Federal Court of Appeal | Cour d'appel fédérale

Date: 20190524

Docket: A-400-17

Citation: 2019 FCA 161

CORAM: **GAUTHIER J.A.**
BOIVIN J.A.
GLEASON J.A.

BETWEEN:

PATRICK CONNOLLY

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Vancouver, British Columbia, on March 20, 2019.

Judgment delivered at Ottawa, Ontario, on May 24, 2019.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: GAUTHIER J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] This is an appeal from the Federal Court's judgment in *Connolly v. Canada (National Revenue)*, 2017 FC 1006 (*per* Annis J.), dismissing Mr. Connolly's application for judicial review of the November 30, 2016 decision made by a delegate of the respondent Minister. In the decision, the delegate declined to grant relief in respect of income tax on over-contributions to

Mr. Connolly's Registered Retirement Savings Plans (RRSPs) and declined to waive the associated interest and penalties for the 2003 to 2010 taxation years.

[2] For the reasons that follow, I would dismiss this appeal, without costs.

I. Background

[3] It is useful to commence by reviewing the background to this appeal.

[4] Mr. Connolly did not file income tax returns for the 1988 to 2003 taxation years before the applicable April 30th deadlines because he owed no tax in any of those years and had been told by his accountant that it was therefore not necessary for him to file tax returns. As a result, he received no Notices of Assessment prior to 2005 for the 1997 to 2003 taxation years. In an individual taxpayer's Notice of Assessment, the Minister of National Revenue provides details of a taxpayer's unused RRSP contribution room.

[5] Because Mr. Connolly was a member of a pension plan, his and his employer's pension contributions gave rise to a pension adjustment that reduced his RRSP contribution room to near zero. However, it appears that Mr. Connolly was unaware of this and erroneously believed he could make the maximum contribution to an RRSP, although he provided no details of what led him to reach this conclusion. Mr. Connolly made no inquiries about his contribution room, and neither his accountant nor his financial institution appears to have discussed the issue with him. In 2003, Mr. Connolly contributed $15,000 to his RRSP and $15,000 to a spousal RRSP; he contributed a further $15,000 to his spousal RRSP in 2004.

[6] In early 2005, Mr. Connolly's accountant filed income tax returns for the 1997 to 2004 taxation years. Mr. Connolly eventually received Notices of Assessment for these years, including for 2003 and 2004. These informed him that he had "unused RRSP contributions" that he could carry forward and deduct from his income in future years. The Notices also referred to a special tax payable on over-contributions to an RRSP, but did not inform Mr. Connolly that he had made an over-contribution. As the Notices were not put before the Tax Court or this Court, it is unclear what they said about the quantum of Mr. Connolly's unused RRSP contribution room.

[7] Mr. Connolly's accountant later filed tax returns for Mr. Connolly for the 2005 to 2008 taxation years. Over several years, Mr. Connolly deducted only a small portion of his RRSP contributions. More specifically, according to records from Canada Revenue Agency (the CRA), Mr. Connolly deducted $600 for the 2004 taxation year, $628 in the 2005 taxation year, $55 in the 2007 taxation year and $3,190 in the 2008 taxation year. This left $40,527 that Mr. Connolly contributed to his and his spousal RRSPs but did not deduct.

[8] On February 9, 2007, the CRA sent Mr. Connolly a letter explaining that he might have over-contributed to his RRSPs from 2003 to 2005 and that, if so, the excess was subject to a tax of one percent per month. The letter also informed him of the requirement that he file an RRSP over-contribution return for each year he had excess RRSP contributions (known as a T1-OVP return), that he could withdraw the excess contributions and that, if he did so within the statutorily prescribed timeframe, he could make the withdrawal without withholding tax by filing a T3012A form.

[9] Shortly after receipt of this letter, Mr. Connolly directed his accountant to prepare the necessary T1-OVP returns and a T3012A form. However, the accountant did not send the forms until February 12, 2008, more than a year later. There is no evidence that Mr. Connolly did anything in the interim to inquire as to the status of the filings. While Mr. Connolly deposes in his affidavit that his accountant filed the required returns and forms in February 2008, the CRA has no record of having received them.

[10] On October 20, 2008, the CRA sent a further letter to Mr. Connolly, requesting that he file his T1-OVP returns within 30 days and explaining that if he failed to do so, the Minister would assess him arbitrarily. Mr. Connolly did not file the returns within 30 days and, accordingly, the Minister arbitrarily assessed Mr. Connolly on January 5, 2009, issuing Notices of Assessment requiring him to pay tax on the RRSP over-contributions, penalties flowing from the failure to file the required T1-OVP returns in a timely fashion and interest on both amounts.

[11] On January 21, 2009, Mr. Connolly's accountant filed T1-OVP returns for 2003 to 2007 and T3012A forms for 2003 and 2004. On February 26, 2010, Mr. Connolly withdrew $15,000 from his RRSP and $29,854.24 from his spousal RRSP. Mr. Connolly included the withdrawals in his income for 2010 and claimed a corresponding deduction. The Minister reassessed and denied the deduction.

