Federal Court Cour fédérale

Date: 20250506

Docket: T-2368-23

Citation: 2025 FC 814

Ottawa, Ontario, May 6, 2025

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

CRÉATIONS GUIMEL INC.

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Créations Guimel Inc. [Applicant] applied for relief under the Voluntary Disclosures Program [VDP] established under subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [Act], which provides guidance in the exercise of discretion by the Minister of National Revenue [Minister or Respondent], acting through the Canada Revenue Agency [CRA]. The Minister denied relief to the Applicant [Decision] on the basis that its VDP

application was incomplete, because it failed to produce a T2 return for its 2007 taxation year. The Applicant seeks judicial review of that Decision.

[2] For the following reasons, the application is dismissed. The T2 tax return for the 2007 taxation year was relevant to the Applicant's VDP application, and it failed to produce the information required by the CRA. The Applicant was notified that the failure to produce documents within a specific period could lead to its VDP application being denied, yet it failed to take appropriate measures to produce the documents in due course. The CRA finding that the VDP application was incomplete due to the missing information was reasonable, and the CRA did not breach the Applicant's procedural rights in the circumstances.

II. Background Facts

[3] The facts are not contested until the events following the last exchange of letters between the parties on May 11, 2023.

[4] On June 26, 2019, the Applicant filed a VDP application for taxation years 2008 to 2017. Importantly, as stated by the Applicant in its VDP application, the disclosure mainly concerned the Applicant's sale of cumulative eligible capital (knowhow) to clients in Europe in 2007, the proceeds of which were then invested in a bank in Luxembourg, and then used in 2016 to purchase a rental property in France. The tax consequences of this investment for the taxation years 2008 to 2017 were the subject of the VDP application (Certified Tribunal Record [CTR], Tab A at 7–12).

[5] On August 2, 2019, the CRA requested additional information regarding the VDP application, including a completed Form RC199; a Form RC59 "Authorizing and Cancelling a Representative" duly completed with a level 2 authorization; a Modified T2, "Corporation Income Tax Return," for the tax years ending December 31, 2008 to December 31, 2017; and a Form T1135, "Foreign Income Verification Statement," for the tax years ending December 31, 2008 to December 31, 2017 (Exhibit D of the Affidavit of Me Leibovich, Applicant's Record [AR] at 69).

[6] On or about September 3, 2019, the CRA received from the Applicant a Form RC59 noting Me Charles Leibovich [Me Leibovich] as the Applicant's "authorized representative," duly completed with a level 2 authorization (Exhibit E of the Affidavit of Me Leibovich, AR at 78), as well as the Form T1135 "Foreign Income Verification Statement," for the tax years ending December 31, 2008 to December 31, 2017 (Exhibit F of the Affidavit of Me Leibovich, AR at 83). The Applicant, through its legal representative Me Leibovich, also requested an extension of time to provide the CRA with the modified T2, "Corporation Income Tax Return," for the tax years ending December 31, 2008, to December 31, 2017 (Exhibit E of the Affidavit of Me Leibovich, AR at 74).

[7] There is no information in the record as to whether the CRA granted the extension of time sought by Me Leibovich but, in any event, on September 19, 2019, modified T2 returns for the Applicant for its taxation years 2008 to 2017 were provided to the CRA (Exhibit G of the Affidavit of Me Leibovich, AR at 105).

[8] On December 24, 2019, the CRA requested that the RC199 Form (the VDP application form) be resubmitted and signed by the owner of the Applicant. In that letter, the CRA also informed the Applicant that "[it] require[d] the information within 21 days from the date of this letter or [it would] deny this application and close the file without further contact" (Exhibit I of the Affidavit of Me Leibovich, AR at 111). A copy of that letter was sent to both the Applicant and Me Leibovich.

[9] That RC199 Form signed by the owner of the Applicant was provided to the CRA within the timeline provided, on January 9, 2020 (Exhibit J of the Affidavit of Me Leibovich, AR at 116).

[10] On January 15, 2020, the CRA responded to the January 9, 2020, letter including the RC199 Form and stated that the Applicant's VDP application "contain[ed] the required information and documentation, in accordance with paragraph 43 of Information Circular IC00-1R6, to allow [it] to determine [the Applicant's] eligibility for relief," and confirmed that the Effective Date of Disclosure was January 9, 2020. That letter also stated that "[a]s of the date of this letter, [it] ha[d] not assessed whether [the Applicant's] application [met] all of the five validity conditions to qualify for relief as described in paragraph 28 of [the CRA Information Circular IC00-1R6 - Voluntary Disclosures Program]" (Exhibit K of the Affidavit of Me Leibovich, AR at 148).

[11] On August 22, 2022, the Applicant's VDP application was referred to the Offshore Voluntary Disclosures Program [OVDP] of the CRA for review and evaluation (Affidavit of L. Trites at para 3, Respondent's Record [RR] at 4).

[12] On October 5, 2022, the CRA requested Me Leibovich, the Applicant's authorized representative, to provide documentation regarding the Applicant's alleged sale of cumulative eligible capital property in 2007, including the calculation of the capital gain, support for the adjusted cost base, any amendments to the company's T2 return for 2007, bank statements for each of the foreign accounts, the purchase and sale agreement for the property in France, rental agreements for the property in France for the years 2016–2017, as well as bank statements showing the rental income. The letter also stated that "[s]hould [the CRA] not receive all the requested information by November 7, 2022, [it] may deny the disclosure as it may be considered incomplete." A copy of the letter was also sent to the Applicant's owner and addressed to Mr. Claude Sasportas (Exhibit L of the Affidavit of Me Leibovich, AR at 150–153).

[13] The information sought by the CRA in its letter of October 5, 2022, related in part to information on the 2007 taxation year, which was outside the scope of the Applicant's VDP application relating to taxation years 2008 to 2017.

[14] On November 7, 2022, on the deadline offered by the CRA to provide the information, Me Leibovich responded (on behalf of the Applicant) stating that he only received the CRA's letter on October 31, 2022, because the letter was addressed to his predecessor firm. Me Leibovich provided some of the documentation requested and also mentioned that the Applicant

was in the process of finding the documentation to support the sale of the cumulative eligible property in 2007 and the T2 return (Exhibit M of the Affidavit of Me Leibovich, AR at 157). At no time in this letter Me Leibovich disputed the CRA's request, on the basis that the information relating to the 2007 fiscal year was outside of the Applicant's VDP application. Moreover, while the Applicant was given until November 7, 2022, to provide the T2 return for the 2007 taxation year, Me Leibovich did not seek an extension of time to provide the documentation, even if he was now out of time to do so.

