion conferred on the Minister under subsections 220(2.1) and 220(3) of the *ITA* (*Safe Food Matters Inc v Canada (Attorney General)*, 2022 FCA 19 at para 37). The CRA is not required to follow the manner with which courts conduct statutory interpretation – the standard of perfection does not apply. Nor is the CRA required to give reasons on every argument, legislative provision, or detail raised by the parties (*Mason* at paras 61, 69–70; *Vavilov* at paras 119–120). Also, the length of the reasons themselves is not a decisive indicator of the reasonableness of the decision (*Vavilov* at paras 92, 292–293; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paras 16–19; *Groupe Maison Candiac Inc v Canada (Attorney General)*, 2023 FC 1720 at para 63).

[46] On the other hand, the more serious the impact of the decision on the rights and interests of a party, the more the reasons must reflect these issues, be sufficient for the parties, and "the decision maker must explain why its decision best reflects the legislature's intention" (*Mason* at

para 76; *Vavilov* at paras 133–134; *Alexion* at para 21). Consequently, a decision may be unreasonable simply because the decision maker does not consider or address, in their reasons, the particularly harsh consequences for the affected individuals (*Mason* at paras 69, 76; *Vavilov* at paras 134–135).

VI. Analysis

A. *The CRA failed to consider any remedial interpretation of subsections 220(2.1) and 220(3) of the ITA*

[47] The important provisions in these applications are subsections 220(2.1), 220(3), 220(3.2) and 220(3.5) of the *ITA*, which provide:

Waiver of filing of documents **(2.1)** Where any provision of this Act or a regulation requires a person to file a prescribed form, receipt or other document, or to provide prescribed information, the Minister may waive the requirement, but the person shall provide the document or information at the Minister's request. …	**Renonciation** **(2.1)** Le ministre peut renoncer à exiger qu'une personne produise un formulaire prescrit, un reçu ou autre document ou fournisse des renseignements prescrits, aux termes d'une disposition de la présente loi ou de son règlement d'application. La personne est néanmoins tenue de fournir le document ou les renseignements à la demande du ministre. […]
Extensions for returns **(3)** The Minister may at any time extend the time for making a return under this Act. …	**Prorogations de délais pour les déclarations** **(3)** Le ministre peut en tout temps proroger le délai fixé pour faire une déclaration en vertu de la présente loi. […]
Late, amended or revoked elections	**Choix modifié, annulé ou produit en retard**

(3.2) The Minister may extend the time for making an election or grant permission to amend or revoke an election if	**(3.2)** Le ministre peut, en ce qui concerne un choix prévu par une disposition visée par règlement, proroger le délai pour faire le choix ou permettre la modification ou l'annulation du choix si les conditions suivantes sont réunies :
(a) the election was otherwise required to be made by a taxpayer or by a partnership, under a prescribed provision, on or before a day in a taxation year of the taxpayer (or in the case of a partnership, a fiscal period of the partnership); and	**a)** le choix devait être fait par ailleurs par un contribuable ou une société de personnes au plus tard un jour donné d'une de ses années d'imposition ou d'un de ses exercices, selon le cas;
(b) the taxpayer or the partnership applies, on or before the day that is ten calendar years after the end of the taxation year or the fiscal period, to the Minister for that extension or permission.	**b)** le contribuable ou la société de personnes demande au ministre, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition ou de l'exercice, de proroger le choix ou d'en permettre la modification ou la révocation.
…	[…]
Penalty for late filed, amended or revoked elections	**Pénalité relative au choix modifié, annulé ou produit en retard**
(3.5) Where, on application by a taxpayer or a partnership, the Minister extends the time for making an election or grants permission to amend or revoke an election (other than an extension or permission under subsection (3.201)), the taxpayer or the partnership, as the case may be, is liable to a penalty equal to the lesser of	**(3.5)** Lorsque le ministre proroge le délai pour faire un choix ou permet qu'un choix soit modifié ou annulé (sauf s'il s'agit de la prorogation ou de la permission visée au paragraphe (3.201), le contribuable ou la société de personnes, selon le cas, est passible d'une pénalité égale à la moins élevée des sommes suivantes :
(a) $8,000, and	**a)** 8 000 $;
(b) the product obtained when $100 is multiplied by the number of complete months from the day on or before which the election was required to be made to the day the application was made in a form satisfactory to the Minister.	**b)** le produit de la multiplication de 100 $ par le nombre de mois entiers compris dans la période commençant à la date où, au plus tard, le choix devait être fait et se terminant le jour où la demande de prorogation, de modification ou d'annulation est faite sous une forme que le ministre juge acceptable.

[48] In its decisions, the CRA purported to apply the principles of statutory interpretation. In both decisions, the CRA opined that a harmonious interpretation of subsection 220(2.1) and subsection 220(3), considered in the context of the scheme set out under section 220 of the *ITA* as a whole, indicated that the Minister did not have discretion to waive the filing of the Election under subsection 220(2.1), nor to accept a new return under subsection 220(3) of the *ITA*. The CRA held that the implied exclusion rule applied, and the existence of ministerial discretion in this case would conflict with subsection 220(3.2) of the *ITA* and section 600 of the Regulations, which set out a closed list of circumstances when a late election is acceptable, and prescribe a penalty in those cases under subsection 220(3.5).

[49] The CRA's reasons in both decisions essentially reflect that analysis. The reasons in this section therefore apply to both files. In my view, while the CRA's decisions indeed reflect one plausible interpretation, the CRA failed to consider the remedial nature of the scheme set out under section 220 of the *ITA*. Careful attention to the remedial nature of the scheme allows for an alternative plausible interpretation. For the reasons that follow, the CRA must reconsider its decisions and take into account the remedial nature of subsections 220(2.1) and 220(3) of the *ITA*, following which the CRA may then evaluate whether its initial decisions stand.

[50] In determining the Minister's discretion under subsections 220(2.1) and 220(3), the modern rule of statutory interpretation applies. As noted by the FCA in *ConocoPhillips* :

> [36] The general approach to statutory interpretation is well established and was articulated at paragraphs 39 and 40 of the decision of the Federal Court:
>
> > [39] In addressing the question of whether the Minister's interpretation of her authority under subsection 220(2.1) of the ITA is reasonable, I begin by noting that it is trite law that

> statutes should be read according to Driedger's modern rule of statutory interpretation, namely that:
>
> > …the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
> >
> > as cited in Ruth Sullivan, *Statutory Interpretation*, 2ed edition (Toronto: Irwin Law, 2007) at 41 [Sullivan]. Also see *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27, 154 DLR (4th) 193 at para 21.
>
> [40] The ITA, like any other federal statute, must also be read in view of section 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21, such that subsection 220(2.1) must be "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." In addition, the Supreme Court has specifically stated in *Stubart Investments Ltd. v Canada*, 1984 CanLII 20 (SCC), [1984] 1 SCR 536, [1984] CTC 294 at paras 57-61, that, in tax cases, the modern rule of statutory interpretation should be followed rather than the traditional strict approach to statutory interpretation (see also: David G Duff et al., *Canadian Income Tax Law*, 5th ed (Lexis Nexis: Markham, 2015) [Duff] at 107, 116-117).
>
> (*ConocoPhillips* at para 36)

[51] In *Bonnybrook* at paragraph 34, the FCA elaborated on this rule and held:

> [34] The proper approach to statutory interpretation was described in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10:
>
> > [10] It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, 1999 CanLII 639 (SCC), [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable

> meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

(*Bonnybrook* at para 34)

[52] The principles of statutory interpretation, along with section 12 of the *Interpretation Act* require, when possible, the preference for a remedial interpretation that best ensures the attainment of the statutory provision's object (see also *Bell ExpressVu* at para 26, quoting Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87; *Vavilov* at paras 117–118; *Mason* at paras 69, 83). Section 12 of the *Interpretation Act* provides:

Enactments deemed remedial	**Principe et interprétation**
12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.	**12** Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

[53] As held by the SCC in *Vavilov* at paragraph 121, the CRA must interpret subsections 220(2.1) and (3) of the *ITA*

> in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to 'reverse-engineer' a desired outcome.

