Federal Court  Cour fédérale

Date: 20211217

Docket: T-3-17

Citation: 2021 FC 1440

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 17, 2021

PRESENT: Madam Justice Walker

BETWEEN:

CLAIRE BOREL CHRISTEN

Applicant

and

CANADA REVENUE AGENCY

Respondent

JUDGMENT AND REASONS

[1] The applicant, Ms. Borel Christen, seeks judicial review of a decision dated December 2, 2016 (Decision) of a delegate of the Minister of National Revenue in which he rejected the validity of her disclosure of goods abroad under the Voluntary Disclosures Program (VDP).

[2] On October 20, 2015, the applicant filed a disclosure (Disclosure) under the VDP, a program managed by the Canada Revenue Agency (CRA), to disclose assets that she owned in Switzerland. In the second administrative review of the Disclosure, the Minister determined that the CRA had undertaken an audit of the applicant's foreign assets prior to the date of the Disclosure and that the information disclosed was subject to this audit. The Minister therefore found that the Disclosure was not valid, as it could not be considered voluntary, and issued the Decision.

[3] In the context of a confused judicial history, the respondent agreed that this application for judicial review of the Decision be allowed on the basis of a reasonable apprehension of bias. Thus, there is only one issue left: Should this Court issue (1) an order of *certiorari* and *mandamus* requiring the respondent to accept the Disclosure as voluntary and valid; or (2) a declaration of the validity of the Disclosure. In support of her request for such an outcome, the applicant insists that there can be only one reasonable outcome to this matter and that the respondent's bias makes it no longer fit to act in the matter.

[4] After carefully considering the parties' evidence and arguments, the applicant's application for judicial review is allowed in part, and the Disclosure will be remitted to the VDP officers for a new independent review in accordance with the Court's directions set out below. However, the applicant's request to issue an order of *mandamus* or a declaration by the Court is denied.

I. Facts

[5] The applicant immigrated to Canada in 1974. Although she had held assets in Switzerland since that date, she had never reported those assets to the CRA, nor had she reported the income generated by those assets before her Disclosure.

[6] In 2014, the CRA initiated an audit (Audit) of the applicant's Swiss assets following information obtained by French authorities during a check at the France–Switzerland border on July 18, 2014, while the applicant was travelling in Europe.

[7] In March 2015, the applicant met with her counsel to inquire about her tax obligations in Canada relating to her Swiss assets. In May 2015, the applicant authorized her counsel and his firm to represent her in a voluntary disclosure proceeding. On that same date, the applicant apparently agreed with her counsel that she should travel to Switzerland to try to find the documents that she needed to demonstrate that her Swiss assets did not originate from a source of taxable income in Canada. The applicant and her counsel reportedly met in July 2015 to review the documents collected in Switzerland. At that time, some documents were still missing but were apparently obtained in the following weeks.

[8] The applicant was informed of the Audit on September 25, 2015, through a letter from an auditor. The letter notified the applicant that she was the subject of a CRA audit for the years 2005 to 2014, as she supposedly had failed to report that she held foreign assets. In a telephone call with the applicant's counsel in October 2015, a CRA officer informed her that French customs officials had allegedly found bank statements from a Swiss bank in the applicant's car.

[9] On October 20, 2015, the applicant filed her Disclosure with the VDP disclosing her Swiss assets. The Disclosure covered the 1976 to 2014 taxation years.

[10] The factual framework of the communications between the applicant, the CRA and the Minister is complex. It is therefore important to outline the key events that led to the Decision:

Date	Event
On or around September 22, 2015	A CRA officer attempted to reach the applicant by phone and left her a voice message requesting that she call him back.
September 25, 2015	A CRA auditor sent a letter in French to the applicant notifying her that she was the subject of the Audit for the 2005 to 2014 taxation years, as she allegedly had failed to report that she held foreign assets.
October 6, 2015	Counsel for the applicant, on vacation from mid-September to early October 2015, contacted the CRA officer to clarify the situation.
October 20, 2015	The applicant filed her Disclosure with the VDP disclosing her assets held in Switzerland.
February 8, 2016	Alain Gagnon, the officer assigned to the applicant's file, confirmed receipt of the Disclosure and requested that the applicant provide him with information, documents, and appendices relevant to her Disclosure.
May 6, 2016	Stephanie Henderson, Manager of the CRA's Offshore Compliance Section, sent an email to Carol Cochrane in which she stated that the Disclosure should be denied by the VDP because it was involuntary.
May 13, 2016	Counsel for the applicant provided Mr. Gagnon with the required tax forms and an estimate of unreported foreign income between 1974 and 2005.