[15] On January 15, 2023, the CRA acknowledged receipt of the Applicant's information sent on November 7, 2022, and requested again the missing information. The letter stated that "should we not receive all the requested information by March 15, 2023, we may deny the disclosure as it may be considered incomplete." A copy of that letter was also sent to the Applicant's owner (Exhibit N of the Affidavit of Me Leibovich, AR at 169).

[16] On March 14, 2023, Me Leibovich requested an additional 30 days to provide the Applicant's information, stating that it was in the process of assembling the information requested and that its accountant was in the middle of personal income tax season and required additional time to provide the CRA with the information requested (Exhibit O of the Affidavit of Me Leibovich, AR at 173).

[17] On March 16, 2023, Laura Trites, a CRA OVDP Compliance Programs Officer, spoke on the telephone with Me Leibovich and accepted to give the 30-day extension that he requested

(Affidavit of L. Trites at para 11, RR at 6; Exhibit I of the Affidavit of L. Trites, RR at 41). That extension of time therefore terminated on or about April 15, 2023.

[18] On April 17, 2023, Ms. Trites spoke on the telephone with Me Leibovich where he told Ms. Trites that "[h]e ha[d] all the documents and [would] fax them th[at] week" to the CRA (Affidavit of L. Trites at para 12, RR at 6; Exhibit I of the Affidavit of L. Trites, RR at 41). Me Leibovich did not do so.

[19] On May 11, 2023, Me Leibovich sent another letter to the CRA, in which he stated that "[o]ur client [wa]s attempting to retrieve the documentation regarding the sale in 2017 [sic] [and that they would] also forward [to the CRA] the 2007 amended tax return under separate cover as it is being modified to reflect the tax treatment of cumulative eligible property in 2007" (Exhibit P of the Affidavit of Me Leibovich, AR at 178). While he was out of time to provide the documents, Me Leibovich did not ask for any additional delay, in this letter, nor afterwards.

[20] Me Leibovich left for vacation in mid-July 2023.

[21] The following facts are contested.

[22] The CRA's evidence is that on August 1, 2023, because it did not receive any information from Me Leibovich and the Applicant was out of time to provide the information, Ms. Trites called Me Leibovich and left a message on his voicemail. Ms. Trites requested that the Applicant provide the amended T2 for 2007 by August 14, 2023, or the VDP application

would be closed as incomplete. Neither Me Leibovich nor anyone else from his office returned the call (Affidavit of L. Trites at paras 14–15, RR at 6–7; Exhibit I of the Affidavit of L. Trites, RR at 41).

[23] Me Leibovich attests that he had access to his messages while on vacation and that if he had received such a call, he would have certainly reacted. Moreover, if the Applicant's owner had been contacted, he would have communicated with Me Leibovich (Affidavit of Me Leibovich at paras 43–45, AR at 30–31; Affidavit of C. Sasportas at para 20, AR at 247). Mr. Sasportas, the Applicant's owner, also attests in his affidavit that he was never called by the CRA auditor on August 1, 2023, and that if he had received a communication, he would have communicated with Me Leibovich (Affidavit of C. Sasportas at para 20, AR at 247).

[24] Me Leibovich attests that upon his return from vacation in mid-August, he reached out to the Applicant's accountant by telephone and discussed the need to obtain an amended T2 return for 2007 that correctly reflected the tax treatment of the disposition of cumulative eligible property for that year (Affidavit of Me Leibovich at paras 37–38, AR at 30).

[25] Me Leibovich also attests that in his view, in the ensuing period, the Applicant understood that the matter was in abeyance with the CRA because no written communication had been received from the CRA with respect to a "final delay." Moreover, had a "final delay" been issued, Me Leibovich would have pushed the Applicant's accountant to provide a corrected amended T2 return or asked another professional to prepare it (Affidavit of Me Leibovich at paras 39, 44, 46, AR at 30–31).

[26] With the evidence above disputed, and since the CRA did not receive the amended T2 to report the capital gain from a sale of eligible capital property of the corporation in 2007, Ms. Trites, acting as the OVDP Compliance Programs Officer of the CRA, reported the VDP application as incomplete on August 30, 2023 (Affidavit of L. Trites at para 15, RR at 7).

[27] On September 13, 2023, VDP Officer Patrick Blais analyzed the VDP application and the OVDP report and concluded that the disclosure was incomplete since the Applicant did not provide the amended T2 for the 2007 tax year (CTR, Tab N at 107–108).

[28] On October 10, 2023, the CRA rendered its Decision denying the Applicant's VDP application, on the basis that the Applicant failed to provide an amended T2 "Corporation Income Tax Return" for the tax year ending on December 31, 2007 (Exhibit A of the Affidavit of Me Leibovich, AR at 34; CTR, Tab O at 110).

[29] The Decision, issued to the Applicant, also notes that "[w]e contacted you on August 1, 2023, informing you that we had not received the […] Amended T2, 'Corporate Income Tax Return,' for the tax year ending December 31, 2007" (Exhibit A of the Affidavit of Me Leibovich, AR at 34; CTR, Tab O at 110).

[30] The VDP report, dated September 9, 2023, on which the Decision was partly made, also noted that "[t]he auditor made a last call on August 1, 2023, telling the taxpayer to provide the amended T2 for 2007 or disclosure w[ould] be considered incomplete" (Exhibit Q of the Affidavit of Me Leibovich, AR at 207; Exhibit B of the Affidavit of L. Trites, RR at 14).

III. Issues and Standard of Review

[31] Is the CRA Decision denying the Applicant's VDP application unreasonable or in breach of procedural fairness?

[32] It is common ground that reasonableness is the standard of review applicable to the exercise of the Minister's discretion under subsection 220(3.1) of the Act (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *Canada Revenue Agency v Telfer*, 2009 FCA 23 at paras 2, 24; *Grewal v Canada (National Revenue)*, 2020 FC 356 at para 26 [*Grewal FC*]; *Livaditis v Canada (Revenue Agency)*, 2010 FC 950 at para 24 [*Livaditis*]). That standard of review applies mainly to the CRA's decision that the Applicant's VDP application was "incomplete." The Applicant essentially argues that the Decision is unreasonable because it cannot be justified in light of the facts and the CRA fundamentally misapprehended or failed to take into account the evidence before it.