(*Vavilov* at para 121)

[54] Moreover, at paragraph 76 of *Mason*, the SCC held that a decision maker, in their interpretation of a statute or in the exercise of discretion, has to consider the potential "harsh consequences" for an entity. In "grapp[ling] with the particularly severe or harsh consequences for the affected [entity]," the decision maker has to "explain why [their] decision best reflects the legislature's intention" (*Mason* at para 76, relying on *Vavilov* at paras 133–134).

[55] In its decisions, the CRA does not discuss nor put any weight on section 12 of the *Interpretation Act*, nor examine the remedial nature of section 220 of the *ITA*.

[56] The scheme of section 220 was adopted and presented by Parliament as a "Fairness Package," to make "the tax system simpler, easier and fairer" by allowing "common sense in dealing with taxpayers who, because of personal misfortune or circumstances beyond their control, are unable to meet our deadlines or comply with our rules" (Canada, Minister of National Revenue, "Fairness Package," Press Release, May 24, 1991, Applicants' Record, at 1799). The FCA has suggested that the "Fairness Package" exists to "blunt the harsh effects" of some provisions of the *ITA* (*Bonnybrook* at paras 47, 54).

[57] Within the "Fairness Package," subsection 220(2.1) was adopted by Parliament to authorize the Minister to waive a taxpayer's requirement to file a prescribed form, receipt or other document. Subsection 220(3) of the *ITA* was adopted to permit the Minister to authorize an extension of time to make a return.

[58] In *Bonnybrook*, the FCA considered both provisions. In that case, the issue was whether the Minister could accept a request for an extension of time for the filing of a return that would allow Bonnybrook to receive a dividend refund. Under subsection 129(1) of the *ITA*, a tax return had to be filed within three years after the end of its taxation year, which Bonnybrook failed to do. Bonnybrook sought to overcome this difficulty by applying for relief from the Minister under subsections 220(2.1) and (3) of the *ITA*.

[59] Of interest in this case, Bonnybrook sought, under subsection 220(2.1), a waiver of the requirement to file the return within three years, as provided under subsection 129(1) of the *ITA*. Bonnybrook also sought an extension of time, under subsection 220(3), to file their return.

[60] Initially, the Minister rejected the request on the basis that even if the extension of time to file the return was granted, the refund under subsection 129(1) could still not be made because of the specific requirement under the *ITA* that the refund be available only if the return had been submitted within three years. In other words, the Minister’s consent to the late filing of a return does not extend nor eliminate another requirement specifically set out in the *ITA*, in their case being that the return had to be filed within three years. To do so, in the Minister’s view (and likewise in this case according to the CRA), would circumvent a specific provision stating the contrary, which would be inconsistent with a harmonious interpretation of the *ITA* provisions. Indeed, the granting of an extension of time under subsection 220(3), which is a generic rule, would conflict with the specific requirement that the return be filed within three years under subsection 129(1), which is a more specific provision – the conflict therefore triggers the implied exclusion rule of statutory interpretation.

[61] In *Bonnybrook*, the FCA disagreed and held that:

> [40] The CRA's view expressed above is that the taxpayer relief provisions cannot affect a filing requirement which restricts the issuance of a dividend refund. The problem with this reasoning is that this is exactly what the taxpayer relief provisions are intended to do — enable the Minister to provide relief from strict filing requirements.
>
> [41] There is no question that the text, context and purpose of subsection 129(1) of the Act is to require a tax return to be filed within three years. This is not the end of the matter, however, as it is also necessary to consider the text, context and purpose of the taxpayer relief provision. Interpreted in this manner, subsection 220(3) gives the Minister a broad discretion to override strict filing requirements in other provisions.
>
> [42] Subsection 220(3) of the Act provides the Minister with a broad discretion to extend the time to file a "return". The provision is not new, as it can be traced back to the *Income War Tax Act*, 1917, S.C. 1917, c. 28. Given its long history, and its broad language, the reach of subsection 220(3) has no doubt expanded over time as new "return" filing requirements have been enacted.
>
> [43] For example, the provision applies to any type of "return," which would include information returns that are required to be filed in various circumstances. It has also been applied by the Federal Court in respect of an income tax return filing requirement for non-residents under subsection 216(4) (*Kutlu v. Canada*, 1997 CanLII 5990 (FC), 130 F.T.R. 85, [2000] 4 C.T.C. 129 (F.C.)).
>
> [44] In its memorandum, the Crown submits that the waiver authority in subsection 220(2.1) does not apply to subsection 129(1) because the return requirement is a condition rather than a requirement. This argument was only with respect to the waiver authority in subsection 220(2.1) of the Act. In any event, it is worth noting that in *Kutlu*, above, an extension of time was granted under subsection 220(3) in respect of requirement that was essentially a condition.
>
> [45] It is also useful to note that the CRA has authorized waivers that are conditions to obtaining a benefit. Some examples are set out below.
>
> - The CRA has waived the filing requirement in subsection 8(10) of the Act which is a condition of obtaining a deduction for certain employment expenses (CRA Guide T4044 at p. 5).

● The CRA has also waived the filing requirement in subsection 63(1) of the Act which is a condition of obtaining a deduction for child care expenses (CRA Income Tax Folio S1-F1-C2, para. 1.47).

● In the past, the CRA had extended the time for filing research and development forms under subsection 37(11) which are a requirement to claiming R&D benefits. (See *Alex Parallel Computers Research Inc. v. Canada*, 1998 CanLII 8794 (FC), 157 F.T.R. 247, [1999] 2 C.T.C. 180.) This practice was later prohibited by an amendment to the Act in subsection 220(2.2).

[46] Based on the text alone, subsection 220(3) provides the Minister the discretion to grant the relief that Bonnybrook seeks.

[47] This interpretation also aligns with the context and purpose of taxpayer relief provisions such as subsection 220(3). From time to time, Parliament has enacted various measures to blunt the harsh effects of strict filing requirements in the Act. Some of these relieving provisions are specific to particular requirements and others are more general. There is no one size fits all for the type of relief that is granted. Sometimes the relief is granted automatically subject to payment of a penalty (e.g., subsection 85(7) of the Act), and in other cases the relief is subject to specific conditions (e.g., subsection 166.1(7) of the Act).

[48] Subsections 220(2.1) and (3) are examples of relief measures which have broad application and give the Minister the authority to provide relief from filing requirements throughout the Act. The decision of the Minister regarding subsection 220(3) fails to give due regard to the breadth of this provision.

…

[54] It is not clear what led Parliament to enact the 1994 amendments, but their introduction corresponds in time with a decision of the Tax Court of Canada which is scathing in its rebuke of the harshness of the three year deadline to file a tax return in order to obtain a refund of an overpayment of tax: *Chalifoux v. M.N.R.*, 1991 CanLII 14230 (TCC), 91 D.T.C. 946 at p. 947, [1991] 2 C.T.C. 2243:

> … This abrogation of a taxpayer's right of ownership, one of the most fundamental rights in a democratic society, seems to me to be abusive on the part of the legislature and should be removed from the statute book, at least in its present form.

