Date: 20080214

Docket: T-1200-07

Citation: 2008 FC 183

Ottawa, Ontario, the 14th day of February 2008

PRESENT: THE HONOURABLE MR. JUSTICE MARTINEAU

BETWEEN:

MARCEL LALONDE

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR ORDER AND ORDER

[1] Subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (the ITA), gives the Minister of National Revenue (the Minister) the power to waive or cancel all or any portion of any penalty or interest otherwise payable by a taxpayer. In practice, this discretion is delegated to representatives of the Canada Revenue Agency (the Agency or the CRA) under subsection 220(2.01) of the ITA.

[2] The applicant, Marcel Lalonde, is seeking judicial review of a “second-level” decision made by one of the Agency’s managers on the Minister’s behalf. The manager refused to cancel all the interest that had accrued pursuant to assessments dated April 30, 1997, and September 21, 2000 (the reassessments) for the 1992 and 1993 taxation years.

[3] The impugned decision was made on May 8, 2007, by Jean Laporte, a litigation manager at the Agency. He concluded that, apart from the periods of May 24, 1996, to June 9, 1997, and September 15 to December 15, 2001, there had been no undue delay in the Agency’s processing of the applicant’s file. However, the impugned decision does not state the total amount of the reductions granted by the Minister.

[4] No notice of reassessment following the impugned decision was filed with the Court. During the hearing before this Court, the applicant suggested that a reassessment had been made following that decision. However, the document of June 11, 2007, which the applicant described in his pleadings as an [TRANSLATION] “amended reassessment by Revenue Canada” is actually a statement of account, not a notice of assessment.

[5] According to the statement of account of June 11, 2007, the Agency retroactively cancelled $493.43 and $566.14 in interest on December 15, 2001, and retroactively reversed $236.39 and $271.57 in interest on May 3, 2007. Those amounts were credited to the applicant and applied to the balance shown on the last statement sent to him on December 1, 2006.

Rules on Assessment and Relief

[6] Our tax collection system is based on the mechanism of "self-reporting" and "self-assessment" by taxpayers themselves. At the federal level, section 150 of the ITA requires taxpayers to file a return of income every year, while section 151 requires them to estimate the amount of tax payable. It is therefore up to taxpayers themselves to prepare a return in good faith, estimate the amounts owed and, finally, remit those amounts to the tax authorities within the prescribed time. The Minister must then, "with all due dispatch", examine the return and assess the taxpayer (subsection 152(1) of the ITA). However, tax liability is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made (subsection 152(3) of the ITA).

[7] Millions of returns are received each year and, needless to say, given the Minister's duty to act with all due dispatch in assessing taxpayers, it is unavoidable that returns will be examined quickly and summarily, especially since the good faith of taxpayers must be presumed. It is often impossible to say at first glance whether a return has been prepared improperly. Spot checks are used to maintain the integrity of the tax system (*R. v. McKinlay Transport*, [1990] 1 S.C.R. 627, at pp. 636-639 and 648). It is from this perspective that the ITA allows the Minister to audit taxpayers' returns more thoroughly at a later date and, where applicable, issue notices of reassessment (subsection 152(4) of the ITA).

[8] The Minister normally has three years from the date of the initial assessment to issue a reassessment, unless the taxpayer has completed and filed with the Minister a waiver in prescribed

form, or unless misrepresentations, whether fraudulent or not, have been made in the circumstances provided for by law (subsection 152(3.1), paragraphs 152(4)(*a*) and (*b*) and subsection 152(4.01) of the ITA). The Minister also has the power, on application by a taxpayer, to make a reassessment or redetermination after the normal reassessment period for a statute-barred taxation year to determine the amount of any refund or to reduce the tax payable (subsection 152(4.2) of the ITA). In the circumstances provided for by law, a taxpayer may also ask the Minister to reassess tax for any relevant taxation year in order to take into account a deduction claimed by the taxpayer, where the prescribed form amending the previous return has been filed with the Minister (subsection 152(6) of the ITA).

[9] The purpose of the "fairness" provisions (for example, subsections 152(4.2), 164(1.5) and 220(3.1) and (3.2) of the ITA) is to provide relief from the overly rigid application of some of the ITA's provisions by helping taxpayers resolve issues that arise through no fault of their own and by allowing for a common-sense approach. That said, the ITA is silent about the specific criteria the Minister can consider in exercising this discretion. Information Circulars IC 92-1, IC 92-2 and IC 92-3, all of which are dated March 18, 1992, were considered by Mr. Laporte in the impugned decision and contain a non-exhaustive list of relevant factors. Of course, these are only guidelines. They are not intended to be exhaustive and are not meant to restrict the spirit or intent of the legislation. In short, they provide guidance when the Minister or the Minister's delegate is making the administrative decision. In this regard, it should be noted that, since May 31, 2007, the above-mentioned circulars have been replaced by the new Information Circular IC 07-1, *Taxpayer Relief Provisions* (Circular 07-1).

[10] Information Circular IC 92-1 – *Guidelines for Accepting Late, Amended or Revoked Elections* (Circular 92-1) explains how taxpayers can have considered late, amended or revoked elections for a given taxation year (after 1985). It states that each request is considered on its own particular merits, and it lists the circumstances in which such a request may be accepted, such as where it is evident that the taxpayer acted on incorrect information given by Revenue Canada (the Department) or the Agency (paragraphs 9 and 10 of Circular 92-1). Any assessments or reassessments resulting from the acceptance of a request are subject to the general provisions concerning interest and refunds (paragraph 8 of Circular 92-1).

[11] Information Circular IC 92-3 – *Guidelines for Refunds Beyond the Normal Three Year Period* (Circular 92-3) provides in paragraph 7 that the Minister will issue a refund or reduce the amount owed, where this would otherwise be prohibited by statute (statute-barred), if the Minister "is satisfied that such a refund or reduction would have been made if the return or request had been filed or made on time, and provided that the necessary assessment is correct by law and has not been previously allowed". However, the Minister's ability to adjust amounts for a statute-barred taxation year should not be used to reconsider the points in issue where the taxpayer has chosen not to challenge those points through the normal objection and appeal processes or where those points have already been dealt with through an objection or appeal.