[33] The other argument raised by the Applicant is essentially couched in a breach of procedural fairness. Procedural review is a form of analysis that "focuses on the nature of the rights involved and the consequences for affected parties" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 55 [*Canadian Pacific Railway*]). When dealing with matters of procedural fairness, the role of a reviewing court is to determine whether "the applicant knew the case to meet and had a full and fair chance to respond" (*Canadian Pacific Railway* at para 56). The Court thus conducts a "reviewing exercise… 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied"

(*Canadian Pacific Railway* at para 54). Concretely speaking, this requires the Court to "assess the procedures and safeguards" in place to protect the rights of a party appearing before the administrative decision maker and determine whether they have been followed in the Applicant's case. If they have not been followed, it is then incumbent on the Court to intervene. Such intervention is an essential part of safeguarding the fairness of the administrative process and holding administrative decision makers to account (*Vavilov* at para 13).

IV. Analysis

A. *The Voluntary Disclosures Program*

[34] Subsection 220(3.1) of the Act gives the "CRA the ability to administer the income tax system fairly and reasonably by helping taxpayers to resolve issues that arise through no fault of their own, and to allow for a common-sense approach in dealing with taxpayers who, because of personal misfortune or circumstances beyond their control, could not comply with a statutory requirement for income tax purposes" (*Bozzer v Canada (National Revenue)*, 2011 FCA 186 at para 22 [*Bozzer*]). Subsection 220(3.1) provides the following:

220. (3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer … waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer … and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.	**220 (3.1)** Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable […] renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable […]. 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.

[35] Subsection 220(3.1) of the Act gives the Minister discretion to waive or cancel all or any portion of any penalty or interest that would otherwise be payable for the preceding ten years.

[36] The VDP is a discretionary program established under these provisions to promote compliance with taxation laws by encouraging taxpayers to come forward and correct errors or omissions in past filings, and set out the circumstances within which the Minister may exercise their discretion to waive or cancel all or any portion of penalties or interests. If the VDP application is accepted under the applicable conditions, taxpayers will have to pay the taxes, but any penalties, interests or potential prosecution that might have been imposed in relation to the errors may be waived in part or entirely (*Grewal v Canada (Attorney General)*, 2022 FCA 114 at paras 2–3 [*Grewal FCA*]; *Prince v Canada (National Revenue)*, 2020 FCA 32 at paras 4, 8, 17; *Canada (National Revenue) v Sifto Canada Corp*, 2014 FCA 140 at para 5; *Bozzer* at para 59; *4053893 Canada Inc v Canada (National Revenue)*, 2021 FC 218 at para 8; *Christen v Canada (Revenue Agency)*, 2021 FC 1440 at paras 15-16, 33; *Grewal FC* at para 5; *Prince v Canada (National Revenue)*, 2019 FC 348 at para 13; *Williams v Canada (National Revenue)*, 2011 FC 766 at para 3 [*Williams*]; *Livaditis* at para 3).

[37] CRA Information Circular IC00-1R6 - Voluntary Disclosures Program [the "Information Circular"] is a CRA document providing information on the VDP program and the discretionary authority of the Minister to grant relief to taxpayers. Information circulars are administrative policy statements that are not binding in law nor determinative of the meaning of a provision of the Act (*Bozzer* at para 23; *Karia v MNR (FC)*, 2005 FC 639 at para 7 [*Karia*]). They

nevertheless provide a roadmap to taxpayers that may wish to make a VDP application, including the procedure and criteria that the Minister may apply in making a determination.

[38] Under paragraph 28 of the Information Circular, the VDP requires five conditions to be met:

a) the disclosure be voluntary;

b) the disclosure be complete;

c) the disclosure must involve the application, or potential application, of a penalty;

d) the disclosure must include information that is at least one year past due; and

e) the application must include payment of the estimated tax owing.

[39] The most relevant paragraphs in the Information Circular applicable to this case, and which discuss the requirements and procedure to be followed during the process of a VDP application, are as follows:

> 13. If a VDP application is accepted as having met the conditions set out in paragraph 28, it will be considered a valid disclosure. Under the General Program, the taxpayer will not be charged penalties (subject to the limitation period explained in paragraph 17) and will not be referred for criminal prosecution with respect to the disclosure (i.e. for tax offences).
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> […]
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> 27. If an attempted second application is made for the same issue that was previously denied as incomplete due to information not being received by the stipulated date, then the second application will be denied.
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> […]
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> 32. A taxpayer's VDP application must be made for all relevant taxation years where there was previously inaccurate, incomplete or unreported information regarding their tax affairs, including any

non-arm's length transactions and circumstances. In cases where books and records no longer exist, the taxpayer should make all reasonable efforts to estimate the income for those years. […]

33. There may be extraordinary circumstances where the taxpayer cannot submit all of the information or documentation with their VDP application. In these circumstances, a request for an additional specified period of time must be made in writing at the time the application is submitted. Upon review of the request, the CRA may allow the taxpayer a period of time to submit such information in order to complete the application. Normally this period of time is no more than 90 days from the effective date of disclosure (EDD) (paragraphs 50 to 55).

34. While the information provided in an application must be complete, the application may not be disqualified simply because it contains minor errors or omissions. As well, if the CRA is satisfied that the taxpayer has provided all available information and legitimately cannot locate or obtain certain documents (e.g., relating to a deceased relative) or has made reasonable efforts to estimate income amounts related to years for which documentation is unavailable, the application may be considered to be complete. Each application will be reviewed on its own merits.

[…]

43. Taxpayers should use Form RC199, Voluntary Disclosures Program (VDP) Application to apply for VDP. If a taxpayer is not using Form RC199, the VDP application should contain all of the information requested on that form. All CRA returns, forms and schedules needed to correct the non-compliance must be included with the application.

[…]

47. The taxpayer's authorized representative can submit the application for relief under the VDP. In this case, both the taxpayer and the authorized representative must sign the VDP application (paragraph 43).

[Information Circular IC00-1R6 - Voluntary Disclosures Program, Exhibit C of the Affidavit of Me Leibovich, AR at 60–66; emphasis added]

[40] In this case, the main issues are about whether the Applicant's VDP application was "complete" for the purposes of the Information Circular, and whether the CRA made its Decision in breach of the Applicant's right to procedural fairness.