> [55] The significance of the 1994 amendments, counsel suggests, is that if Parliament intended that the Minister have the discretion to extend the three year deadline in the dividend refund provision, it would have done so expressly as it did in subsection 164(1.5).
>
> [56] In my view, counsel suggests a leap too far in suggesting that subsection 220(3) of the Act does not apply to dividend refunds in light of the 1994 amendments. In circumstances where a provision provides relief to taxpayers, such as subsection 220(3), the provision should be given effect unless it is quite clear that Parliament intended otherwise. Parliament has not done so in subsection 129(1), even taking into account subsections 152(4.2) and 164(1.5) of the Act. If Parliament had intended that the general relief provisions in subsections 220(3) not apply to subsection 129(1), it would have been an easy matter for Parliament to have provided for this explicitly.
>
> …
>
> [58] I would agree that the filing deadline in subsection 129(1) is intended to provide some finality, but I would not agree that it was intended to be generous or override general taxpayer relief provisions. Filing deadlines in the Act are generally intended to be reasonable and provide some finality, but the Act also recognizes that strict filing requirements may result in unfairness in particular circumstances.
>
> (*Bonnybrook* at paras 40–48, 54–56, 58) [emphasis added]

[62] The FCA therefore opined that subsection 220(2.1) and subsection 220(3) were examples of relief measures of broad application to "blunt the harsh effects of strict filing requirements in the Act" that in turn "enable the Minister to provide relief from strict filing requirements," "giv[e] the Minister a broad discretion to override strict filing requirements in other provisions," "give the Minister the authority to provide relief from filing requirements throughout the Act," and "the provision should be given effect unless it is quite clear that Parliament intended otherwise. … If Parliament had intended that the general relief provisions in subsections 220(3) not apply …, it would have been an easy matter for Parliament to have provided for this explicitly" (*Bonnybrook*

at paras 41, 47–48, 56; see also *Lanno v Canada (Customes & Revenue Agency)*, 2005 FCA 153 at para 6; *ConocoPhillips Canada Resources Corp v Canada (National Revenue)*, 2016 FC 98 at para 56).

[63] The substantive result in *Bonnybrook* is that the Minister therefore has the discretion to extend specific filing requirements under the *ITA*, with the result that the exercise of that discretion extends to other deadlines related to the filing, in that case being on provisions limiting the availability of a refund (at para 55). While the deadline applicable in *Bonnybrook* related to the requirement under subsection 129(1) to file a return within three years, the deadline in this case is to file the Election within the CIF provision of Bill C-43.

[64] Subsections 220(2.1) and 220(3) were therefore enacted to "correct injustice" (Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at 504) and, as such, "must be given a wide and liberal construction so as to enable [them] to effectively serve this remedial purpose" (*Elan Corp v Comiskey* (CA), 1990 CanLII 6979 (ON CA)). Consistent with *Bonnybrook*, a remedial interpretation of subsection 220(2.1) and subsection 220(3) of the *ITA*, if it exists, could potentially afford a "broad application" to allow it "to blunt the harsh effects of strict filing requirements" – including in this case to allow the late filing of Onex's T5013 returns for their 2012 and 2013 taxation years under subsection 220(3) (along with the Election), or to waive altogether the requirement to file the Election (and if the Minister wishes, have Onex provide the document upon request) under subsection 220(2.1).

[65] The Respondent relies on *ConocoPhillips* and the implied exclusion principle of statutory interpretation that a general rule may not override a more specific provision (at paras 48–49). I agree with the principle and its application in appropriate cases. In *ConocoPhillips*, the FCA held that subsection 220(2.1), as a general provision, could not displace the application of a more specific provision setting particular rules in the case of notices of objection. It was held that subsection 220(2.1) could not permit the waiver of the necessity to serve a notice of objection because a complete scheme existed setting out how to do so, notably under subsections 165(1), 166.1(1), 166.1(7), 166.2(1) and 166.2(5). More specifically, the waiver requested under subsection 220(2.1) would give the Minister a power that has been "denied" specifically under a detailed provision pursuant to subsection 166.1(7). For that reason, and in that context, the "implied exception" rule of statutory interpretation that a more general provision cannot override a more specific one, could apply (*ConocoPhillips* at paras 47–49; see also *Jennings-Clyde, Inc. (Vivatas, Inc.) v Canada (National Revenue)*, 2024 FC 1141 at paras 32-37).

[66] That is not the situation here. An interpretation allowing the harmonious and complimentary application of both subsections 220(2.1) and (3), and subsection 220(3.2) together with the scheme of section 220 as a whole, may be plausible, as discussed below. *ConocoPhillips* is therefore not compelling on the facts of this case, and in the concurrent potential application of subsections 220(2.1), 220(3), 220(3.2) and 220(3.5) of the *ITA*.

[67] Moreover, in *Bonnybrook* at paragraph 59, the FCA distinguished *ConocoPhillips* and held that the scheme under subsection 129(1) was quite different and that *ConocoPhillips* did not assist in the interpretation of that provision. In my view, the same comment applies to the requirement

to file the Election in this case. Unlike *ConocoPhillips*, a waiver or an extension of time in this case would not grant the Minister a power that the Minister has been "denied" under the CIF provision of Bill C-43, or under subsection 220(3.2) and subsection 220(3.5) of the *ITA* (see *ConocoPhillips* at para 47). Rather, like in *Bonnybrook*, the Minister's granting of a waiver or an extension of time to file a return could extend the deadline to file the Election as required under the CIF provision of Bill C-43, like it did for the refund of a dividend under subsection 129(1), despite the return not being made within the three year rule as specifically required under that subsection of the *ITA*.

[68] The Respondent also relied on *Banff Caribou Properties Ltd v Canada (Attorney General)*, 2023 FC 312 [*Banff Caribou*] to bolster the CRA's ruling. In that case, Banff Caribou wished to file amended returns in order to attach letters electing to treat certain depreciable capital properties as separate classes of eligible non-residential buildings under subsection 1101(5b.1) of the Regulations, allowing them to deduct a capital allowance at a more advantageous rate. This Court dismissed an application for judicial review of the Minister's refusal to permit the filing of the amended returns on the basis that Banff Caribou's attempt to file an amended tax return amounted to a request for the CRA to accept a late-filed election, which was contrary to the closed list of circumstances set out in section 600 of the Regulations.

[69] The Respondent therefore relies on *Banff Caribou* in support of the CRA's interpretation that late-filed elections are not permitted outside of the closed list of circumstances expressly set out in the *ITA* and Regulations, notably subsection 220(3.2) of the *ITA* and section 600 of the Regulations.

[70] While the decision of the Court in *Banff Caribou* appears at first glance to be compelling, the factual setting was different. In that case, Banff Caribou did not wish to file an amended return, but only to file the election: "[t]he Applicant's only proposed amendment to its returns is to attach election letters" (*Banff Caribou* at para 21). No amendment was actually required in the returns. Consequently, the only issue for the CRA in that case was whether the late filing of the election could be permitted in the circumstances of that case. The Court held that while Banff Caribou had framed its request on an amendment to its return, the reality was that it was solely seeking to make a late filed election.

[71] The CRA considered the request as to whether it had the jurisdiction to accept a late-filed election in relation to a provision that was not prescribed in the *ITA* and Regulations granting permission to do so (*Banff Caribou* at para 26). Most importantly, the Court held that the Minister's interpretation of its jurisdiction was reasonable "based on the submissions it received" (*Banff Caribou* at para 5).

[72] Notably, however, Banff Caribou did not request for the Minister to exercise their discretion under subsection 220(3) of the *ITA* and permit the late filing of a return, as is argued in this case, nor for the Minister to exercise their discretion under subsection 220(2.1) to waive the requirement to file the election. The findings of the Court in *Banff Caribou*, while persuasive in light of the facts and arguments in that case, are not completely responsive to this case, especially given the FCA's decision in *Bonnybrook* which specifically relates to the two provisions at stake in this case, which are subsections 220(2.1) and 220(3) of the *ITA*.

[73] In this case, Onex had completed their returns for the 2012 and 2013 taxation years under their interpretation of the applicable *ITA* provisions, and filed the T5013 returns before the enactment of Bill C-43. Had Onex filed the Election under Bill C-43, they would also have had to amend their 2012 and 2013 tax returns, as the information enclosed was no longer accurate. Therefore, and contrary to *Banff Caribou*, Onex's request to file an amended tax return does not amount solely to an indirect request for the CRA to accept a late-filed election that cannot be otherwise accepted under the *ITA*.