Date	Event
May 18, 2016	Mr. Gagnon recommended denying the Disclosure. This report was approved by Alexandre Gauthier-Hamel, the Minister's delegate and first administrative decision-maker.
May 31, 2016	Mr. Gauthier-Hamel denied the Disclosure, considering that it was late and did not meet the criterion of being voluntary (First Decision).
August 28, 2016	The applicant, through a letter addressed to Daniel Martineau, Assistant Director of the VDP, requested a second administrative review of her Disclosure.
August 24, 2016	The VDP acknowledged receipt of the request for a second review and asked the applicant to forward all relevant information not yet submitted to the VDP.
November 17, 2016	Denis Roy, the VDP officer tasked with undertaking the second administrative review, recommended that the Disclosure be denied.
December 2, 2016	The Minister's delegate, Mr. Martineau, issued the Decision refusing to consider the Disclosure to be voluntary and valid.

II. Impugned decision

[11] The Decision under judicial review in the case at hand follows the second review of the Disclosure. Mr. Martineau refused to consider the applicant's Disclosure valid for the following reasons:

> [TRANSLATION]
>
> We have carefully considered the circumstances of your case. According to Information Circular IC00-1R4, Voluntary Disclosures Program, a disclosure must meet four conditions to be valid. Unfortunately, your disclosure is invalid given that the disclosure is not considered voluntary.
>
> Paragraph 51 [of] Information Circular IC00-1R4 states that from the effective date of the disclosure, provided that the disclosure

> meets all four conditions of validity, the taxpayer is protected against penalties and possible prosecution.
>
> However, it was determined that the CRA received your disclosure on October 20, 2015, and that we undertook an audit prior to the disclosure date. In addition, the information you are disclosing is covered by the audit.

III. Judicial history

[12] To better understand the context of the case at hand, a chronology of the key judicial events that took place during this application is provided below:

Date	**Event**
January 3, 2017	The applicant filed her notice of application for judicial review of the Decision with the Court.
March 20, 2017	The respondent filed a motion to consent to the judgment and to remit the Disclosure to another decision-maker based on the following judicial admission: [TRANSLATION] "the decision-maker of the first application was reluctantly involved in the process of reviewing the second application".
April 27, 2017	The respondent's motion was dismissed by Prothonotary Morneau. He found that the respondent did not agree with the two conclusions sought in her application for judicial review. The applicant could not be compelled to drop one of the conclusions in her judicial review, that of a [TRANSLATION] "directed verdict".
November 8, 2017	Justice Roy dismissed the respondent's appeal from Prothonotary Morneau's decision.
January 26, 2018	The respondent filed the affidavit of Mr. Roy, a VDP officer, because the decision-maker, Mr. Martineau, retired in May 2017.
February 28, 2018	The parties conducted cross-examinations on the applicant and Mr. Roy's affidavits.

Date	Event
September 28, 2018	The applicant filed a motion seeking, among other things, a decision on the objections provided by the respondent during the cross-examination of Mr. Roy.
October 20, 2019	Prothonotary Steele dismissed the applicant's motion.
January 19, 2021	The applicant submitted a motion intended to: a) declare that the respondent cannot reconsider its admission that the application for judicial review must be allowed because of a reasonable apprehension of bias; and b) strike all allegations and claims inconsistent with this admission from the respondent's memorandum of fact and law.
March 26, 2021	The respondent filed an amended memorandum striking certain paragraphs.
April 6, 2017	Order from Prothonotary Steele accepting the respondent's amended memorandum and ordering the applicant to file the required notice to withdraw her January 19, 2021 motion in accordance with the agreement between the parties.

[13] On June 14, 2021, the applicant filed an informal motion with the Court to include in her record two letters from the CRA dated May 21, 2021, and June 9, 2021, respectively. The May 21 letter is a third CRA decision denying the Disclosure, which turned out to be another denial. However, in the June 21 letter, the CRA explained that it had set aside the third review and reinstated the December 2, 2016 Decision that is at issue in the case at hand. The June 9, 2021 letter states as follows:

> [TRANSLATION]
>
> We have decided to set aside our decision issued on May 21, 2021, because of a miscommunication regarding the request for the third review of the file.

> This means that, for the time being, the denial decision dated December 2, 2016, is the one that prevails in this case.

[14] The respondent did not object to the applicant's motion being submitted by simple letter and indicated that the letters sent would not change the dispute. On June 15, 2021, Prothonotary Molgat ordered that the letters dated May 21, 2021, and June 9, 2021, be included in the applicant's record and be part of the Court file for the hearing scheduled for June 23, 2021.

IV. Legislative scheme

[15] The *Income Tax Act*, RSC 1985, c 1 (5th Supp) (ITA) provides for the payment of interest on tax payable and penalties for failure to file a return (sections 161 and 162). At the same time and under subsection 220(3.1), the Minister has discretion to reduce a taxpayer's tax burden by waiving some or all the interest and penalties that should have been paid. The VDP, a program created under this provision, is intended to encourage taxpayers to make a disclosure on their own initiative, to correct past omissions in their dealings with the CRA. If the CRA accepts a disclosure as valid, the taxpayer will not be subject to penalties and will not be prosecuted for this disclosure. In addition, the Minister may grant the taxpayer interest relief.

