Federal Court  Cour fédérale

Date: 20190207

Docket: T-370-18

Citation: 2019 FC 160

Ottawa, Ontario, February 7, 2019

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

FORBES PAINTING AND DECORATING LTD.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Forbes Painting and Decorating Ltd. [Forbes], has applied pursuant to section 18.1 of the *Federal Courts Act*, RCS 1985, c F-7, for judicial review of a decision dated January 29, 2018 made by a delegate of the Minister of National Revenue [the Minister].

[2] The decision under review confirmed the denial of Forbes' request for the re-appropriation of its 2006 and 2007 T2 statute-barred credits pursuant to section 221.2(2) of

the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [the *Act*]. Forbes alleges that this decision was unreasonable, was made without justification and contrary to law, and was made in breach of the duty of procedural fairness owed to it.

[3] Forbes requests in its Notice of Application:

- an order in the nature of *certiorari* to quash and set aside the decision;
- an order in the nature of *mandamus* requiring the Minister to apply and set-off the statute-barred credits against Forbes' current corporate income tax and/or source deduction arrears; and
- its solicitor-client costs of this application.

[4] Forbes also requests in its Memorandum of Fact and Law an order requiring the Minister to set-off the amount of certain garnished funds against an outstanding source deduction debt it owes to the Minister, effective as at the date the funds were seized, including any applicable interest.

I. Background

[5] Forbes is a commercial and residential painting business which operates in and around the City of Edmonton. It has two directors and shareholders, Mr. Nelson Antunes and Mr. Sergio Reis, and the company provides their primary source of income.

[6] Mr. Antunes and Mr. Reis state in their respective affidavits that they failed to realize Forbes was obliged to prepare and file income tax returns for years it had not made a profit.

[7] Forbes did not file its 2006 and 2007 corporate income tax returns within six months after the end of the years 2006 and 2007 as required by paragraph 150(1)(a) of the *Act*. After its requests and demands to file went unanswered, the Canada Revenue Agency [CRA] issued notional assessments for those taxation years on November 24, 2010, pursuant to subsection 152(7) of the *Act*. These assessments amounted to $10,885.28 in corporate income tax and $1,327.53 in penalties for 2006, and $97,333.55 in corporate income tax and $38,891.50 in penalties for 2007.

[8] The CRA then proceeded to collect the balance owing through Requirements to Pay issued under section 224(1) of the *Act*. In November 2011, it collected by way of garnishment $12,795.03 relating to Forbes' 2006 taxation year and $76,754.73 relating to Forbes' 2007 taxation year.

[9] After these garnishments, Forbes hired an accountant in 2012 to file its outstanding T2 tax returns for its 2006 and 2007 taxation years. In filing these returns, Forbes reported taxable net income which resulted in the net tax owing being less than the garnished amounts. The difference between the garnished amounts and the amounts owing for 2006 and 2007 represent the statute-barred credit [SBC] amounts that Forbes seeks to recover in this application.

[10] The SBC amounts owed to Forbes could not be re-appropriated because its 2006 and 2007 returns had not been filed within the period of three years as stated in subsection 164(1) of the *Act*. Consequently, in August 2015 Forbes requested that the SBCs owing from 2006 and

from 2007 be re-appropriated by the Minister pursuant to subsection 221.2 of the *Act* and be applied to its outstanding payroll balance. This subsection provides that:

Re-appropriation of amounts	**Réaffectation de montants**
221.2 (2) Where a particular amount was appropriated to an amount (in this section referred to as the "debt") that is or may become payable by a person under this Act, the *Excise Tax Act*, the *Air Travellers Security Charge Act* or the *Excise Act*, 2001, the Minister may, on application by the person, appropriate the particular amount, or a part of it, to another amount that is or may become payable under any of those Acts and, for the purposes of any of those Acts,	**221.2 (2)** Lorsqu'un montant est affecté à une somme (appelée « dette » au présent article) qui est ou peut devenir payable par une personne en application de la présente loi, de la *Loi sur la taxe d'accise*, de la *Loi sur le droit pour la sécurité des passagers du transport aérien* ou de la *Loi de 2001 sur l'accise*, le ministre peut, à la demande de la personne, affecter tout ou partie du montant à une autre somme qui est ou peut devenir ainsi payable. Pour l'application de ces lois:
(a) the later appropriation is deemed to have been made at the time of the earlier appropriation;	**a)** la seconde affectation est réputée effectuée au même moment que la première;
(b) the earlier appropriation is deemed not to have been made to the extent of the later appropriation; and	**b)** la première affectation est réputée ne pas avoir été effectuée jusqu'à concurrence de la seconde;
(c) the particular amount is deemed not to have been paid on account of the debt to the extent of the later appropriation.	**c)** le montant est réputé ne pas avoir été payé au titre de la dette jusqu'à concurrence de la seconde affectation.