[74] The fact that an "election" is required does not displace the Minister's discretion under subsection 220(2.1) and subsection 220(3). As discussed below, subsection 220(2.1) does not make such a distinction as to what type of "documents" may be waived, and subsection 220(3) does not specify whether other extensions are available when an extension of time to file a return is considered. In *Kutlu v Canada*, 130 FTR 85, 1997 CanLII 5990 (FC) [*Kutlu*], the Court quashed a decision of the Minister refusing an extension of time for filing a return under subsection 220(3) of the *ITA*, in a case where the return would also require a type of "election" made under subsections 216(1) and (4) of the *ITA* and relating to taxation on net income rather than gross income (indeed, the word "election" was used by the Court in describing the issue : *Kutlu* at 3). In that case, to benefit from the application of that section, a return had to be filed within six months of the end of the taxation year as required under subsection 216(4), which was not done. The Court held in that case that subsection 220(3) "exists primarily in order to remedy the injustices that this regime could cause" (*Kutlu* at 9).

[75] Consequently, a remedial interpretation may be plausible as discussed below, in which the application of subsection 220(2.1) and subsection 220(3), on the facts of this case, can co-exist with the scheme of section 220 of the *ITA* as a whole. The CRA's failure to consider this plausible alternative interpretation, before excluding it, is unreasonable. The CRA failed to consider a potential remedial interpretation and provide reasons as to why it chose a more restrictive interpretation.

(1) Additional CRA reasons in relation to subsection 220(2.1) of the *ITA*

[76] In relation to file T-85-22, the CRA provided additional reasons that do not apply in file T-2082-22.

[77] First, the CRA ruled that the Minister did not have discretion to accept Onex's request because the Election was not a requirement under a "provision of this Act" pursuant to subsection 220(2.1) of the *ITA*. Indeed, the waiver available under subsection 220(2.1) only exists in relation to the filing of documents required by "any provision of this Act or a regulation." Because the requirement to file an Election is found in the CIF provision of Bill C-43, a waiver of the requirement to file the Election under Bill C-43 was simply not available to Onex.

[78] The CRA does not rely on any authority to justify its conclusion. The CRA merely concludes that it has not found any support for the proposition supporting that a provision of an amending legislation, such as Bill C-43, becomes part of the amended statute.

[79] Onex argues at paragraph 73 of their memorandum of fact and law that “[s]ince the CIF Provision and the ITA are ‘[s]tatutes enacted by a legislature that deal with the same subject [they] are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject’” (relying on Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at 407; see also subsection 42(3) of *Interpretation Act*). Onex relies on *Bell ExpressVu*, where the SCC held that a statute enacted in 1991 informed the scope and meaning of a provision enacted in a separate statute in 1985, and where the majority of the SCC held that both statutes “must be seen as operating together as part of a single regulatory scheme,” and that “consideration must be given to each statute’s [role] in the overall scheme” (*Bell ExpressVu* at para 46).

[80] Onex therefore argues, at paragraph 74 of their memorandum of fact and law, that “in light of the context of the provisions and in order to give full effect to subsection 220(2.1) while considering its overall scheme, the terms ‘any provision of this Act’ must be read to include all amending legislation that forms part of the legislative scheme of the ITA, including the CIF Provision. Such an interpretation defeats the CRA’s erroneous position to the contrary and is the only possible interpretation that ‘result[s] from the grammatical and ordinary sense of the provision [and] accords well with [its] objectives’” (relying on *Bell ExpressVu* at para 49).

[81] The Respondent argues that the CIF provision is not incorporated in the *ITA*. At paragraphs 63 and 64 of their memorandum of fact and law, the Respondent argues that the doctrine of merger, which is codified in subsection 42(3) of the *Interpretation Act*, provides that “when a statute is amended, the new law that is added becomes an integral part of the amended legislation and has

the same operation as the amended legislation, <u>except for the date of commencement</u>” [emphasis added] (relying on Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at 355). According to the Respondent, this doctrine does not apply to merge a specific provision of an amending statute that just sets out commencement dates with the legislation it amends. Therefore, subsection 21(15), including the Bill C-43 Election and related commencement date, were never added to, and so did not become a part of, the *ITA* under the doctrine of merger.

[82] With respect, the reliance on Professor Sullivan for the proposition that the “date of commencement” is not merged in the amended statute is not convincing in this case.

[83] First, the terms “<u>except for the date of commencement</u>” are not found in subsection 42(3) of the *Interpretation Act*. Indeed, subsection 42(3) provides:

42(3) An amending enactment, as far as consistent with the tenor thereof, shall be construed as part of the enactment that it amends.	**42 (3)** Le texte modificatif, dans la mesure compatible avec sa teneur, fait partie du texte modifié.

[84] Second, the principle referred to by Professor Sullivan, and the case law relied upon, stand for the principle and aim at the protection of individuals from retroactive or retrospective applications of the amending statute. The exclusion of the CIF date from the amended statute is therefore an exception to the merger rule, applicable in some cases in order to protect individuals from retroactive or retrospective applications of the amending enactment. In this case, it is the taxpayer who may decide that the *ITA* applies before its otherwise set date to come into force. The protection required for individuals discussed by Professor Sullivan does not apply in this case.

[85] Third, section 12 of the *Interpretation Act* could also apply on this issue, suggesting that a remedial interpretation of the merger doctrine under subsection 42(3) favours an interpretation including the CIF provision into the *ITA* for the purposes of this case.

[86] Therefore, the CRA failed to properly consider subsection 42(3) of the *Interpretation Act* and explain why, in this case, a remedial interpretation of the term “any provision of this Act” and consistent with section 12 and subsection 43(2) of the *Interpretation Act*, could not include the CIF provision of Bill C-43 that amended the *ITA*.

[87] Moreover, no case law has been brought to the attention of the Court as to the meaning of subsection 42(3) of the *Interpretation Act*, suggesting that a restrictive interpretation should be made such that amending enactments should be construed as part of the amended statute, except for its CIF provision. While certainly the rules against retroactivity and retrospectivity, and the rules applicable to transitional provisions, may have roles to play, there is no principled reason why CIF provisions can never also form part of the amended enactment to achieve the purpose of remedial interpretation.

[88] The CRA also rejected the application of subsection 220(2.1) on a second ground. The CRA ruled, relying on *Nassau*, that a waiver of the Election falls outside of the permissible scope of the Minister’s discretion under subsection 220(2.1) because a “decision” is required by the taxpayer in order to make the election, in the sense that the taxpayer must forego one option in favour of another, and in this case, Onex never actually made an election.

[89] However, with respect, the specific terms of subsection 220(2.1) do not specifically limit the Minister's discretion to waive the filing of "designations" but not of "elections," nor limit the Minister's discretion to only accept the waiver of documents that do not require a "decision." There is nothing in the text of subsection 220(2.1) to suggest that because an election requires a "decision" between two options, that the documents notifying the "decision" to the CRA cannot fall within the terms "prescribed form, receipt or other document" under subsection 220(2.1) of the *ITA*. Moreover, the *Nassau* case must be interpreted in its context, and nothing suggests that the ruling of the FCA and the distinction between a "designation" and an "election" should have an impact on the Minister's discretion to waive the filing of a "prescribed form, receipt or other document" under subsection 220(2.1) of the *ITA*. The wording of subsection 220(2.1), especially its reference to "other document," is broad, and certainly can include any type of document contemplated under the *ITA*, including an election, even if an election requires the taxpayer to make a "decision." A remedial interpretation of subsection 220(2.1) is plausible, which could include the filing of an Election in this case, by letter or otherwise, as being a "document" for the purposes of subsection 220(2.1), which the Minister could waive.

[90] As argued by Onex at paragraphs 68–69 of their memorandum of fact and law, and I agree, the proposed distinction imposes erroneous logic according to which the taxpayer can only be relieved of filing a "prescribed form, receipt or other document" that do not disclose a "decision," when the income tax system is based on the principle of self-reporting and self-assessment (*R v McKinley Transport Limited*, [1990] 1 SCR 627 at 648, 1990 CanLII 137 (SCC)), and when taxpayers are constantly required to make "decisions" in relation to their tax claims and assessments. If Parliament had intended that subsection 220(2.1) not apply to elections or to

documents that require a "decision," "it would have been an easy matter for Parliament to have provided for this explicitly" (*Bonnybrook* at para 56). Rather, as the Tax Court of Canada commented: "220(2.1) allows the Minister to waive the timing for virtually anything required to be filed" (*Petratos v The Queen*, 2013 TCC 240 at para 19 [*Petratos*] (footnote 3)).

