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Discretionary Decisions of the Minister: The Distinction Between Reviewing and Deciding

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The jurisdiction of the Tax Court of Canada is confined by statute and, in income tax matters, is largely limited to determining the correctness of tax assessments. Its jurisdiction does not extend to judicially reviewing decisions of the Minister of National Revenue made under a discretionary relief provision of the *Income Tax Act*. Such decisions are subject to review by the Federal Court.[1]

The Minister's discretionary decisions do not always state her interpretation of the relevant statutory provisions, particularly where the Minister has otherwise published statements outlining her interpretation of those provisions. Should a court opine on the correct interpretation of a provision if the Minister's published views on the scope of the provision are well-known, but her decision in a particular case is silent on the point? Answers to this question are mixed.

In a recent case, *Bonnybrook Industrial Park Development Co. Ltd) v. Canada (National Revenue*), 2018 FCA 136, the Federal Court of Appeal considered whether the Minister had properly exercised her discretion in refusing to grant the taxpayer the requested relief. While the Court was unanimous in finding that the Minister's reasons for doing so were inadequate, there were differing conclusions on the appropriate disposition of the appeal.

In reviewing the Minister's decision, Justice Woods (with whom Justice Near agreed) interpreted the relevant provision and determined that the matter should be remitted back to the Minister to be reconsidered in accordance with the Court's interpretation. Justice Stratas, in dissent, declined to engage in a similar analysis and held that, as an independent reviewer, the Court is not the Minister's "adviser, thinker, or ghostwriter" (para 91).

Summary of the Decision

At issue in this appeal was a decision of the Minister denying a taxpayer relief from a filing requirement under the *Income Tax Act*. To be entitled to claim a particular type of refund, the taxpayer was required to file a tax return within three years after the end of the relevant taxation year. Having failed to do so, the taxpayer sought relief by requesting the Minister to

[1] The standard of review is reasonableness insofar as the decision is challenged on the basis of the factors relevant to the exercise of the Minister's discretion (*Canada Revenue Agency v. Telfer*, 2009 FCA 23), and correctness if there is a dispute as to whether the Minister correctly interpreted the provision of the *Income Tax Act* that authorizes the Minister to make the decision sought (*Bozzer v. Canada*, 2011 FCA 186, para 3).

exercise her discretionary authority under the *Income Tax Act* to either waive that requirement or extend the time for filing the return.

The Minister's decision was encapsulated in a one-paragraph explanation provided to the taxpayer in a letter. Speaking for the majority, Justice Woods identified two "obvious errors" with the decision

1. It referred to the wrong provision of the *Income Tax Act*. Instead of referring to subsection 129(1) (the provision pursuant to which the taxpayer was seeking the refund), it referred to subsection 164(1) (a provision which imposed a similar filing requirement but otherwise dealt with a different type of refund).

2. It failed to address one of the two forms of relief sought by the taxpayer. It only explicitly addressed the request for an extension of time.

Both parties urged the Court to treat these errors as minor and requested that they be ignored. Writing for herself and Justice Near, Justice Woods agreed with this approach regarding the first error and observed that in "this computerized age of 'cut and paste,' this error is best explained as an oversight which should be overlooked" (para 29). However, she reached a different conclusion with respect to the second error. Since there was no evidence that the Minister had even considered the request for a waiver, she determined that it would be appropriate to remit this matter back to the Minister for consideration.

Justice Woods proceeded to consider the Minister's decision to deny the taxpayer's request for an extension of time and ultimately found this decision (limited as it was) to be both unreasonable and incorrect. Although the decision itself was no more than a conclusory statement, Justice Woods referred to other published administrative statements of the Minister repeatedly taking the same flawed interpretative position.

In disposing of the appeal, Justice Woods held that the Minister should reconsider the matter having regard to the interpretative principles set out in her reasons. Specifically, she determined that, while filing deadlines are generally intended to be reasonable and provide some finality, the *Income Tax Act* also recognizes that "strict filing requirements may result in unfairness in particular circumstances" and that the Minister has broad authority to provide relief in such circumstances (para 58).

In a strongly-worded dissent, Justice Stratas was critical of the Minister in providing a decision that lacked transparency and justification (paras 92 and 93):

> In conducting [a] review, I am entitled to interpret the reasons given by the Minister seen in light of the record before her. Through a legitimate process of interpretation, I can sometimes understand what the Minister meant when she was silent on certain things.
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> But faced with a silence whose meaning cannot be understood through legitimate interpretation, who am I to grab the Minister's pen and "supplement" her reasons? Why should I, as a neutral judge, be conscripted into the service of the Minister

> and discharge her responsibility to write reasons? Even if I am forced to serve the Minister in that way, who am I to guess what the Minister's reasoning was, fanaticize [sic] about what might have entered the Minister's head or, worse, make my thoughts the Minister's thoughts? And why should I be forced to cooper up the Minister's position, one that, for all I know, might have been prompted by inadequate, faulty or non-existent information and analysis?

Justice Stratas was firmly of the view that the role of a reviewing court is to only review the work of the Minister, and not do the Minister's work. As a result, he would have remitted the matter back to the Minister for full consideration and ordered the Minister "to do the job Parliament assigned to her and her alone: to look at the relevant provisions, interpret them, and decide upon their meaning with an explanation that permits meaningful review" (para 94).

The Minister did not seek leave to appeal the decision to the Supreme Court of Canada.

Implications Going Forward

As it relates to the appropriate remedy where reasons are inadequate, the state of the law following *Bonnybrook* remains in flux. While the Supreme Court has directed reviewing courts to supplement the reasons of administrative decision-makers in certain circumstances (see, in particular, *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, paras 22-27), the limits of such intervention in the context of tax matters will likely continue to be refined.

Under the reasonableness standard, the reviewing court must defer to the administrative decision-maker and confine its review to considering whether the impugned decision is intelligible, transparent, and justified, as well as within the range of possible outcomes given the applicable facts and law in question (*Dunsmuir v. New Brunswick*, 2008 SCC 9, para 62; and, most recently, *Groia v. Law Society of Upper Canada*, 2018 SCC 27, paras 46 and 175).

The need for the decision to satisfy these requirements has generally focused a reasonableness review on the reasons provided by the administrative decision-maker. However, as the majority reasoning in *Bonnybrook* reflects, it is inherently difficult for a reviewing court not to not intervene in cases where questions of statutory interpretation are raised and where the Minister has publicly adopted an interpretation that the court concludes is incorrect as a matter of law.

The Supreme Court of Canada will soon have an opportunity to revisit the nature and scope of judicial review in a trilogy of cases: *Bell Canada, et al. v. Attorney General of Canada* (Court File No. 37896), *National Football League v. Attorney General of Canada* (Court File 37897); and *Minister of Citizenship and Immigration v. Vavilov* (Court File No. 37748), all of which are scheduled for hearing on December 4-6, 2018. The parties in these cases have been expressly invited by the Court to devote a substantial part of their written and oral submissions to the standard of review, and there are also numerous intervenors. Although not in the tax context, it is hoped that the Court will provide much-needed guidance in this area.