Federal Court  Cour fédérale

**Date: 20231228**

**Docket: 23-T-122**

**Citation: 2023 FC 1755**

[ENGLISH TRANSLATION]

**Montréal, Quebec, December 28, 2023**

**PRESENT: The Honourable Mr. Justice Gascon**

**BETWEEN:**

**CLINIQUE SHERBROOKE INC.**

**Applicant**

**and**

**HIS MAJESTY THE KING**

**Respondent**

# ORDER AND REASONS

## I. Introduction

[1] The applicant, Clinique Sherbrooke Inc. [Sherbrooke], filed a motion in writing pursuant to section 369 of the *Federal Courts Rules*, SOR/98-106 [Rules], seeking an order of the Court granting an extension of time pursuant to subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7 [Act] to file an application for judicial review of a Canada Revenue Agency [CRA] decision rendered on March 31, 2022, almost 21 months ago [Decision]. In the Decision, the

CRA refused to reassess Sherbrooke for the 2016 tax year following the issuance of an arbitrary assessment in 2018, because the legal deadline for filing its tax return had expired.

[2] The respondent, His Majesty the King, represented by the Attorney General of Canada [AGC], opposes Sherbrooke's motion for an extension.

[3] For the reasons that follow, and having considered Sherbrooke's motion record and the AGC's response record, Sherbrooke's motion is denied.

## II. Background

[4] Sherbrooke is a corporation offering dental care, whose senior non-board member officer is Pascal Terjanian.

[5] In July 2018, the CRA issued an arbitrary notice of assessment to Sherbrooke for the 2016 tax year.

[6] Sherbrooke submits that, on or about September 12, 2018, it mailed the CRA a paper copy of its tax return for the 2016 taxation year. However, no evidence of the submission or mailing of this paper version appears in the Court file.

[7] On July 28, 2021, the CRA received Sherbrooke's 2016 tax return. On or about April 6, 2022, Sherbrooke received a letter from the CRA dated March 31, 2022, informing it that its 2016 tax return was filed out of time, that the CRA would therefore be unable to reassess it for that tax year, and that the CRA refuses to process its return. This is the Decision that Sherbrooke wishes to challenge in its application for judicial review.

[8] Following the Decision, Mr. Terjanian tried unsuccessfully to contact the CRA to obtain more information and convince the CRA to change its position. When Sherbrooke received no response from the CRA, the company's new accountant suggested resubmitting the 2016 tax return with the word "amended" added, since, according to the accountant, the CRA must process amended tax returns within 10 years.

[9] In April 2023, on the advice of its accountant, Sherbrooke decided to resubmit its 2016 tax return to the CRA.

[10] Around August 8, 2023, Sherbrooke received a requirement to pay from the CRA.

[11] On November 23, 2023, more than a month after Mr. Terjanian's return from vacation, Sherbrooke filed this motion for extension of time with the Court.

[12] I pause for a moment to add that the receipt of Sherbrooke's tax return for the 2016 taxation year and its subsequent processing by the CRA are already the subject of a related mandamus application in Court File No. T-2287-23.

[13] There is no doubt that Sherbrooke failed to file its application for judicial review of the CRA's Decision on time. The starting point for filing such an application is 30 days from the first communication of the Decision informing Sherbrooke of the CRA's refusal to process the 2016 tax return, which the CRA states it received in July 2021. However, it appears from the file that Sherbrooke actually received and was informed of the Decision at the beginning of April 2022, more than 20 months ago.

[14] It therefore remains to be determined whether, in the circumstances, the extension of time requested by Sherbrooke should be granted.

## III. Analysis

[15] To be successful, Sherbrooke must meet the four well-established criteria set out by the Federal Court of Appeal for granting an extension of time (*Thompson v Canada (Attorney General)*, 2018 FCA 212 at para 5 [*Thompson*]; *Alberta v Canada*, 2018 FCA 83 at para 44 [*Alberta*]; *Canada (Attorney General) v Larkman*, 2012 FCA 204 at para 61 [*Larkman*]; *Canada (Attorney General) v Hennelly*, 244 NR 399, 1999 CanLII 8190 (FCA) at para 3 [*Hennelly*]).

[16] These four criteria are: (i) did Sherbrooke have a continuing intention to pursue its application for judicial review? (ii) is there some merit to its application? (iii) is there any prejudice to the AGC or the CRA as a result of the delay? and (iv) is there a reasonable explanation for the delay? The burden is on Sherbrooke to prove each of these elements (*Virdi v Canada (Minister of National Revenue)*, 2006 FCA 38 at para 2). However, the criteria are not conjunctive: a motion for an extension of time may be granted even if not all the criteria are met (*Alberta* at para 45; *Larkman* at para 62).