[11] In a letter dated December 7, 2015, the CRA advised Forbes that the SBCs owing from 2006 and 2007 could not be re-appropriated to their outstanding payroll balance because its account was not compliant.

[12] Following receipt of this letter, Forbes filed its tax returns to become compliant and applied again in May 2017 for re-appropriation of the SBCs to be applied to its outstanding payroll balance. In this second request, Forbes cited three factors as extraordinary circumstances why the Minister should re-appropriate the SBCs:

- Forbes was unable to file its tax returns within the three-year statute-barred timeframe as its shareholders were new to the corporate structure and unfamiliar with the filing deadlines;
- Forbes' shareholders were under the impression that corporate returns did not have to be filed if the corporation was in a loss position for that year; and
- The funds withheld caused Forbes financial strain by preventing it from making its required payroll remittances, resulting in interest and penalties owing on the payroll account.

[13] This second request was denied by the CRA in a letter dated July 20, 2017, which stated that there were no extraordinary circumstances that had prevented Forbes from filing its returns within the three years from its tax year ends and that, in the opinion of the Minister's delegate, Forbes had not demonstrated that it took any action to resolve non-compliance within what the delegate perceived to be a reasonable time.

[14] Following this denial, Forbes made a second-level review request that the matter be reconsidered and filed another Form RC431 E (17) *Request for Re-appropriation of T2 Statute-barred Credits* [the SBC Form] in August 2017. This request cited the same three factors as stated in the May 2017 request, but also referred to the decision in *Cybernius Medical Ltd v*

Canada (Attorney General), 2017 FC 226 at para 54, 276 ACWS (3d) 965 [*Cybernius*], where this Court found it was unreasonable for the Minister not to exercise her discretion to ensure the collection of a payroll source debt by using an existing SBC.

II. The Delegate's Decision

[15] In a letter dated January 29, 2018, a delegate of the Minister upheld the original decision not to re-appropriate the SBCs for the 2006 and 2007 taxation years. This letter stated, in relevant part:

> …
>
> Based on the information you provided and our review, we will not re-appropriate the T2 statute-barred credits. There were no changes on the account, and no new information or other documentation was provided. We do not take into consideration the results of court cases, nor do we compare the situation of this corporation to the situation of other corporations, as each review is solely based on the corporation. We have determined that there were no extraordinary circumstances that prevented the corporation from filing its returns within three years from their tax year-ends.
>
> When deciding whether to exercise discretion, the Canada Revenue Agency (CRA) considers numerous factors; whether the taxpayer has demonstrated that extraordinary circumstances prevented the filing of the corporate returns within three years from their tax year-end, the actions the taxpayer took to demonstrate that they attempted to resolve their non-compliance within a reasonable time, and the taxpayer's compliance history.
>
> …

III. Issues

[16] This application for judicial review raises the following issues:

- What is the appropriate standard of review?

- Was the decision reasonable?
- Did the Minister fetter her discretion by undue reliance upon the Re-appropriation of T2 Statute-barred Credits Guide [Guide]?
- Is *mandamus* appropriate in the circumstances?
- Should costs be awarded, and if so on what scale?

IV. Analysis

A. *Standard of Review*

[17] Forbes says that, while the fettering of discretion has traditionally been reviewable on the correctness standard, whether a decision-maker's discretion has been fettered should now be reviewed on the reasonableness standard. Forbes further says that the fettering of discretion is always outside the range of possible, acceptable outcomes and is, therefore, unreasonable *per se*.

[18] The Respondent says that the appropriate standard of review is reasonableness, since re-appropriation of an SBC is a discretionary decision, and that the reasonableness standard also applies when addressing the question of whether discretion has been fettered.

