

**Date: 20070706**

**Docket: T-927-06**

**Citation: 2007 FC 723**

**Ottawa, Ontario, July 6, 2007**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**IRENE MCINTOSH**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA and  
THE FAIRNESS COMMITTEE OF  
THE CANADA CUSTOMS AND REVENUE AGENCY**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

**O'KEEFE J.**

[1] This is an application for judicial review of a decision of the Canada Customs and Revenue Agency (the CCRA) dated May 12, 2006, which refused to grant the applicant relief on the basis of financial hardship, from interest and penalty charges assessed for taxation years 2000 to 2004, pursuant to subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, (5th Supp.), c.1 (the Act).

[2] In her notice of application, the applicant seeks:

- (i) an order setting aside the decision dated May 12, 2006, which denied her fairness request;
- (ii) an order directing a new assessment;
- (iii) in the alternative, an order that the Court cancel or waive the penalties and arrears of interest; and
- (iv) an order for costs.

[3] In her memorandum of fact and law, the applicant asks that the interest and penalties be cancelled. In the alternative, the applicant requests that the interest and penalties be recalculated at seventeen percent, and that she be given a reasonable schedule to make payments.

### **Background**

[4] As of July 20, 2006, the applicant owed \$81,871.92 in penalties and interest in respect of the taxation years 2002, 2003 and 2004. The applicant wrote to the Chief of Appeals of the CCRA on March 19, 2005, seeking relief from the interest and penalty charges regarding the taxation years 2001 and 2002, on the basis of special circumstances (family problems). The letter was interpreted as a request under the fairness legislation for a waiver of interest and penalties due to special circumstances. The request was denied by letter dated November 16, 2005, because the applicant had failed to provide evidence in support of her claim that she had experienced family problems during the relevant period.

[5] By letter dated November 30, 2005, the applicant sought review of the decision to deny her fairness request. The applicant indicated that she had both family and financial problems which led to her inability to file her taxes promptly. The applicant explained that she had to care for her mother, who was seriously ill, and that her son had misappropriated a large sum of money in order to pay off gambling debts. Her son was arrested and had allegedly been beaten by the police. In addition, the applicant's husband was in a car accident and was unable to work for a year. The applicant had become depressed, experienced stress, and her income had decreased dramatically.

[6] The CCRA responded by letter dated December 6, 2005, and indicated that additional information regarding the applicant's financial situation was required. The applicant was asked to complete an income and expense statement and return it to the CCRA. The applicant responded to the request by providing the CCRA with an income and expense statement which showed that her expenses were \$6,753 per month, while her income was \$5,900 per month. Information regarding properties owned by the applicant and outstanding loans was also provided to the CCRA. By letter dated February 10, 2006, L. Hayter (Manager, Revenue Collections) found that there was no conclusive evidence of financial hardship and advised the applicant that relief would not be granted in her case.

[7] By letter dated March 14, 2006, the applicant sought review of the decision made by L. Hayter with respect to her fairness request. The applicant's letter elaborated upon the circumstances, both family and financial, which led her to file her taxes late. The applicant appended a number of documents to her letter, including: (1) information relating to her son's altercation with the police;

and (2) an “instalment payment summary” indicating that she had paid \$33,606.65 to the CCRA on September 03, 2004.

### **Administrative Review**

[8] A fairness review officer, L. Webster, reviewed the request and prepared a report which noted that the applicant’s total debt was \$82,559.59 (\$33,307.32 in interest and \$45, 561.37 in penalties). The officer reviewed the CCRA’s decision to deny the relief requested by the applicant and concluded:

Based on the information submitted the request does not meet the criteria of the Fairness Legislation on the grounds of financial hardship. The taxpayer and her spouse own their residence and two rental properties. They also own a business which operates group homes from the rental properties. Although the statement shows no savings or investments, the taxpayer had interest income in 2004 of \$4,785.00. The taxpayer last remitted a payment to this debt in May 2005. The taxpayer has equity in the three properties of \$90,000.00. The taxpayer also has RRSPs of \$20,000.00. This includes two private loans of \$355,000.00 towards which no payments are being made. Full disclosure is not being made and I recommend that the request be denied.

### **Decision on Behalf of Minister by J. Jackson**

[9] J. Jackson, Director of the Toronto West Tax Services Office, reviewed L. Webster’s report and accepted the recommendation to deny fairness relief on behalf of the Minister. He found that there was no conclusive evidence that payment of the debt would cause financial hardship to the applicant. The applicant was advised of the negative decision on May 12, 2006.