[17] That said, the power to grant an extension of time remains discretionary, and the four criteria established by the case law, while framing its exercise, do not have the effect of restricting it. Ultimately, the overriding consideration in the exercise of the Court's discretion is "the interests of justice" (*Larkman* at paras 62, 85). The Court must therefore examine each of the criteria with some flexibility to ensure that justice is done and decide whether it would be in the interests of justice to grant the extension of time (*Alberta* at para 45; *Thompson* at para 6; *Larkman* at para 62; *MacDonald v Canada (Attorney General)*, 2017 FC 2 at para 11).

[18] Having considered the written submissions of the parties, I am not satisfied that this is a situation where I should exercise my discretion in favour of Sherbrooke and where it would be in

the interests of justice to grant an extension of time, as the evidence is wholly insufficient to satisfy the four factors governing the exercise of my discretion. In particular, the evidence does not establish a continuing intention to challenge the CRA's Decision by way of an application for judicial review, a basis for Sherbrooke's application for judicial review, or a reasonable explanation for the lengthy delay in filing its application. In addition, the evidence supports the existence of some prejudice to the CRA, given the long delay since the Decision.

A. *Continuing intention to pursue the application*

[19] An extension of time first requires Sherbrooke to demonstrate a continuing intention to pursue its application for judicial review during the long period of more than 20 months since the prescribed 30-day time limit. Admittedly, through Mr. Terjanian, Sherbrooke has made numerous attempts to convince the CRA to process its 2016 tax return, which it claims to have sent in September 2018. But there is no evidence on file that Sherbrooke intends to seek judicial review of the CRA's March 2022 Decision refusing to process Sherbrooke's tax return for late filing.

[20] I agree with the AGC that Sherbrooke's inquiries with the CRA about the progress of its case or its efforts to find solutions with its accountants to convince the CRA to process its 2016 tax return by means other than judicial review of the Decision cannot, logically, prove a continuing intention to file an application for judicial review within the 30-day time limit (*Laurent v Canada (Attorney General)*, 2023 FC 1439 at para 16).

[21] Although informed of the Decision at the beginning of April 2022, Sherbrooke took no steps to challenge the Decision and the CRA's refusal to process its 2016 tax return by way of an application for judicial review before this Court. The decision to resubmit the return in

April 2023 does not reflect a continuing intention to file an application for judicial review (*1594418 Ontario Inc v Canada (Attorney General)*, 2021 FC 157 at para 46).

B. *Merits of application*

[22] Moreover, whether in its written submissions or in the affidavits of Mr. Terjanian or the company's accountant filed in support of this motion, Sherbrooke remains completely silent on the question of whether its application for judicial review of the Decision has legal merit.

[23] Since the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the analytical framework is now based on the presumption that the standard of reasonableness is applicable whenever a court must decide on the merits of an application for judicial review of an administrative decision such as the CRA Decision. There are two exceptions to this presumption: the standard of correctness applies when prescribed by legislative intent or required by the rule of law (*Vavilov* at para 17). Neither of these exceptions applies in this case.

[24] The standard of reasonableness focuses on the decision made by the administrative decision maker, encompassing both the reasoning process and the result (*Vavilov* at paras 83, 87). When the applicable standard of review is that of reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The reviewing court asks "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility" (*Vavilov* at para 99). The reviewing court must however, refrain from "reweighing and reassessing the evidence considered" by the decision

maker (*Vavilov* at para 125). Rather, the court must adopt an attitude of restraint, intervening only "where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13). It is important to remember that review under the standard of reasonableness still finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers (*Vavilov* at paras 13, 75). For the reviewing court to set aside an administrative decision, it must be satisfied that there are sufficiently serious shortcomings to render the decision unreasonable (*Vavilov* at para 100).

[25] As the AGC rightly points out, Sherbrooke's request for an extension of time does not explain how the CRA's decision is unreasonable.

[26] Sherbrooke does not claim that the CRA was informed prior to the Decision that the tax return had been sent. It simply asserts that it sent its tax return twice, in July 2021 before the Decision and then in April 2023 after the Decision. Moreover, there is nothing in the Court's record to suggest that the CRA had before it clear and convincing evidence that a paper version of the 2016 tax return had been sent.

[27] On the other hand, it is clear that under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA], subsection 152 (4), Sherbrooke's tax return for the 2016 taxation year was clearly untimely when received by the CRA in July 2021.

[28] I conclude, therefore, that Sherbrooke has not presented any compelling reasons or argument demonstrating the unreasonableness of the Decision or any likelihood of success in its potential application for judicial review of the Decision.