[16] CRA Information Circular IC00-1R4 (Circular) applies in the case at hand and was in effect when the applicant filed her Disclosure. The Circular provides information on the parameters of the VDP and the circumstances in which the Minister analyzes disclosures (*Grewal v Canada (National Revenue)*, 2020 FC 356 at para 6 (*Grewal*)).

[17] In accordance with the Circular, the Minister must review four cumulative conditions to determine whether a disclosure can be considered valid:

> i. the disclosure is voluntary;
>
> ii. the disclosure is complete;
>
> iii. the disclosure involves the application, or potential application, of a penalty; and
>
> iv. the disclosure includes information that is at least one year past due, or less than one year past due where the disclosure is to correct a previously filed return.

[18] The VDP relies on the key principle that a disclosure must be "voluntary". A disclosure is not considered voluntary if the taxpayer was aware of an audit at the time of submitting an application to the CRA (paragraphs 31(i) and 32 of the Circular). With respect to the effective date of a disclosure, paragraphs 51 and 50 of the Circular must be read jointly:

> **The Effective Date of a Disclosure (EDD)**
>
> 50. The EDD is the earlier of:
>
> i. the date the CRA receives a completed and signed form RC199, *Taxpayer Agreement*, or
>
> ii. the date a letter, signed by the taxpayer or the taxpayer's authorized representative and containing similar information (see paragraphs 43 to 45) to form RC199 is received by the CRA.
>
> 51. From this date, provided that the disclosure meets the four validity conditions, the taxpayer is granted protection against penalties and possible persecution, regarding the amounts included in the disclosure.

V. Issue and remedy sought

[19] In her notice of application for judicial review, the applicant asks the Court to

1. set aside the December 2, 2016 Decision issued by Mr. Martineau; and

2. remit the matter to the Assistant Director of the VDP asking him to reopen the file and treat the Disclosure as valid, as it meets the four validity conditions set out in the Circular.

[20] Subsequently, in her memorandum of facts and law filed on August 31, 2020, the applicant added a request that the Court declare the Disclosure valid.

[21] Since the respondent conceded that the Decision could be vitiated by a breach of procedural fairness and that the Disclosure should be remitted to another VDP decision-maker for redetermination, one issue remains in dispute:

> [TRANSLATION]
> Should this Court issue (i) a directed verdict order (according to the applicant) or an order of *certiorari* and *mandamus* (according to the respondent) requiring the respondent, once the matter is returned to it, to accept the Disclosure as voluntary and valid or (ii) a declaration the of the Disclosure's validity?

[22] The applicant's application for judicial review is therefore not limited to returning the matter to another delegate of the Minister at the VDP. Rather, she requests that the Court declare her Disclosure valid.

[23] The law of judicial review gives a reviewing court exceptional power to substitute its finding for that of an administrative decision-maker *(Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206 at para 68 (*Tennant*)). The Court exercises this power indirectly by setting aside the decision under review and ordering the decision-maker to issue a specific finding: the remedy sought by the applicant in her notice of application for judicial review. In these cases, the Court relies on paragraph 18(1)(a) of the *Federal Courts Act*, RSC 1985, c F-7.

This relief in the nature of *certiorari* and *mandamus* (and other measures amounting to indirect substitution) is sometimes called a "directed verdict" in English ("*verdict imposé*" in French). In fact, this expression is inaccurate and belongs to criminal law rather than administrative law (*Tennant* at para 74).

[24] Indirect substitution is possible where the reviewing court finds that there is only one reasonable outcome and that remitting the case to the administrative decision-maker serve no useful purpose (*Tennant* at para 72). However, this form of relief remains an extraordinary remedy under the law of judicial review (*Tennant* at para 79; *Doyle v Canada* (*Attorney General*), 2020 FC 259 at para 39).

[25] In addition, the Supreme Court of Canada confirms that "there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 142 (*Vavilov*), including where the reviewing court concludes that it is obvious, during its judicial review, that only one result is inevitable. The Supreme Court also recognizes that delays, fairness to the parties, and the need to settle the application are factors relevant to the court's assessment of an exceptional application for indirect substitution.

[26] Furthermore, the applicant requests, through her memorandum of fact and law, that this Court substitute its decision for that of the Minister and declare the applicant's Disclosure valid. Again in *Tennant*, the Federal Court of Appeal explained that such a declaration amounts to an

indirect substitution of the Court's decision with that of the administrative decision-maker and that, as in the case of a writ of *mandamus*, this should be possible only where there is only one reasonable outcome (para 75).

VI. Analysis

[27] The applicant's arguments that are central to her application for an exceptional remedy are as follows: (1) recognizing the validity of the Disclosure is the only reasonable outcome to her case; and (2) because of the reasonable apprehension of bias on its part, the respondent is no longer able to act in the case. Therefore, the applicant insists that remitting her Disclosure to another administrative decision-maker within the VDP would cast her into [TRANSLATION] "a judicial whirlwind that will take years."

Is recognizing the validity of the Disclosure the only reasonable outcome in the applicant's case?