[19] In *Cybernius*, Justice McVeigh determined that the appropriate standard of review in respect of a decision by the Minister not to apply section 221.2 of the *Act* is reasonableness:

> [35] I do not find the issue before me to be an extricable question of law. Rather, it is the Minister's ongoing discretionary decision not to re-appropriate funds seized in December, 2009. The timing of when matters occurred is purely factual. The standard of review for Ministerial discretion is reasonableness.

> [36] The applicability of the reasonableness standard can be confirmed by following the approach discussed in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]. As the Supreme Court of Canada noted in that case, at paragraph 53, "[w]here the question is one of fact, discretion or policy, deference will usually apply automatically". Since a decision by the Minister under section 221.2 is discretionary, the deferential standard of reasonableness applies. By necessity, the Minister's decision whether to re-appropriate or not involves the Minister "interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, above, at para 54). This factor, too, confirms that the applicable standard is reasonableness.

[20] To similar effect is *Pomeroy's Masonry Limited v Canada (Attorney General)*, 2017 FC 952, [2017] GSTC 79 [*Pomeroy's Masonry*], where Justice Southcott considered the standard of review for a decision by the Minister not to apply section 221.2 of the *Act* and re-appropriate an SBC, and concluded that:

> [12] … for purposes of identifying the applicable standard of review, it is sufficient to note that the decision turned on consideration of the circumstances surrounding the timeliness of the Applicant's tax filings. These are factual matters. The decision evidences no explicit exercise in statutory interpretation and certainly no interpretation of s 221.2(2) which can be characterized as extricable from the factual matters considered in the decision.
>
> [13] It is therefore my conclusion, consistent with that of Justice McVeigh in considering a decision involving factual matters in *Cybernius*, that the standard of review applicable to the Minister's decision is reasonableness.

[21] In view of *Cybernius* and *Pomeroy's Masonry* as well as the parties' submissions, I find the reasonableness standard applies to the Minister's decision not to re-appropriate the SBCs in this case.

[22] The reasonableness standard also applies to the question of whether the Minister fettered her discretion by undue reliance upon the Guide. As Justice Stratus concluded in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 24, 341 DLR (4th) 710: "A decision that is the product of a fettered discretion must *per se* be unreasonable."

[23] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708).

B. *Was the decision reasonable?*

[24] Forbes says the Minister's decision is unreasonable because she did not exercise her discretion to ensure collection of current corporate income tax and source deduction arrears by using an existing tax credit. In Forbes' view, the Minister's decision does not provide a clear and supportable justification to deny its re-appropriation request given what Forbes regards as a large sum of money under consideration. Forbes asserts that the Minister's decision-making, when read in the context of its financial situation, constitutes a punishment for the perceived failure to meet the Minister's unclear expectations.

[25] The Respondent defends the Minister's decision as being reasonable because the three factors Forbes advanced for re-appropriation of the SBCs were incorrect. First, Forbes' directors were not new to the corporate structure as they had been directors from the time of its incorporation. Second, Forbes' directors took no steps to corroborate their mistaken belief that a corporation does not have to file tax returns if it makes no income. And third, the payroll debts predate the garnishment, which resulted from Forbes' own conduct, and nothing indicates that Forbes is at financial risk because of the SBCs not being re-appropriated.

[26] The ability of a corporate taxpayer to continue as a going concern, if raised in a request for re-apportionment under subsection 221.1(2) of the *Act*, is a factor that should be weighed by the Minister when assessing the re-apportionment of SBCs. This was the case in *Pomeroy's Masonry*, where the Court stated:

> [27] The Applicant's written submissions in support of its re-appropriation requests explained that the Applicant is a small business employing five individuals and that, if CRA did not agree to allow the re-appropriation of the statute-barred credits to the company's HST liability, Mr. Pomeroy would not be able to pay CRA and would face the possibility of declaring bankruptcy. The submissions stated that Mr. Pomeroy had liens put on his current jobs and was struggling to keep his business going with this balance owing to CRA, making every effort to get his books and records up to date and his corporate tax filings current. As such, the written submissions identified not only hardship that would be sustained by the Applicant or its principal if the re-appropriation request was refused but also the resulting possibility that the HST liability would not be paid.
>
> [28] … my decision does not turn on the manner in which the Minister weighed relevant factors. Rather, it results from the fact that the record demonstrates no consideration or weighing at all of the Applicant's submissions as to the effect upon it, and its ability to pay its HST liability, that would result from its request being refused.