[91] Therefore, the dismissal of the merger doctrine, as well as the conclusion that a waiver was not available in this case because an election required a "decision," does not consider section 12 and subsection 42(3) of the *Interpretation Act* nor the requirement to construe statutory provisions remedially. The exclusion of the CIF provision from the *ITA*, in this case, represents a restrictive interpretation that limits the powers of the Minister, instead of expanding it as a remedial interpretation could plausibly require.

[92] The CRA's failure to consider other plausible interpretations, which is a "pertinent aspect of [the *ITA*'s and the *Interpretation Act*'s] texts, contexts or purposes," and to provide reasons as to why other less restrictive interpretations had to be excluded because the CRA's "decision best reflects the legislature's intention" (*Mason* at para 76; *Vavilov* at para 133), is sufficiently important that this reviewing Court has lost confidence in the outcome the CRA has reached (*Vavilov* at para 122).

(2) Additional CRA reasons in relation to subsection 220(3) of the *ITA*

[93] In relation to file T-2082-22, the CRA also provided additional reasons that do not apply in file T-85-22.

[94] The CRA ruled that the Election under the CIF provision of Bill C-43 was not a "return," and was not "tied" to the filing of the "return," and therefore subsection 220(3) of the *ITA* did not apply.

[95] The Respondent argues at paragraph 82 of their memorandum of fact and law that Onex's position that the relevant CIF provision "would be meaningless in the absence of a partnership return" is devoid of merit. The Respondent argues that this submission ignores the fact that the Election can be made regardless of whether a partnership return had been filed on time, late, or not at all.

[96] Onex argues that the CRA decision that subsection 220(3) could not apply to the Election because it is not required to be filed with a return is an unduly restrictive approach that ignores the context of the CIF provision and, more generally, of the return filing requirements applicable to a partnership and its partners. Onex submits that it is no coincidence that the Election under Bill C-43 had to be filed no later than the filing date of the partnership's return, since the Election directly impacts the return itself. Therefore, as argued by Onex, while the CIF provision may not be textually tied to the filing of the partnership return, in practice and in fact it is, because the Election has an impact on the content of the return. The CRA therefore erred in concluding otherwise based on an overly reductive textual interpretation of the CIF provision that ignores its context.

[97] In this case, Onex's T5013 returns for the 2012 and 2013 taxation years had already been filed, prior to the enactment of Bill C-43. Had Onex filed the Election, the Election would clearly have had an impact on those returns and Onex argues that they were therefore required to amend

them. Because an amendment of the returns is required, then they ought to be allowed to make a late filing of their return under subsection 220(3) of the *ITA*.

[98] The Respondent submits, at paragraph 96 of their memorandum of fact and law, that "the CRA was alive to the administrative and compliance obligations of the Applicants arising from making an Election and found that [Onex] could have notified the CRA of <u>any consequential changes to its T5013 returns by letter</u>" [emphasis added]. The Respondent appears to be relying on the CRA's finding to bolster their argument that the Election was not "tied" to the return – the letter notifying the CRA of the Election only had to identify the changes on the T5013, without having to actually re-file.

[99] With respect, this distinction favours form over substance. Even if the CRA was agreeable to accepting a letter noting the changes to the T5013 returns, instead of requiring a complete re-filing out of administrative efficiency, the evidence demonstrates that substantively, changes to the T5013 returns were necessary and expected by the CRA in the circumstances. Had Onex made the Election in due course, they could have filed their Election along with newly amended T5013 returns reflecting the changes, instead of proceeding by way of a simple letter. The fact remains that substantively, the T5013 returns would have been amended one way or another.

[100] The CRA's ruling that subsection 220(3) cannot apply in this case because the Election is not a "return" nor "tied" with the return, is therefore unreasonable, for three main reasons.

[101] First, on the facts of this case, and because Onex had already filed its T5013 returns, new returns were required "along with" or at the very least concurrent with the filing of the Election (by way of letter or an actual re-filing of the T5013 returns).

[102] Second, the CRA opined that subsection 220(3) did not apply in this case, because the Election is simply not a "return" as understood under subsection 220(3). However, in *Bonnybrook*, the FCA cautioned the CRA against such a restrictive interpretation of subsection 220(3). In that case, the FCA held that "subsection 220(3) gives the Minister a broad discretion to <u>override strict filing requirements in other provisions</u>," and that "[s]ubsections 220(2.1) and (3) are examples of relief measures which have broad application and give the Minister the authority to provide <u>relief from filing requirements throughout the Act</u>" [emphasis added] (*Bonnybrook* at paras 41, 48). Clearly, the FCA was of the view that subsection 220(3) should not be limited to "returns" or documents "tied" to the "return," and extended to documents other than "returns" that also had to be filed under other provisions of the *ITA* along with or as a consequence of the return. The requirement to "file" elections (or any other type of document) is clearly contemplated by the FCA in its interpretation of subsection 220(3) when it interprets subsection 220(3) as granting discretion to the Minister to allow an extension of time to provide "relief from filing requirements throughout the Act." In the end, as held by the FCA in *Bonnybrook* at paragraph 56, subsection 220(3) should have a broad application and be given effect unless it is quite clear that Parliament intended otherwise, because it would have been an easy matter for Parliament to have provided for this explicitly.

[103] Third, the CRA in this case, relying on *Bonnybrook*, agreed with Onex's argument that if the CRA could extend a deadline to file a T5013 return, "the deadline for a form or an election that is tied to the actual filing of that return by a taxpayer's filing due date (as defined in subsection 248(1)), would also be extended" [emphasis added] (CRA decision, Applicants' Record, at 60). In doing so, the CRA limited its jurisdiction to elections that are "tied" with a return and as discussed above, denied that this was the case of Onex. However, the additional requirement that the election be "tied" with the return is not provided for in the text of subsection 220(3). Indeed, no such limitation is included in the wording of the enactment. The CRA's restrictive interpretation therefore fails to take into account the remedial nature of subsection 220(3), and the broad interpretation imposed by the FCA in *Bonnybrook*, in which the FCA did not limit the application of subsection 220(3) to "returns," but rather found that it applies to other filing requirements throughout the *ITA* (*Bonnybrook* at paras 41, 48). Given that elections are a type of document that is required to be "filed" under the *ITA*, there are no principled reasons, under the FCA decision in *Bonnybrook*, to exclude some elections from the application of subsection 220(3), but not others, simply because they are not "returns" or "tied" to the "return."

[104] Consequently, the CRA failed to properly consider the legal and factual constraints relating to its decision (*Mason* at para 66). The CRA's restrictive interpretation does not comply with the fact that the T5013 returns had to be amended (by re-filing or by letter – but they needed to be amended), and the CRA interpretation of subsection 220(3) incorporates a restriction that information submitted along with the return must be "tied" to the return, when subsection 220(3) makes no specific mention of that requirement. As stated, if Parliament had intended for that result, it would have been an easy matter for Parliament to have provided for this explicitly (*Bonnybrook*

at para 56). The CRA therefore failed to consider a plausible alternative interpretation that could have complied with the remedial nature of subsection 220(3) of the *ITA*.

[105] As stated above in the context of subsection 220(2.1), another plausible remedial interpretation exists for the application of subsection 220(3), which the CRA was compelled to consider and provide reasons as to why its more restrictive interpretation "best reflect[ed] the legislature's intention" (*Mason* at para 76; *Vavilov* at para 133). As held by the FCA in relation to subsection 220(3) in *Bonnybrook* at paragraph 48, which also applies in this case, "[t]he decision of the Minister regarding subsection 220(3) fails to give due regard to the breadth of this provision." The CRA's failure is sufficiently important that this reviewing Court has lost confidence in the outcome the CRA has reached (*Vavilov* at para 122).