[12] Mr. Connolly objected to the reassessment and appealed to the Tax Court. In an unreported judgment dated April 5, 2013 (file 2012-3282(IT)I), the Tax Court (*per* Bocock J.), allowed the appeal in part, concluding that Mr. Connolly met the statutory requirements to claim

the deduction for the 2004 over-contributions, but not the 2003 over-contributions. In the Tax Court's view, since the Minister reassessed Mr. Connolly in 2008, he was eligible for the 2004 deduction when he withdrew the over-contribution in 2010. Neither Mr. Connolly nor the Crown appealed the Tax Court's judgment, which is consequently final. In *obiter dicta*, or non-binding comment, the Tax Court suggested that Mr. Connolly seek a ministerial waiver for the tax on the over-contributions, penalties and interest and intimated that the Minister would look favourably on such a request.

[13] On December 19, 2013, Mr. Connolly requested relief from the tax on the over-contributions, penalties and interest. It is this request that gave rise to the decision that is the subject of this appeal.

[14] On September 29, 2014, the CRA asked Mr. Connolly to file T1-OVP returns for 2008, 2009 and 2010. Since Mr. Connolly had not done so by June 19, 2015, the Minister again arbitrarily assessed Mr. Connolly for tax on the over-contributions, penalties and interest in respect of these years. Mr. Connolly filed a T1-OVP return in August 2015 and objected to the June 19, 2015 assessment. The CRA allowed the objection with respect to the 2010 taxation year.

[15] By decision dated November 30, 2016, the Minister denied Mr. Connolly's requests for relief from the tax on the over-contributions and for waiver of penalties and interest. This decision was judicially reviewed before the Federal Court, and the Federal Court's decision is the subject of the present appeal.

[16] According to the CRA's calculations, as of October 17, 2018, Mr. Connolly owed $62,968.67 in respect of his RRSP over-contributions, associated penalties and interest, broken down as follows:

Taxation year	Tax assessed	Late filing penalty	Arrears interest	Balance
2003	$2,930.00	$498.10	$1,640.66	$5,068.76
2004	$4,788.00	$813.96	$2,181.82	$7,783.78
2005	$5,012.64	$852.15	$1,507.04	$7,371.83
2006	$5,012.64	$852.15	$906.50	$6,771.29
2007	$5,006.04	$600.72	$324.44	$5,931.20
2008	$4,623.24	$785.95	$1,991.39	$7,400.58
2009	$4,308.96	$732.52	$1,519.64	$6,561.12
2010	$566.08	$96.23	($22.12)	$640.19
Total as of December 31, 2010				$47,528.75

Although no additional tax has been assessed and no additional penalties have been imposed since the 2010 taxation year, interest has continued to accumulate on the arrears. The total interest for January 1, 2011 to October 17, 2018 was $22,222.53. Added to the tax, penalties and

interest owing on December 31, 2010, this totals $69,751.28.The CRA credited $6,782.61 it would otherwise have refunded to Mr. Connolly against this balance, reducing it to $62,968.67.

[17] Mr. Connolly claims that in 2003 and 2004 he was suffering from severe depression, due to his constructive dismissal from his long term employment, the death of his son some years previously and the death of his father-in-law in 2003. However, he provided only limited medical evidence to support these assertions because his treating physician had retired. That evidence does not comment on how, if at all, Mr. Connolly's condition might have impacted his ability to make the requisite filings and withdrawals.

II. Relevant Legislative and Policy Provisions

[18] It is convenient to next detail the pertinent provisions in the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the *ITA*) and the CRA's guidelines concerning these provisions.

A. *ITA Provisions*

[19] The *ITA* provides that a taxpayer's contributions to an RRSP are deductible from income up to the taxpayer's deduction limit: *ITA*, s. 146(1), (5), (5.1). For taxpayers who do not participate in a registered pension plan, the deduction limit is 18 per cent of the previous year's earned income to an allowable yearly maximum that is set at $ 26,500 for the 2019 taxation year. Where a taxpayer participates in a registered pension plan, the taxpayer's RRSP deduction limit is reduced through a pension adjustment to avoid unfairness between taxpayers with and without

pensions: *ITA*, s. 146(1); *Income Tax Regulations*, C.R.C., c. 945, s. 8301. Generally, income earned on RRSP contributions is not taxable as long as it remains in the RRSP: *ITA*, s. 146(4).

[20] If a taxpayer makes a contribution to his or her RRSP that exceeds his or her applicable deduction limit, the cumulative excess amount is taxed under Part X.1 of the *ITA* at a rate of one percent per month until it is withdrawn: *ITA*, ss. 204.1(2.1), 204.2(1.1), 204.3. (This is subject to a $2,000 lifetime grace amount that allows a taxpayer to overcontribute up to $2,000 without being subject to tax on over-contributions: *ITA*, s. 204.2(1.1).) Although a taxpayer is also taxed on the withdrawal of over-contributions from an RRSP, the taxpayer is entitled to an offsetting deduction if the withdrawal is made within the statutorily prescribed period, which is generally up to two years after the year in which the taxpayer made the contribution: *ITA* ss. 56(1)(*h*), 146(8), (8.2), (8.21).