[12] Interest relief may also be granted as a result of extraordinary circumstances, actions of the Agency or the taxpayer's inability to satisfy a tax obligation or requirement at issue. It is therefore

clear that the purpose of a request for interest relief (waiver or cancellation) under subsection 220(3.1) of the ITA is not to give taxpayers an additional way to arbitrarily reduce or settle their tax debt.

[13] Paragraphs 5 and 6 of Information Circular 92-2, *Guidelines for the Cancellation and Waiver of Interest and Penalties* (Circular 92-2), are relevant:

> 5. Penalties and interest may be waived or cancelled in whole or in part where they result in circumstances beyond a taxpayer's or employer's control. For example, one of the following extraordinary circumstances may have prevented a taxpayer, a taxpayer's agent, the executor of an estate, or an employer from making a payment when due, or otherwise complying with the Income Tax Act:
>
> (a) natural or human-made disasters such as, flood or fire;
>
> (b) civil disturbances or disruptions in services such as, a postal strike;
>
> (c) a serious illness or accident; or
>
> (d) serious emotional or mental distress such as, death in the immediate family.
>
> 6. Cancelling or waiving interest or penalties may also be appropriate if the interest or penalty arose primarily because of actions of the Department, such as:
>
> (a) processing delays which result in the taxpayer not being informed, within a reasonable time, that an amount was owing;
>
> (b) material available to the public contained errors which led taxpayers to file returns or make payments based on incorrect information;
>
> (c) a taxpayer or employer receives incorrect advice such as in the case where the Department wrongly advises

> a taxpayer that no instalment payments will be required for the current year;
>
> (d) errors in processing; or
>
> (e) delays in providing information such as the case where the taxpayer could not make the appropriate instalment or arrears payments because the necessary information was not available.

[14] It should also be noted that, at the time the impugned decision was made, undue delays in resolving an objection or an appeal or completing an audit could also serve as a basis for exercising the discretion conferred by subsection 220(3.1) of the ITA, even though this situation was not formally listed as an example in Circular 92-2 the way it is now in paragraph 26(f) of Circular 07-1.

[15] That being said, even where the delay is due to the actions of the Department or the Agency, other factors may come into play and possibly limit the amount of interest relief. This will depend on the taxpayer's conduct. Paragraph 10 of Circular 92-2 refers to these additional factors:

> 10. The following factors will be considered when determining whether or not the Department will cancel or waive interest or penalties:
>
> (a) whether or not the taxpayer or employer has a history of compliance with tax obligations;
>
> (b) whether or not the taxpayer or employer has knowingly allowed a balance to exist upon which arrears interest has accrued;
>
> (c) whether or not the taxpayer or employer has exercised a reasonable amount of care and has not been negligent or careless in conducting their affairs under the self-assessment system;

> (d) whether or not the taxpayer or employer has acted quickly to remedy any delay or omission.

[16] That being said, at the time the impugned decision was made, fairness requests were processed as follows by Agency employees. An initial decision was made by an officer (the first level). If the decision was negative, the taxpayer could then request an administrative review by a manager (the second level). In such a case, an officer prepared a report containing a recommendation on whether or not relief should be granted. In practice, the officer's report was then reviewed by a group of three persons (the review committee) before being submitted to the manager for a final decision (the Minister's representative).

[17] At this point, before examining the facts of this case, it is important to point out that a taxpayer cannot file an objection or an appeal to the Tax Court of Canada (TCC) following a negative decision under subsection 220(3.1) of the ITA but must instead apply to the Federal Court if the taxpayer wants the decision reviewed (paragraph 13 of Circular 92-2; see also *Adamson v. The Queen*, 2002 DTC 1540, and *Neathly v. The Queen*, 2007 TCC 611). Of course, the taxpayer must exhaust all available internal remedies before applying for judicial review. This means that, after a negative decision is made at the first level, the taxpayer must first request a review of that decision by a manager in accordance with the procedure explained above.

Initial Assessments and Reassessments

[18] In 1992 and 1993, the applicant invested in a tax shelter, namely, flow-through shares in a mining company, Exploration Auriginor inc. (Auriginor). In his 1992 and 1993 tax returns, he

claimed tax deductions of $9,600 and $12,000 in connection with those shares. On June 2, 1993, and May 2, 1994, the Minister issued assessments that made no changes to these amounts (the initial assessments).

[19] The Minister began an audit in 1995 and an investigation in 1996 concerning the exploration expenses of Auriginor and two other mining companies, Acabit inc. and Plexmar Resources Inc. The investigation was conducted by the Special Investigations Section of the Laval Tax Services Office. The investigators had serious reasons for believing that a significant portion of the exploration expenses renounced by these three companies during the 1992, 1993 and 1994 taxation years did not constitute exploration expenses. This would mean that the investors were not entitled to a large part of the tax deductions they had claimed in the tax returns in question. Some 234 investors could therefore have been affected if the Minister adjusted the assessments previously made for the 1992, 1993 and 1994 taxation years.

[20] Since the 1992 taxation year was soon to become statute-barred, the Agency sent the applicant a letter on April 30, 1996, asking him to complete the form to waive the application of the normal reassessment period. He was also told that the 1993 taxation year was still under investigation. The applicant completed and returned the waiver form on May 14, 1996.

[21] On November 29, 1996, the applicant was provided with details in a letter prepared by R. Dugré, an investigator with Special Investigations. The deductions claimed for 1992 and 1993 were to be reduced to $672 and $480. At the same time, the applicant was told that the buyback of

the flow-through shares in Auriginor gave rise to a capital gain that had to be reported in the year of disposition. The applicant had failed to report a total of $15,000 in capital gains ($7,000 and $8,000) in 1993.