(3) Other plausible remedial interpretation of subsection 220(2.1) and subsection 220(3) available to the CRA

[106] For the reasons above, the CRA failed to consider whether, on a remedial interpretation of the provisions in play, another plausible interpretation existed that could have provided discretion to the Minister in this case, while at the same time coexist harmoniously with the scheme of section 220 as a whole.

[107] I am mindful of Justice Stratas' cautionary words in *Bonnybrook*, and will not provide a complete interpretation of the scheme, as it is the Minister's duty (*Bonnybrook* at para 67).

[108] From a generic standpoint, the CRA applied the principles of statutory interpretation, and more specifically the implied exclusion rule, and found that the existence of ministerial discretion in this case would conflict with subsections 220(3.2) and 220(3.5) of the *ITA*, which set out when elections may be accepted late, and also require the imposition of a penalty.

[109] In the CRA's words, the waiver of the requirement to file would conflict with subsection 220(3.2) which limits late filings of elections to those identified under section 600 of the Regulations. The conflict would exist, in the CRA's view, because if the Minister has discretion in this case, the waiver would allow Onex to receive the remedy of a late filing, without facing the penalty provided under subsection 220(3.5). Subsections 220(3.2) and 220(3.5) could therefore be redundant.

[110] Likewise, in the CRA's view, subsection 220(3) allows taxpayers to late file returns in order to avoid a late-filing penalty. In this case, the returns were already made and subsection 220(3) was not intended to blunt the effects of a taxpayer failing to make an election. In the CRA's view, again, that power exists under subsection 220(3.2) of the *ITA* and a broad interpretation of the Minister's powers may render subsections 220(3.2) and 220(3.5) redundant.

[111] Indeed, the Respondent argues that the implied exclusion rule of statutory interpretation indicates that Parliament did not intend subsection 220(2.1) and subsection 220(3) to be used to waive an election or allow the late filing of an election that was not prescribed under section 600 of the Regulations, such as the Bill C-43 Election. In their view, allowing an entity to rely on subsections 220(2.1) or 220(3) to late file an election that is not prescribed in section 600 of the

Regulations would result in it doing so without penalty, which is incompatible with the scheme of section 220.

[112] Without providing a complete interpretation of the scheme under section 220, a remedial interpretation, as required under section 12 of the *Interpretation Act* but also under the normal rules of statutory interpretation, plausibly permits the “Fairness Provisions” to allow a taxpayer to have access to different layers of ministerial discretion, depending on the case. As argued by Onex, subsections 220(2.1) and 220(3) may serve distinct and different purposes, which were not analyzed by CRA.

[113] As stated in *Petratos*, a broad interpretation of subsection 220(2.1) “allows the Minister to waive the timing for virtually anything *required* to be filed” (*Petratos* at para 19 (footnote 3)). Moreover, as held by the FCA in *Bonnybrook*, subsection 220(2.1) and subsection 220(3) are examples of relief measures of broad application to “blunt the harsh effects of strict filing requirements in the Act” and “give the Minister the authority to provide relief from filing requirements throughout the Act” (at paras 47–48). And in *Nassau*, the FCA held that “[a]lthough relief is provided selectively by the [*ITA*], it does not necessarily follow that Parliament intended to preclude relief in those situations not specifically addressed by the [*ITA*]” (*Nassau* at para 33, see also paras 32–36).

[114] Therefore, a plausible remedial interpretation may grant discretion to the Minister to address fairness issues, despite subsection 220(3.2) and subsection 220(3.5), depending on the facts of the case.

[115] Under such a remedial interpretation, the Minister has the power to assess the facts of each case and, when those facts require that the taxpayer should be relieved from the “harsh effects” of the *ITA* completely, the Minister ought to have the power to do so. To the extent that a return is not required (and subsection 220(3) is not an option for the taxpayer), the Minister may do so by waiving the filing of the document under subsection 220(2.1). When a return is required, then the Minister may grant complete relief under subsection 220(3).

[116] Such remedial interpretation may not be conflicting with subsection 220(3.2) and subsection 220(3.5). Subsection 220(3.2) may serve a different purpose and grant an additional and different type of relief to taxpayers, in relation to some specific types of elections. In those cases, and when perhaps the facts of the case do not warrant complete relief from the Minister under subsection 220(2.1) or subsection 220(3), the Minister may still accept the late filing of those specific elections provided under section 600 of the Regulations, but in exchange for the applicable penalty provided under subsection 220(3.5).

[117] In other words, different layers of “Fairness Provisions” exist in the “Fairness Package” under section 220. While a remedial interpretation of the scheme could grant the Minister leeway to waive the filing of documents, or accept the late filing of returns, and in doing so grant complete relief from the penalty or the “harsh effect” of the *ITA*, in less compelling cases of fairness, the Minister may still accept the late filing of specific elections identified in section 600 of the Regulations, but in exchange for the imposition of a penalty, as the taxpayers in those cases are less deserving of a complete remedy from the “harsh effects” of the *ITA*.

[118] Subsection 220(3.2) therefore grants a second potential remedy for some elections, that does not exist for other types of documents. For elections not contemplated under section 600 of the Regulations, only compelling cases on fairness grounds may permit relief under subsection 220(2.1) or subsection 220(3), which, if granted, will be complete. For those elections that are identified under section 600 of the Regulations, and where those fairness grounds are not so compelling and the Minister refused relief under subsections 220(2.1) or 220(3), taxpayers may make their case to the Minister to accept the late filing, but along with the application of the penalty set out under subsection 220(3.5). That additional potential access to a remedy does not exist for any other document and is restricted to the elections under section 600 of the Regulations.

[119] Moreover, in relying on the implied exclusion rule, the CRA implicitly relied on the presumption against tautology, which requires a presumption that the legislature avoids superfluous or meaningless words. According to the CRA, if subsection 220(2.1) or subsection 220(3) granted discretion to the Minister in this case, the effect would be to conflict with and render subsections 220(3.2) and (3.5) essentially meaningless or redundant. A harmonious interpretation of the *ITA* therefore requires the CRA to construe subsections 220(2.1) and (3) restrictively. The presumption against tautology is instructive and the CRA's interpretation is plausible in this regard. However, the presumption against tautology may be rebutted when, for example, the legislature anticipates potential misunderstandings or problems in applying the statute. In those circumstances, the legislature may choose to include repetitions, or superfluous clauses "for greater certainty" to make the statute easier to read (Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at 211–226). I note, for example, that even if subsection 220(3.2) provides for specific late-filings of elections under section 600 of the

Regulations (and is a “more specific provision” as reasoned by the CRA), subsections 220(4.54) and (4.63), which are part of the “Fairness Package” under section 220 of the *ITA*, also provide for additional extensions of time to make elections under different circumstances (and would constitute other “more specific provisions” on elections not included under section 600 of the Regulations).

[120] The exercise of statutory interpretation thus requires an examination of the implied exclusion rule and presumption against tautology, but also a consideration of other potential explanations that may justify the use of the same words or concepts within the statute, perhaps to facilitate the application or understanding of the act. A more “general” provision does not therefore always conflict with a more specific one, where an explanation may exist. A remedial interpretation, but also applying all the rules of statutory interpretation together, may explain why an apparent contradiction is actually not set out, and that a different outcome allowing the concurrent application of the “general” and “more specific” provisions was intended by the legislature, notwithstanding an apparent conflict.

[121] It is not for this Court to determine which of the plausible interpretations is more appropriate – that is the Minister’s duty. However, the proposed interpretation was not examined by the CRA, is remedial, and is harmonious with the *ITA* interpreted as a whole. The CRA is able to determine whether, on the facts of this case, this proposed interpretation is plausible or acceptable – or reasonable. The CRA’s failure to consider a remedial interpretation that could be consistent and harmonious with the scheme under section 220 as a whole, and explain why a more

restrictive interpretation "best reflects the legislature's intention" (*Mason* at para 76), causes this Court to lose confidence in the outcome reached by the CRA (*Vavilov* at para 122).

