Federal Court Cour fédérale

Date: 20250917

Docket: T-2099-24

Citation: 2025 FC 1529

Toronto, Ontario, September 17, 2025

PRESENT: Mr. Justice Brouwer

BETWEEN:

DAVID JACOB ROTFLEISCH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] David Jacob Rotfleisch seeks judicial review of a decision of the Canada Revenue Agency [CRA] denying him relief from interest accrued in respect of the 2000 tax year. For the reasons set out below I dismiss Mr. Rotfleisch's application as he has not established that the decision was unreasonable or procedurally unfair.

I. BACKGROUND

[2] Mr. Rotfleisch is a practicing tax lawyer who was called to the bar in 1983. A Certified Specialist in Taxation Law, Mr. Rotfleisch is also qualified as Chartered Accountant and a Chartered Professional Accountant.

[3] In his tax return for the 2000 tax year Mr. Rotfleisch claimed a $75,000 charitable donation to Ideas Canada Foundation [Ideas]. His claimed donation was part of a complex leveraged donation program in which, in exchange for a pledged donation to Ideas, participants received a 25-year interest-free loan equal to 80% of the amount pledged. This enabled donors to claim charitable donations in amounts five times higher than what they actually transferred to the charity from their own funds (*Kossow v Canada*, 2013 FCA 283 [*Kossow FCA*]). Mr. Rotfleisch's $75,000 charitable donation claim was thus based on an actual outlay of just $15,000 of his own funds; the remainder was made up of the interest-free loan.

[4] On February 27, 2004, the CRA informed Mr. Rotfleisch that it was investigating Ideas, and on May 4, 2024, the CRA notified him that it was disallowing 80% of his claimed charitable donation, or $60,000, which it reconfirmed in a second letter on May 26, 2004. On June 18, 2004, the CRA issued a notice of reassessment informing Mr. Rotfleisch of the amount owing, which it followed up with warning letters on July 25 and November 1, 2004. These letters, too, stated the amount owing.

[5] Mr. Rotfleisch filed a Notice of Objection to this reassessment of his 2000 tax return on November 29, 2004. By letter dated December 15, 2004, the CRA acknowledged Mr. Rotfleisch's objection and advised that it would be held in abeyance pending the Tax Court of Canada's disposition of a test case, *Kossow v The Queen*, 2012 TCC 325 [*Kossow TCC*], an appeal of a similar decision by CRA to disallow 80% of a claimed charitable donation to Ideas by a different taxpayer. According to a CRA-generated Taxpayer Relief Fact Sheet, CRA's December 15, 2004, letter also explicitly stated what would presumably have been known to Mr. Rotfleisch as a very experienced tax lawyer and accountant: interest would continue to accumulate on his unpaid balance but that to avoid this situation, he could settle his balance while maintaining his objection.

[6] The Kossow litigation was lengthy. The Tax Court of Canada issued its decision dismissing Ms. Kossow's appeal on September 14, 2012, and the Federal Court of Appeal dismissed her appeal of the Tax Court decision on December 6, 2013 (*Kossow FCA*). The Supreme Court of Canada dismissed her subsequent application for leave to appeal on May 15, 2014 (*Kathryn Kossow v Her Majesty the Queen*, 2014 CanLII 24496 (SCC)).

[7] Almost six months after the Supreme Court of Canada had dismissed Ms. Kossow's leave application, the CRA issued a Notice of Confirmation to Mr. Rotfleisch, confirming the denial of $60,000 of the $75,000 charitable donation he had initially claimed.

[8] On December 22, 2014, Mr. Rotfleisch filed a request with the Minister for relief of arrears interest that had accumulated since January 1, 2004, pursuant to subsection 220(3.1) of

the *Income Tax Act*, RSC 1985, c 1. His request was grounded on what he claimed was CRA's undue delay in resolving his December 2004 objection, as the CRA had chosen to hold Mr. Rotfleisch's objection in abeyance for a decade. Mr. Rotfleisch asserted that he had not been informed, within a reasonable time, that an amount was owing.

[9] On January 5, 2015, while his relief request was still pending, Mr. Rotfleisch paid the outstanding balance of his arrears interest in relation to the 2000 taxation year, which totalled $34,191.80, thereby halting the further accumulation of arrears interest. Mr. Rotfleisch also filed a notice of appeal to the Tax Court of Canada challenging the denial of a portion of his claimed donation to Ideas Canada Foundation; he eventually discontinued that appeal.