[22] On January 31, 1997, the applicant was notified in writing that the mining companies concerned remained responsible for proving that the mining exploration work had been done. According to Mr. Dugré, the funds subscribed by the investors were essentially the only funds available to pay the costs associated with the exploration expenses. In this regard, the investigator noted that 62 percent of the funds related to the flow-through shares had been returned to the investors, with deductions. Since the funds subscribed by the investors could not be spent twice, and since they had not been used to pay the costs associated with the exploration work, the mining companies concerned could not renounce them in favour of the investors. Mr. Dugré's letter also stated that the Minister would be issuing notices of reassessment shortly for each of the taxation years in question to disallow part of the deduction claimed for Canadian exploration expenses and to assess a deemed capital gain following the receipt of the buyback amount. The said notices were not to include any penalties. Of course, the applicant could object to the assessment and could also submit to the Minister [TRANSLATION] "any request to cancel interest pursuant to the fairness package".

[23] Notices of assessment for the 1992 and 1993 taxation years were indeed issued by the Minister on April 30, 1997 (the 1997 assessments). Those notices of assessment were not filed with the Court. However, it seems that they adjusted the initial assessments as indicated in Mr. Dugré's

letter. Like other investors, the applicant completed notice of objection forms for the 1997 assessments. The Agency received his objections on or about June 2, 1997. On September 18, 1998, a settlement offer was made to the investors who had objected to the 1997 assessments, including the applicant. Under the Minister's offer, the mining exploration expenses in question could not be deducted, but the capital gain previously assessed at the time the flow-through shares were bought back would be replaced by a capital loss with some calculation of interest. However, the Minister's offer was conditional on the investors concerned waiving their right to object or appeal. The applicant turned down the offer. Settlement of the files of the applicant and the other investors who had turned down the offer was suspended administratively by the Agency pending the outcome of the criminal charges laid in the meantime under the ITA against the promoters of the mining companies involved, Alain Guy Garneau, Gérald R. Provencher and Jacques Munger (the promoters).

[24] The promoters' trial was held during the winter of 2000. The applicant cooperated fully with the investigation. His written statement was filed with the Quebec Superior Court by consent of counsel. At that point, he gave counsel for Justice Canada all the documents requested of him, including his tax returns. In March 2000, the promoters were convicted of, among other things, wilfully allowing investors to claim non-qualifying expenses even though they knew that the financing provided was not flow-through financing within the meaning of the ITA. During the submissions on sentencing, the prosecution viewed the investors as innocent victims and even asked them to provide an itemization of the interest charged by the Agency at the time the tax deduction was disallowed (see the letter of March 21, 2000, by Joanne Grenier from Justice Canada).

[25] In September 2000, following these convictions, François Blais from the Laval Tax Services Office (Appeals Division) reviewed all the objection files of the investors concerned, apparently including the applicant's file. Settlement of the objections was to result in reassessments being issued to reduce to nil the deductions for exploration expenses claimed by the investors in their returns and delete any taxable capital gain previously added to the investors' income under the 1997 assessments. As a result, any capital gain previously assessed against the investors at the time of the buyback of the mining companies' shares (which no longer fell within the definition of "flow-through share" in paragraph 66(15)(*d*.1) of the ITA) was to be deleted and replaced with a capital loss. That being said, there is no evidence in the Court file (or, it seems, in the Agency's file) that the applicant was personally notified in writing of the proposed settlement of his previous objections in the manner described above.

[26] In any event, on September 21, 2000, the applicant was sent notices of reassessment for 1992 and 1993 (the 2000 assessments). The net federal tax payable was $7,603.36 for 1992 and $10,254.91 for 1993. In terms of the changes made by the Minister to the previous assessments for 1993, the arrears interest previously calculated was reduced by $1,659.36. The notices filed with the Court do not explain how the Minister calculated the amounts of tax payable. Except as regards the interest, there is no explanation of the changes made by the Minister, although it is stated that [TRANSLATION] "[f]urther information . . . will follow under separate cover".

[27] The 2000 notices of assessment that the Agency may have in its file were not included in the respondent's record. Moreover, the Court file contains no explanatory letter or schedule accompanying the 2000 assessments and no subsequent correspondence between the Agency and the applicant providing further information on this subject. The applicant therefore seems to have become rather confused at the time about the 2000 assessments.

[28] The applicant wrongly treated the 2000 assessments as mere account notices. In January 2001, after receiving information by telephone from one Martine Manta, who worked at the Agency, he thought that he did not have to make payments or do anything else given that the challenge to the assessment [TRANSLATION] "for the entire group involved" was being appealed to the TCC. In any case, on April 20, 2001, the Minister's collection officer sent the applicant a letter informing him of his tax balance for 1992 and 1993. However, the evidence in the Court file does not indicate the balance (unpaid tax and interest) owed by the applicant on that date.

First-Level Review of the Fairness Request

[29] On July 10, 2001, the applicant, in a single document (the fairness request), made a [TRANSLATION] "T1 adjustment request" for 1992 and 1993 and an [TRANSLATION] "interest cancellation request".

[30] First, the applicant amended his tax returns in order to

(1) reduce (1992 and 1993) to nil the amounts entered as mining exploration expenses;

(2) report (1993) taxable capital gains ($5,250 and $6,000) and net capital losses corresponding to the total of these amounts ($11,000); and

(3) claim (1992 and 1993) allowable business investment losses ($9,000 and $10,500).

He requested that reassessments be made accordingly (the adjustment request).

[31] Second, in accordance with Mr. Dugré's letter of January 31, 1997, the applicant maintained his [TRANSLATION] "interest cancellation request pursuant to the fairness package" (the interest cancellation request).