[10] On June 2, 2006, the CCRA affirmed its decision dated November 16, 2005, which had denied the applicant's fairness request on the basis of special circumstances (family problems). The applicant's current application for judicial review deals with the CRRA's finding with respect to financial hardship.

[11] On June 2, 2006, the applicant applied for judicial review of the decision of the CCRA, dated May 12, 2006, which denied the applicant's fairness request on the basis of financial hardship. This is the judicial review of the decision to deny the applicant's fairness request on that basis.

### **Issue**

[12] The issue in this appeal is:

Did the CCRA err in not exercising its discretion to grant the applicant relief on the basis of financial hardship, from the penalties and interest charged?

### **Applicant's Submissions**

[13] The applicant submitted that she should have been granted relief from the penalties and interest assessed by the CCRA on the basis of the *Guidelines for the Cancellation and Waiver of Interest and Penalties*, IC-92-2 (the Guidelines), dated March 18, 1992.

[14] Pursuant to paragraph 6(a) of the Guidelines, the cancellation or waiver of interest or penalties may be appropriate if the interest or penalty arose primarily because of the actions of the department, such as processing delays which result in the taxpayer not being informed, within a reasonable time, that an amount was owing. The applicant noted that her income tax returns for taxation years 2000, 2001 and 2002 were filed on September 9, 2004. However, the tax returns for the years 2000 and 2001 were not assessed by the CCRA until January 17, 2005, and the tax return for the year 2002 was not assessed by the CCRA until March 10, 2005.

[15] Pursuant to paragraph 6(b) of the Guidelines, penalties and interest may be waived or cancelled where material available to the public contained errors which led taxpayers to file returns or make payments based on incorrect information. The same is true for errors in processing (see paragraph 6(d) of the Guidelines). The applicant submitted that the CCRA misallocated the funds she provided in September 2004 by crediting the wrong taxation year, which resulted in further interest and penalties being assessed. The applicant's accountant advised the CCRA of the error in processing the applicant's income tax returns on March 19, 2005, and the funds were transferred by the CCRA on June 22, 2005. The applicant was not advised of this transfer until November 2005.

[16] In addition, the applicant noted that her accountant had delivered a cheque for \$33,795.78 to the CCRA in order to complete payment for taxation years 2003 and 2004. However, it was submitted that the CCRA misallocated funds, which caused the accrual of penalties and interest on an inaccurate amount.

[17] The applicant noted that interest and penalties were calculated at a rate of 50% for taxation year 2001 and 42% for taxation year 2002. It was noted that in response to the applicant's fairness request, the CCRA officer indicated that if a tax return was not filed by the due date, she would be liable for a late-filing penalty of 5% of the tax owed, plus a further penalty of 1% per month that the return was outstanding up, to a maximum of 12%.

[18] The applicant noted the respondent's submission that she had a history of late tax filing since 1998, and that she had allegedly been sent notices. The applicant submitted that she had no record of having received such notices, and there was no proof of such notices in the respondent's record. It was noted that the applicant voluntarily filed her 2000, 2001 and 2002 taxes simultaneously, followed by her 2003 taxes (which were delayed with explanation). She noted that her 2004 taxes were filed on time.

[19] Pursuant to paragraph 5(d) of the Guidelines, penalties and interest may be waived or cancelled where they result in circumstances beyond a taxpayer's control, such as serious emotional or mental distress. The applicant submitted that her son's psychiatric problems distracted her from her business. It was submitted that the applicant had cared for her ill mother, which reduced the amount of time she could devote to her business. The applicant submitted that her husband's car accident in September 2002 affected her ability to run the business. It was noted that from 2001

until 2003, the applicant had suffered insomnia secondary to anxiety. She was also treated for tension headaches in 2004.

[20] Pursuant to paragraph 10 (c) of the Guidelines, the factors to be considered in determining whether or not the department will cancel or waive penalties or interest include whether or not the taxpayer has exercised a reasonable amount of care and has not been negligent or careless in conducting their affairs under the self-assessment system. Paragraph 10(d) of the Guidelines indicates that whether or not the taxpayer acted quickly to remedy any delay or omission may also be considered. The applicant noted that she had experienced misfortune with accountants, as she had hired three different individuals. She submitted that she had actively attempted to participate in the process of settling the amount of taxes she owed to the CCRA.

### **Respondent's Submissions**

[21] The respondent submitted that in an application for judicial review of the Minister's decision under subsection 220(3.1) of the Act, the Court may only grant relief if it is satisfied that the Minister had:

- (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;



- (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
- (e) acted, or failed to act, by reason of fraud or perjured evidence; or
- (f) acted in any other way that was contrary to law.