[10] By letter dated November 9, 2023, a Team Leader at the CRA's Appeals Branch acting on authority delegated by the Minister of National Revenue [Minister's Delegate/MD] granted partial relief of arrears interest, for the period from December 6, 2013 (the date on which the Federal Court of Appeal dismissed Ms. Kossow's appeal) until November 7, 2014 (the date on which the CRA issued the Notice of Confirmation to Mr. Rotfleisch) but denied relief for the remaining periods. The MD found that there had been no undue delay caused by the CRA while holding the objection in abeyance pending the outcome of the *Kossow* case up until December 6, 2013. The MD found further that Mr. Rotfleisch had been advised of the amount owing within a reasonable time as he had been informed of this in the June 18, 2004, notice of reassessment and had filed an objection on December 15, 2004, concerning that reassessment, and therefore "knew there was a balance owing during all the time the Kossow case was in court."

[11] The MD found that the fact that Mr. Rotfleisch was waiting for a decision on his objection did not prevent him from paying the balance owing while it was being held in abeyance, and that it was Mr. Rotfleisch's own decision to leave an amount unpaid upon which arrears interest accrued.

[12] Mr. Rotfleisch requested reconsideration of the first MD's decision, which was refused by a second MD on July 22, 2024. This is the decision under review.

A. *Decision under review*

[13] On reconsideration the MD confirmed her colleague's prior determination, denying any further interest arears relief. The MD found that the decade which it had taken for the final resolution of the *Kossow* matter, while lengthy, was not undue. She explained:

> [Y]ou have to take into consideration that your file could not be worked by the Appeals section as they had to wait for the outcome of the related *Kossow* case. TCC processes and timeframe depend on how complex a file is. An appeal that involves multiple taxpayers under donation programs are generally considered more complex, and therefore, need more time to be completed. The review of the TCC steps determined that no undue delay occurred during the course of the *Kossow* file, even if it took several years to be resolved. Indeed, constant and regular actions were made, as well as no unjustified inactive periods of time were observed. …
>
> Other than the period already granted, due to the size, scope, and complexity of these donation programs, as well as considering the issues at hand, and the normal Court process and timelines, I find the timeframe for the litigation process, while may seem long, was reasonable and justified.

[14] The MD again determined that the accumulation of interest arrears was squarely within Mr. Rotfleisch's control:

> [I]t was your initial responsibility to have the balance paid by the original due date, and to clear the outstanding amount in a timely manner to avoid further arrears interest charged. You made the conscious choice to wait for the outcome of the relate *Kossow* file at the TCC before paying your outstanding balance, while previously made aware of the consequences of an unpaid balance in your account, such as arrears interest being charged, through the notice of objection's acknowledgement letter issued on December 15, 2004, and contacts with the Collections Department. The review of your relief request and your file demonstrates that there were no circumstances that would have prevented you from paying the amount owing. Moreover, one cannot expect to gain a financial advantage in excess of the donation amount in the first place, and it was under your control to participate in this program as well as no[t] paying the tax owing by the due date. It was also your decision to appeal the audit reassessment and to wait for the outcome of it before making payments.

[15] The MD concluded: “[T]his review did not allow me to conclude that, other than the period already granted, any other unjustified or excessive delay occurred in the scope of Kossow case and your objection file.” She added: “In addition, you should not expect to profit from a charitable donation, and it was by your own choosing to wait for the outcome of the related TCC case before taking action to reduce the accumulated interest.”

II. ISSUES

[16] Mr. Rotfleisch challenges the decision of the MD on two grounds:

A. The decision was unreasonable;

B. The Minister’s Delegate was biased.

[17] The parties agree that the standard of review applicable to the merits of the MD's administrative decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *Canada Revenue Agency v Telfer*, 2009 FCA 23 at paras 2, 24-25 [*Telfer*]). Reasonableness review entails an assessment of whether the decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law bearing upon it (*Vavilov* at para 85). The hallmarks of reasonableness are justification, transparency and intelligibility (*Vavilov* at para 99).

[18] The parties submit that matters of procedural fairness are subject to correctness review. I agree that the standard is similar to correctness, as noted in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69:

> [54] A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. I agree with Caldwell J.A.'s observation in *Eagle's Nest* (at paragraph 20) that, even though there is awkwardness in the use of the terminology, this reviewing exercise is "best reflected in the correctness standard" even though, strictly speaking, no standard of review is being applied.

III. ANALYSIS

A. *Preliminary issues*

(1) Respondent incorrectly identified

[19] The Respondent submits that Mr. Rotfleisch named the incorrect party as the Respondent in this matter. I agree and note that Mr. Rotfleisch offered no argument to the contrary. Pursuant to Rule 303 of the *Federal Courts Rules*, SOR/98-106 [the Rules], the Attorney General of Canada should be named as the Respondent. The style of cause will therefore be amended.

(2) Inadmissible evidence

[20] The Respondent objects to three documents that were included in the record by Mr. Rotfleisch, arguing that they were not before the decision maker and do not fall within any of the exceptions identified by the Federal Court of Appeal in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22, or *Sharma v Canada (Attorney General)*, 2018 FCA 48.

[21] In oral argument Mr. Rotfleisch conceded that the documents were inadmissible and offered no argument for their consideration and no explanation for their inclusion in the record in the first place.

[22] I agree that the documents are inadmissible, and I will not consider them; however, I note that nothing turns on them in any event.

B. *Was the MD's decision unreasonable?*

[23] Mr. Rotfleisch argues that the MD's reconsideration decision was unreasonable because it (a) "failed to meaningfully consider the Agency's role in delays processing the Applicant's

objection" and constituted a fettering of discretion, and (b) "failed to meaningfully address the Applicant's central arguments", which were that the delays in processing his objection were unreasonable.

[24] Subsection 230(3.1) of the *Act*, under which Mr. Rotfleisch made his request for interest arears relief, provides broad discretion to the MD to "waive or cancel all or any portion of any penalty or interest otherwise payable under this Act."

[25] The CRA has developed guidelines for the evaluation of relief requests through the CRA Information Circular IC07-1R1, "Taxpayer Relief Provisions" (August 18, 2017) [Information Circular]. This Information Circular sets out a non-exhaustive list of factors for consideration by the MD, including: "(a) extraordinary circumstances, (b) actions of the CRA; (c) inability to pay or financial hardship" (Information Circular at para 23). The Information Circular identifies a number of circumstances in which penalties and interest may be waived "mainly because of actions of the CRA," including "undue delays in resolving an objection or an appeal, or in completing an audit" (Information Circular at para 26(f)).

[26] Mr. Rotfleisch claims that the fact that his objection "took nearly a decade to process" constitutes "a prima facie case that the delays were unreasonable" and asserts that the MD unreasonably failed to acknowledge her own role in causing the delay. By denying him relief in the face of this purportedly unreasonable delay he argues that the decision "fails to give effect to a key element" of the Information Circular "which clearly states that an applicant may be entitled

to a waiver or cancellation of interest where there are undue delays in resolving an applicant's objection." He frames this alleged error as a fettering of discretion.

[27] I am not persuaded.

[28] To be sure, the ten-year processing delay was lengthy. Indeed, the MD acknowledged as much. But what matters for the assessment of a waiver request is whether the delay was *undue*, which I take to mean unjustified or unwarranted in the circumstances. The MD found that it was not, and provided a reasoned explanation based on the facts and the law as to how it reached that conclusion. As the MD explained:

> [A]n acknowledgement letter was issued on December 15, 2004, in which it was mentioned that the case would be held in abeyance as the issue concerned multiple taxpayers and the Appeals had to wait for the outcome of the related case, Kossow (2005-1974(IT)G). Consequently, your objection's case was under a non-workable status during the process of Kossow file by the Tax Canada Court (TCC). The Kossow-related case judgement was rendered on September 14, 2012, dismissing and finding that the amounts claimed as donations to Ideas donation program as a result of the taxpayer's participating in the leveraged donation program were not valid gifts.
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> …
>
> Other than the period already granted, due to the size, scope, and complexity of these donation programs, as well as considering the issues at hand, and the normal Court process and timelines, I find the period between the time you filed the notice of objection in November 2004, and the time the Federal Court notice of confirmation was issued on November 7, 2014, may seem a long period of time. However, you have to take into consideration that your file could not be worked by the Appeals section as they had to wait for the outcome of the related Kossow case. TCC processes and timeframe depend on how complex a file is. An appeal that involves multiple taxpayers under donation programs are generally considered more complex, and therefore, need more time to be completed. The review of the TCC steps determined that no undue

> delay occurred during the course of the Kossow file, even if it took several years to be resolved. Indeed, constant and regular actions were made, as well as no unjustified inactive periods of time were observed.