C. *Prejudice*

[29] In the absence of evidence to the contrary, the arbitrary assessment issued by the CRA in July 2018 is presumed valid and reflects the amount owed by Sherbrooke for the 2016 taxation year (ITA at subsection 152 (8)).

[30] I accept the AGC's argument that, in the circumstances, the extension of time requested by Sherbrooke would cause prejudice to the CRA since, as the administrative decision maker responsible for applying the ITA, the CRA serves the public interest and has a duty to ensure that the time limits for challenging its administrative decisions are respected so as to bring finality to administrative decisions and ensure their effective implementation without delay.

D. *Reasonable justification for delay*

[31] I now turn to the last criterion established by case law, namely a reasonable explanation justifying the delay. On this issue, once again I can only observe the silence of the evidence put forward by Sherbrooke: I can find no reasonable explanation in Sherbrooke's submissions or affidavits for the long delay of nearly 21 months to file its application for judicial review before the Court.

[32] As the AGC clearly explained in its written submissions, Sherbrooke's argument that its accountant's poor advice was responsible for the delay in taking action does not hold water.

[33] There is also no explanation for the delay of almost a year between Sherbrooke's first consultation with the accountants in April 2022 and the subsequent consultation in March 2023. Similarly, there is no attempt to explain the delay between August and November 2023, following the CRA's second refusal to accept Sherbrooke's resubmission of its 2016 tax return.

Sherbrooke's record is equally silent on why, between September and the filing of its motion for an extension of time on November 23, 2023, Sherbrooke was unable to file its application for judicial review.

[34] The burden was on Sherbrooke to come up with a reasonable explanation for the delay, and for the long period of time that has elapsed since the application for judicial review should have been filed. There is absolutely no explanation, no matter which segment of the nearly 21-month period is being considered.

E. *Assessing the factors and the interests of justice*

[35] In weighing each of the factors set out in *Larkman* and *Hennelly*, and taking into account the circumstances of this case, I give decisive weight to the total absence of justification for the very long delay and the lack of demonstration that Sherbrooke's application has merit. Following my analysis, I can therefore identify no reason that would allow me to extend the time for filing Sherbrooke's application for judicial review.

[36] It has been repeatedly recognized that undertaking judicial review of administrative tribunal decisions within the relatively short timeframes prescribed by the Act reflects the public interest in the finality of administrative decisions (*Canada v Berhad*, 2005 FCA 267 at para 60 [*Berhad*], leave to appeal to SCC refused, 31166 (May 25, 2006); *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41 at para 24). This time limit "is not whimsical" and exists "in the public interest, in order to bring finality to administrative decisions so as to ensure their effective implementation without delay" (*Berhad* at para 60).

[37] I recognize that the interests of justice remain the paramount consideration in granting an extension of time. But the interests of justice do not exist in a vacuum, and do not absolve applicants of the duty to meet their burden of proof. Here, to exercise my discretion in Sherbrooke's favour would require me to ignore all the established criteria for an extension of time, and to turn a blind eye to the lack of evidence to support each of the factors set out in the case law for considering granting such an extension. The rule of law is based on the fundamental principles of certainty and predictability. The exercise of a discretionary power must originate in the law. The exercise of such a power cannot be adequate or judicious, and in the interests of justice, if it ignores the minimum requirements of the applicable law.

## IV. Conclusion

[38] In the circumstances, I conclude that it is not in the interests of justice to grant the requested extension of time.

[39] Furthermore, I am of the opinion that there is no reason to depart from the general principle that the unsuccessful party must bear the costs. I would add that, under section 410 of the Rules, the costs relating to a motion for an extension of time are normally borne by the applicant. In the exercise of my discretion, I therefore award costs to the respondent and set the amount at $500.

**ORDER in 23-T-122**

**THIS COURT ORDERS as follows:**

1. The applicant's motion for an extension of time is denied.

2. Costs of $500 are awarded to the respondent.

"Denis Gascon"
Judge

Certified true translation
Janna Balkwill

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | 23- T-122 |
| **STYLE OF CAUSE:** | CLINIQUE SHERBROOKE INC. v HIS MAJESTY THE KING |

**MOTION IN WRITING CONSIDERED AT MONTRÉAL, QUEBEC, PURSUANT TO SECTION 369 OF THE *FEDERAL COURT RULES***

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| **ORDER AND REASONS:** | GASCON J |
| **DATED:** | DECEMBER 28, 2023 |

**WRITTEN SUBMISSIONS BY:**

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| Julie Tremblay | FOR THE APPLICANT |
| Guillaume Turcotte | FOR THE RESPONDENT |

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