[32] The applicant's fairness request was sent to the Shawinigan-Sud Tax Centre and was received on July 13, 2001. Receipt of the [TRANSLATION] "adjustment request" for 1992 and 1993 was acknowledged by means of a letter dated August 23, 2001: [TRANSLATION] "We will process the request as soon as possible, and we will send you a notice of reassessment if applicable". The fairness request was in fact processed in the fall of 2001 by Diane Charette, an officer at the Montérégie-Rive-Sud Tax Services Office. On October 17, 18 and 22, 2001, she did various checks with officers working at other offices, including Mr. Dugré and Mr. Blais from the Laval Tax Services Office. According to the information gathered by Ms. Charette, the reassessments had been processed by Mr. Blais on September 21, 2000, but copies of the 2000 notices of assessments (and the applicant's 1997 objections) were not in the applicant's tax file sent by Mr. Dugré. On October 22, 2001, Ms. Charette therefore left the applicant a message asking him to find the 2000 assessments.

[33] On October 25, 2001, Ms. Charette informed the applicant that he [TRANSLATION] "cannot make a correction request or an objection on a point already decided by the Appeals Division, that is, his losses on the shares of Acabit, Auriginor and Plexmar. He must appeal to the TCC." Ms. Charette also told him that the 2000 assessments [TRANSLATION] "are further to the judgment on limited partnerships and the directives of the Laval coordinating office. All of the investors' files were settled following that judgment, except the investors represented by Mr. Ryan." After receiving that information, the applicant understood that the Agency would not proceed with his fairness request. As we shall see in the next section, following the verbal notification he received from Ms. Charette on October 26, 2001, the applicant applied to the TCC for an extension of time to appeal from the 2000 assessments (since the time limit had already passed).

[34] On October 29, 2001, Ms. Charette nonetheless met with Mr. Blais concerning the applicant's fairness request: [TRANSLATION] "It is clear that [the applicant's] $11,000 capital loss was not entered in the system even though we calculated that loss for him after the objections were settled [in September 2000]." It was agreed that Ms. Charette would [TRANSLATION] "update the system for the capital loss" and process the interest cancellation request made in the fairness request.

[35] On November 13, 2001, Ms. Charette had a telephone conversation with the applicant, who confirmed that he wanted to continue his appeal to the TCC [TRANSLATION] "because he wants to defend his position on the business losses, as Paul Ryan is doing with a group of investors". Ms. Charette made it clear to him that the Agency could not correct the failure to enter the

$11,000 capital loss he had incurred in 1993 in the system because [TRANSLATION] “his case is before the Court”. However, she left a note stating that the applicant [TRANSLATION] “is entitled to his $11,000 capital loss as shown on the T7WC for 1993”. She also told the applicant that he would receive a written response to the interest cancellation request shortly. In fact, Ms. Charette’s notes of November 13, 2001, which were filed with the Court, indicate she had already prepared a negative report. In short, all that remained was to send the applicant a denial letter on the Minister’s behalf.

[36] On November 14, 2001, in a letter signed by D. Corbeil, Chief of Appeals, the interest cancellation request was denied on the Minister’s behalf. First, the letter stated that the 1997 assessments had been made pursuant to a waiver of the application of the reassessment period for 1992 and within the time limit of three years from the date of the initial assessment for 1993. In addition, the 2000 assessments [TRANSLATION] “were made within a reasonable time given the scope of the file and [the applicant’s] choice to wait for the criminal court’s decision to settle [his] objections”. Mr. Corbeil’s decision was based on Circular 92-2.

[37] Mr. Corbeil also informed the applicant that [TRANSLATION] “the law does not confer any right to object to a discretionary decision to cancel or not to cancel interest or penalties” but that the applicant could make a written request to the director of a tax centre or tax services office for an administrative review of that decision.

Appeal from the 2000 Assessments

[38] In the meantime, on October 26, 2001, the applicant applied to the TCC for an extension of time and filed a notice of appeal against the 2000 assessments (the applicant's appeal), as Ms. Charette had suggested to him on October 25, 2001.

[39] In his appeal, the applicant made several of the same arguments found in his fairness request, but in greater detail. He submitted, *inter alia*, that the loss resulting from the disposition of his shares in Auriginor was a business loss. He also submitted that the interest claimed from him pursuant to the 2000 assessments was unjustified and excessive and should be cancelled or substantially reduced: [TRANSLATION] "the appellant is in no way responsible for the delays in settling this file, which have lasted many years. He had no control over the procedures and the progress of the file, and he participated in all efforts to speed up that progress."

[40] The applicant's appeal from the 2000 assessments was received by the TCC on October 30, 2001, and Ms. Charette received confirmation of that appeal by fax on November 5, 2001.

[41] The application for an extension of time to appeal from the 2000 assessments was allowed on January 25, 2002 by Deputy Judge D.R. Watson of the TCC, who considered the appeal valid. It appears that the TCC's lack of jurisdiction to review a negative decision by the Minister concerning the cancellation of interest was not raised or discussed at that time. However, based on the documentation submitted to this Court by the parties, it appears that, on January 25, 2002, the

Agency treated the interest cancellation request in the applicant's appeal as a request to review the negative first-level decision made by Mr. Corbeil on November 14, 2001.

[42] The applicant discontinued his appeal on June 9, 2004. According to the documentation submitted to this Court by the parties, the Agency later agreed to process administratively, at the second level, the adjustment request made by the applicant in his letter of July 10, 2001 (which had not led to a decision) and the interest cancellation request (which had already been denied on November 14, 2001).

Second-Level Review of the Fairness Request

[43] The fairness request was processed at the second level by an Agency manager in the spring of 2007.

[44] According to the applicant, who is representing himself in these proceedings, he contacted Revenue Canada regularly each month for five years to try to find out how his file was progressing. However, he was never able to obtain any information whatsoever or even the name of a person or division responsible for his file. From December 2006 to February 2007, he increased the number of calls he made to three or four a week. The Agency does not deny these allegations now. On February 19, 2007, the applicant was called for the first time by Jean Laporte, a litigation manager for the Agency, who told him that he did not have his file but that he could review the file if the applicant sent him a copy of it. The applicant faxed him a copy the same day. It was from that time that the Agency decided to review the applicant's fairness request in its entirety.