[21] Taxpayers who make over-contributions to their RRSPs are required to file an annual return (known as a T1-OVP return) within 90 days of the end of the taxation year and to estimate and pay the amount of tax payable: *ITA*, s. 204.3(1). Since the tax on over-contributions is payable at the end of each month (rather than after the end of the year), the taxpayer generally must also pay interest on the unpaid tax: *ITA*, ss. 161(1), 204.3(2). Where a taxpayer fails to file his or her T1-OVP return or is late in doing so, the taxpayer is liable to a penalty: *ITA*, ss. 162(1), 204.3(2) and may also be required to pay interest on the penalty: *ITA*, ss. 161(11), 204.3(2).

[22] Subsection 204.1(4) of the *ITA* provides for discretionary relief against the Part X.1 tax payable on over-contributions to an RRSP. It provides in relevant part:

Where an individual would, but for this subsection, be required to pay a tax under subsection […] 204.1(2.1) in respect of a month and the individual establishes to the satisfaction of the Minister that	Le ministre peut renoncer à l'impôt dont un particulier serait, compte non tenu du présent paragraphe, redevable pour un mois selon le paragraphe […] (2.1), si celui-ci établit à la satisfaction du ministre que […] l'excédent cumulatif qui est frappé de l'impôt fait suite à une erreur acceptable et que les mesures indiquées pour éliminer l'excédent ont été prises.
(*a*) the […] cumulative excess amount on which the tax is based arose as a consequence of reasonable error, and	
(*b*) reasonable steps are being taken to eliminate the excess,	
the Minister may waive the tax.	

[23] Subsection 220(3.1) of the *ITA* provides for discretionary relief against interest and penalties payable by taxpayers, including penalties payable for failing to file a T1-OVP return (or delaying in doing so) and interest payable on unpaid tax on over-contributions and penalties:

The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer […] or on application by the taxpayer […] 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 […] in respect of that taxation year […].	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 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 […] en application de la présente loi pour cette année d'imposition […], ou l'annuler en tout ou en partie […].

[24] Both provisions contemplate the Minister making a discretionary decision; however, they differ in that subsection 204.1(4) of the *ITA* sets out conditions for relief (that the taxpayer must establish to the Minister's "satisfaction" that the over-contribution "arose as a consequence of

reasonable error" and that "reasonable steps are being taken to eliminate the excess") whereas subsection 220(3.1) contains no such conditions, affording the Minister broad discretion to grant or deny relief.

[25] Although discretion in the instant case is vested in the Minister, as provided in subsection 220(2.01) of the *ITA*, the Minister may delegate her powers to CRA employees.

B. *CRA Guidelines*

[26] Two CRA guidelines are relevant. The first, entitled "Guidelines for waiving tax – 19(23)7.23" is internal to the CRA and provides guidance for evaluating requests for waiving Part X.1 tax. The other is a published guideline, entitled, "IC07-1 Taxpayer Relief Provisions", and provides guidance for several different types of taxpayer requests for relief, including requests for relief from penalty and interest under subsection 220(3.1) of the *ITA*.

[27] The internal guideline for waiving Part X.1 tax attempts to define the two statutory criteria for granting a waiver by providing definitions of what "reasonable error" means and of what constitutes "reasonable steps". It explains the following with respect to "reasonable error":

> **What is reasonable error?**
>
> Reasonable error means that the taxpayer did not intend to over contribute to their RRSP/PRPP and that it happened because of extraordinary circumstances beyond their control.
>
> Reasonable error means that the excess arose because of a mistake and that the taxpayer did not intentionally over-contribute. For the mistake to be reasonable, it has to be one that an impartial person would consider more likely to occur rather than less likely to occur based on circumstances.

> An impartial person is someone who is not biased about how an issue or situation arose and how it is resolved as well as does not have a personal interest in the case's resolution.
>
> It will depend on the facts of each case.

[28] "Reasonable steps" are said to mean:

> **What are reasonable steps?**
>
> Reasonable steps to eliminate the excess contribution generally means that the steps are being taken by the taxpayer to eliminate the excess as quickly as possible. The reasonable steps must be looked at from the point the taxpayer **became aware** or was advised […] of the excess and the **measures** the taxpayer took after he became aware or was advised of the excess.
>
> The reasonable error condition must be met in order to consider the reasonable steps. If the reasonable error condition is not met, proof of withdrawal is not required.
>
> If the Agency has determined that the excess arose due to reasonable error, and if the excess has not already been eliminated, the taxpayer has **two months** from the date of the Agency's letter to withdraw funds and submit proof.
>
> (emphasis in original)

[29] Turning to the published guideline, it provides that, without limiting the Minister's overall discretion to grant relief under subsection 220(3.1) of the *ITA*, the Minister may provide relief from penalties 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".

[30] The guideline goes on to explain that extraordinary circumstances are "circumstances beyond a taxpayer's control […] 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". The guideline identifies the following as examples of extraordinary circumstances:

(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.