[29] The MD also correctly explained that the processes before the TCC were not within her control, as the TCC is an independent court.

[30] Federal courts have previously rejected "undue delay" arguments in similar circumstances, where the CRA decided to hold objections in abeyance while test cases made their way through appeals (see, for example, *McMillan v Canada* (Attorney General), 2025 FC 408 at para 34; *Belchetz v Canada (National Revenue)*, 2020 FCA 225; *Les Gestions Bussey Inc. v. Canada (Attorney General)*, 2019 FC 17; *Amoroso v Canada (Attorney General)*, 2013 FC 157 at para 69, referring to *Moledina v The Queen*, 2007 TCC 354; *Telfer*). While every case must be decided on its own facts, Mr. Rotfleisch has not provided a valid basis upon which these authorities might be distinguished, nor established that the MD's explanation was unreasonable.

[31] Nor has Mr. Rotfleisch established any failure by the MD to consider the factors set out in the Information Circular to assess whether the delay entitled him to relief from interest arrears. I find, to the contrary, that the MD's reasons clearly demonstrate otherwise.

[32] As noted by Mr. Rotfleisch, the Information Circular also provides that relief may be warranted "if an extraordinary circumstance beyond the control of a taxpayer's representative or actions of the CRA (as described in [the Information Circular] paras 25-26) [has] prevented the

taxpayer from complying with an obligation or requirement under the act" (Information Circular at para 36) and sets out a number of factors to be considered when assessing relief requests:

> a. whether the taxpayer has a history of compliance with tax obligations
>
> b. whether the taxpayer has knowingly allowed a balance to exist on which arrears interest has accrued
>
> c. whether 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
>
> d. whether the taxpayer has acted quickly to remedy any delay or omission
>
> (Information Circular at para 33)

[33] The MD's decision engages directly with most of these factors, none of which favour granting Mr. Rotfleisch relief. The MD reasonably found that "there were no circumstances that would have prevented you from paying the amount owing" and that by delaying making payment until 2015 Mr. Rotfleisch had knowingly allowed a balance to exist on which arrears accrued. None of these facts is contested by Mr. Rotfleisch. Although Mr. Rotfleisch objects to the MD's finding that "one cannot expect to gain a financial advantage in excess of the donation amount in the first place, and it was under your control to participate in this program as well as no[t] paying the tax owing by the due date," the finding relates directly to the third factor identified in paragraph 33 of the Information Circular and is entirely reasonable.

[34] It is true that the MD did not make an explicit finding regarding the first factor identified in paragraph 33 of the Information Circular, regarding the taxpayer's history of compliance with tax obligations; however, a finding on this factor would only have worked against Mr.

Rotfleisch, who has a lengthy documented history of noncompliance in filing his tax returns and remitting payments.

[35] Mr. Rotfleisch also claims that the MD's decision was not responsive to his submissions. According to Mr. Rotfleisch, when the MD replied to his submissions by highlighting that complex tax litigation involves delays, and that the CRA was constrained by the judicial delays for the resolution of *Kossow*, she ignored his arguments which pointed to specific caselaw holding that the CRA's own decisions – like the decision to hold his objection into abeyance– could attract relief when they create delay.

[36] Again, the submission has no merit. The record contains a Tax Payer Relief Sheet prepared by the decision-maker to summarize and analyze the request for relief according to the factors set out in the Information Circular. Tax Payer Relief Sheets can be consulted to understand the reasons for a tax decision (*Maloney v Canada (Attorney General)*, 2024 FC 1474 at para 37). Mr. Rotfleisch's Tax Payer Relief Sheet shows that the caselaw cited by Mr. Rotfleisch was addressed and briefly distinguished by the first MD, and is again mentioned by the second MD. Mr. Rotfleisch has not demonstrated any error in the manner in which this jurisprudence was addressed.

[37] As the Respondent points out, this Court's role is not to substitute its own assessment of the facts for that of the MD; it is to assess whether the decision under review "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47); or as articulated in *Vavilov*, whether it is

"based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law bearing upon it" (*Vavilov* at para 85).

[38] Mr. Rotfleisch has not shown that the MD's assessment of his request for arrears interest relief falls short of this standard. I conclude that the MD's decision to deny Mr. Rotfleisch's relief request was reasonable.