[45] In his affidavit of July 27, 2007, Mr. Laporte explained that he had then asked Maryse Lepage, an officer in the litigation office of the Montréal Tax Services Office, to review the applicant's file. Ms. Lepage did in fact prepare a report dated March 19, 2007, which was entitled [TRANSLATION] "FAIRNESS REQUEST – REVIEW (second level)". The report contained a statement of the reasons for the fairness request; a summary of the facts; the response on the Minister's behalf to the fairness request made by the applicant on July 10, 2001, which was denied at the first level on November 14, 2001; Ms. Lepage's second-level review (review of the fairness package and fairness review committee); and Ms. Lepage's conclusion.

[46] In her report, Ms. Lepage stated that she had considered the fairness request based on the criteria set out in Circulars 92-1, 92-2 and 92-3. Most of the adjustments to the assessments that were being sought by the applicant were not justified, nor was full reduction of the accrued interest. Ms. Lepage's general conclusion was as follows:

> [TRANSLATION]
>
> In my opinion, a review of the applicant's fairness package request in light of the criteria in Information Circular 92-2 and, more specifically, the factors set out therein does not justify granting the applicant's request, except for the following:
>
> (a) granting a reduction of interest for the periods from May 24, 1996, to June 9, 1997, and from September 15 to December 15, 2001, for the applicant's 1992 and 1993 taxation years **in relation to his investments in the Exploration Auriginor inc. project**;
>
> (b) recognizing the net capital losses totalling $8,250 (11,000 x 75%) incurred by the applicant in 1993.

[Emphasis in original]

Ms. Lepage relied in this regard on subsection 230(3.1) of the ITA and paragraph 6(a) of Circular 92-2.

[47] At the end of Ms. Lepage's report is a section entitled [TRANSLATION] "Fairness Review Committee", which contains the comments and signatures of three other persons (the fairness review committee) expressing agreement with Ms. Lepage's conclusion.

[48] On May 8, 2007, Mr. Laporte decided to accept Ms. Lepage's recommendation in full. He therefore granted the fairness request in part for the following reasons:

> [TRANSLATION]
>
> With regard to the claim for allowable business investment losses for the 1992 and 1993 taxation years, we cannot grant your request, since the company involved does not fall within the definition of "private small business corporation" in subsection 248(1) of the *Income Tax Act*.
>
> With regard to the taxable capital gains you are asking to add to your income for the 1992 and 1993 taxation years, the facts in the file indicate that you actually incurred net capital losses of $3,750 and $4,500, respectively, after the company's buyback of the shares. We recognize those net capital losses totalling $8,250 as net capital losses to be carried forward.
>
> With regard to your request to carry forward to the 1993 taxation year the net capital losses you incurred in previous taxation years, we cannot apply those losses to the 1993 taxation year because you did not realize a taxable capital gain that year.
>
> With regard to your request to cancel arrears interest, we conclude from our review of the file that, except for the periods from May 24, 1996, to June 9, 1997, and from September 15 to December 15,

> 2001, there has been no undue delay in processing your file. We are therefore granting you interest relief for the periods from May 24, 1996, to June 9, 1997, and from September 15 to December 15, 2001, for the 1992 and 1993 taxation years.

[49] In the impugned decision, Mr. Laporte invited the applicant to apply for judicial review if he felt that [TRANSLATION] "we have not exercised our discretion correctly in reviewing your request". Hence this application for judicial review.

Reviewability of the Impugned Decision

[50] The impugned decision is a final decision on the fairness request, which, it must be remembered once again, had two separate legal aspects:

(a) The cancellation under subsection 220(3.1) of the ITA of the interest for the 1992 and 1993 taxation years accrued since May 24, 1996, further to the reassessments issued on April 30, 1997, and September 20, 2000;

(b) The correction of the assessments under subsections 152(4), (4.2) and/or (6) of the ITA further to the amendments made by the applicant on July 10, 2001, to his tax returns for the 1992 and 1993 taxation years.

[51] The impugned decision recognized that there had indeed been undue delay in processing the applicant's file for the periods from May 24, 1996, to June 9, 1997, and from September 15 to December 15, 2001, but it denied that this was the case for the other periods (including the period after December 15, 2001). Moreover, the impugned decision recognized that a net capital loss of

$8,250 ($11,000 x 75%) incurred in 1993 had been omitted from the applicant's historical account, which meant that the account had to be rectified accordingly.

[52] These were basically factual determinations. In this regard, Mr. Laporte stated in his affidavit that he had consulted the following documents: the applicant's letter of July 10, 2001; Ms. Charette's notes and her report dated November 13, 2001; the first-level decision of November 14, 2001; the appeal documents and discontinuance filed with the TCC by the applicant; Ms. Lepage's report of March 19, 2007; and an extract from the Agency's computer file. Mr. Laporte also stated that, in exercising the ministerial discretion as such, he had relied on the applicable provisions of the ITA and the guidelines set out in Circulars 92-2 and 92-3.

[53] The applicant is not disputing the lawfulness of Mr. Laporte's refusal to treat the losses he incurred in 1993 as business losses (and not capital losses). However, he submits that Mr. Laporte's decision to grant a partial reduction of interest must be reviewed by the Court.

[54] When an application for judicial review is directed against a discretionary decision made by the Minister or the Minister's delegate under the "fairness provisions" of the ITA, the standard that applies is reasonableness *simpliciter*, not patent unreasonableness as formerly applied by the Court (*Lanno v. Canada (Customs and Revenue Agency)*, [2005] F.C.J. No. 714 (QL), 2005 FCA 153, at paras. 3-7; *Comeau v. Canada (Customs and Revenue Agency)*, [2005] F.C.J. No. 1334 (QL), 2005 FCA 271, at paras. 15-17).

[55] Therefore, what must be asked is whether, after a “somewhat probing examination”, the reasons given by Mr. Laporte and Ms. Lepage, when taken as a whole, can support the impugned decision (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at paras. 47 and 50). That being said, although it is not necessary for every element of the reasoning in the decision to pass a test for reasonableness, the reviewing judge must still be satisfied that the administrative decision-maker made a reasonable decision, on the whole, after fully reviewing the taxpayer’s file and taking all the relevant criteria into account.

[56] The applicant basically submits that the Minister failed to take account of all the evidence in his file, including the fact that the interest arose primarily because of the Agency’s actions. He alleges today that his file could have been processed in a few weeks; that many problems were caused by the loss of important documents in the file, which was an important factor in the failure to process his file; that the information sent by the Agency was incorrect; that oversights by Agency officers meant that all the assessments he received were incorrect; and that his original file was not found, even in the spring of 2007. He submits that these errors in processing, the delays and the loss of documents were not taken into account or were arbitrarily disregarded by the Minister’s representative. As a result, the ministerial decision not to cancel the interest accrued since December 15, 2001, is not reasonable in the circumstances.

[57] The respondent submits that the Minister had valid reasons for not processing the applicant’s file earlier and that the errors in processing and the omissions for which the Agency is now being criticized are not determinative or relevant in this case. In this regard, the respondent

points out that the Minister has a broad discretion under the law. Mr. Laporte took account of all the evidence in the file and the criteria set out in Circular 92-2. His decision is reasonable in the circumstances, including his refusal to cancel the interest accrued since December 15, 2001, since the applicant had decided to appeal to the TCC from the 2000 assessments.

[58] The applicant answers that, according to the notes in the Agency's file, he was notified by Agency representatives on October 18 and 25, 2001, that he could not request a correction or adjustment and that he had to apply to the TCC instead. On October 26, 2001, the applicant therefore applied to the TCC for an extension of time to appeal from the reassessment. In that application, he argued, *inter alia*, that all the interest claimed from him for the 1992 and 1993 taxation years was unjustified and excessive and should be cancelled or substantially reduced. It was not until after the receipt of a fax stating that the applicant [TRANSLATION] "has appealed to the TCC" that the following cryptic note dated November 6, 2001, appeared: [TRANSLATION] "François [Blais] had explained the file to the taxpayer, and he thought that the taxpayer did not have to file an appeal with the Court."

[59] The Court will therefore examine the impugned decision in light of the contested reasons it contains, the evidence on file and the relevant criteria already set out at the beginning of these reasons (Rules on Assessment and Relief). For the purposes of these proceedings, the Court accepts that the content of Ms. Lepage's report can serve as a justification for the impugned decision, since Mr. Laporte and the review committee accepted the recommendations made in that report.

[60] I begin by noting that Ms. Lepage stated in her report that the Minister was not responsible for the actions of third parties and did not have to assume risks for investors. Although the applicant had a history of compliance with his tax obligations, it could not be said that the circumstances were beyond the control of the investors in the mining companies concerned, who assumed the risk of deductions to which they were not entitled. As the starting point for an analysis to be completed by assessing the specific facts concerning the applicant, this premise certainly seems reasonable to me. However, the persons who must review a fairness request cannot limit their analysis to the reaffirmation of such general principles, since the very purpose of the so-called fairness or relief provisions is to create an exceptional scheme, particularly in cases in which undue delay in resolving an objection or an appeal or completing an audit results in whole or in part from actions of the Agency or the Department.

[61] Where relief is denied or granted in part, the Agency must provide the taxpayer with an explanation of the reasons for and factors in the decision. It will be recalled that each fairness request received by the Agency must be reviewed and decided on its own merits. The Agency's decision must reflect this obligation, which arises out of procedural fairness. One of the major flaws of the impugned decision is the apparent failure by Ms. Lepage, the members of the review committee and Mr. Laporte to analyze the merits of the interest cancellation request in light of the applicant's specific situation. It is true that Ms. Lepage's report contained a brief summary of the facts (although several relevant facts were omitted), but the problem with an analysis like Ms. Lepage's is the lack of findings of fact on the causes of the delay and the responsibility of the Agency's employees.

[62] Can it be said that, in the applicant's case, there were errors in processing, delays, missing information in the file, incorrect information or changes of position that resulted from the Agency's actions? If so, do those actions justify any relief from the interest resulting from the reassessments in the applicant's specific circumstances? In other words, can it be said that there was undue delay, and during which particular periods?

[63] In her analysis, Ms. Lepage referred simply to the specific way the Minister had treated Wilfrid Comeau, who in 1992 had purchased flow-through shares of Acabit, one of the three mining companies investigated starting in 1995 (2004 FC 461 and 2005 FCA 271). Ms. Lepage concluded that the applicant had to be treated the same way as Mr. Comeau because the facts were the same: [TRANSLATION] "[t]he judges of the Federal Court of Appeal agreed that the decision made by the Agency's Appeals Division on October 7, 2003, to cancel the arrears interest for the period from May 24, 1996, to June 9, 1997, was reasonable", while "the Minister granted an additional reduction of interest for the period from September 15 to December 15, 2001". I am not aware of the applicant's specific circumstances to which these various dates refer. Incidentally, I note that, unlike in *Comeau*, the Court did not have the benefit of reviewing the content of the minutes, if any, of meetings of the review committee, which apparently considered the appropriateness of granting or denying the applicant's fairness request in the spring of 2007, several years after the judgments rendered by the Court and the Federal Court of Appeal in *Comeau*.

[64] In his affidavit, Mr. Laporte justified the delay after December 15, 2001, by noting that, on January 25, 2002, the applicant had been given leave by the TCC to appeal from the 2000 assessments. This explanation is not referred to either in the letter signed by Mr. Laporte or in Ms. Lepage's report, which means that it can hardly be used to support the impugned decision now. In any event, the Minister took a long time to make a final decision after the applicant discontinued his appeal to the TCC in June 2004. According to the uncontradicted evidence on file, it was only the applicant's insistence on obtaining a final decision on his fairness request that led Mr. Laporte to decide in March 2007 to instruct Ms. Lepage to review the applicant's file and submit her recommendations to him. The respondent is proposing a new explanation today to justify this additional three-year delay. According to Mr. Laporte's affidavit, even after the applicant discontinued his appeal to the TCC, the Agency decided to suspend its decision because it was waiting to see [TRANSLATION] "the outcome of the files that are part of the flow-through share project and the interrelated research and development project". The Agency was also waiting for [TRANSLATION] "a decision to be rendered shortly in a similar case", namely, *Comeau*, *supra*.