[28] The applicant submits that a common sense of fairness must govern the outcome of the case at hand and that, based on all the evidence on the record, there is no other outcome or reasonable alternative to recognizing the validity of her Disclosure. She points out that the Minister would have reached that sole conclusion if she had not fettered her discretion. The applicant asserts that the Minister is trying to persuade the Court that the reasonableness of the Decision must be analyzed independently of the principle of fairness. The applicant submits that such an analysis is contrary to that of the Federal Court of Appeal in *Canada v Guindon*, 2013 FCA 153 at para 58, and that in the case at hand, the VDP used its statutory powers in a manner inconsistent with the teachings of the Court of Appeal *(Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 (*Stemijon*)).

[29] A decision made under subsection 220(3.1) of the ITA and the VDP is a highly discretionary one. I agree with the applicant that the principles of fairness are reflected in each of these decisions. However, the principles of fairness also require that VDP officers treat taxpayers and their voluntary disclosure requests in a consistent and transparent manner in light of the facts and evidence supporting their individual requests. The guidelines in the Circular are not "binding in law", but they are an important starting point for an officer (*Chekosky v Canada (Revenue Agency),* 2019 FC 841 at paras 42 and 43, citing *Stemijon* at para 27).

[30] The significant events uncontested by the parties are as follows:

- 2014: The CRA began the Audit of the applicant's Swiss assets.
- May 2015: The applicant authorized her counsel and his firm to represent her in a voluntary disclosure process.
- Summer/Fall 2015: The applicant then took steps to identify and collect important documents related to her foreign assets. The applicant and her counsel met in July to review the documents collected in Switzerland.
- September 25, 2015: The CRA sent a letter to the applicant notifying her that she was the subject of the Audit for the 2005 to 2014 taxation years, as she allegedly failed to report that she had foreign assets.
- October 20, 2015: The applicant filed her Disclosure with the VDP disclosing her assets held in Switzerland.

[31] Notice of the Audit was therefore issued to and received by the applicant almost one month before she filed her Disclosure.

[32] However, the applicant submits that she made the decision to file a voluntary disclosure under the VDP in May 2015 and that it is from that date onward that the voluntary nature of her Disclosure must be determined by the Minister. In her memorandum of fact and law, the

applicant lists the steps she took in Switzerland and her meetings with her counsel in the summer of 2015, which demonstrate an ongoing intention to disclose her foreign assets. She submits that the Minister cannot review the Disclosure and requirements of the Circular without linking these facts and her May 2015 decision to the principles of fairness central to subsection 220(3.1) of the ITA.

[33] The objective of the VDP is to encourage taxpayers to make voluntary disclosures to correct previous omissions in their dealings with the CRA. The voluntary nature of a disclosure is a critical element of the program strengthened by the Circular (at paragraphs 8, 31–32). This element reflects the principles of fairness underpinning the VDP. If the Minister declares a non-voluntary disclosure to be valid, she may undermine the VDP. Neither Mr. Roy nor the Minister made any errors in concentrating their respective analyses on the voluntary nature of the Disclosure and the conditions set out in the Circular.

[34] In his notes to file (August 24, 2016, to October 24, 2016) and his report dated November 17, 2016, Mr. Roy, the officer responsible for undertaking the second administrative review of the Disclosure, makes a detailed analysis of the applicant's file and the Disclosure, referring to the four conditions for a valid disclosure set out in paragraphs 31 to 42 of the Circular. However, Mr. Roy did not limit his analysis to a strict application of these conditions. Specifically, he carefully considered the issue of the voluntary nature of the Disclosure not only by applying paragraph 32 of the Circular but also by considering the steps taken by the applicant and the events that took place from May to October 2015, as set out in the chronology of events in paragraph 10 of this judgment.

[35] Mr. Roy discussed the voluntary nature of the Disclosure with the applicant's counsel, and his notes to file for that date indicate a respectful discussion. In light of the chronology of the steps taken by the applicant and the discussion with the applicant's counsel, Mr. Roy consulted with his team leader (Mr. Gauthier-Hamel), and they agreed to seek the recommendation of the officers of VDP headquarters (HQ). Mr. Roy prepared a summary of the aspects of the file relevant to the [TRANSLATION] "dilemma" of the voluntary nature of the Disclosure and his conclusion that it could not be considered voluntary. Mr. Gauthier-Hamel sent the summary to HQ by email. Then, Mr. Roy discussed the case with an HQ officer, who informed him that she wished to discuss the case with her colleague or supervisor. Following the internal discussions, the officer informed Mr. Roy that HQ would endorse his position.

[36] Mr. Roy concluded that the letter dated September 25, 2015, notifying the applicant that she was the subject of the Audit, was considered a compulsory measure and that the Disclosure could not be considered to meet the voluntariness criterion. He therefore recommended that the First Decision be upheld, that is, that the Disclosure be deemed involuntary on October 20, 2015. Once Mr. Roy's recommendation was approved by his team leader, Mr. Grenier, the applicant's file was forwarded to the office of the decision-maker, Mr. Martineau.