[22] The respondent submitted that the standard of review applicable to the Minister's decision was reasonableness (see *Lanno v. Canada (Customs and Revenue Agency)* (2005), 334 N.R. 348, 2005 FCA 153). It was submitted that the Court may set aside the decision under review if it was made in bad faith, if the Minister ignored relevant facts, took irrelevant facts into consideration, or if the decision was contrary to law (see *Barron v. Canada (Minister of National Revenue)*, [1997] 2 C.T.C. 198, (1997) 209 N.R. 392 (F.C.A.)). The respondent noted that the Guidelines which set out the factors to be considered in exercising the discretion to waive penalties and interest, included:

- (a) extraordinary circumstances beyond the taxpayer's control that prevented the taxpayer from complying with the Act. These include a serious illness or accident and serious emotional distress (such as death in the immediate family);
- (b) whether the penalties and interest were incurred primarily because of the actions of the department; and
- (c) the taxpayer's inability to pay the amounts owing.

[23] The respondent submitted that in her application for judicial review, the applicant had failed to provide any explanation for why the Minister's decision was unreasonable. It was noted that the applicant did not provide any financial information in support of her request for an administrative review of the decision to deny her fairness request. The respondent submitted that the Minister had based his decision upon the information provided. Further, it was submitted that the Minister had observed the principles of fairness and had not erred in law in making the decision. The respondent submitted that the decision was reasonable and should not be interfered with.

### **Analysis and Decision**

#### **Standard of Review**

[24] The standard of review applicable to the Minister's decision regarding whether to provide discretionary relief under the fairness provisions of the Act is that of reasonableness (see *Lanno* above).

#### [25] **Issue**

Did the CCRA err in not exercising its discretion to grant the applicant relief on the basis of financial hardship, from the penalties and interest charged?

Pursuant to section 7 of the Guidelines (IC-92-2), the Minister may grant a taxpayer relief from penalties and interest where there is an inability to pay the amounts owing. The applicant requested that she be granted relief on the basis of financial hardship from the penalties and interest

assessed by the CCRA. The evidence of financial hardship provided to the CCRA by the applicant included statements that:

- her son had forged her signature and misappropriated about \$120,000 in order to cover gambling losses;
- she had paid legal fees in order to pursue a case against the police officers who had allegedly beaten her son;
- her husband was injured in a car accident, and was unable to work from September 18, 2002, until March 17, 2002;
- she had obtained a loan in 2004 in order to pay accounting fees and income tax, however an error by the CCRA credited the 2000 tax year and transferred the balance to the 2004 account, causing additional interest to be applied to the account than would have been charged if it had been applied to the correct year, being 2001;
- she had obtained loans in 2004 and 2005 in order to pay all income tax returns for 2000 to 2004, and the outstanding balance of \$80,000 represented penalties and interest;
- due to her focus upon family problems, the applicant's business income had declined by 90%; and
- there was an outstanding liability of \$690,000 against her house and its fair market value was only \$550,000.

[26] The applicant provided documentary evidence which included records of her son's altercation with the police, and an instalment payment summary indicating that the applicant made a payment in September 2004 that was applied toward the 2004 taxation year. The applicant also

submitted information about the value of her business and residential properties and an income and expense statement.

[27] The process followed in the administrative review consisted of a fairness officer reviewing the material provided by the applicant and then preparing a report containing a recommendation for the Minister's representative. Officer L. Webster considered the applicant's request for the cancellation of interest on the basis of financial hardship. The officer noted that both the applicant and her husband were self-employed, that they owned properties valued at \$1,050,000, and had mortgages, lines of credit and loans totalling \$960,000. It was noted that the applicant had equity of \$90,000 remaining in the properties. The officer also noted that the applicant had interest income of \$4,785 in 2004.

[28] In addition, the officer noted that the applicant had private loans outstanding. The applicant had \$20,000 in RRPS and a 1992 vehicle. The officer noted that two errors by the CCRA which resulted in the applicant's payments being attributed to the wrong taxation years had been corrected and interest adjustments had been made at the time of transfer. Finally, the officer noted that the applicant had a history of filing her taxes late, and that her fairness request on the basis of special circumstances had been denied. The officer concluded that the applicant did not meet the criteria of the fairness legislation on the grounds of financial hardship, and her request was denied.

[29] This recommendation was adopted on behalf of the Minister by Jack Johnson, Director, Toronto West Tax Services Office, who found that there was no conclusive evidence that paying the

debt would cause financial hardship to the applicant. In my opinion, the fairness officer's review of the applicant's request appears to be reasonable and the Minister's adoption of the recommendation to deny the fairness request also appears to be reasonable. I would agree that the evidence provided by the applicant did not warrant granting the fairness request on the basis of financial hardship.

[30] I would note that it was proper for the Minister to treat the applicant's request as one under the fairness provisions, as the request concerned the waiving of interest and penalties.

[31] The application for judicial review is therefore dismissed.

**JUDGMENT**

[32] **IT IS ORDERED that** the application for judicial review is dismissed.

“John A. O’Keefe”

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Judge

**ANNEX****Relevant Statutory Provisions**

The relevant statutory provisions are set out in this section.

The *Income Tax Act*, R.S.C. 1985, c.1 5th Supp., as amended:

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| <p>220(3.1) The Minister may at any time waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by a taxpayer or partnership and, notwithstanding subsections 152(4) to 152(5), such assessment of the interest and penalties payable by the taxpayer or partnership shall be made as is necessary to take into account the cancellation of the penalty or interest.</p> | <p>220(3.1) Le ministre peut, à tout moment, renoncer à tout ou partie de quelque pénalité ou intérêt payable par ailleurs par un contribuable ou une société de personnes en application de la présente loi, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.</p> |
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The *Federal Courts Act*, R.S.C. 1985, c. F-7.:

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| <p>18.1 . . .</p> <p>(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal</p> <p>(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;</p> <p>(b) failed to observe a principle of natural justice, procedural</p> | <p>18.1 . . .</p> <p>(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas:</p> <p>a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;</p> <p>b) n'a pas observé un principe de justice naturelle ou d'équité</p> |
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| fairness or other procedure that it was required by law to observe;   | procédurale ou toute autre procédure qu'il était légalement tenu de respecter;   |
| (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;  | c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;   |
| (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it; | d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose; |
| (e) acted, or failed to act, by reason of fraud or perjured evidence; or  | e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;   |
| (f) acted in any other way that was contrary to law.  | f) a agi de toute autre façon contraire à la loi.  |

The *GUIDELINES FOR THE CANCELLATION AND WAIVER OF INTEREST AND PENALTIES* (IC-92-2), March 18, 1992.:

**Guidelines and examples of circumstances where cancelling or waiving interest or penalties may be warranted**

5. Penalties and interest may be waived or cancelled in whole or in part where they result in circumstances beyond a taxpayer's or employer's control. For example, one of the following extraordinary circumstances may have prevented a taxpayer, a taxpayer's agent, the executor of an estate, or an employer from making a payment when due, or otherwise complying with the Income Tax Act:

...

(d) serious emotional or mental distress such as, death in the immediate family



6. Cancelling or waiving interest or penalties may also be appropriate if the interest or penalty arose primarily because of actions of the Department, such as:

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

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

(c) a taxpayer or employer receives incorrect advice such as in the case where the Department wrongly advises a taxpayer that no instalment payments will be required for the current year;

(d) errors in processing; or

(e) delays in providing information such as the case where the taxpayer could not make the appropriate instalment or arrears payments because the necessary information was not available.

7. It may be appropriate, in circumstances where there is an inability to pay amounts owing, to consider waiving or cancelling interest in all or in part to facilitate collection.

For example,

(a) When collection has been suspended due to an inability to pay.

(b) When a taxpayer is unable to conclude a reasonable payment arrangement because the interest charges absorb a significant portion of the payments. In such a case, consideration may be given to waiving interest in all or in part for the period from when payments commence until the amounts owing are paid provided the agreed payments are made on time.

10. The following factors will be considered when determining whether or not the Department will cancel or waive interest or penalties:

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

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

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

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

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

**DOCKET:** T-927-06

**STYLE OF CAUSE:** IRENE MCINTOSH

- and -

ATTORNEY GENERAL OF CANADA and  
THE FIARNESS COMMITTEE OF THE  
CANADA CUSTOMS AND REVENUE AGENCY

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** June 13, 2007

**REASONS FOR JUDGMENT  
AND JUDGMENT OF:** O'KEEFE J.

**DATED:** July 6, 2007

**APPEARANCES:**

Irene McIntosh  
Self-Represented

FOR THE APPLICANT

Maria Vujnovic

FOR THE RESPONDENTS

**SOLICITORS OF RECORD:**

Irene McIntosh  
Brampton, Ontario

FOR THE APPLICANT

John H. Sims, Q.C.  
Deputy Attorney General of Canada

FOR THE RESPONDENTS