B. *The Minister's exercise of discretion under subsection 220(3)*

(1) CRA decision on the exercise of the Minister's discretion

[122] The CRA ruled that the Minister did not have the discretion to accept the filing of a new T5013 return under subsection 220(3). However, in the event that its assessment was wrong, the CRA proceeded with the analysis of Onex's request if the Minister did have the discretionary power to accept the new filing. The CRA ruled that the arguments raised by Onex do not support the Minister granting the extension requested.

[123] The CRA ruled that Onex deliberately chose, after having consulted their taxation advisors, not to file an Election. The CRA opined that Onex has to accept the consequences of their own interpretation of certain public statements of the CRA in support of their earlier returns in 2012 and 2013 and in the absence of an Election.

[124] The CRA also ruled that the filing of an Election in Onex's case would not have constituted an undue burden. In the CRA's view, the CIF provision of Bill C-43 does not contain any wording requiring the Election to be filed with a return or with an amended return, or a prescribed form. Therefore, Onex could simply make the Election by a simple letter, and describe the consequential changes required in the amounts of specific items in Onex's T5013 returns. The filing of an Election by Onex would therefore have resulted in minimal compliance and administrative burden.

[125] The CRA also dismissed Onex's argument that it was unnecessary for them to file an Election, because the intended results of their current returns as well as an Election under Bill C-43 were the same under both scenarios. In other words, the CRA rejected Onex's argument that the filing of the Election was redundant. In the CRA's view, Onex is in error. Because the Election was not filed, the result under both scenarios are indeed different. Therefore, having failed to file the Election on time, Onex must accept the tax results under the legislation applicable to their 2012 and 2013 taxation years.

[126] Finally, the CRA ruled that it did not change its position or interpretation in relation to the alleged long-standing administrative practice of the CRA that a subsection 113(1) dividend deduction should be equal to the gross amount of dividend received. The CRA rejected Onex's argument and ruled that previous CRA documents and statements did not specifically relate to subsection 91(5) of the *ITA*, which was an important section relating to deductions in this case, or specifically state that the CRA would permit a section 113 dividend deduction equalling the gross amount of dividend received from the foreign affiliate through the partnership. The CRA also ruled that to the extent that certain comments may have been made informally at a 2005 conference, Onex should not have placed complete reliance on these unofficial comments given the fact that no definitive written position was ever publicly communicated by the CRA.

[127] Critically, however, the CRA made no factual finding on Onex's submission that they always intended to benefit from the Election, as suggested by the establishment of their structures and their conclusion that the filing of an Election would be redundant, and that in seeking a waiver

under subsection 220(2.1) or an extension of time to file a new return under subsection 220(3), they were not engaging in retroactive tax planning.

(2) Onex's arguments on the unreasonableness of the CRA's exercise of discretion

[128] Onex submits that the CRA's decision refusing to grant them permission to file a new return is unreasonable in light of the legal and factual constraints that bear on it (*Vavilov* at para 105). Onex argues that they followed the CRA's previous "clear, unambiguous and unqualified practice" set out in its published guidance and materials, allowing Onex to deduct the "gross amount of dividends included for the purposes of determining the partner's income" and therefore had a legitimate expectation that the CRA would cap the section 113 dividend deduction available to Onex to the "gross amount." Onex argues that the CRA's position is contrary to previous practice and that the CRA's change of position breaches their right to procedural fairness because it breached their legitimate expectation that the CRA would comply with previous practice (Onex's memorandum of fact and law at paras 95–97, Applicants' Record, at 242).

[129] Onex also asserts that the CRA position that they did not have to amend their 2012 and 2013 returns along with the Election under Bill C-43 is unfounded. Onex argues that the filing of the Election would also have required the amendment of their returns because the reporting on those returns would no longer be accurate if an Election had been filed. In Onex's view, because their interpretation of the *ITA* already granted them the benefit that would have been obtained had an Election been made, they decided that an Election was redundant. Moreover, filing an Election and amended returns, for the sole purpose of obtaining a tax result that it had already achieved, was an unnecessary burden.

[130] Onex finally argues that the CRA failed to consider and appears not to have weighed many relevant factors in its decision, including that : (a) the proposed reassessment was unjust in the circumstances because Onex was not engaging in retroactive tax planning and always had a continuing intention to take the full section 113 dividend deduction; (b) Onex made their decision based on the misleading CRA published guidance; (c) Onex was in compliance with its tax obligations and has a history of tax compliance; (d) Onex was reasonable, diligent and took remedial action as soon as practicable; and (e) Onex was at all times fully cooperative with the CRA.

(3) The Respondent’s arguments on the reasonableness of the CRA’s decision

[131] The Respondent argues that the CRA did not fail to give weight to the Applicants’ alleged diligence and care in its tax affairs. Rather, the CRA considered that the Applicants had sophisticated taxation advisors and deliberately chose not to make a timely Bill C-43 Election. The CRA also considered that filing an Election on time was not redundant, nor onerous, and would not have resulted in an unnecessary compliance and administrative burden. Finally, the CRA did not mislead Onex on the interpretation of the relevant *ITA* provisions and there was no compelling reason why Onex did not file the Election in due course.

(4) The Minister failed to consider relevant elements in the exercise of their discretion

[132] The CRA’s ruling that the filing of the Election would not have constituted an undue burden is reasonable. Onex has not filed any evidence demonstrating how burdensome the filing of the amended T5013 returns would have been in the circumstances. Moreover, as argued by the

Respondent at paragraph 96 of their memorandum of fact and law, Onex could make the Election in writing, and indicate the consequential changes to their T5013 returns in that letter; and there is no evidence suggesting that the CRA would not have accepted such letter and rather required the proper re-filing of new and amended T5013 returns for 2012 and 2013.

[133] I also disagree with Onex's argument regarding their legitimate expectation that the CRA would not change its position regarding its published guidance. First, the doctrine of legitimate expectations does not create any substantive rights (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 97). Second, regarding Onex's argument on their reliance on the CRA's published guidance, the CRA considered the argument and reasonably rejected it. In my view, the published guidance is not sufficiently clear to support Onex's argument. The published guidance does not specifically address the structures established by Onex. To that effect, and as recognized by Onex, the application of the provisions of the *ITA* to their particular structures required the interpretation of complicated provisions of the *ITA*. The requirement to consider and construe the inter-relationship of multiple complicated provisions of the *ITA*, as well as complex structures of corporate entities, necessarily implies that different interpretations may be available to different parties. Therefore, the CRA's interpretation and application of the *ITA* provisions to Onex in this case, in its proposed reassessment, does not necessarily represent a change of position.

[134] However, in my view, in refusing to exercise the Minister's discretion, the CRA failed to consider the extensive consequences applying to Onex in the circumstances as stated in Onex's letter of March 1, 2022, and notably that the reassessment would create injustices (see Copeland

Affidavit at Exhibit E at paras 32–33, 54, Applicants' Record, at pp 120, 124; *Mason* at paras 76, 104), given Onex's cumulative representations indicating that they always intended to benefit from the ultimate tax result now provided by Bill C-43, and that their request was not an attempt at retroactive tax planning (which the CRA has not ruled upon). The CRA also failed to consider that Onex had already filed their 2012 and 2013 returns and therefore, any Election under Bill C-43 required the filing of changes to the returns (by way of letter or the filing of new returns), even if Onex's current T5013 returns already reflected the substantive result that Onex always intended to achieve (which is the same substantive benefit that is specifically contemplated under Bill C-43).