[37] Mr. Roy's notes and report show that he considered the requirements of the Circular and that he was aware of the importance of analyzing all relevant facts, including the applicant's intentions in her meetings with her counsel in March and May 2015 and the principles of fairness. I do not accept the applicant's arguments that the VDP officers blindly complied with the interpretation of the paragraphs of the Circular.

[38] The applicant submits that Mr. Roy's decision to consult with HQ was of no use, as HQ merely responded that the VDP had to make the decision and comply with the policies. I disagree. Before contacting an HQ officer, Mr. Roy completed his analysis of the file and provisionally found the disclosure not to be voluntary. In my view, his decision to undertake additional consultations further demonstrates the extent of his assessment of the applicant's second application for administrative review.

[39] I find that the VDP did not exercise its powers under subsection 220(3.1) of the ITA in a manner inconsistent with the teachings of the Court of Appeal in *Stemijon*. On the contrary, Mr. Roy and Mr. Martineau's reference to the Circular is not a problem, as the statements within it were considered guidelines and not prescriptive. In support of Mr. Martineau's Decision, there was a comprehensive review of the issue of the Disclosure's validity (*Stemijon* at para 31).

[40] The applicant insists that Mr. Martineau's finding may lead to absurd results by ignoring the common meaning of the term "voluntary" because a disclosure filed immediately after the first contact with the CRA's Audit Branch would be deemed invalid. With respect, this argument ignores the analysis of voluntariness in Mr. Roy's Disclosure and attempts to relay on a case that is based on a substantially different set of facts and chronology. I agree with the respondent that such an outcome, based on a one-minute interval between the taxpayer's and the Audit Branch's communications, would appear to be unfair and unreasonable. It does not follow that the Decision is also unfair and unreasonable.

[41] Mr. Roy agreed that the applicant gave her counsel a clear mandate on May 15, 2015, and that at that time, her intention was to make a voluntary disclosure. The applicant submits that the voluntary nature of her Disclosure was therefore established, and that Mr. Martineau erred in basing his denial on the later dates of the letter dated September 25, 2015, concerning the Audit and the filing of the Disclosure on October 20, 2015.

[42] The applicant's decision to begin to identify the scope of a possible disclosure is not the end of the story. The VDP could not treat it as such either. Intentions can change, as can the scope of the proposed disclosure. In the case at hand, the evidence in the record indicates that the Disclosure was not ready or complete in May 2015. The potential scope of the Disclosure could not be established without further investigation by the applicant and her counsel. Therefore, the VDP officers' analysis of the steps taken by the applicant and her counsel from May to October 2015 and the time gap between her learning of the Audit and the filing of her Disclosure were not wrong. This was a necessary part of a comprehensive analysis of the file, the legislation, the case law and the Circular. I agree with the respondent that there is an important distinction between the date on which information is actually disclosed to the VDP and the date on which the taxpayer makes the decision to look into filing a disclosure.

[43] The applicant also submits that the doctrine of promissory estoppel applies to compel the VDP to treat the Disclosure as valid (*Wong v Canada (National Revenue*) 2007 FC 628 at paras 34–41 (*Wong*). She points out that this doctrine adds to her argument that there is only one reasonable decision in her file. The applicant states that as soon as the CRA receives a disclosure, its officers must determine whether the disclosure meets the voluntariness criterion

and must notify the taxpayer. In the case at hand, the applicant filed the Disclosure on October 20, 2015, and from then until the First Decision was issued on May 31, 2016, the VDP officers acted in a way that that gave her the impression that the voluntariness criterion had already been met. She argues that their actions constitute a tacit promise and that it is inconceivable that the CRA, including Mr. Gagnon, would request financial documents regarding previous years without saying anything about the issue of the validity of the Disclosure.

[44] In *Wong*, the Court confirmed that the principles of the doctrine of promissory estoppel apply in the context of a disclosure made under the VDP (at para 34). The Court then described the conditions for applying these principles (*Wong* at para 35; see also *Grewal* at para 40):

> [35] The requirements of promissory estoppel are (1) a promise that the promisor will conduct himself in a certain way in given circumstances; (2) reliance on that promise; and (3) action on the promise to the promisee's detriment/or promisor's benefit.

[45] I find that the applicant's argument is not persuasive. I acknowledge that the negative First Decision came as a shock to the applicant, but the fact that Mr. Gagnon requested complete information for the years covered by the Disclosure does not suggest a promise by Mr. Gagnon or the VDP to accept her request for disclosure. Under paragraph 35 of the Circular, a taxpayer "must provide full and accurate facts and documentation for all taxation years or reporting periods where there was previously inaccurate, incomplete or unreported information relating to any and all tax accounts with which the taxpayer is associated." Mr. Gagnon's requests sought to complete the file. They did not establish a tacit promise or a breach of procedural fairness.

[46] The applicant submits that Ms. Henderson's email dated May 6, 2016, led the VDP officers to change their course of action and to deny the Disclosure in the first administrative review. This argument is central to the applicant's arguments regarding the procedural fairness of the first review, but the email does not demonstrate a tacit promise by the VDP to accept the Disclosure. Mr. Gagnon's requests for information and documents began before May 6, 2016. The applicant's arguments to the contrary are not persuasive.