[41] On the issue of the completeness of the VDP application, as stated in *Williams* at paragraph 6: "a complete disclosure must include full and accurate reporting of all previously inaccurate, incomplete or unreported information. Information provided must be substantially complete. Disclosures with material errors or omissions will not qualify for the VDP" [emphasis added] (see also Information Circular at paras 32, 43). The Applicant correctly noted in oral argument that a VDP application indeed requires that all inaccurate or unreported information must be disclosed, even if that information relates to taxation years that are more than 10 years prior, and for which an applicant may not receive relief from the Minister.

B. *The VDP Application Was Incomplete*

[42] The Applicant submits that its VDP application was "complete" and that all of the criteria set out in the Information Circular have been met, with respect to the 2008 to 2017 taxation years. The only issue raised by the CRA concerns the 2007 taxation year, which is outside the scope of the years concerned by the Applicant's VDP application.

[43] The Applicant relies on paragraph 34 of the Information Circular, stating that a VDP application "may not be disqualified simply because it contains minor errors or omissions. As well, if the CRA is satisfied that the taxpayer has provided all available information and legitimately cannot locate or obtain certain documents […] or has made reasonable efforts to

estimate income amounts related to years for which documentation is unavailable, the application may be considered to be complete. Each application will be reviewed on its merits."

[44] The Applicant further submits that the only document missing was the T2 return, but that a lot of information relating to the 2007 taxation year was submitted to the CRA, including the estimated tax liability, and the Applicant provided payment of that liability with its VDP application (contrary, for example, to the cases in *Williams* and *Palonek v Minister of National Revenue*, 2006 FC 494 [*Palonek*] where none of the documents were provided to the CRA for the applicable taxation years). Furthermore, the Applicant limited its VDP application to the taxation years 2008 to 2017, because these were the only taxation years for which the CRA could grant relief under the VDP given the 10-year limit.

[45] Relying on *Matthew Boadi Professional Corp v Canada (Attorney General)*, 2018 FC 53 [*Boadi*], the Applicant then submits that even if the information for 2007 was incomplete, the CRA still had to rule on its eligibility for the years 2008–2017. In this case, because the VDP application was complete for the years 2008 to 2017 for which relief was requested, the Applicant's VDP application should not have been dismissed as a result of the failure to file a T2 return for the 2007 taxation year. That omission was "minor" as understood under paragraph 34 of the Information Circular.

[46] The Respondent submits that the Applicant acknowledged in their VDP application that the sale of eligible capital expenditures in 2007 resulted in the funds to invest in a foreign property in the years thereafter. The Applicant's own VDP application therefore clearly made the

2007 taxation year a relevant one, in which a tax event was not reported. Under paragraph 43 of the Information Circular, the Applicant had the obligation to correct "[a]ll CRA returns, forms and schedules needed to correct the non-compliance" and include relevant taxation years where there was previously inaccurate, incomplete or unreported information regarding their tax affairs, whether or not the taxation year in question is outside the 10-year period for which the Minister may grant relief.

[47] Moreover, the Respondent submits that the missing amended T2 return from the 2007 taxation year was not a "minor omission." The information provided by the Applicant for the years 2008 to 2017 was not compatible with the Applicant's T2 return for 2007. A tax event was unreported in the Applicant's T2 return for 2007 which affected the Applicant's tax liability for the years thereafter.

[48] The Respondent relies on the *Williams* case, where the CRA requested T1 returns for the VDP disclosure and the Applicant replied that the documents would eventually be delivered, but they never were. In *Williams*, the nature of the requested document was similar to the one in this case and the Court held that it was reasonable to refuse the VDP application on the grounds that it was incomplete, and that the failure to provide these documents was not considered a "minor omission" (*Williams* at paras 10, 24).

[49] The Respondent also relies on *McCracken v Canada*, 2009 FC 1189 at paragraphs 12, 17 [*McCracken*], where the CRA denied granting a taxpayer further extensions of time to "complete" the application and provide his tax returns. The taxpayer was being given the

"runaround" by a third party to receive documents, but he had other means at his disposal, such as bank records, in order to complete his disclosure. The CRA refused to grant the taxpayer further extensions of time and considered the disclosure incomplete, and that decision was upheld by the Court.

[50] I agree with the Respondent. In my view, the 2007 taxation year is relevant to the Applicant's VDP application and the CRA properly requested that additional documentation be provided (as consistent with paragraphs 32 and 43 of the Information Circular). The Applicant itself raised the importance of the 2007 transaction in its VDP application. Moreover, the Applicant acknowledged that the taxpayer must disclose all unreported information regardless of whether that information relates to a year that is outside of the 10-year request for relief. Therefore, the Applicant's argument that it limited its VDP application to the taxation years 2008 to 2017 precisely because these were the only taxation years for which the CRA could grant relief under the VDP given the 10-year limit is without merit.

[51] Indeed, the Information Circular requires that "[a] taxpayer's VDP application must be made for all relevant taxation years where there was previously inaccurate, incomplete or unreported information regarding their tax affairs" and that "[a]ll CRA returns, forms and schedules needed to correct the non-compliance must be included with the application" (Information Circular at paras 32, 43; endorsed in *Williams* at para 6). Consequently, to seek discretionary relief from the Minister, a taxpayer must disclose all unreported or non-compliant information, regardless of whether, for some prior years, the Minister may not have discretion to grant any relief. In other words, regardless of the 10-year limit, to obtain ministerial relief for up

to 10 years, a taxpayer must come completely clean and provide full disclosure of all non-compliance with the Act, even if some of those taxation years are more than 10 years prior.

[52] The CRA's Decision to continue to request the filing of an amended T2 return for the 2007 taxation year, and its conclusion that the Applicant's failure to provide it is therefore not a "minor omission" under paragraph 34 of the Information Circular, is also reasonable.

[53] First, the Applicant concedes that the information relating to the 2007 taxation year is relevant in this case and that a tax event went unreported. Second, the correspondence demonstrates that, even if some information on the 2007 taxation year had been disclosed, the Applicant was still trying to retrieve some documentation regarding the sale in 2007 (Exhibits M and P of the Affidavit of Me Leibovich, AR at 157, 178). Clearly, if additional documentation needed to be retrieved, more information still had to be disclosed to the CRA to support the disclosure of unreported information for the 2007 taxation year. Third, no evidence was adduced to demonstrate that the information on the 2007 taxation year was impossible to obtain, and no request was made by the Applicant for the CRA to apply paragraph 34 of the Information Circular and consider that all the information had otherwise been provided and that the Applicant legitimately could not locate or obtain certain other documents.

[54] The Applicant's reliance on *Boadi* is misguided. In that case, the applicant sought to make a VDP application for the taxation years 2005–2013. The CRA denied the application on the basis of voluntariness, because the applicant was subject to an ongoing enforcement action. The Court granted judicial review in that case because, while enforcement action was ongoing

for the years 2011–2013, the 2005–2010 returns had been assessed. Because there was no longer any enforcement action in relation to the years 2005–2010, the VDP disclosure for those years could be considered voluntary. In that sense, the Court held that the two different periods ought to be considered separate. While the VDP application for years 2011–2013 could be denied and considered involuntary because of the pending enforcement action, that conclusion could not apply to years 2005–2010.

[55] Those facts do not exist in this case. There is no allegation that the 2007 taxation year is distinguishable from the 2008–2017 taxation years. Indeed, the 2007 taxation year triggered the following years' tax events. It is therefore not unreasonable for the CRA to refuse to dissociate the 2007 taxation year from the 2008–2017 VDP application in this case. Moreover, unlike *Boadi*, the issue here is not in relation to voluntariness, but whether the disclosure is complete. The evidence amply demonstrates that additional documentation and information had to be provided to the CRA, including the 2007 T2 return for the 2007 taxation year.

[56] It was therefore reasonable for the CRA to consider that the T2 return for the 2007 taxation year was relevant to the VDP application, and that the failure to provide that document was not a "minor omission." The CRA could reasonably deny the Applicant's VDP application on that basis.

C. *There Is No Breach of Procedural Fairness: The Applicant Did Not Have a Right to a Notice and a "Final Delay" Before the CRA Made its Decision*

[57] The Applicant submits that the CRA breached its right to procedural fairness because, in August 2023, it did not give it sufficient notice and provide a "final delay" to file the T2 return, failing which the VDP application would be denied. Specifically, the Applicant takes issue with the CRA reasons stating that "[w]e contacted you on August 1, 2023 informing you that we had not received the following […and] [w]e provided you with a final opportunity to reply or the disclosure will be considered incomplete" (Exhibit A of the Affidavit of Me Leibovich, AR at 34). The Applicant asserts that this statement is untrue and that the CRA never made this final communication.

[58] The Applicant also asserts that the CRA ought to have provided it with a "final delay" by way of letter sent to both Me Leibovich and the owner of the Applicant because previously, the CRA had twice sent notices imposing deadlines on October 5, 2022, and on January 15, 2023, by letter to each of them (Exhibits L and N of the Affidavit of Me Leibovich, AR at 150–153, 168–169). Instead, on August 1, 2023, Ms. Trites allegedly only left a message on Me Leibovich's voicemail, but did not contact or send letters to the Applicant's representative and owner, which the Applicant argues she should have done.

[59] In its Decision dated October 10, 2023, the CRA states that it contacted the Applicant on August 1, 2023 (Exhibit A of the Affidavit of Me Leibovich, AR at 34; CTR, Tab O at 110). The allegation that the CRA contacted the Applicant is also stated in the CRA's "Voluntary Disclosures Program – Report," where it is noted that the "auditor made a last call on August 1,

2023, telling the taxpayer to provide the amended T2 for 2007 or the disclosure will be considered incomplete" (Exhibit Q of the Affidavit of Me Leibovich, AR at 207; Exhibit B of the Affidavit of L. Trites, RR at 14).

[60] Both Me Leibovich and the Applicant's owner allege that they were not contacted by the CRA OVDP Compliance Programs Officer prior to making the Decision (Affidavit of Me Leibovich at paras 43–45, AR at 30–31; Affidavit of C. Sasportas at paras 19–20, AR at 246–247).

[61] The Respondent submits that the Applicant and its authorized representative were aware of the scope of the VDP and of the public policy guidelines for its operation when the Applicant filed its disclosure. Over several months, the CRA requested on multiple occasions an amended T2 to report the capital gain from a sale of eligible capital property of the corporation in 2007 for the analysis of the VDP application, to no avail. Moreover, there were many communications on the issue and the Applicant was given ample opportunities to provide the T2 return and make submissions, and the Applicant did not demonstrate any extraordinary circumstances as to why it could not produce the T2 return in due course.

[62] In oral argument, the Respondent stated that Ms. Trites did leave a voicemail message but that in any event, even had she not made that call, the issue is of no consequence in the case because no additional "notice" or "final delay" was required under the Information Circular and the lack of a call did not breach the Applicant's right to procedural fairness.

(1) Content of Procedural Fairness in a VDP Application

[63] Although the "duty of procedural fairness in administrative law is 'eminently variable,' inherently flexible and context-specific," the Applicant submits that in the absence of a right to request a second review (as may have been the case under a prior version of the Information Circular), the extent of procedural fairness is higher, as the interests of the Applicant are more severely affected (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 21–24 [*Baker*]). Without specifically relying on the doctrine of legitimate expectations in its written representations, the Applicant essentially argues that since the CRA had sent letters to both its owner and authorized representative and provided a specific delay on prior occasions, it had a legitimate expectation that the CRA would do so again and indicate a "final delay" on August 1, 2023, before making a final decision (*Baker* at para 26). The fact that Ms. Trites only allegedly called Me Leibovich, and did not also send a letter to the Applicant's owner, therefore breached the Applicant's legitimate expectations and procedural fairness.

[64] I disagree. The extent of procedural rights owed in this case is minimal. As held in *Williams* at paragraphs 26 and 31:

> [26] […] the obligation of fairness in reaching a decision under the VDP program is minimal: *Wong v Canada* (MNR), 2007 FC 628 at para 29. The applicant was under an obligation to comply with the requirements of the Act, and became liable for penalties when he failed to do so. The discretion accorded to the Minister to waive or cancel any penalties imposed is broad, and constitutes exceptional relief from penalties for which taxpayers are otherwise liable to pay under statute.
>
> […]

> [31] I would add that the degree of procedural fairness and the robustness by which the principle is implemented varies with the nature of the interests or rights engaged and with the nature of the discretion. The VDP is a highly discretionary program which, as its object, encourages compliance with important mandatory statutory requirements. Put more bluntly, it is designed to encourage taxpayers to do that which they were required by law to have done in the first place. As such, the criteria governing the exercise of discretion are strict and narrow and the rights involved are minimal.
>
> [emphasis added]

[65] The VDP exists in a context where an applicant has failed to comply with their obligations under the Act, and is requesting relief from penalties and interests, and potentially prosecution. The VDP is itself a highly discretionary program and the rights involved, which are to be relieved of consequences otherwise imposable pursuant to the Act, are minimal. In other words, the Minister is under no obligation to dispense taxpayers from adverse impacts relating to their failures to comply with the Act. As discussed in *McCracken* at paragraph 16 "[t]he Minister has a discretion to waive penalties in the instances of those who fail to provide a complete information or to pay their taxes on time, but that is not a right that the taxpayer has, it is an exercise of discretion" (emphasis added). Consequently, the level of procedural fairness owed to taxpayers in this context is low.

[66] Moreover, the fact that there is no second review level available in this case has no impact on the content of procedural fairness. While the decisions in *Williams*, *McCracken* and *Palonek* may have been taken in a context where a second review level was available under the Information Circular, which is not the case here, this does not affect the amount of procedural fairness owed. In those cases, this Court upheld decisions to deny eligibility to the VDP on the

basis of missing documents (*Williams*, *Palonek*), or to refuse requests for an extension of time to provide documents (*McCracken*), even if a second review level was available. Indeed, in all three cases, the CRA did not notify the taxpayers of an incoming decision (on second review) or allow another "final delay" to provide documents that were still missing for analysis in the second review. Even at the second review level, the CRA still did not accept additional extensions of time to provide documents (*McCracken*) or notify the applicant of a "final delay" to provide the documentation before a decision would be made on the second review level (*Williams, Palonek*). In other words, the same procedure that was applied in this case was also followed in those cases, albeit during the second level review instead of the first level; and no additional notice of a "final delay" or an opportunity to provide missing documents was offered at the second review level.

[67] Specifically, in *Palonek*, in a situation similar to this case where numerous extensions of time were granted, the Minister denied the applicant's VDP application because of the failure to provide complete information by the deadline (and when no further extension of time was requested), without providing an additional "notice" or "final delay" to provide the documents. Likewise, at the second review level (and even a third level in that case), the Canada Customs and Revenue Agency [CCRA] did not provide an additional notice or "final delay" to provide the information, and the Court upheld the decision as reasonable in the circumstances (*Palonek* at paras 18, 25–27, 37–38, 41–43, 47, 50, 56–58, 64, 103, 125). Therefore, even if a second review level existed, this would not allow the Applicant to obtain an additional extension of time, nor an opportunity to obtain notice of a "final delay" to file the T2 return for the 2007 taxation year.

[68] Moreover, the Applicant provided no case law suggesting that there was an additional obligation on the CRA to provide a "final delay" or notice in a case relating to the VDP, or that the lack of a second review level had an impact on the content of procedural fairness, despite the specific contrary indications in the Information Circular.

[69] Also, the VDP and decision-making process is discussed in the Information Circular and ample notice of the procedure to be followed exists therein. The procedure identified is the one to which the Applicant was entitled, and from which it benefitted in this case. For example, paragraph 45 of the Information Circular specifically requires a taxpayer to "comply with [CRA requests for documentation] within the stipulated timeframes […] If a taxpayer refuses to provide complete documentation or if CRA is not satisfied that the application is complete, then the taxpayer will in most cases not be eligible for relief" (emphasis added). Paragraph 33 of the Information Circular, albeit in the context of the filing of the VDP, also contemplates that the documents must be filed along with the VDP application, or shortly thereafter. A taxpayer may request an extension of time to provide disclosure in that context, but paragraph 33 only contemplates an extension of 90 days. The Information Circular is therefore specific on the issue of a taxpayer having to respond to the CRA's queries in short order; and at no time does the Information Circular provide additional obligations upon the CRA to "notify" or provide "final delays" to the taxpayer to provide documentation, when it is about to make a final conclusion on the VDP application.

[70] No additional procedural right or legitimate expectation that additional notice or further extensions of time be given to provide the documents, under the Information Circular or

otherwise, exists in this case. The Information Circular specifically informed the Applicant that the disclosure had to be complete, and that there was no second level review or any possibility for a second VDP application if the VDP application was denied on the basis that it was incomplete (Information Circular at paras 27, 32–34, AR at 63). The CRA letters also informed the Applicant that failure to provide the T2 return could result in its VDP application for relief to be denied. The Applicant had no procedural right to receive an additional "final delay" with a new deadline, as argued by the Applicant, nor to receive additional notice that a negative decision was about to be made given that the T2 return had not been provided. As stated by Justice Rennie in *Williams* at paragraph 23:

> [23] The requirements and risks of the VDP are clearly set out in the IC-001R and the Client Agreement Form. Taxpayers must make full disclosure, and if they are not accepted as voluntary, or found to be incomplete, the taxpayer may be liable for the penalties that flow from their disclosure. In this regard, the applicant received a letter from the VDP stating, "you have 90 days from the date of disclosure to submit all documentation needed to substantiate the disclosure." The applicant replied that he would deliver his outstanding returns on October 4, 2006. He did not do so.

[71] There is therefore no breach of procedural fairness, and the removal of a second review level has no impact on that assessment. The Applicant was offered the entire extent of the procedure provided under the Information Circular, and an additional extension of time. The Information Circular does not provide an obligation upon the CRA to offer additional "final delays," and procedural fairness does not require in this case a second review or an additional notification of "final delays" offered by the CRA for the Applicant to meet their case, before a decision is made.

[72] The Applicant in this case was provided with the full procedure offered under the Information Circular. Had the Applicant been more diligent, or better communicated with the CRA on its timeline issues, perhaps the Decision would have been different.

(2) The Evidence Demonstrates that the Applicant Was Aware of the Case to Meet and Had Ample Opportunity to Provide the Document

[73] The Applicant's main argument in relation to a breach of procedural fairness relates to an alleged voicemail that Ms. Trites would have left Me Leibovich on August 1, 2023 (Affidavit of L. Trites at para 14; Exhibit I of the Affidavit of L. Trites, RR at 41). Me Leibovich attests not having received any such telephone call or voicemail. The Respondent argues that Ms. Trites did make that telephone call but that in any event, even had she not made that call, she did not have to provide further notice or any "final delay" to the Applicant. Therefore, whether the telephone call was made or not is of no consequence, and there is no breach of the Applicant's right to procedural fairness.

[74] The Applicant argues that throughout the collaboration between the CRA (mainly through Ms. Trites) and the Applicant (through Me Leibovich), when the CRA provided final deadlines, it did so by letter under separate cover sent to both Me Leibovich and to the Applicant's owner (Exhibits L and N of the Affidavit of Me Leibovich, AR at 150–153, 168–169). Consequently, Ms. Trites breached the Applicant's procedural rights by failing to offer another "final delay" by letter sent to Me Leibovich and to the Applicant's owner, and instead only offering that "final delay" by way of voicemail, without at least also trying to contact the

Applicant's owner, given that Ms. Trites was not able to communicate directly with Me Leibovich.

[75] The fact that Ms. Trites, as the OVDP Compliance Programs Officer, could legitimately call Me Leibovich directly is not contested. As the Applicant's "authorized representative," the CRA could contact Me Leibovich by telephone as he provided his telephone number in the Form RC59 where he was designated as the "authorized representative" for the Applicant (CTR at 46). The Information Circular also specifically contemplates that the CRA may contact a VDP applicant through its "authorized representative" (Information Circular at paras 47–49, AR at 65). Ms. Trites indeed had telephone discussions with Me Leibovich on March 16 and April 17, which are not contested nor alleged to have been inappropriate. Both of these telephone calls occurred after the CRA's letter of January 15, 2023, which explained that the deadline to respond was March 15, 2023, and that the failure to provide the document could lead to the Applicant's VDP application being denied.

[76] In this case, it is important to understand the entire context. When the CRA made its Decision on October 10, 2023, about one year had passed since the initial CRA request for the T2 return on October 5, 2022, without the Applicant having filed the T2 return or even seeking an extension of time to do so after May 11, 2023.

[77] It is important to note that the CRA sent two requests for additional information, in the context of the Applicant's VDP application. In those two requests, on October 5, 2022, and on January 15, 2023, the CRA clearly imposed a deadline and stated that "[s]hould [it] not receive

all the requested information by [the relevant date], [it] may deny the disclosure as it may be considered incomplete" (Exhibits L and N of the Affidavit of Me Leibovich, AR at 150–153, 168–169).

[78] On both occasions, Me Leibovich responded. In the first response, on November 7, 2022, Me Leibovich simply indicated that the Applicant was in the process of finding documentation and did not seek an extension of time to provide the information, even if the Applicant was now out of time to do so (Exhibit M of the Affidavit of Me Leibovich, AR at 157). In his second response, on March 14, 2023, Me Leibovich asked for an additional 30 days to provide the document, as the accountant was in the middle of personal income tax season (Exhibit O of the Affidavit of Me Leibovich, AR at 173).

[79] That extension of time of 30 days was granted on March 16, 2023, by a telephone conversation between Me Leibovich and Ms. Trites (Affidavit of L. Trites at para 11; Exhibit I of the Affidavit of L. Trites, RR at 41). It is important to note that even if the deadline had now changed to about April 15, 2023, no additional letter was sent to Me Leibovich or to the Applicant's owner to confirm the new timeline, in writing. The discussion occurred by telephone only.

[80] On April 17, 2023, and even if the Applicant's deadline to produce the T2 return was closing, Me Leibovich and Ms. Trites had a second telephone conversation in which Me Leibovich indicated that "[h]e ha[d] all the documents and w[ould] fax them th[at] week"

(Affidavit of L. Trites at para 12; Exhibit I of the Affidavit of L. Trites, RR at 41). He failed to do so.

[81] In oral argument, the Applicant conceded that the conversations of March 16, 2023, and April 17, 2023, occurred as stated by Ms. Trites in her affidavit, and the communications and their content are not contested.

[82] About three weeks later on May 11, 2023, Me Leibovich sent another letter reiterating that the Applicant was attempting to retrieve the documentation regarding the sale in the 2007 taxation year and that he would forward the T2 2007 amended tax return under separate cover. No additional extension of time was sought at that time, even if the Applicant was now out of time to produce the document (Exhibit P of the Affidavit of Me Leibovich, AR at 178). But the T2 return for the 2007 taxation year was never sent to the CRA.

[83] The evidence therefore demonstrates that both Me Leibovich and Ms. Trites were able—and amenable—to communicate by telephone to move the file forward. The August 1, 2023, telephone call was made in that context. Having not received the T2 return despite the statement of Me Leibovich on April 17, 2023, and as indicated in the May 11, 2023, letter that the T2 return would be sent under different cover, Ms. Trites simply attempted to determine whether and when the T2 return would be sent. In that sense, she was simply following up with the Applicant's authorized representative, as she had done before, and as provided under the Information Circular.

[84] The Applicant contests that Ms. Trites left the voicemail to Me Leibovich on August 1, 2023. However, I find that Ms. Trites did make a telephone call to Me Leibovich and left a message on his voicemail. In the T2020 Memorandum of conversation (Exhibit I of the Affidavit of L. Trites, RR at 41), it is noted that telephone calls were made on March 16, April 17 and August 1, 2023. The March 16, 2023, telephone call is when Ms. Trites granted a second extension of time (to April 15, 2023) to provide the T2 return for the 2007 taxation year. The April 17, 2023, telephone call is when Me Leibovich indicated that "[h]e has all the documents and will fax them this week." These two telephone calls and their content are not contested. Only the August 1, 2023, voicemail, as indicated in the T2020 Memorandum of communication, is contested.

[85] The Applicant's allegation is that Ms. Trites did not accurately report or recollect this voicemail or, worse, fabricated it and then incorporated it in her report, and later in the Decision. I reject that allegation.