[31] The guideline also provides that, even if circumstances beyond a taxpayer's control exist, the following additional factors will be considered for determining whether to grant relief from interest and/or penalties:

(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.

[32] The guideline continues by stating that, aside from exceptional circumstances, taxpayers are generally considered to be responsible for error or omissions made by third parties acting on their behalf.

III. The Decision of the Ministerial Delegate

[33] With this background in mind, I turn now to review the decision of the ministerial delegate that is at the heart of this appeal. In it, as noted, the delegate denied Mr. Connolly's requests for relief under subsections 204.1(4) and 220(3.1) of the *ITA*.

[34] With respect to the request for relief from Part X.1 tax under subsection 204.1(4) of the *ITA*, the delegate applied the above-discussed guideline and stated that:

> Reasonable error means that [Mr. Connolly] did not intend to over-contribute to [his] RRSP and that it happened because of extraordinary circumstances beyond [his] control.
>
> Reasonable steps means that [Mr. Connolly took] steps to eliminate the excess as quickly as possible.

[35] The delegate found that Mr. Connolly's lack of awareness or receiving poor financial advice from his accountant or financial institution did not amount to extraordinary circumstances. The delegate also rejected the fact that Mr. Connolly was suffering from emotional distress at the relevant times, finding that his distress was not a mitigating factor and did not directly contribute to his inability to file his T1-OVP returns in a timely fashion or to make payments in a timely manner. The delegate further held, contrary to the decision of the Tax Court, that the deadline for withdrawing both the 2003 and 2004 over-contributions was December 31, 2006, and went on to conclude that any delay occasioned by reason of waiting for a response to the T3012A form was not to be considered beyond Mr. Connolly's control because a "Form T3012A is not necessary to withdraw the excess amount".

[36] With respect to the request for relief from the penalties and interest, the delegate held that the Minister may consider waiving or cancelling some or all of the interest or penalties if a taxpayer "can show that the penalties and interest are as a result of circumstances beyond the individual's control such as illness, an accident, serious emotional distress, a natural disaster, or an action of the CRA". The delegate found that none of the foregoing circumstances could be said to apply to Mr. Connolly and thus denied his request to waive the penalties and interest.

IV. The Federal Court's Decision

[37] I move now to review the salient points in the Federal Court's decision.

[38] After reviewing the facts and the parties' arguments, the Federal Court commenced its analysis by considering the standard of review to be applied to the delegate's decision. The Federal Court held that the delegate's decision was to be assessed on a standard of correctness because the application was framed as a matter of statutory interpretation and the CRA possesses no greater expertise on the interpretative issue than the Court. In so ruling, the Federal Court relied on the decisions of this Court in *Redeemer Foundation v. Minister of National Revenue*, 2006 FCA 325, [2007] 3 F.C.R. 40 (*Redeemer Foundation*) and *Bozzer v. Canada*, 2011 FCA 186, [2013] 1 F.C.R. 242 (*Bozzer*).

[39] The Federal Court then turned to the issue of whether the delegate's decision was correct and focussed its analysis on the delegate's interpretation of subsection 204.1(4) of the *ITA*. The Federal Court held that the delegate's interpretation was correct because Mr. Connolly's claims for relief were rejected by the delegate mainly because ignorance of the law and reliance on a

third party advisor are not available as grounds for relief as the Federal Court held in *Fleet v. Canada (Attorney General)*, 2010 FC 609, 370 F.T.R. 192; *Gagné v. Canada (Attorney General)*, 2010 FC 778, 371 F.T.R. 150 (*Gagné*); *Dimovski v. Canada Revenue Agency*, 2011 FC 721, 391 F.T.R. 270 (*Dimovski*); *Kapil v. Canada Revenue Agency*, 2011 FC 1373, 401 F.T.R. 122 (*Kapil*). The Federal Court followed these cases and also relied on the decision of this Court in *Corporation de l'École Polytechnique v. Canada*, 2004 FCA 127, 325 N.R. 64 (*École Polytechnique*) for the proposition that there is "no such doctrine as a reasonable mistake of law": Reasons at para. 53. The Federal Court also rejected Mr. Connolly's contention, framed as both a factual error and a breach of procedural fairness that the Minister erred in failing to follow the Tax Court's *obiter* suggestion that the Minister should look favorably on the appellant's requests for relief. The Court thus held that the delegate was correct in refusing the requested relief.

[40] However, the Federal Court went on to take the unusual step of offering submissions that it believed could be made to this Court so as to assist the appellant on appeal. The Federal Court declined to award costs to the respondent in light of Mr. Connolly's financial situation and the nearly $60,000 in tax, penalties and interest he was required to pay.

V. The Parties' Positions

[41] The parties differ as to the standard of review to be applied to the ministerial delegate's decision on the merits. Mr. Connolly asserts that the correctness standard is applicable because the decision rests on an interpretation of provisions in the *ITA* and therefore raises an extricable question of law, which he asserts is reviewable on the correctness standard. In support of this

proposition, Mr. Connolly relies on *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8. He also says that the correctness standard applies to the assessment of whether the delegate violated his rights to procedural fairness.

[42] The respondent, for her part, agrees that correctness applies to the assessment of the alleged procedural fairness violation but asserts that, in accordance with the rules applicable to judicial review generally, the reasonableness standard of review is applicable to the delegate's decision as the *ITA* is the Minister's "home statute". In support of this proposition, the respondent relies on *Bell Canada v. Canada (Attorney General)*, 2017 FCA 249, [2018] 4 F.C.R. 300 at para. 9, leave to appeal to SCC granted 37896 (May 10, 2018); and *Schmidt v. Canada (Attorney General)*, 2018 FCA 55 at para. 23, leave to appeal to SCC denied 38179 (April 4, 2019).

[43] On the merits, Mr. Connolly focusses his arguments only on subsection 204.1(4) of the *ITA* and contends that the Federal Court erred both in the approach to statutory interpretation and in the conclusions reached.

[44] More specifically, Mr. Connolly says that the term "reasonable error" does not denote extraordinariness. Likewise, the term "reasonable steps" does not denote immediacy. He relies on dictionary definitions and case law from other situations in support of this argument. He thus submits that the Federal Court's interpretation does not accord with the text of subsection 204.1(4) of the *ITA*.

[45] He further submits that this interpretation is also inconsistent with the provision's purpose, which he asserts is to afford relief from the strict application of the rules governing RRSP contributions. He submits that these rules are complex and it is likely that taxpayers will make errors. He therefore says that Parliament intended to provide for relief in circumstances where taxpayers make reasonable errors and take reasonable steps to correct them. Mr. Connolly rejects the Federal Court's reliance on the bounds of the due diligence defence elaborated by this Court in *École Polytechnique*, which he says is inapplicable to the interpretation of subsection 204.1(4) of the *ITA*.

[46] In his view, both an error as to a taxpayer's contribution room and a taxpayer's reliance on a third party to take steps to correct an over-contribution, could be reasonable. Thus, he says that the Federal Court erred in holding otherwise. In his view, reasonableness in the fiscal context is to be assessed from the perspective of an ordinary, objective person with knowledge of a taxpayer's circumstances. Mr. Connolly argues that such an objective person would consider his error and the steps he took to be reasonable and thus says he ought to have been granted the relief he requested under subsection 204.1(4) of the *ITA*.

[47] Mr. Connolly adds that the delegate should have taken into account the Tax Court's comments about ministerial relief and that the failure to do so was not only unreasonable, but also a violation of procedural fairness.

[48] As the penalties and interest were premised at least in part on the determination under subsection 204.1(4) of the *ITA*, Mr. Connolly says that the delegate's decision should be set aside in its entirety.

[49] The respondent, on the other hand, submits that the delegate's interpretation of subsection 204.1(4) of the *ITA* is reasonable. According to the respondent, the purpose of taxing over-contributions to RRSPs is to discourage taxpayers from making them. In the respondent's submission, a reasonable mistake of law cannot be a "reasonable error" because a taxpayer is expected to seek competent advice and is responsible for the consequences that flow from following such evidence when it is incorrect. "Reasonable steps", for the respondent, means that a taxpayer withdraws the over-contribution as quickly as possible.

[50] In the respondent's view, Mr. Connolly's over-contribution did not result from reasonable error since neither his ignorance of the law nor his reliance on third parties can be reasonable. Likewise, he did not establish that his emotional distress was the cause of the over-contribution. Similarly, the respondent argues that Mr. Connolly did not take reasonable steps to withdraw the over-contribution as he was first informed that he had over-contributed in 2007 and did not withdraw the over-contributions until 2010.

[51] The respondent rejects the notion that the delegate erred in not relying on the *obiter* comments made by the Tax Court as the Tax Court has no jurisdiction over the Minister's exercise of discretion under the provisions at issue. The respondent thus requests that the appeal

be dismissed, but in light of Mr. Connolly's circumstances, confirmed following the hearing that the Minister does not seek costs.

VI. Analysis

[52] In this appeal, this Court is required to determine whether the Federal Court selected the correct standard of review and, if so, whether it applied that standard correctly. We are therefore in effect required to step into the shoes of the Federal Court and to re-conduct a *de novo* review of the delegate's decision: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-46; *Canada (Attorney General) v. Heffel Gallery Ltd.*, 2019 FCA 82 at para. 20. This Court must therefore determine the applicable standard of review and whether, in light of the relevant standard, the ministerial delegate committed a reviewable error in rejecting Mr. Connolly's request for relief. Each of these issues is discussed below.

A. *Standard of review*

[53] The delegate's subsection 204.1(4) analysis involves two separate components: first, consideration of the test to be applied under the subsection, and, second, application of that test to the facts of Mr. Connolly's case. The Supreme Court has made it clear that different aspects of administrative decisions may contain different issues, which may be reviewable under different standards of review: *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 at paras. 49-52 (*Mouvement laïque*); *Canadian Broadcasting Corporation v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615 at paras. 35-37, 40.