[47] Having considered the factual framework in 2015, I am not persuaded by the applicant's arguments. Mr. Roy did not ignore the fairness issue of whether the applicant's intention to file a disclosure enabled her to conclude that her potential Disclosure had to be treated as being voluntary. The Minister's delegate, Mr. Martineau, could reach two reasonable conclusions, having considered the Circular, the Disclosure, and the progression of the relevant events:

1. the Disclosure was involuntary as it was received by the CRA after the applicant received the letter dated September 25, 2015, notifying her that she was the subject of the Audit; or

2. the Disclosure was voluntary on the basis that the applicant's argument that her decision in May 2015 to begin looking into the possibility of a voluntary disclosure of her Swiss assets to the CRA enabled her to stray from the text of the Circular.

[48] I therefore find that there is no single reasonable outcome to this case. The applicant has failed to establish exceptional circumstances that warrant the Court's indirect substitution of its own finding requiring the respondent to recognize the Disclosure as voluntary and valid. The applicant's delay in filing her Disclosure before October 20, 2015, almost one month after receiving the notice of the Audit, raises a substantive issue of the voluntariness of the Disclosure.

Does the reasonable apprehension of bias on the part of the respondent mean that it is no longer in a position to act in the applicant's case?

[49] The respondent conceded in 2017 that Mr. Martineau's Decision could have been vitiated by a breach of procedural fairness. I agree and find that the Decision must be set aside.

[50] On September 8, 2016, Mr. Gauthier-Hamel, the administrative decision-maker for the First Decision, received an email from Mr. Roy. In this email, Mr. Roy outlined the main facts of the applicant's case and referred to his [TRANSLATION] "dilemma" with respect to the finding to be made in the case at hand.

[51] Even more important, on September 14, 2016, Mr. Gauthier-Hamel sent Mr. Roy's email to HQ, with a carbon copy (cc) to Mr. Roy, saying that they needed their opinion about the voluntariness of the Disclosure in the case at hand. Then, in response to a question from HQ, Mr. Gauthier-Hamel sent a second email to HQ confirming that he would not be responsible for approving the second decision, as he was the signatory of the first. However, in his email, he expressed his views on the recommendation that should be made in the file:

> [TRANSLATION]
>
> Since I was the signatory in the first application, Simon Grenier will be responsible for approving the recommendation for Mr. Daniel Martineau, our AD.
>
> As for the decision, Simon, Denis, and Daniel Martineau will meet to discuss it soon.
>
> As far as I know, the recommendation will eventually be a denial because:
>
> In March 2015, according to the rep, the client met with her representative to inquire about her tax obligations related to foreign income and to make the first payment of +-$800.
>
> However, in April 2015, in filling out her T1 2014, she checked "No" in box 266 for the T1135s [*sic*].

> In September, the auditor sent a letter for the T1135s.
>
> In October, she made her VD and subsequently paid $18,000 to the rep.

[52] Mr. Gauthier-Hamel's participation in the CRA's assessment of the second review of the Disclosure was considerable: he intervened in Mr. Roy's decision-making process and, by extension, that of Mr. Martineau. The email sent by Mr. Gauthier-Hamel was not just factual. It expressed his opinion as to the likely outcome of the second review of the Disclosure. Mr. Gauthier-Hamel's involvement in this second review reduces the appearance of impartiality and independence of Mr. Roy, who is a central figure in connection with the Decision, and gives rise to a reasonable apprehension of bias on the part of the respondent in connection with the Decision.

[53] In addition, the process leading to the First Decision is deficient mainly because of the notorious email from Ms. Henderson, Manager of the CRA's Offshore Compliance Section. On May 6, 2016, Ms. Henderson sent an email to the VDP and cc'd Mr. Gagnon, the officer responsible for the first review of the Disclosure. In this email, Ms. Henderson explicitly expressed her opinion on the prospective outcome of the first review of the Disclosure:

> I have noted that a voluntary disclosure was received on October 20, 2015. The GB cases are GB153020735128 and GB1S3020736578 and the file is assigned to Alain Gagnon in Shawinigan. We need to ensure that this VDP is denied as it should not be considered to have been voluntary but rather as a result of audit contact. The auditor on the file is Olivier Finette.

[54] I do not agree with the respondent's argument that the notes to file made by Mr. Gagnon fail to indicate any details of his opinion on the issue of the voluntariness of the Disclosure and

that this demonstrates that he was not influenced by this email. In my view, the very fact that Ms. Henderson's email was sent to Mr. Gagnon raises a reasonable apprehension of bias on the part of the VDP and Mr. Gauthier-Hamel. The email constitutes unwarranted interference in the VDP assessment of the file.

[55] However, the file shows that Mr. Roy, the second reviewing officer, does not appear to have received, read, or been influenced by the email dated May 6, 2016. In particular, Mr. Roy stated in the cross-examination on February 28, 2018, that he had not read Ms. Henderson's email before preparing his recommendation. In addition, Mr. Roy continued to wonder whether he could conclude that the Disclosure should be considered voluntary long after the date of the email. For example, he contacted HQ only in October 2016.