> [29] The failure to consider these factors may be attributable to the Guidelines' emphasis on consideration of whether there were extraordinary circumstances which prevented the filing of returns within three years from the applicable tax year end. However, the Guidelines' section on extraordinary circumstances, and a subsequent section referring to CRA error or delay, are followed by a third, albeit brief, section entitled "Other circumstances". This section states that the CRA may also apply ministerial discretion if a taxpayer's circumstances do not fall within the situations described above and that each case must be reviewed based on its own circumstances. In my view, it is the Minister's failure to consider the other circumstances raised by the Applicant, particularly when viewed through the jurisprudential lens provided by *Cybernius*, which makes the decision unreasonable.

[27] When assessing a request for the re-apportionment of an SBC, the Minister should also have regard to whether denial of the request might possibly result in the Minister's inability to collect outstanding tax arrears from a taxpayer. The retirement of outstanding tax debts is a factor to be considered in the exercise of the Minister's discretion (*Pomeroy's Masonry* at para 25; and *Cybernius* at paras 54-55).

[28] It is clear from the record in this case that Forbes was suffering financial hardship.

[29] Mr. Antunes and Mr. Reis each state in their respective affidavits that the Minister's continued denial of Forbes' request to apply existing tax credits to current tax arrears has caused "significant financial hardship" for Forbes.

[30] The cover letter from Forbes' accountant requesting the second-level review and reconsideration stated that:

> …we note that the Company has been put into a position of duress as a result of CRA's decision dated July 20, 2017. … The

> Company had previously borrowed funds from family and friends to cover the payroll debt owed to CRA (as noted in our original request) and said option is no longer available. CRA's refusal to re-appropriate the statute barred credits after the Company has become fully compliant has effectively jeopardized the ability of the Company to continue as a going concern.

[31] The SBC Form enclosed with the August 2017 reconsideration request shows that Forbes was suffering from the non-appropriation of the SBCs. It stated:

> The statute barred funds that CRA has held has caused the Company and its shareholders significant financial strain, preventing the Company from making its required payroll remittances and as a result incurring significant payroll penalties and interest on its payroll account as well as considerable emotional stress to the shareholders of the Company.
>
> …
>
> In order to facilitate payments the Company had to make significant sacrifices including borrowing funds from family, and friends in order to pay CRA it's [*sic*] penalties and interest when in fact CRA had the funds (via the garnishment) on hand the entire time, but would not transfer them to the outstanding account.

[32] There is no indication that the Minister considered this hardship in her delegate's decision. The completed Recommended Resolution form sent to CRA's headquarters in connection with the second-level review request makes no mention of Forbes' financial hardship (though it does show that *Cybernius* was considered by the CRA employee who completed this form). It is not possible to discern from the record whether this factor was considered or weighed as an "other" circumstance in denying Forbes' re-appropriation request. In my view, this renders the decision unreasonable because it is not apparent or transparent that Forbes' financial hardship was a factor in the decision-making process. The decision under review will therefore be set aside.

[33] Before leaving this issue, mention should be made to Forbes' argument that the Minister refused to consider the law, notably *Cybernius,* by the delegate's statement that the CRA does not take into consideration the results of court cases, and that this represents an extricable question of law which brings the Minister's decision into the realm of correctness review. In Forbes' view, the Minister's decision in this regard is not only unreasonable, but also incorrect, absurd, and contrary to the public interest; and the Minister's conduct borders on reprehensible.

[34] I find this argument to be without merit. While the decision letter stated that CRA does not take into consideration the results of court cases, this does not mean, as Forbes suggests, that the Minister never considers case law. There is nothing before the Court to suggest that the Minister or her delegate do not apply the principles and interpretations of the law arising out of court cases.

C. *Did the Minister fetter her discretion by undue reliance upon the Guide?*

[35] Forbes says the Minister fettered her discretion by relying only upon the Guide to determine if there were extraordinary circumstances explaining the delay in filing the tax returns. According to Forbes, administrative decision-makers may consider administrative guidelines, but they cannot be relied on in a way that limits the discretion conferred by statute on a decision-maker. Forbes further says subsection 221.2(2) of the *Act* and this Court's jurisprudence has the force of law; the Guide does not.

[36] The Respondent maintains that the Minister's discretion was not fettered by the Guide. The Respondent notes that the Guide clearly states that CRA may also apply ministerial discretion if a taxpayer's circumstances do not fall within the situations listed in the Guide.