C. *Bias*

[39] Mr. Rotfleisch alleges that the decision gives rise to a reasonable apprehension that the MD was biased against him and that this resulted in a breach of procedural fairness. He bases this allegation entirely on the following two sentences in the MD's decision:

> Moreover, one cannot expect to gain a financial advantage in excess of the donation amount in the first place, and it was under your control to participate in this program as well as no[t] paying the tax owing by the due date.
>
> […]
>
> In addition, you should not expect to profit from a charitable donation, and it was by your own choosing to wait for the outcome of the related TCC case before taking action to reduce the accumulated interest.

[40] Mr. Rotfleisch alleges that the MD attacked his character "by imputing in [sic] improper motive to his decision-making without evidence." He asserts that "the Minister has not established that the Applicant expected to "gain a financial advantage" through his participation in Ideas," and that he was "portrayed by the decision-maker to be greedy, and a person of

improper moral character who the Minister would be justified in punishing by denying the relief he sought."

[41] To succeed on his allegation of a reasonable apprehension of bias, Mr. Rotfleisch must meet the standard established by Grandpré J. in his dissenting opinion in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 394:

> …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."
>
> …The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

[42] I find that Mr. Rotfleisch's bias allegation has no foundation.

[43] The point being made by the MD is not the moral judgment Mr. Rotfleisch makes it out to be, but is, rather, an accurate statement of the applicable law. Indeed, one need look no further than *Kossow FCA* to see the basis and relevance of the MD's impugned statements. After endorsing the definition of a gift as "a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor" (*Maréchaux v The Queen*, 2010 FCA 287 at para 3 [*Maréchaux*], citing *The Queen v Friedberg*, 1991 CanLII 14017 (FCA)), the Federal Court of Appeal confirmed the continuing validity of two propositions from *Maréchaux*:

> (a) a long-term interest-free loan is a significant financial benefit to the recipient; and
>
> (b) a benefit received in return for making a gift will vitiate the gift, whether the benefit comes from the donee or another person.
>
> (*Kossow* at para 25)

[44] The Federal Court of Appeal then explained how these principles applied to Ms. Kossow's participation in Ideas, the leveraged-donation program in which Mr. Rotfleisch also participated:

> [27] It is evident from the facts of this case that several long-term interest-free loans formed part of the leveraged-donation programme entered into by Ms. Kossow. The judge found, and I agree, that
>
> > [t]he Appellant was able to transfer $50,000, $60,000 and $50,000 to Ideas by using only $17,000, $20,400 and $17,000 of her own money in 2000, 2001 and 2002 respectively. She accomplished this without having to pay interest on a commercial loan for the difference (paragraph 69).
>
> [28] The result was that Ms. Kossow received a significant financial benefit as the recipient of a long-term, interest-free loans. That benefit did not come from the donee but from Talisker as a result of her participation in the donation program. The interest-free loan and the donation were two components of an arrangement consisting of a series of interconnected transactions …
>
> [29] As noted by the judge, in *Maréchaux*, the Federal Court of Appeal found that Mr. Maréchaux did not make a gift within the meaning of section 118.1 of the Income Tax Act because he made his payment to the charitable foundation expecting to receive a "significant benefit" in return. The "significant benefit" received in *Maréchaux* was an interest-free loan from a third-party lender (paragraph 9). Ms. Kossow received a 25 year interest-free loan from Talisker and her donations were conditional upon being approved and receiving her interest-free loans. This resulted in the cash and leveraged components of the program and the donations being interconnected. In my view, the relevant facts of this case are

> so similar to the facts of *Maréchaux* that the judge did not err in law in reaching the same conclusion.
>
> (*Kossow FCA* at paras 27-29)

[45] The MD's comments about not gaining a financial advantage in excess of a donation amount or profiting from a charitable donation thus relate directly to the reason Mr. Rotfleisch's charitable donation claim was rejected in the first place, and were relevant to the determination of whether, in all the circumstances, relief from arrears interest was warranted. There is no basis to find that an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that the MD did not decide fairly. Mr. Rotfleisch's bias allegation is dismissed.

D. *Conclusion*

[46] As I have found the decision under review to be reasonable and procedurally fair, I will dismiss the application.

[47] Both parties sought costs in the event of their success. As the Respondent is the successful party, I award costs to the Respondent.

JUDGMENT in T-2099-24

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to name the Attorney General of Canada as the respondent.

2. The application is dismissed.

3. Costs are awarded to the Respondent.

"Andrew J. Brouwer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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Carol MacLellan	FOR THE RESPONDENT

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