[56] I find that Ms. Henderson's email is indicative of neither bad faith nor bias on the part of the VDP in connection with the Decision contested in this application for judicial review. I also do not agree with the applicant's argument that the VDP and the Minister fettered their discretion as a result of receiving the email.

[57] The question before the Court is whether the existence of two VDP decisions marred by transparency and procedural fairness problems, as well as a third negative decision made and then set aside, calls into question the VDP's ability to conduct a new independent assessment of the Disclosure.

[58] The applicant submits that the respondent and the VDP officers engaged in an unfair and misleading process contrary to the principles of the VDP and subsection 220(3.1) of the ITA as soon as her Disclosure was filed. According to the applicant, Mr. Gagnon's requests to the applicant to provide more documents that set out her tax omissions under the pretext of finalizing his review were unusual in light of the VDP's practices and, in fact, were nothing more than a ploy. She also states that the VDP's adoption of Ms. Henderson's directive in her May 6, 2016 email and the involvement of Mr. Gauthier-Hamel in the second review of the Disclosure are problems that affected the VDP's entire decision-making process. The applicant submits that these errors constitute insurmountable obstacles to any further review of her file by the VDP.

[59] The applicant's arguments with respect to Mr. Gagnon's requests for information during the first review of the Disclosure were made in the context of her concerns about promissory estoppel and the existence of a tacit promise by the VDP to accept the Disclosure. Her arguments also extend to her general belief that the VDP lacks independence and will inevitably reject her Disclosure.

[60] I addressed the issue of Mr. Gagnon's role and the issue of the promissory estoppel in the previous section of this judgment. The requests for information and documents during the first review of the Disclosure were part of the normal VDP process to ensure that the applicant's file was complete in accordance with the conditions set out in the Circular. These requests do not call into question the VDP's independence as a whole.

[61] With respect to Ms. Henderson's email, there is no doubt that it was inappropriate and that it undermined the independence of the VDP in the first review. However, the applicant did not demonstrate that this email undermined the second review of her Disclosure or, more specifically, Mr. Roy's detailed analysis. I cannot take for granted that the VDP officers would be influenced by Ms. Henderson's directive if the file were returned to the VDP.

[62] Similarly, Mr. Gauthier-Hamel's involvement in the second review undermined the procedural fairness of this review, but his error cannot be attributed to all other VDP officers. On the contrary, the file demonstrates that Mr. Roy analyzed the file before he had any contact with other people either inside or outside the VDP. That said, it may be appropriate to find that there was a systemic failure within an organization after a series of errors. In the case at hand, and in light of an inappropriate email from Ms. Henderson and a serious error of judgment by Mr. Gauthier-Hamel, I am not prepared to find that there was such a failure.

[63] I do not accept the applicant's serious allegations that the respondent's counsel chose Mr. Roy as an affiant to conceal facts. The decision to choose Mr. Roy stems from his role as the VDP officer responsible for conducting the second administrative review of the Disclosure. At the risk of repeating myself, the record before the Court demonstrates that Mr. Roy thoroughly analyzed the applicant's facts and arguments. He was an obvious and reasonable choice as an affiant, given the imminent or actual retirement or Mr. Martineau.

[64] The applicant points out that Mr. Roy did not know whether Mr. Martineau had read Ms. Henderson's email during his deliberations leading to the Decision, but the applicant's

concern is insufficient to establish the bad faith of the respondent's counsel in their choice of Mr. Roy. I also note the observation of Prothonotary Steele that the presence of a document in the VDP file does not mean that Mr. Martineau read it or that this document influenced him.

[65] In addition, Prothonotary Steele rejected Mr. Roy's argument of bias in her October 25, 2019 decision, and there is no reason to question this conclusion in the case at hand:

> [TRANSLATION]
> [14] The argument of apprehension of "bias" on the part of Mr. Roy raised by Ms. Borel Christen's counsel at the hearing is not persuasive. Knowing whether Mr. Roy spoke to his superiors before signing his affidavit is therefore irrelevant to the matters at issue.

[66] The applicant raises several additional arguments questioning the VDP's ability to undertake an independent and unbiased review of her file. I will address these arguments briefly. First, she alleges that the VDP, the respondent and its counsel backtracked after Justice Roy's order issued on November 8, 2010, and pursued a litigation strategy that sought to keep the case shrouded in secrecy. The applicant's arguments stem from her firm conviction that all these players are engaged in a deeply flawed and unfair process.

[67] I find that the applicant has not established her generalized allegations of misconduct on the part of each of the participants involved in her case. The prosecutors erred in proposing a resolution of this request in 2017 that did not address the request that the Court issue an order of *certiorari* and *mandamus*. However, the applicant decided to continue her application for a "directed verdict". The respondent and its counsel have never indicated that they agreed with this exceptional application. They did not backtrack after Roy J.'s decision.