[135] In the Certified Tribunal Record, the CRA included a policy regarding the exercise of the Minister's discretion under subsection 220(3) (Draft policy on subsection 220(3), Applicants' Record, at 180); the policy is consequently relevant to these applications for judicial review and must therefore have been considered. The policy is broad and includes considerations of extraordinary circumstances, errors made by the taxpayer following incorrect information given by the CRA, and "<u>other circumstances</u>" [emphasis added]. According to the policy, in considering whether an extension should be granted under subsection 220(3), the Minister should consider, *inter alia*, the exercise of reasonable care of the taxpayer in conducting their affairs under the self-assessment system (the taxpayer was not negligent nor careless); and whether the taxpayer acted quickly or within a reasonable timeline to remedy the situation.

[136] In argument before this Court, Onex submitted that in considering "other circumstances" under subsection 220(3), the Minister should also have considered those "other circumstances"

existing in other guidelines, such as Circular IC07-1 applicable to “Taxpayer Relief Provisions” (although not including subsection 220(2.1) and subsection 220(3)), and Circular IC76-19R3 relating to “Transfer of property to a corporation under section 85.” In Onex’s view, “other circumstances” included for consideration under these Circulars may also, depending on the case, be appropriate circumstances to consider in requests made under subsection 220(2.1) and subsection 220(3). Those considerations include the factors noted above for subsection 220(3) that have been considered by the CRA (Draft policy on subsection 220(3), Applicants’ Record, at 180), and add the taxpayer’s history of compliance, whether the tax consequences were not intended by the taxpayer or result from incorrect information provided by the CRA, and whether the purpose of the taxpayer is to engage in retroactive tax planning or because of negligence in complying with the law.

[137] In my view, all of the “other circumstances” noted were relevant in the Minister’s consideration of Onex’s request and may be included in the “other circumstances” open to the Minister to consider under the policy regarding the exercise of the Minister’s discretion under subsection 220(3). As the SCC held in *Mason* at paragraph 76, a decision maker must always consider the potential impact on the affected entity, grapple with particularly severe or harsh consequences for the entity and if the resulting decision has “particularly harsh consequences,” then the decision maker must explain “why [their] decision best reflect the legislature’s intention” (*Mason* at para 76, citing *Vavilov* at paras 133–135).

[138] In this specific case, in their letter to the Minister dated March 1, 2022 (Copeland Affidavit at Exhibit E, Applicants’ Record, at 124–125), Onex requested the Minister to consider, in the

exercise of their discretion, that the proposed CRA reassessment was unfair in their case because, *inter alia*, they reported their income for 2012 and 2013 in a manner consistent with a reasonable interpretation of the statute that they believed was supported by the CRA publications and public statements of both the CRA and the Department of Finance; it would have been burdensome to file an Election when the ultimate tax result was the same; the CRA departed from a longstanding practice; and the result achieved by Onex in their T5013 returns actually reflects the appropriate and intended results as confirmed by the Amendments under Bill C-43. That final aspect of these applications is uncontested – the CRA agrees that the Amendments of Bill C-43 meet exactly what Onex intended to achieve through their complex corporate structures.

[139] In other words, on a proper interpretation of Onex’s arguments taken as a whole, Onex submitted to the Minister that they always had the intention to have access to the same result as that obtained under the Bill C-43 Amendments (but they already did under their structures), that the situation caused unintended tax consequences, that they acted with reasonable care and acted quickly to remedy the situation when they were notified of the issue (by seeking the exercise of ministerial discretion in the two decisions that are the subject of these applications for judicial review), and that Onex’s request did not represent a retroactive attempt at tax planning (an element also found to have been relevant in *Banff Caribou* at para 33; see also *Nassau* at paras 32–35).

[140] The CRA failed to make any specific findings of fact on these grounds, or consider and weigh these representations, some of which were specifically on point with the CRA’s policy that appears to have been considered or could be included in the residual “other considerations” given that those considerations had been endorsed in other Circulars, or by the Court (Draft policy on

subsection 220(3), Applicants' Record, at 180, as discussed above; see also *Banff Caribou* at para 33; *Nassau* at para 35).

[141] The CRA failed to explain why, in its view, the "harsh consequences" in this case better reflected Parliament's intention. Indeed, while the CRA did rely on the fact that Onex had access to tax advisors, it failed to consider and rule on Onex's representations that their conduct in consulting tax advisors was to ensure that the steps they took were consistent with benefiting from the Amendments under Bill C-43, by filing an Election or relying on their already filed T5013 returns. Therefore, the CRA failed to make findings of fact on: (a) Onex's allegation that they have always conducted themselves in a manner suggesting that they intended to access the result achieved by Parliament in enacting the Amendments of Bill C-43; (b) the assertion that Onex was not engaging in retroactive tax planning; (c) the submission that the consequences of the current proposed reassessment were unintended; and (d) the claim that Onex at all times acted reasonably.

[142] If Onex's representations on these issues were considered by the CRA, the reasons do not indicate why they carried no weight in the exercise of the Minister's discretion. Relying on the entire information available to it in relation to Onex's taxation compliance history, had the CRA made negative findings of fact on those issues, those findings could have bolstered its decision. On the other hand, had the CRA made those findings of fact in favour of Onex, and weighed them against the CRA's other considerations, perhaps the ultimate decision would have been different.

[143] It is important to note that the CRA is likely in possession of Onex's entire tax history. The CRA may be in a position to determine why Onex may have decided not to make the Election in

due course, because doing so at the time was more advantageous for other tax reasons. Such a conclusion could lead to an inference that Onex was actually engaging in retroactive tax planning. If that was the CRA's hypothesis, the CRA could have sought additional representations from Onex on that basis before coming to its conclusion, in accordance with procedural fairness. But the CRA did not do so, does not appear to have made any finding of fact on the issue, and failed to consider Onex's representations.

[144] The CRA therefore failed to properly consider the submissions of the parties and to grapple with the particularly severe or harsh consequences for Onex (*Mason* at para 76). These failures relating to the factual and legal constraints bearing on the decision cause the Court to lose confidence in the outcome reached (*Mason* at para 66, *Vavilov* at para 106).

VII. Conclusion

[145] The CRA failed to consider the remedial nature of subsection 220(2.1) and subsection 220(3) of the *ITA*, being part of a "Fairness Package" established under section 220, and failed to consider section 12 of the *Interpretation Act* requiring that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[146] While the CRA's interpretation is one possible interpretation under the applicable principles of statutory interpretation, including the rule of "implied exception" that a more general provision cannot override a more specific one, I am not satisfied that the CRA would have come to the same conclusion had it properly considered another plausible interpretation including the

remedial nature of the "Fairness Package" as noted in the reasons above. For that reason, the matter is remitted to the CRA for reconsideration.

[147] In relation to subsection 220(3) and the refusal by the Minister to exercise their discretion, the CRA failed to consider the "harsh consequences" of a refusal to exercise discretion for Onex and explain why that decision best reflected the intention of Parliament. The CRA also failed to determine whether Onex always intended to benefit from the tax result established under Bill C-43 or whether Onex's request was an attempt at retroactive tax planning. The CRA had to properly consider and weigh those issues in its decision-making process.

[148] The application for judicial review is granted. The Minister's decision is set aside. The matter is remitted back to the Minister for their reconsideration in accordance with the principles set out in these reasons.

VIII. Costs

[149] The parties have agreed that costs should follow the cause and that if the applications for judicial review were granted, costs in an amount of $8,330 should be awarded in favour of the Applicants.

JUDGMENT in T-85-22, T-2082-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The Minister's decision is set aside and the matter is remitted back for reconsideration.
3. Costs in an amount of $8,330 are payable to the Applicants.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-85-22, T-2082-22
STYLE OF CAUSE:	ONEX CORPORATION, ET AL. v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 27, 2024
JUDGMENT AND REASONS:	RÉGIMBALD J.
DATED:	AUGUST 9, 2024

APPEARANCES:

Léon H. Moubayed, Élisabeth Robichaud and Luca Teolis	FOR THE APPLICANTS
Laurent Bartleman, Aleksandrs Zemdegs and Anna Kirk	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Davies Ward Phillips & Vineberg LLP Barristers & Solicitors Montréal (Québec)	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT