

Federal Court



Cour fédérale

**Date: 20110209**

**Dockets : T-979-09  
T-980-09**

**Citation: 2011 FC 143**

**Ottawa, Ontario, February 09, 2011**

**PRESENT: The Honourable Mr. Justice Simon Noël**

**Docket: T-979-09**

**BETWEEN:**

**DINA QUASTEL**

**Applicant**

**and**

**CANADA REVENUE AGENCY**

**Respondent**

**Docket: T-980-09**

**AND BETWEEN:**

**JONAS QUASTEL**

**Applicant**

**and**

**CANADA REVENUE AGENCY**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Jonas Quastel and his wife, Dina Quastel, each made an application seeking judicial review of a decision from the Canada Revenue Agency (“CRA”) in which CRA refused their respective request to see the penalties and interests vacated from their tax debt under the “fairness provisions” of the *Income Tax Act*, RS, 1985, c 1 (5th Supp) and the *Excise Tax Act*, RSC 1985, c E-15. As the matters spawn from the same general factual matrix, the Court will deal with both applications within the present Reasons for Judgment and Judgment. A copy of these Reasons will be placed in both court files.

[2] The Quastels’ requests were evaluated by a CRA officer for recommendations. The files were then evaluated by a second CRA officer. This process led to a First Level Decision in the Applicants’ case, which refused the Applicants’ Taxpayer Relief requests. After filing additional documentation, a Second Level Request was made and a third CRA officer analyzed this request. A Second Level Decision was made which was also unfavourable to the Applicants, who are now seeking judicial review of the decisions.

### **The contested tax bills**

[3] The Applicants contest their assessment by CRA for the 1999, 2000 and 2001 tax years. For years 1999 and 2001, the Applicants had not filed tax returns and so their income was assessed pursuant to section 152(7) of the *Income Tax Act*.

### **Mr. Quastel’s tax records**

[4] A Notice of Reassessment for the tax years 1999, 2000 and 2001 was given to Mr. Quastel on February 8, 2005. Gross negligence penalties and late filing penalties were levied. Mr. Quastel contested this reassessment by way of a Notice of Objection dated March 2, 2005.

[5] Reassessment was however made using a bank deposit analysis method and notice of this method was given to Mr. Quastel on July 4, 2006. This notice was appealed to the Tax Court of Canada. Upon consent judgment, the Tax Court vacated the gross negligence penalties and settled the respective amounts of taxable income.

[6] Parallel to the assessments of Mr. Quastel's income under the *Income Tax Act*, a similar process was engaged in regards to the Goods and Services Tax (the "GST") aspect that remained unpaid. A first assessment was served on November 26, 2004. At that time, Mr. Quastel filed a Notice of Objection of this assessment on March 2, 2005. Reassessment was made and communicated by way of notice on May 31, 2006. This reassessment was also contested to the Tax Court of Canada. By way of consent judgment, the amounts payable were established and gross penalties were vacated.

[7] Mr. Quastel applied to CRA for a waiver of interest and late-filing penalties with respect to the income tax debt and the GST debt.

**Mrs. Quastel's tax records**

[8] A Notice of Reassessment for the tax years 1999, 2000 and 2001 was given to Mrs. Quastel on December 13, 2004. Gross negligence penalties and late filing penalties were levied. Mrs. Quastel contested this reassessment by way of a Notice of Objection dated March 2, 2005.

[9] Reassessment was however made using a bank deposit analysis method and notice of this method was given to Mrs. Quastel on July 4, 2006. This notice was appealed to the Tax Court of Canada. Upon consent judgment, the Tax Court settled the respective amounts of taxable income, and the levied gross negligence penalties were vacated, except for the 2000 taxation year where they were to be adjusted upon the unreported business income.

[10] Parallel to the assessments of Mrs. Quastel's income under the *Income Tax Act*, a similar process was engaged in regards to the GST portion that remained unpaid. A first assessment was served on December 7, 2004. On December 19, 2004, Mrs. Quastel filed a Notice of Objection of this assessment. Reassessment was made and communicated by way of notice on May 31, 2006. This reassessment was also contested to the Tax Court of Canada. By way of consent judgment, the amounts payable were reduced.

[11] The outstanding amount was paid in full in December 2008, and the Applicants seek to be awarded an amount they deem was paid in excess.

[12] Again, while the Applicants made separate applications, the impugned decisions are, in fact, the same and are dealt with within these Reasons as the First and Second Level requests for taxpayer relief were one and the same. The only variations relate to amounts assessed and similar

concerns and, for the purpose of this judicial review, they are not determinant. The materials submitted by both Applicants contained the same substantive arguments

### **The applicable law**

[13] The Applicants' request for relief was made pursuant to section 220 (3.1) of the *Income Tax Act*, RS, 1985, c 1 (5th Supp) and section 281.1 of the *Excise Tax Act*, RSC 1985, c E-15 (collectively, the "Fairness Provisions"). It is useful here to cite these provisions extensively:

*Income Tax Act*, R.S., 1985,  
c. 1 (5th Supp.)  
Waiver of penalty or interest

**220(3.1)** The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.

*Excise Tax Act*, R.S.C. 1985, c.  
E-15

*Loi de l'impôt sur le revenu*,  
L.R.C. 1985, c. 1 (5e suppl.)  
Renonciation aux pénalités et  
aux intérêts

**220(3.1)** Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation

*Loi sur la Taxe d'accise*, L.R.C.  
1985, c. E-15

Waiving or cancelling interest	Renonciation ou annulation — interest
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**281.1 (1)** The Minister may, on or before the day that is 10 calendar years after the end of a reporting period of a person, or on application by the person on or before that day, waive or cancel interest payable by the person under section 280 on an amount that is required to be remitted or paid by the person under this Part in respect of the reporting period.

**281.1 (1)** Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin d'une période de déclaration d'une personne ou sur demande de la personne présentée au plus tard ce jour-là, annuler les intérêts payables par la personne en application de l'article 280 sur tout montant qu'elle est tenue de verser ou de payer en vertu de la présente partie relativement à la période de déclaration, ou y renoncer.

[14] As is suggested by the wording of these provisions, the Minister's decision to grant relief is discretionary ("may ... waive or cancel"). To calibrate this discretion and to ensure fairness in the application of the Fairness Provisions, guidelines were adopted by CRA. These guidelines are at the heart of the present matter, as they were relied upon by CRA in refusing the Applicants' request for relief under the Fairness Provisions. As is abundantly clear from the relevant case law and the principles of administrative law, the guidelines are not meant to fetter the decision-maker's discretion. Rather, each case must be assessed on its merits, on a case-by-case basis, as the guidelines are not legally binding: "In general, guidelines such as the taxpayer relief provisions are not law, but can be very beneficial to both decision makers and members of the public to the extent that they provide for more organized analysis and reasons and enhance the level of consistency and accountability to the public" (*Spence v Canada Revenue Agency*, 2010 FC 52, para 24; see also, *inter alia*, *Nixon v Canada (National Revenue)*, 2008 FC 917; *Guerra v Canada (Revenue Agency)*, 2009 FC 459; *Laflamme v Canada (National Revenue)*, 2008 FC 1403).

[15] The guidelines for the application of section 220(3.1) of the *Income Tax Act* are known as “Information Circular IC07-1 - Taxpayer Relief Provisions”. Similar guidance exists in regards to the *Excise Tax Act*. The relevant provisions of the Taxpayer Relief Provisions guidelines read as follows:

¶ 23. The Minister may grant relief from the application of penalty and interest where the following types of situations exist and justify a taxpayer's inability to satisfy a tax obligation or requirement at issue:

- (a) extraordinary circumstances
- (b) actions of the CRA
- (c) inability to pay or financial hardship

¶ 24. The Minister may also grant relief if a taxpayer's circumstances do not fall within the situations stated in ¶ 23

#### Extraordinary Circumstances

¶ 25. Penalties and interest may be waived or cancelled in whole or in part where they result from circumstances beyond a taxpayer's control. Extraordinary circumstances that may have prevented a taxpayer from making a payment when due, filing a return on time, or otherwise complying with an obligation under the Act include, but are not limited to, the following examples:

- (a) natural or man-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.

#### Actions of the CRA

¶ 26. Penalties and interest may also be waived or cancelled if the penalty and interest arose primarily because of actions of the CRA, such as:

(a) processing delays that result in the taxpayer not being informed, within a reasonable time, that an amount was owing;

(b) errors in material available to the public, which led taxpayers to file returns or make payments based on incorrect information;

(c) incorrect information provided to a taxpayer, such as in the case where the CRA wrongly advises a taxpayer that no instalment payments will be required for the current year;

(d) errors in processing;

(e) delays in providing information, such as when a taxpayer could not make the appropriate instalment or arrears payments because the necessary information was not available; or

(f) undue delays in resolving an objection or an appeal, or in completing an audit.

#### Inability to Pay or Financial Hardship

¶ 27. It may be appropriate, in circumstances where there is a confirmed inability to pay all amounts owing, to consider waiving or cancelling interest in whole or in part to enable taxpayers to pay their account. For example:

(a) when collection had been suspended due to an inability to pay and substantial interest has accumulated or will accumulate;

(b) when a taxpayer's demonstrated ability to pay requires an extended payment arrangement, consideration may be given to waiving all or part of the interest for the period from when payments start until the amounts owing are paid, as long as the agreed payments are made on time and compliance with the Act is maintained; or

(c) when payment of the accumulated interest would cause a prolonged inability to provide basic necessities (financial hardship) such as food, medical help, transportation, or shelter, consideration may be given to cancelling all or part of the total accumulated interest.

¶ 28. Consideration would not generally be given to cancelling a penalty based on an inability to pay or financial hardship unless an extraordinary circumstance, as described in ¶ 25 has prevented compliance. However, there may be exceptional situations that may give rise to cancelling penalties, in whole or in part. For example,



when a business is experiencing extreme financial difficulty, and enforcement of such penalties would jeopardize the continuity of its operations, the jobs of the employees, and the welfare of the community as a whole, consideration may be given to providing relief of the penalties.

[16] Thus, it is clear that there are three (3) main grounds suggested by the guidelines by which the Fairness Provisions operate, although these do not limit the scope of the Fairness Provisions themselves and the discretion of the decision-maker. These grounds are: 1) extraordinary circumstance; 2) actions by CRA; and 3) financial hardship. Guidance is also given in regards to the factors to be considered in the assessment of these factors:

¶ 33. Where circumstances beyond a taxpayer's control, actions of the CRA, or inability to pay or financial hardship has prevented the taxpayer from complying with the Act, the following factors will be considered when determining whether or not the CRA will cancel or waive penalties and interest:

(a) whether or not the taxpayer has a history of compliance with tax obligations;

(b) whether or not the taxpayer has knowingly allowed a balance to exist on which arrears interest has accrued;

(c) whether or not the taxpayer has exercised a reasonable amount of care and has not been negligent or careless in conducting their affairs under the self-assessment system; and

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

### **First Level and Second Level decisions**

[17] The Applicants had submitted that the circumstance of their case was such that it required the application of the Fairness Provisions. Their family was expecting another child, which would further strain their financial situation. They alleged their good faith and absence of maliciousness, while denouncing the “bullying of collections personnel and glacial inefficiency at CRA”. They

argued the delays of their case to be such that the Fairness Provisions should be resorted to in order to modify or annul the accrued interests. Jonas Quastel had been sick in 1999 and required treatment in Israel. This situation was to be considered as an exceptional circumstance. Expenses deemed discretionary spending by CRA were alleged to be essential to Mr. Quastel's business as a film director. The Applicants alleged that the interests accrued since the Tax Court of Canada Judgments should not be compiled, as the delays were due to CRA's inefficiency in processing the request for taxpayer relief. Also, the Applicants allege that the professional help they hired was incompetent and left the matter unresolved. More generally, the Applicants made a claim of inability to pay and financial hardship.

[18] The First Decision did not grant the relief the Applicants sought. Summarily, it can be said that this decision was negative in light of the following elements:

- (a) There was no evidence that treatment of this file by CRA was exceptionally long or that the delays in the matter could be attributed to CRA. In fact, the delays were attributable to the Applicants, who did not deal with the matter in a timely fashion.
- (b) The Applicants' representative's error was not considered sufficient and did not represent a situation beyond the Applicants' control.
- (c) Mr. Quastel's illness in 1999 was not reasonably linked to the late-filing of returns, as the earliest one was due in 2000. Also, his business income for 1999 suggested that his incapacity was not as debilitating as alleged.

- (d) Financial hardship was defined as a prolonged inability to provide the basic necessities of life. The CRA officer suggested that cutting back on discretionary spending would help in this regard. Basically, the Applicants' situation did not correspond with financial hardship.
- (e) A house was purchased in 2001, while the Applicants knowingly allowed a balance to exist.

[19] As this decision was not favourable to them, the Applicants brought this decision to the Second Level before CRA. In this Second Level Decision, CRA confirmed the First Level Decision. In support of this decision, the Second Level Decision noted the following:

- (a) Mr. Quastel's medical condition was not causally connected to the reproached delays and interests charged by CRA that were contested by the Applicants.
- (b) The delays and errors were caused by the Applicants' own actions.
- (c) Financial hardship was not present, as the documents provided were incomplete and did not allow for a transparent view of the Applicants' financial situation. In any event, the family income is nearly double the threshold determined to be the low-income level.

- (d) The Applicants' tax compliance record shows that the returns for years 2002 and 2003 were overdue.
  
- (e) All things considered, the Applicants did not qualify for taxpayer relief under the fairness provisions.

**Standard of review**

[20] It is this Second Level Decision that the Court is asked to review judicially, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. As noted above, it is the exercise of the Minister's discretionary power under section 220 (3.1) of the *Income Tax Act* and section 281.1 of the *Excise Tax Act* that is to be reviewed by the Court. The Court thus notes that the grounds for review are that the Minister based the decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, in keeping with the language of paragraph 18.1(4)(d) of the *Federal Courts Act*.

[21] As instructed by the Supreme Court in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 46, "More generally, it is clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with *Dunsmuir*. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the *Federal Courts Act*." Hence, as it is the exercise of discretion that is contested, the applicable standard of review is that of reasonableness, as is confirmed by the relevant case law (*Canada Revenue Agency v Telfer*, 2009 FCA 23; *Spence v Canada Revenue*

*Agency*, 2010 FC 52; *Northview Apartments Ltd. v Canada (Attorney General)*, 2009 FC 74; *Cayer v Canada Revenue Agency*, 2009 FC 1195).

[22] The Applicants were not represented before the Court thus the preceding observations in regards to the standard of review may seem technical in nature. Judicial review is different from an appeal of a decision, especially when the standard of review is that of reasonableness. The Court is to ask itself if the impugned decision is part of the reasonable outcomes defensible in fact and law, indicating that there is indeed some leeway in administrative decision-making (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47). Hence, the Court's power does not extend to a reassessment of the evidence or to substituting its decision for that of CRA. At the stage of judicial review, the outcomes are limited: either the matter is sent back for redetermination or the decision is accepted as "reasonable" or "correct", according to the applicable standard of review.

### **Analysis**

[23] The impugned Second Level Decision is reasonable. Although unfavourable to the Applicants, it does assess the evidence before it and addresses the required elements put forth by the Applicants. It reasonably used the guidance provided by the applicable guidelines, but not to the extent of fettering the discretion conferred by law.

[24] As the guidelines indicate, relevant factors are to be considered upon by CRA when assessing the application of the fairness provisions. Again, these are indicated at paragraph 33:

¶ 33. Where circumstances beyond a taxpayer's control, actions of the CRA, or inability to pay or financial hardship has prevented the taxpayer from complying with the Act, the following factors will be

considered when determining whether or not the CRA will cancel or waive penalties and interest:

(a) whether or not the taxpayer has a history of compliance with tax obligations;

(b) whether or not the taxpayer has knowingly allowed a balance to exist on which arrears interest has accrued;

(c) whether or not the taxpayer has exercised a reasonable amount of care and has not been negligent or careless in conducting their affairs under the self-assessment system; and

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

[25] As the record indicates, the Applicants did not have a history of compliance with tax obligations, as their 1999 and 2000 tax records were first assessed under section 152(7) of the *Income Tax Act*. Also, they had not filed tax records for years 2002 and 2003. This factor was thus adequately addressed and considered by CRA.

[26] As noted in the Second Level Decision, the Applicants knowingly allowed a balance to exist. During this period, they put a considerable down payment on a house, while letting their tax account go unresolved. This was considered by CRA.

[27] Throughout the proceedings with CRA, the Applicants had not brought forth all the relevant documentation, requiring CRA to prompt them on some occasions. This was taken by CRA as a contribution by the Applicants in delaying their case.

[28] Also, an inquiry was made in regards to CRA's contributions to the delay, and nothing was found to be out of the ordinary, therefore excluding the grounds provided for by paragraph 23(b)

of the Guidelines. Concurrently, the Applicants' financial situation was objectively assessed in comparison with the applicable guidelines on poverty. The Applicants' financial situation was not deemed to be in dire straights. CRA suggested cutting back on discretionary spending and the like to address any issues with payment of the tax debt.

[29] The Applicants did not detail in what respect third-party mistakes and omissions contributed to the situation; it was only alleged in general. In any event, case law recognizes as reasonable the conclusion by which people are held responsible for mistakes of third parties made before CRA, and that these are not "circumstances beyond their control" (*Jones Estate v Canada (Attorney General)*, 2009 FC 646; *Northview Apartments Ltd. v Canada (Attorney General)*, 2009 FC 74; *Légaré v Canada (Customs and Revenue Agency)*, 2003 FC 1047). As this same Court has noted in *Babin v Canada (Customs and Revenue Agency)*, 2005 FC 972, a recourse against this third-party may exist, but is independent of the case at bar.

[30] At its face, there was no breach of procedural fairness, and none was alleged. The Court finds that CRA assessed all the relevant evidence before it, and made reasonable conclusions. The Second Level Decision was reasoned and clear and found its basis in the facts and applicable law. The relevant guidelines and factors were indeed considered in concluding as the Second Level Decision did. Also, a brief review of jurisprudence shows that the fairness provisions are usually used in circumstances much more dire than the present (see, for example, *Laflamme v Canada (National Revenue)*, 2008 FC 1403). Not that this is binding, but it also does confer reasonability to the decision, as like situations should be treated similarly as per the inherent "fairness" of the fairness provisions.

[31] As such, there is nothing this Court can do but decline to intervene, as the impugned decision is “reasonable”, within the scope and prism of judicial review.

[32] The Respondent sought \$3,000 in costs against the Applicants. These will not be awarded, pursuant to the Court’s discretion (see Rule 400 of the *Federal Courts Rules*, SOR 2004-283) and in light of the Applicants’ considerable tax burden resulting from the impugned decision. The Applicants had a different view of this recourse. They thought it was an appeal when it is a judicial review. Both Applicants said that they were at least in part responsible for the ongoing situation and that they had learned from it. Using the discretion given to the Court in Rule 400 of the Federal Courts Rules, it is in the public interest that the more than \$3,000 in costs request not be granted.



**JUDGMENT**

**THIS COURT’S JUDGMENT is that** the applications for judicial review are dismissed.

No costs shall be awarded.

“Simon Noël”

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Judge

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

**DOCKETS:** T-979-09 and T-980-09

**STYLE OF CAUSE:** DINA QUASTEL  
v  
THE MINISTER OF NATIONAL REVENUE

JONAS QUASTEL  
v  
THE MINISTER OF NATIONAL REVENUE

**PLACE OF HEARING:** Vancouver, BC

**DATE OF HEARING:** February 1, 2011

**REASONS FOR JUDGMENT:** NOËL S. J.

**DATED:** February 9, 2011

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