[65] In his affidavit, Mr. Laporte also referred to the fact that, in *Rouleau-Joncas*, a decision rendered after *Comeau*, [TRANSLATION] "a class action on a similar matter was heard in the fall of 2004 and the decision was rendered in November 2006". Finally, he stated that other interrelated files were to be submitted shortly by counsel in connection with a collective request for the cancellation of interest. That collective request was submitted to Mr. Laporte on July 13, 2007. Based on the foregoing, Mr. Laporte stated that [TRANSLATION] "the CRA was waiting to process the files as a whole". In short, although it is true that Mr. Laporte granted the request to process

[TRANSLATION] “the file immediately” in the spring of 2007, he noted that [TRANSLATION] “[m]aking an isolated decision in the context of large-scale files is not the way the CRA usually proceeds”. It followed that, [TRANSLATION] “even if beneficial to [the applicant’s] file”, “any future decision made in the other similar files can no longer be applied to [him]”.

[66] None of Mr. Laporte’s explanations for the long delay after December 15, 2001, can be found in the impugned decision. Judicial review proceedings are limited in scope. Their essential purpose is the review of administrative decisions to ascertain whether they are consistent with the applicable statute or law. The reviewing court (barring exceptional circumstances, which do not exist here) is limited to the record that was before the federal board, commission or other tribunal. Fairness to the parties and to the administrative tribunal under review dictates such a limitation: *Bekker v. Canada* (2004), 323 N.R. 195 (F.C.A.). The reviewing court must proceed on the record as it has it, confining itself to the criteria for judicial review: *Canada (Attorney General) v. McKenna*, [1999] 1 F.C. 401 (C.A.). Clearly, these principles prevent the Court today, in these judicial review proceedings, from receiving evidence that was not before the decision-maker. Accordingly, subsequent reasons and reasons not referred to in the impugned decision cannot serve as a rational basis for finding the conclusions reached in the decision valid. Moreover, I would point out that authorizing decision-makers to supplement their reasons after the fact through affidavits is not at all conducive to the transparency of the decision-making process. That being said, the respondent has not satisfied me that the additional reasons given by Mr. Laporte in his affidavit prevented the Agency from making a final decision on the applicant’s fairness request.

[67] The Agency was perfectly capable of making two final decisions in the *Comeau* case, both of which led to applications for judicial review, while the applicant's fairness request remained outstanding the entire time (for an account of those proceedings, see *Comeau v. Canada (Customs and Revenue Agency)*, [2004] F.C.J. No. 1179, 2004 FC 961). In her report, Ms. Lepage did refer to the most recent decisions of the Court and the Federal Court of Appeal in *Comeau*, *supra*, but I note that, on May 28, 2003, this Court had already allowed a first application for judicial review of a final decision made by an Agency manager on November 15, 2001 (docket no. T-2222-01). Moreover, on July 24, 2003, the parties in *Comeau* had discontinued the appeals from the decision of May 28, 2003. If both cases were the same, why was the applicant's interest cancellation request not processed earlier, since this aspect was not within the TCC's jurisdiction anyway?

[68] The Court has also read the judgment rendered by the Quebec Superior Court on November 7, 2006, in *Rouleau-Joncas*, which Mr. Laporte referred to in his affidavit (*Rouleau-Joncas v. Placements Etteloc Inc. et al.*, 2006 QCCS 5319, under appeal). When this application for judicial review was heard, counsel for the respondent acknowledged that the applicant was not part of the group of persons covered by the class action against the Crown and the companies and individuals that were defendants in those proceedings. In *Rouleau-Joncas*, the basic issue involving the Crown was the extracontractual liability of the provincial and federal tax authorities, to whom the plaintiffs largely attributed their financial losses in the Etteloc project. At first glance, therefore, I do not see how the judgment expected in *Rouleau-Joncas* could have had any impact on the exercise of the relevant ministerial power in the applicant's specific case.

[69] In light of the evidence on file, the Agency has not provided a reasonable explanation for a large portion of the delays since December 15, 2001, and especially between June 10, 2004, and May 8, 2007. Those delays are due mainly to the actions of the Minister or the Minister's representatives. I also note that the applicant does not seem to have been informed within a reasonable time that his file had been suspended pending decisions to be rendered shortly in "similar" cases.

[70] The application for judicial review is therefore well-founded. The impugned decision does not withstand a probing examination. In my opinion, the general conclusion that there was no undue delay except during the two periods referred to in the impugned decision is arbitrarily unreasonable. I also consider the general conclusion in Ms. Lepage's report that the applicant does not satisfy the criteria set out in Circular 92-2 arbitrary and unreasonable. Finally, all of the reasons in Mr. Laporte's letter and Ms. Lepage's report do not support their conclusion that there was no undue delay in processing the applicant's file after December 15, 2001.

Conclusion and Remedies

[71] For the reasons stated above, this application for judicial review must be allowed.

[72] In his originating notice filed on June 29, 2007, and his memorandum dated September 10, 2007, the applicant asks this Court to cancel the interest for taxation years after December 15, 2001. However, it must be recalled that, even though the applicant's complaints are justified, I can only set aside the impugned decision and refer the matter back to the respondent for reconsideration in

accordance with such directions as the Court considers appropriate. This is what I have decided to do in this case.

[73] For guidance, however, a few additional comments must be made to ensure that the parties clearly understand the purpose and effect of the order to set aside and refer back accompanying these reasons.

[74] First, as I noted above, the Minister has already acknowledged in the impugned decision that undue delay was caused by the Agency's actions at least for the periods from May 24, 1996, to June 9, 1997, and from September 15 to December 15, 2001. Therefore, that part of the impugned decision does not have to be set aside. The tax relief granted to the applicant in the impugned decision for these two periods therefore continues to apply and has full legal effect.