[54] I agree with Mr. Connolly that the first aspect of the delegate's consideration of the subsection 204.1(4) analysis, involving delineation of the applicable test enshrined in the subsection, raises a question of law and that, to date, this Court has reviewed legal interpretations made by the Minister or a ministerial delegate of provisions in the *ITA* for correctness, even though under the *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 framework such questions are normally subject to review on a reasonableness standard: see, e.g., *Redeemer Foundation* at para. 24; *Bozzer* at para. 3*; Sheldon Inwentash and Lynn Factor Charitable Foundation v. Canada*, 2012 FCA 136 at paras. 19-23, 432 N.R. 338; *Prescient Foundation v. Canada (National Revenue)*, 2013 FCA 120 at paras. 12-13, 358 D.L.R. (4th) 541; *Opportunities for the Disabled Foundation v. Canada (National Revenue)*, 2016 FCA 94 at para. 16, 482 N.R. 297.

[55] That said, given significant developments in the common law of judicial review in recent years, it may well be that this approach is no longer correct as my colleague, Woods J.A., recently noted in *Bonnybrook Park Industrial Development Co. Ltd. v. Canada (National Revenue)*, 2018 FCA 136 at paras. 22-24 and *Ark Angel Foundation v. Canada (National Revenue)*, 2019 FCA 21 at paras. 30-31. However, for the reasons set out below, it is in my view unnecessary to decide this issue in the present case.

[56] The second aspect of the delegate's subsection 204.1(4) analysis, involving application of the test set out in the subsection to Mr. Connolly's situation, is reviewable for reasonableness: *Lepiarczyk v. Canada (Revenue Agency)*, 2008 FC 1022 at para. 19, [2009] 1 C.T.C. 117 (*Lepiarczyk*); *Gagné*, at para. 10; *Kapil* at para. 19. As the Federal Court explained in

Lepiarczyk, not only is the Minister's decision discretionary, but it also is based on the Minister's determination on issues of mixed fact and law, i.e. whether the over-contribution resulted from a reasonable error and whether reasonable steps are being taken to eliminate the over-contribution. These sorts of determinations are to be accorded deference.

[57] Finally, on the procedural fairness issue, no deference is owed to the delegate, it being for the reviewing court to determine whether Mr. Connolly's procedural fairness rights were violated: *Canadian Pacific Railway Co. v. Canada (Attorney General)*, 2018 FCA 69 at paras. 33-56; *Elson v. Canada (Attorney General)*, 2019 FCA 27 at para. 31.

B. *Did the Delegate commit a reviewable error?*

[58] I turn now to consider whether there was an error made by the Minister's delegate that warrants this Court's intervention.

(1) Interpretation of subsection 204.1(4) of the *ITA*

[59] Dealing first with the interpretation of subsection 204.1(4) of the *ITA*, it is my view that the delegate's interpretation is unreasonable and therefore, by definition, incorrect. In short, there is no way to equate the provision's requirement of a reasonable error with a requirement that the error result from extraordinary circumstances. Nor is it reasonable to exclude from consideration all errors flowing from a mistake about the quantum of available contribution room or all errors caused by bad advice received from a third party. Similarly, it is unreasonable to interpret the taking of reasonable steps to withdraw an over-contribution from an RRSP to mean that a

taxpayer must withdraw the over-contributions as soon as possible or within the two-month timeframe mentioned in CRA's internal "Guidelines for waiving tax – 19(23)7.23".

[60] According to the Supreme Court in *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83 at para. 108, assessing the reasonableness of a statutory interpretation requires the reviewing court to ask "[…] whether the tools of statutory interpretation – including the text, context and purpose of the provision – can reasonably support the [Minister's] conclusion".

[61] Here, the text of subsection 204.1(4) of the *ITA* cannot reasonably support the delegate's interpretation given the wording of the provision, which requires only that the error that led to the over-contribution and steps taken to remedy it be reasonable.

[62] The *Oxford English Dictionary* defines "reasonable" as meaning, in this context, "in accordance with reason; not irrational, absurd or ridiculous; just, legitimate; due, fitting" and "sufficient, adequate, or appropriate for the circumstances or purpose; fair or acceptable in amount, size, number, level, quality, or condition". In a similar fashion, *Black's Law Dictionary* defines reasonable as meaning, in this context, "fair, proper, or moderate under the circumstances; sensible".

[63] The French version of subsection 204.1(4) of the *ITA* refers to "erreur acceptable" and "mesures indiquées" (emphasis added). *Le Petit Robert* defines acceptable as "[q]ui mérite d'être accepté" (deserving of acceptance) and synonymous with "recevable" (acceptable) and indiquée,

as an adjective, as “signalé comme étant le meilleur” (said to be best or fitting) or “adéquat” (adequate) and synonymous with “prescrit” (prescribed) and “recommandé” (recommended). Although Parliament opted to use two words – acceptable and indiquée – in the equally authoritative French version in place of one – reasonable – in the English, the two versions have a common meaning. An error must be reasonable or acceptable and the steps taken to remedy its consequence, i.e. an excess amount being in one’s RRSP, must also be reasonable or adequate in the circumstances.

[64] As Mr. Connolly notes, case law (albeit in different taxation contexts) recognizes that the term “reasonable” denotes how an objective observer, with full knowledge of the pertinent facts, would view the particular action taken: *Bailey v. Minister of National Revenue* (1989), 89 D.T.C. 416, 2 C.T.C. 2177 (T.C.C.); *Safety Boss Ltd. v. The Queen*, 2000 D.T.C. 1767, 3 C.T.C. 2497 at para. 27 (T.C.C.); *Silden v. Canada (Minister of National Revenue)* (1990), 90 D.T.C. 6576 at 6582, 2 C.T.C. 533 (T.D.), rev’d on other grounds (1993) 156 N.R. 275, 93 D.T.C. 5362 (C.A.).

[65] Thus, the plain meaning of the English and French versions of subsection 204.1(4) of the *ITA* cannot reasonably support the conclusion that the error which caused the over-contribution must arise from extraordinary circumstances or that steps must always be taken with all possible dispatch to withdraw the over-contribution from a taxpayer’s RRSP. A textual analysis of the provision therefore leads to the conclusion that the delegate’s interpretation was unreasonable.

[66] A review of the context and purpose of subsection 204.1(4) of the *ITA* also leads to the same conclusion. Subsection 204.1(4) of the *ITA* is part of an integrated statutory scheme

regulating RRSP contributions, which, as described above, limits such contributions, penalizes those who over-contribute and offers relief to those who do so inadvertently. The purpose of subsection 204.1(4) in particular is to provide relief against the harshness that might result from applying the heavy tax on over-contributions to a taxpayer who can demonstrate that her or his over-contribution resulted from a reasonable mistake and who is taking or has taken reasonable steps to correct the mistake.

[67] The delegate's interpretation of subsection 204.1(4) of the *ITA* (as well as the interpretation set out in the internal CRA guideline, on which the delegate relied) thwarts the subsection's remedial purpose as it virtually extinguishes the Minister's discretion, which inescapably leads to the conclusion that the interpretation is unreasonable. Nearly every error a taxpayer might make in over-contributing to his or her RRSP (other than a simple arithmetical error) will be caused by a misunderstanding of the applicable limits – an error of law. If these sorts of errors are read out of the reach of subsection 204.1(4) of the *ITA*, it will have virtually no scope. Similarly, the fact that the error might have been made by a third party advisor or as a result of erroneous advice given by such advisor does not automatically mean that the error cannot be reasonable.

[68] As for reasonable steps, the Minister conceded in argument before us that it would be reasonable for a taxpayer to await confirmation from the Minister in response to a timely-filed T3012A form before withdrawing an over-contribution made to an RRSP so as to avoid having tax withheld by the financial institution. I agree as otherwise subsection 146(8.2) of the *ITA* would be rendered meaningless. It therefore follows that the requirements to take reasonable

steps to withdraw an RRSP over-contribution cannot be equated with immediacy or with the two-month timeframe mentioned in CRA's internal "Guidelines for waiving tax – 19(23)7.23".

[69] Rather, in each case, as noted by Rennie J. (as he then was) in *Dimovski* at para. 16 and *Kapil* at para. 26, reasonableness will turn on an objective assessment of all the relevant evidence. However, it is important to underscore that, because the Canadian tax system is based on self-assessment, it is incumbent on tax payers to take reasonable steps to comply with the *ITA*, including by seeking advice where necessary: see *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 at p. 636, 106 N.R. 385; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3 at para. 54; see also *Dimovski* at para. 17 (making this point in the RRSP context). Given this obligation, it is difficult to see how a taxpayer's ignorance about the fact that RRSP contributions are subject to a limit could be considered reasonable. By contrast, being misinformed about the contribution limit after making reasonable inquiries might well constitute a reasonable error. Likewise, the mere fact that a taxpayer has relied on an expert third party for advice is not determinative. Rather, the circumstances of such reliance need to be analyzed to determine if it was reasonable. Thus, reliance on a third party, such as an accountant, in and of itself, neither entitles nor disentitles a taxpayer to relief under subsection 204.1(4) of the *ITA*.

[70] It therefore follows that the decision under appeal and the Federal Court decisions in *Kerr v. Canada (Attorney General)*, 2008 FC 1073, 334 F.T.R. 249 (*Kerr*); *Gagné*; *Ferron v. Canada Revenue Agency*, 2011 FC 481; *Kapil*; *Levenson v. Canada (Attorney General)*, 2016 FC 10; and *Pouchet v. Canada (Attorney General)*, 2018 FC 473 are incorrect to the extent that they state

that a mistake as to the amount of allowable RRSP contributions under the *ITA* or mistakes caused by advice given by an expert third party can never be reasonable.

[71] *Kerr*, the earliest of these cases, erroneously likened relief under subsection 204.1(4) of the *ITA* to the defence of due diligence. While there is some similarity with the defence of due diligence described in *École Polytechnique* at paras. 28-30, given the context and purpose of subsection 204.1(4) of the *ITA*, the notion of reasonable error is broader and thus is not necessarily limited to what would constitute due diligence. To the degree that the Federal Court collapsed these notions in the present and past cases, it erred.

[72] I therefore am of the view that the delegate's interpretation of subsection 204.1(4) of the *ITA* was unreasonable and therefore also incorrect.

(2) Failure to Apply the Decision of the Tax Court

[73] I turn next to Mr. Connolly's assertion that the delegate erred in failing to follow (or even to fully read) the Tax Court's reasons. While it is difficult to understand why the delegate did not read the entirety of the Tax Court's reasons, the failure to do so or to follow the *obiter* comments made in the decision about the availability of ministerial relief does not amount to a violation of procedural fairness as the Tax Court and the Minister were charged with deciding different issues. Thus, the Minister was not bound to follow the suggestion made by the Tax Court regarding the outcome of the applications for relief as the Tax Court has no jurisdiction over the Minister's exercise of discretion under the provisions at issue: see *Canada (National Revenue) v. Sifto Canada Corp.*, 2014 FCA 140 at para. 23, 461 N.R. 184.

[74] I would however note that the Tax Court's decision finally decided the issue of whether Mr. Connolly's withdrawal in respect of the 2004 taxation year was made in time to allow him to claim the deduction under subsection 146(8.2) of the *ITA*. This issue was squarely before the Tax Court and, as its decision was not appealed, constitutes a final determination on the point, giving rise to issue estoppel: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; see also *742190 Ontario Inc. (Van Del Manor Nursing Homes) v. Canada (Customs and Revenue Agency)*, 2010 FCA 162 at paras. 41, 44, 406 N.R. 255 (confirming that the doctrine of issue estoppel applies to a judgment rendered by the Tax Court under its informal procedure, as was the case in Mr. Connolly's appeal to the Tax Court). Therefore, it was not open to the ministerial delegate to ignore the determination as to the timeliness of the withdrawal for the 2004 taxation year. However, for the reasons discussed in the following section, nothing in this appeal turns on the Minister's failure to follow the Tax Court's determination on this point.

(3) Could Mr. Connolly's conduct fall within subsection 204.1(4) of the *ITA?*

[75] Finally, it is necessary to assess the reasonableness of the result reached by the ministerial delegate. Despite the errors made in the decision, it seems to me that the delegate ultimately reached the only reasonable conclusion in light of the facts that Mr. Connolly put before the Minister.

[76] More particularly, Mr. Connolly provided little detail as to why he made the mistake that resulted in his over-contribution. In his affidavit, Mr. Connolly deposes that the facts stated in the letter his counsel sent CRA in support of his request for relief are true. In that letter,

Mr. Connolly's counsel explain that, on his accountant's advice, he did not file tax returns and therefore did not receive Notices of Assessment, which would have informed him of his contribution room; that "[s]ince he earned a good income at the time, he thought that he could make the maximum contribution"; and that Mr. Connolly was not aware that "he did not have contribution room as a result of his pension contributions made through his work". Taking Mr. Connolly's counsel's statements as true, I am not persuaded that they could support the conclusion that he made a reasonable error.

[77] According to his affidavit, Mr. Connolly appears to have been aware that there was a limit on RRSP contributions and that one's contribution room bore a relationship with one's income. But Mr. Connolly does not seem to have been aware of the impact that his pension contributions could have on his contribution room; nor does he appear to have considered how the limits for his contributions to his spousal RRSP would be determined. Mr. Connolly does not appear to have made any inquiries, whether with his accountant, his bank or his employer, to confirm his contribution room. His error therefore likely cannot be said to have been a reasonable one.

[78] Even if Mr. Connolly could be said to have made a reasonable error in these circumstances, the steps Mr. Connolly took to correct the mistake cannot in any way be characterized as reasonable. When CRA drew the over-contribution to his attention, Mr. Connolly's initial request that his accountant correct the situation as soon as possible might well have been reasonable, but his failure to follow up with his accountant and his ignoring of the subsequent request for information from CRA were not. Given the paucity of medical

evidence provided by Mr. Connolly, his medical condition does not provide an explanation for his lack of diligence.

[79] I would therefore conclude that, even though the ministerial delegate applied an unreasonable interpretation of subsection 204.1(4) of the *ITA*, the delegate reached the only conclusion that was reasonable in the circumstances. Accordingly, there is no basis for interfering with the delegate's conclusion in respect of Mr. Connolly's subsection 204.1(4) request.

[80] In his notice of appeal and his memorandum of fact and law, Mr. Connolly also sought to have the delegate's refusal to waive penalties and interest under subsection 220(3.1) of the *ITA* set aside, but tied his arguments to the outcome under subsection 204.1(4) of the *ITA*. Since the delegate's refusal to waive tax on over-contributions was the only reasonable conclusion in these circumstances, there is no basis to disturb the delegate's conclusion on penalties and interest.

[81] The Federal Court accordingly did not err in dismissing Mr. Connolly's application for judicial review.

VII. Proposed Disposition

[82] In light of the foregoing, I would dismiss this appeal, without costs.

"Mary J.L. Gleason"
J.A.

"I agree.
Johanne Gauthier, J.A."

"I agree.
Richard Boivin, J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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