[68] Second, the applicant submits that the third decision is further evidence of the VDP's systemic problems. The third administrative review that resulted in a third decision on the eve of the hearing, without notice and without the participation of the applicant, is problematic and again raises the issue of procedural fairness and the effectiveness of the respondent and the VDP's decision-making processes. However, the existence of the third decision does not necessarily mean that it is unreasonable or that it was made in bad faith. The issue of whether the Disclosure was "voluntary" in accordance with the conditions set out in the Circular and the principles of fairness remains to be determined through a fair, comprehensive, and clearly independent process.

[69] Finally, the applicant submits that returning her file to the VDP for a third administrative review will result in the continuation of an endless administrative and judicial whirlwind. In this respect, she highlights the delays since 2017. However, at the hearing for her appeal from Prothonotary Morneau's order, Justice Roy shared his doubts with the applicant as to the likelihood of success of her application for a "directed verdict" or order of *mandamus*:

> [TRANSLATION]
>
> However, when you try to pretend that administrative decisions could be overlooked to make it to a Federal Court judge who would examine the merits of the case, would determine what would be appropriate and make a decision, that is an attempt that I would describe as courageous.
>
> . . .
>
> I fear there will be obstacles in your way, but as I told you, you can try it. In *D'Errico* [*D'Errico v Canada (Attorney General)*, 2014 FCA 95], what the Court of Appeal said is that Justice Stratas, in this case, there have been so many delays . . . The tribunal has disappeared; it no longer exists. There was a board; now it is a pension tribunal. We are going to make the decision, and we are going to reduce the pain that everyone else

> will feel otherwise. I am not at all sure that that is the solution you have here.

[70] Notwithstanding this warning, the applicant chose in 2017 to continue with her application to the Court for an exceptional remedy. The respondent is not responsible for the resulting delays. Both parties have been fully engaged in the pursuit of this application, and the COVID pandemic has contributed significantly to the passage of time.

VII. Conclusion

[71] In light of the foregoing, I find that the applicant has failed to meet the strict requirements for the Court to issue an order of *mandamus* or a declaration of the Disclosure's validity. There is not only one outcome to the issue of the voluntariness and validity of the Disclosure. Although to date, the VDP process has suffered from procedural issues and a lack of discipline, I conclude that the delays since the filing of the Disclosure in October 2015 and this application for judicial review in January 2017 are not solely the result of the inaction of the VDP or the CRA. They are shared by the applicant, particularly since November 2017. In addition, I do not find that returning the case to the VDP for review and resolution in accordance with the guidelines below would lead to an endless merry-go-round of judicial reviews and subsequent reconsiderations (*Vavilov* at para 142). I do not agree with the arguments that it is obvious, in this judicial review of the Decision, that a given outcome is inevitable.

[72] In addition, I do not agree with the applicant's argument that the VDP, as an institution, is unable to reassess her Disclosure independently. However, I acknowledge the applicant's

sincere concerns regarding the VDP process that led to the First Decision and the Decision under review. I am also aware of the delays in this matter.

[73] Therefore, I am allowing this application for judicial review only to remit the Disclosure to another delegate of the Minister at the VDP who was not involved in the applicant's case. The new independent review will be conducted in accordance with the following directions of the Court:

(a) The VDP will deal with the applicant's file urgently and with priority.

(b) The respondent and VDP management will ensure that no officers involved in any way in the three decisions made to date or in the administrative reviews related to the Disclosure will participate in the new review or the resulting decision.

(c) The review by the VDP officers will be more thorough, and the decision will need to outline the decision-maker's analysis of the facts, the Circular, and the underlying principles of the VDP and subsection 220(3.1) of the ITA, as well as the justification and rationale for the finding by the Minister's delegate.

(d) The decision-maker will also provide an explanation of the process and safeguards in place to ensure the independence of the VDP and its review of the Disclosure.

VIII. Costs

[74] The general rule is that the losing party pays the costs of the successful party. I see no reason to depart from this rule in the case at hand. The remittance of the Decision for a third

administrative review was not at issue. The only issue since 2017 is whether the Court should issue an order of *certiorari* and *mandamus* requiring the respondent to accept the Disclosure as voluntary and valid or issue a declaration of the validity of the Disclosure. Under the circumstances, costs are awarded in favour of the respondent in accordance with Column III of Tariff B of the *Federal Courts Rules*.

JUDGMENT

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed in part.

2. The Minister's decision dated December 2, 2016, is set aside, and the applicant's request for disclosure (Disclosure is remitted to the Minister for redetermination in accordance with the directions of the Court set out in paragraph 73 of the attached Judgment and Reasons.

3. The applicant's application to the Court to issue (a) an order of *certiorari* and *mandamus* requiring the respondent to accept the Disclosure as voluntary and valid; or (b) a declaration of the validity of the Disclosure, is dismissed.

4. Costs are awarded to the respondent and calculated according to Column III of Tariff B of the *Federal Courts Rules*.

"Elizabeth Walker"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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