[75] Second, there may be a distinction to be drawn between the delays before and after the reassessments. I note that the first period (May 24, 1996, to June 9, 1997) for which the Minister's representative admitted that there had been undue delay (thus due to the Agency's actions) was prior to and shortly after the 1997 assessments (April 30, 1997). The second period accepted by the Minister's representative (September 15 to December 15, 2001) postdates the 2000 assessments by one year (September 21, 2001). Why, then, was the calculation of interest relief stopped at December 15, 2001? This is a point the Minister's representative will therefore have to consider, having regard to the effect of the Agency's past errors in processing, if any.

[76] Third, during the hearing before the Court, the parties did not make any meaningful submissions on the issue of whether or not a notice of reassessment had to be issued to give effect to the Minister's decision (1) granting a reduction of interest for the periods from May 24, 1996, to June 9, 1997, and from September 15 to December 15, 2001; and/or (2) recognizing net capital losses totalling $8,250 incurred by the applicant in 1993. However, I note that the reductions granted by the Minister on the arrears previously calculated following the 1997 assessments were included directly in the 2000 assessments. This is a point the Minister's representative will therefore have to consider.

[77] Fourth, non-payment of the tax payable by a taxpayer creates an obligation to pay as well any interest claimed by the Agency following the Minister's initial assessment or reassessment for a given taxation year. Of course, a taxpayer may take advantage of the fact that collection is suspended while his or her objection or appeal to the TCC is being dealt with to wager on the outcome of the objection or appeal by not paying the amounts claimed by the Agency, with the result that interest will continue to accrue. However, if the objection or appeal is dismissed, then, in principle, the taxpayer cannot complain that the rules of the game put him or her at a disadvantage and must pay the interest that has accrued, unless, of course, the Minister agrees to cancel all or any portion of it under subsection 220(3.1) of the ITA (*Comeau v. Canada Customs and Revenue Agency*, 2005 FCA 271, at paragraph 20). On the other hand, a taxpayer who is entitled to a tax refund following a reassessment can also expect to be paid interest (subsections 164(3) and (3.2) of the ITA). Therefore, the applicant should not claim victory too quickly here and should ensure that

the additional submissions he makes to the respondent will, if appropriate, allow the Minister's representative to exercise his or her discretion by granting interest relief after December 15, 2001.

[78] Fifth, the fact that the applicant was granted leave to appeal from the 2000 assessments (including the interest cancellation) on January 25, 2007, is no doubt a relevant factor. It must be assessed in light, *inter alia*, of the apparently confused or contradictory information the applicant had previously received from Ms. Charette and Mr. Blais in the fall of 2001. This is a point the Minister's representative will have to consider.

[79] Sixth, the fairness request included not only an interest cancellation request but also a request to have the previous assessments adjusted. The applicant was unable to convince the Agency, in May 2007, to treat the losses he had incurred in 1993 as business losses. The applicant is not disputing the lawfulness of this conclusion now. This factor may therefore have a negative impact on the amounts of arrears accrued after December 15, 2001. On the other hand, the fact that interest relief was not granted to the applicant until May 8, 2007, even though it could easily have been granted on June 9, 2004, when the applicant discontinued his appeal to the TCC, seems to be a factor that works in favour of the applicant and in favour of a partial reduction of interest if the delay was due to the Agency's actions. These are points the Minister's representative will therefore have to consider.

[80] In conclusion, in the exercise of my judicial discretion, the impugned decision will be set aside in part and the matter will be referred back to the respondent so that the Minister's

representative can make a new decision taking account of the fact that the applicant is seeking the cancellation of interest accrued since December 15, 2001. The Agency will have to follow the review procedure applicable to such matters and ensure that no one who was involved in the Agency's previous decisions on the applicant's fairness request takes part in the decision-making process. Before making a final decision, the Agency will have to take account, *inter alia*, of the specific circumstances of the applicant's file, the applicant's additional submissions, Circular 07-1, the spirit and intent of subsection 220(3.1) of the ITA, the guidance provided by the Court's reasons and any other relevant factor. The Court acknowledges that it is up to the Minister alone to determine the relative weight to assign to each of these factors. However, any decision by the Minister refusing to cancel all or any portion of the interest will have to be supported by reasons so that the applicant and, if applicable, any reviewing court can understand the reasoning behind the decision and the way the relevant factors identified in the applicant's case were applied. The final decision will have to be made within 90 days after the date of the Court's order.

[81] In view of the result, the applicant, who is representing himself, will be entitled to reasonable disbursements and assessable costs, which I set at $250.

ORDER

THE COURT ORDERS THAT:

1. This application for judicial review is allowed;
2. The decision of May 8, 2007, by the Minister's representative is set aside in part. Specifically, the Court sets aside the conclusion that there was no undue delay in the processing of the applicant's file after December 15, 2001;
3. The matter is referred back to the respondent so that a new decision can be made on the applicant's request for the cancellation of interest on the unpaid balance from the assessments dated April 30, 1997, and September 21, 2000, for the 1992 and 1993 taxation years;
4. In particular, the Minister's representative will have to reconsider the appropriateness of granting a reduction of interest for any period subsequent to December 15, 2001;
5. The respondent will have to follow the review procedure applicable to such matters and ensure that no one who was involved in the previous decisions on the applicant's fairness request takes part in the decision-making process;
6. Before making a final decision, the Minister's representative will have to take account, *inter alia*, of the specific circumstances of the applicant's file, the applicant's additional submissions, Circular 07-1, the spirit and intent of subsection 220(3.1) of the ITA, the guidance provided by the Court's reasons and any other relevant factor;

7. Any decision by the Minister refusing to cancel all or any portion of the interest will have to be supported by reasons so that the applicant and, if applicable, any reviewing court can understand the reasoning behind the decision and the way the relevant factors identified in the applicant's case were applied;

8. The final decision will have to be made within 90 days after the date of the Court's order;

9. The applicant is entitled to reasonable disbursements and assessable costs, which the Court sets at $250.

"Luc Martineau"
Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1200-07
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DATE OF HEARING:	January 21, 2008
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APPEARANCES:

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