[37] In my view, the Minister fettered her discretion by the Guide because she did not review or weigh as a factor, the financial hardship raised by Forbes. This clearly constituted an "other" circumstance beyond those examples stated in the Guide. The Minister focused on whether there were "extraordinary circumstances" which prevented the filing of the corporate returns within three years from their tax year-ends.

D. *Is mandamus appropriate in the circumstances?*

[38] Forbes claims an appropriate remedy in this case is an order in the nature of *mandamus* requiring the Minister to set-off and apply the SBCs for 2006 and 2007 to existing corporate income tax or source deduction arrears. Forbes says the appropriate time for calculating arrears interest are the dates upon which the amounts of the notional assessments for 2006 and 2007 were garnished.

[39] The Respondent says administrative tribunals should be allowed another chance to decide the merits of the matter and not have a reviewing court do it for them. In the Respondent's view, there are no unusual or exceptional circumstances requiring the Court to make a mandatory order compelling the Minister to re-appropriate the SBCs to Forbes' existing or future tax liabilities and that Forbes is the author of its own misfortune and did nothing until the amounts of the notional assessments were garnished.

[40] On this issue, I begin by noting that, while Forbes has requested an order in the nature of *mandamus*, it has provided no argument as to why such relief would be "appropriate."

[41] It is well established that the Courts will not issue *mandamus* to compel a tribunal or decision-maker to make a particular decision when no decision has been made or when the decision-making power is discretionary in nature (*Herzig v Canada (Treasury Board)*, 2002 FCA 36 at para 19, 111 ACWS (3d) 944). *Mandamus* is an extraordinary remedy (*Coombs v Canada (National Revenue)*, 2015 FC 869 at para 19, [2016] 1 CTC 80).

[42] An order in the nature of *mandamus* is neither appropriate nor required in the circumstances of this case. I agree with the Respondent that there are no unusual or exceptional circumstances which necessitate the Court to issue a mandatory order requiring the Minister to re-appropriate the SBCs to Forbes' existing or future tax liabilities.

E. *Should costs be awarded; and if so, at what scale?*

[43] In their written submissions, each of the parties said that, if it was successful in this matter, costs should be awarded in their favour. Since the Minister's decision will be set aside, Forbes is entitled to its costs of this application.

[44] Forbes requests an award on a solicitor-client basis under Rule 400(1) of the *Federal Courts Rules*, SOR/93-22 [*Rules*]. In its view, Forbes points to the statement in the decision letter that CRA does not take into consideration the results of court cases, and this suggests that CRA is not subject to legislative and judicial oversight and exemplifies reprehensible conduct

deserving of censure or rebuke in the public interest and must be deterred. In my view, this suggestion is not only without foundation but also is not a reason to award costs on the scale requested by Forbes.

[45] Solicitor-client costs are exceptional and awarded in instances where a losing party has acted maliciously or defended a proceeding without any warrant or justification for the position advanced by such party.

[46] In terms of analogous cases, I note that this case is similar to *Pomeroy's Masonry*, where factors were not considered by the Minister and costs were based on Tariff B of the *Rules*. However, it is also like *Cybernius*, where it was noted that the matter went to the Court because of the applicant's lack of compliance and a fixed amount of costs awarded.

[47] In this case, after consideration of the factors listed in Rule 400(1), costs in the fixed lump sum of $1,000.00 (inclusive of disbursements and taxes, if any) shall be payable forthwith by the Respondent to Forbes.

V. Conclusion

[48] The decision of the Minister's delegate is not reasonable. The matter is returned to another delegate of the Minister for redetermination in accordance with these reasons for judgment. Costs in the fixed lump sum of $1,000.00 (inclusive of disbursements and taxes, if any) shall be payable forthwith by the Respondent to Forbes.

JUDGMENT in T-370-18

THIS COURT'S JUDGMENT is that:

1. the application for judicial review is allowed; the matter is returned for redetermination by a different delegate of the Minister of National Revenue in accordance with the reasons for this judgment; and

2. costs in the fixed lump sum of $1,000.00 (inclusive of disbursements and taxes, if any) shall be paid forthwith by the Respondent to the Applicant.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Neil Mather	FOR THE APPLICANT
Peter Basta	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mather Tax Law Barristers and Solicitors Edmonton, Alberta	FOR THE APPLICANT
Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT