

Date: 20071018

Docket: T-2203-06

Citation: 2007 FC 1072

Ottawa, Ontario, October 18, 2007

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

RICHARD G. MCLEAN

Applicant

and

CANADA REVENUE AGENCY

Respondent

TRANSCRIPT OF REASONS

Let the attached edited version of the transcript of my Reasons for Order delivered orally from the bench at Calgary, Alberta, on September 5, 2007, be filed to comply with section 51 of the *Federal Courts Act*.

“ R. L. Barnes ”

Judge

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FEDERAL COURT

Court Number T-2203-06

BETWEEN:

RICHARD G. McLEAN

Applicant

- and -

CANADA REVENUE AGENCY

Respondent

EXCERPT (RULING)

September 5, 2007

Held at the Federal Court of Canada
Calgary, Alberta

Volume 1

TAKEN BEFORE:

The Honourable Mr. Justice Barnes

APPEARANCES

TAKEN BEFORE:

The Honourable Mr. Justice Barnes

R. G. McLean

NO COUNSEL

G. C. Laschuk, Esq.

Appeared for the Respondent

Jennifer MacGillivray

Court Registrar

Julie Snijder, CSR(A)

Court Reporter

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01 (EXCERPT BEGINS)

02 THE COURT: These are my reasons for a
03 decision on this application. This is an
04 application for judicial review brought by
05 Richard McLean from a decision by the Canada Revenue
06 Agency which denied his claim to relief from
07 arrears, interest, and late-filing penalties in
08 connection with his 2002 and 2003 income tax
09 returns.

10 Mr. McLean had sought relief
11 under Section 220 of the Income Tax Act, which
12 provides broad discretionary authority in the
13 Minister and her delegates to waive or cancel all or
14 any portion of any penalty or interest otherwise
15 payable by a taxpayer.

16 That authority is further
17 supplemented by departmental guidelines which,
18 broadly speaking, provide for relief where
19 extraordinary circumstances beyond a taxpayer's
20 control may have prevented payment or other
21 compliance with statutory requirements.

22 These would include
23 disasters, civil disturbances, serious illness or
24 accident or serious emotional distress such as that
25 arising from the death of a family member.
26 Departmental conduct may be considered but has no

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01 application here. Finally, an inability to pay
02 amounts owing may be considered to facilitate
03 collection of tax arrears.

04 Mr. McLean candidly
05 acknowledges that his tax return for 2002 was filed
06 almost three years late and that he owed tax arrears
07 in that year of \$8,943.89. His claim for
08 discretionary relief related to interest and
09 penalties amounting to \$7,788.16.

10 He also acknowledges that his
11 2003 tax return was filed more than two years late
12 and that he owed tax arrears of \$4,987.79. His
13 claim for relief from penalties and interest for
14 that year amounted to \$3,880.35.

15 Mr. McLean's request for
16 relief was set out in his letter of August 9th,
17 2006, to the assistant director of Individual
18 Returns and Compliance Division of Revenue Canada
19 Rick LaPage.

20 The circumstances relied upon
21 by Mr. McLean were stated as follows: (1) The
22 physical incapacity and disability followed by knee
23 surgery in 2002 and rehabilitation into 2003.
24 (2) The loss of employment followed by a failed
25 business partnership. (3) A family lawsuit in
26 Ontario, which was resolved in 2002.

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01 Because of the financial
02 difficulties faced by Mr. McLean, his letter
03 indicated that he met his personal obligations by
04 cashing in RRSPs, by borrowing from family members,
05 and by moving into the basement of a friend. He
06 asserted that he was indebted to others in the total
07 amount of \$61,000. In addition, of course, he owed
08 tax arrears for 2002 and 2003.

09 Mr. Gray rendered his
10 fairness decision by letter dated November 16, 2006.
11 He denied relief. That letter did not specifically
12 address all of the hardship issues raised by
13 Mr. McLean; however, it did point out that
14 Mr. McLean had had a long history of late filing,
15 including three years where tax was owing and
16 interest arrears charged.

17 Mr. Gray's letter summed up
18 the negative decision in the following way, and this
19 is a quote (quoted as read):

20 "I have also been advised that
21 Wendy Oryniak contacted you for further
22 information regarding your medical
23 condition. To date the information has
24 not been provided. Although I sympathize
25 with the obstacles you have encountered, I
26 can only consider the available

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01 information, and therefore it is my
02 determination that the CRA exercised its
03 discretion on behalf of the Minister in a
04 fair and reasonable manner. The
05 circumstances outlined by you in support
06 of your request for relief are not
07 sufficient to warrant cancellation of
08 interest or penalties related to your 2002
09 and 2003 income tax returns."

10 The above decision was
11 supported by an internal review and recommendation
12 report authored by one of Mr. Gray's subordinates.
13 That report set out all of Mr. McLean's arguments
14 but recommended that relief be denied.

15 The author of that report
16 referred to Mr. McLean's job loss, his surgery and
17 recovery, his failed business venture, and the time
18 required to sort out the corporate tax situation and
19 the family law dispute and the fact that he had not
20 heard from the department in the intervening years.

21 Her recommendation was as
22 follows (quoted as read):

23 "I recommend that the repeat LFP and
24 arrears interest be upheld for the 2002
25 and 2003 tax years for the following
26 reason: (1) The client has a history of

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01 filing late. He has only filed on time
02 once in 1987. (2) Even though the client
03 has filed late 18 out of the last
04 19 years, he has only been charged arrears
05 interest in five tax years, an LFP in
06 two tax years, and a repeat LFP in
07 three tax years. This is due to
08 substantial deductions for the years. He
09 was not charged arrears interest or an
10 LFP. (3) The client has not provided any
11 documentation to support his claim that
12 his medical condition prevented him from
13 meeting his tax obligations. (4) Although
14 the client has made three monthly payments
15 since August 2006 of \$1,000 each, there is
16 \$22,180.61 balance outstanding. (5) The
17 client has not filed his 2004 or 2005 tax
18 returns."

19 After reviewing that report,
20 Mr. Gray summed up his decision in the following
21 file note, which is also contained in his affidavit,
22 (quoted as read):

23 "Agree. Compliance record is extremely
24 poor. While taxpayer was apparently
25 dealing with medical issues, he has not
26 provided any substantiation as to impact.

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01 Taxpayer relates no steps taken to
02 consider compliance, let alone steps taken
03 to attempt to comply under his
04 circumstances. The taxpayer has not even
05 filed his 2004 and 2005 returns. The
06 taxpayer's circumstances are of his own
07 making, with the possible exception of his
08 medical issue, but he has provided no
09 substantiating information. Such
10 information would have to be independent
11 to receive consideration given his
12 history. Penalties and interest are
13 therefore upheld."

14 The parties agree that the
15 standard of review in this application is that of
16 reasonableness, and that is in accordance with legal
17 authority, including *Lanno v. Canada* 2005 FCA 153, a
18 decision of the Federal Court of Appeal.

19 What that means is that the
20 Minister's decision must be supported by reasons
21 that can stand up to a probing judicial examination.
22 Those reasons need not be compelling, but they must
23 rationally support the conclusion reached.

24 The Court cannot substitute
25 its own view for that of the Minister or his
26 delegates simply because the Court might have

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01 reached a different conclusion on the same facts.
02 By way of example, I must be satisfied that the
03 decisionmaker overlooked important evidence,
04 considered evidence that ought not to have been
05 considered, made material errors of fact, or made a
06 decision that cannot be rationally supported by the
07 reasons given for it.

08 I accept as a correct
09 statement of the law on this issue the following
10 passage from Justice Frederick Gibson's decision in
11 *Young v. Canada* 2006 FC 1164 at paragraph 21. I
12 quote (quoted as read):

13 "The reasonableness or reasonableness
14 simpliciter standard provides that a Court
15 should not interfere with the decision
16 unless it is clearly wrong in the sense of
17 being based on a wrong principle or a
18 misapprehension of the facts. An
19 unreasonable decision is one that in the
20 main is not supported by any reasons that
21 can stand up to a somewhat probing
22 examination. However, a reasonable
23 decision is not necessarily a correct
24 decision, and there can be more than one
25 reasonable decision arising out of the
26 application of a discretionary provision

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01 of law to a particular fact situation."

02 In order to assess the
03 reasonableness of the decision in this proceeding, I
04 am required to examine only the evidence that was
05 before the decisionmaker. This would include
06 Mr. McLean's submissions and also the documentary
07 history of his dealings with the department.

08 The law is equally clear that
09 I cannot consider evidence that was not before the
10 decisionmaker. By way of example, Mr. McLean has
11 included with his affidavit medical evidence and the
12 particulars of his family law litigation that were
13 not shared with the department. These I cannot
14 consider. To the extent that they may support
15 Mr. McLean's claim, they could have been provided to
16 the department along with his request for relief.

17 Indeed, it is somewhat
18 surprising that Mr. McLean provided no medical
19 corroboration to the department because that
20 information was specifically requested of
21 Mr. McLean, and he declined to put it forward at the
22 time.

23 At the same time, I will not
24 consider as evidence Mr. Gray's ex post facto
25 assertion at paragraph 33 of his affidavit that this
26 new medical evidence is unpersuasive and would not

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01 have altered his decision.

02 I have carefully considered
03 Mr. McLean's arguments and the case authorities he
04 has relied upon, but I am not persuaded that
05 Mr. Gray's decision was legally unreasonable.

06 While it is true that
07 Mr. McLean did face some personal difficulties
08 throughout 2002 and 2003, he put forward virtually
09 no evidence forward to the department to explain why
10 he was unable to at least file his tax returns on
11 time or well within the lengthy periods of time that
12 he actually took, leaving aside for the moment the
13 issue of payment of the tax arrears.

14 Notwithstanding his health,
15 family law, and business problems, he continued to
16 deal with those other matters in more or less a
17 timely way, but he chose to put his personal income
18 tax obligations on hold for two and three years
19 respectively. In short, he set certain priorities,
20 and his personal tax obligations were not among
21 them.

22 Although I am sure that
23 Mr. McLean's knee surgery was debilitating and
24 painful, he offered no medical evidence to establish
25 the extent to which this interfered with his ability
26 to work or to prepare a tax return. The fact that

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01 Mr. McLean was forced to move his residence is not a
02 consideration which would warrant relief, and indeed
03 today he did not argue differently.

04 It was also his obligation to
05 make arrangements for the collection of mail, and if
06 he chose not to do so, he can hardly use that as an
07 excuse for not filing his tax returns. From his
08 past dealings with the department, he was well-aware
09 of that obligation, including the consequences of
10 not doing so when tax was payable, and he
11 acknowledged that fact today in argument.

12 In his argument to the Court,
13 Mr. McLean asserted that he was obliged to resolve
14 his business tax filings in priority to his personal
15 tax obligations. That argument was only vaguely
16 alluded to in his initial request for relief to the
17 department, but in any event, it has no legal merit.
18 The taxpayer has an obligation to deal with all of
19 his obligations on a timely basis. A personal tax
20 return must be filed on time even if it may require
21 a later amendment.

22 Mr. McLean argues that
23 Mr. Gray was fixated on his compliance history and
24 that that history was adopted essentially as a
25 prerequisite for the granting of relief.

26 I do not interpret the

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01 decision in the same way. It seems to me when read
02 in the context of all of the supporting
03 documentation that Mr. Gray did not confine the
04 decision to the issue of noncompliance. Under the
05 guidelines he was, of course, entitled to consider
06 the history of noncompliance, and it is clear that
07 he did so.

08 He also noted that the
09 medical excuse had not been documented and that
10 Mr. McLean had no convincing explanation for why he
11 had failed to file tax returns for 2002 and 2003.
12 Mr. Gray also concluded the other matters relied
13 upon by Mr. McLean were largely of his own making.
14 Essentially, Mr. McLean made other choices and set
15 other priorities for his time and resources.

16 It is perhaps also noteworthy
17 that Mr. McLean nowhere stated that he was or
18 remained unable to pay all or any part of his
19 interest arrears or penalties for those tax years.
20 Indeed, it appears that he was cashing RRSPs and
21 borrowing money to pay other creditors through that
22 time.

23 If Mr. McLean was asserting
24 financial inability as an explanation for
25 noncompliance, and that was by no means made clear
26 from the content of his submissions to the

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01 department, Mr. Gray was entitled to receive far
02 more than he received from Mr. McLean. For
03 instance, did Mr. McLean have further savings or
04 RRSPs? Did he own real estate? What kind of car
05 did he drive? Mr. McLean may well have owed money
06 to others, but that fact says nothing about his net
07 worth in the absence of a statement verifying his
08 assets at the time.

09 In fairness to Mr. McLean,
10 before the Court today he did acknowledge that
11 financial hardship, although present at the time,
12 was not the principal basis for his claim to relief.

13 This is not a case like
14 Robertson v. Minister of National Revenue 2003
15 FCT 16. There the department made several material
16 factual errors in support of the decision to deny
17 relief. Here Mr. McLean challenges the weight
18 assigned to the evidence by the department but can
19 point to no obvious errors of fact. It is not the
20 function of the Court to reweigh the evidence on an
21 application such as this for judicial review.

22 Similarly, in Carter-Smith v.
23 Canada 2006 FC 1175, the Court was concerned that
24 the department had ignored important evidence
25 leading to the decision to deny relief. I can see
26 nothing in the record that indicates that Mr. Gray

01 ignored anything of importance to his decision.

02 Although Mr. McLean has
03 supplemented his case before the Court with
04 additional evidence and arguments, he did not fault
05 Mr. Gray for failing to take account of things that
06 were not put before him at the time.

07 At the end of the day,
08 Mr. McLean did not make a compelling case for relief
09 because his failure to comply with his tax
10 obligations was largely because of choices and other
11 priorities that he made -- admittedly made within a
12 difficult set of circumstances.

13 In the result, I am not
14 satisfied that Mr. McLean has met the burden of
15 proof of showing that Mr. Gray's decision was in a
16 legal sense unreasonable, and this application for
17 judicial review is dismissed.

18 The Crown has requested costs
19 under Column 3. Mr. McLean seeks no costs against
20 the Crown. In view of Mr. McLean's concession and
21 the fact that this was not a complicated application
22 factually or legally, I will award costs to the
23 Crown but in the amount of \$500 inclusive of
24 disbursements.

25 (EXCERPT ENDS)

26 * * * * *

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-2203-06

STYLE OF CAUSE: RICHARD G MCLEAN
v.
CANADA REVENUE AGENCY

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: September 4, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** The Honourable Mr. Justice Barnes

DATED: October 18, 2007

APPEARANCES:

Mr. Richard G. Mclean FOR THE APPLICANT

Mr. Graham C. Laschuk FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. Richard G. Mclean FOR THE APPLICANT

JOHN H SIMS, Q.C
Deputy Attorney General of Canada FOR RESPONDENT