[86] I prefer the evidence of Ms. Trites, because Me Leibovich's evidence includes inconsistencies that affect his credibility. Me Leibovich denies having received a voicemail on August 1, 2023. He states at paragraphs 43 and 44 of his affidavit (AR at 30–31) that he had access to his messages while on vacation and would certainly have reacted if he received communication from the CRA (Affidavit of Me Leibovich at para 45, AR at 30–31; Affidavit of C. Sasportas at para 20, AR at 245). That assertion is not persuasive in the circumstances. Me Leibovich and the Applicant had been given an initial deadline of March 15, 2023. That deadline was extended to about April 15, 2023, on the basis that the Applicant's accountant was busy

during tax season. Then, on April 17, 2023, Me Leibovich communicated with Ms. Trites to indicate that the document was ready and would be faxed within the week (Affidavit of L. Trites at para 12; Exhibit I of the Affidavit of L. Trites, RR at 41). This was not done and Me Leibovich did not seek an extension of time as was done by way of letter on March 14, 2023. Then, on May 11, 2023, Me Leibovich appears to change his narrative, now indicating that his client is attempting to retrieve the documentation and would send the 2007 amended tax return under separate cover, appearing to indicate that the T2 return would be provided in relatively short order. Again, that was not done. The Applicant then never sought another extension of time or even kept the CRA updated with its efforts. In the face of an extinguished deadline, the Applicant and Me Leibovich did not "react" accordingly between April 15 and July 2023. If the Applicant's accountant was the reason for the delay, the Applicant ought to have found another professional to prepare the T2 return and provide it in due course (*McCracken* at para 17).

[87] Me Leibovich also states at paragraph 37 of his affidavit that on May 11, 2023, he contacted the Applicant's accountant, who said that he was too busy to make the corrections to the T2 return and that he would do so in July; and that the accountant had provided the Applicant with various incorrect versions of the T2 return. First, that information was never provided to the CRA in Me Leibovich's letter of the same date (May 11, 2023). Moreover, if the accountant had prepared various incorrect versions of the T2 return, the accountant must have been in the possession of the relevant documents. Yet Me Leibovich wrote to the CRA on the same day (May 11, 2023) stating that his client was still trying to retrieve documents. The statement in the letter is inconsistent with his conversation with Ms. Trites on April 17, 2023, when Me Leibovich stated that he had all the documents and would fax them that week. Moreover, the fact

that the accountant was too busy is the same reason offered for an extension on March 14, 2023, and for which an extension was granted. Knowing that the Applicant was out of time to provide the T2 return, and knowing that he would not provide the CRA with the return before July, despite his statements on April 17, 2023, and in his May 11, 2023, letter, Me Leibovich did not seek an extension of time until the end of July or alert the CRA that the T2 return would not come before August. There were indeed no communications between Me Leibovich and the CRA between May 11, 2023, and the issuance of the Decision on October 10, 2023 (a period of five months).

[88] Moreover, if the accountant was indeed busy until July, nothing precluded the accountant from preparing it in August and for Me Leibovich to provide the T2 return to the CRA at any time before October 10, 2023. It is important to note that prior to October 10, 2023, Me Leibovich was not aware of the work being done on the file by CRA, leading to the Decision of October 10, 2023 (because he had allegedly not received the voicemail on August 1, 2023). Had Me Leibovich provided the T2 return at any time prior to October 10, 2023, the CRA perhaps would have revised its position and not have made the Decision to deny the VDP application. Indeed, Me Leibovich's evidence is that the accountant ought to have been available as of July, and Me Leibovich attests that he spoke to him in mid-August upon his return from vacation (Affidavit of Me Leibovich at paras 37–38, AR at 30). However, Me Leibovich failed to provide the T2 return thereafter and to communicate with the CRA to provide an update, and there is no evidence offered as to why the T2 return could not be prepared nor provided to the CRA before October 10, 2023.

[89] Finally, Me Leibovich states at paragraph 39 of his affidavit that he understood that the VDP process was in abeyance. However, there is no evidence to that effect on the file; to the contrary, the Information Circular and letters from the CRA both indicate that a specific deadline applies and failing to respond might result in the VDP application being considered incomplete. Again, no extension of time was requested by the Applicant.

[90] Ms. Trites' evidence is consistent and more persuasive. She has not been subject to cross-examination. She states having left a voicemail message to Me Leibovich on August 1, 2023, and the T2020 Memorandum of conversation notes that she made that telephone call because she had been waiting for the missing document and wished to reiterate that if the CRA did not receive the document, it would close the file as incomplete (Exhibit I of the Affidavit of L. Trites, RR at 41).

[91] I have no reason to impugn the evidence of Ms. Trites. The T2020 Memorandum of conversation notes three telephone calls, two of which are not contested. To accept that Ms. Trites did not make the August 1, 2023, telephone call as suggested by the Applicant would be to find that Ms. Trites fabricated evidence, and then relied upon it to deny the Applicant's VDP application. I cannot make such a finding, in the absence of cross-examination or other evidence that could lead me to such a conclusion. I find that Ms. Trites did leave a voicemail to Me Leibovich on August 1, 2023, as she was entitled to (and had done before) because Me Leibovich was the "authorized representative" of the Applicant for the CRA as understood under the Information Circular. However, that voicemail was simply missed by Me Leibovich and/or his office, in good faith, while he was on vacation.

[92] There is also no evidence that Ms. Trites was aware that Me Leibovich was away from the office. Without cross-examination of either affidavit, it is impossible to determine exactly what was known from Ms. Trites on that basis. But what is in evidence is that she called Me Leibovich and left a voicemail, which appeared to be reasonable and in the normal course of business, as was done prior in March and April. Me Leibovich did not attest in his affidavit that he had modified his voicemail to notify others that he was away from the office until mid-August or to communicate with a colleague in his absence. Me Leibovich also never informed the CRA as to any development in the file or that he was leaving on vacation and that the T2 return would be provided shortly thereafter. I find that the evidence of Ms. Trites is more convincing, as it does not include any inconsistencies, as compared with the evidence of Me Leibovich, as discussed above.

[93] In the circumstances, the CRA's second request by letter dated January 15, 2023, specifically stated that "should we not receive all the requested information by March 15, 2023, we may deny the disclosure as it may be considered incomplete" (Exhibit N of the Affidavit of Me Leibovich, AR at 169). While that timeline was extended on March 16, 2023, no other request for an extension of time was sought by the Applicant. I therefore find that sufficient notice was given to the Applicant and Me Leibovich that they were out of time to provide the information on or about April 15, 2023, and that the CRA was in the position to rule on the VDP application from that date.

[94] Moreover, in my view, the voicemail made by Ms. Trites was informal and inconsequential. Ms. Trites was about to close the file, and prior to doing so, simply tried a final

attempt to reach Me Leibovich, before herself going on vacation. The fact that Ms. Trites did not send a letter to the Applicant's owner and to Me Leibovich separately is indicative that indeed, the CRA was not providing a new "notice" or "final delay" to the Applicant; that deadline had already lapsed and the Applicant had not requested an extension of time. The fact that Ms. Trites' telephone calls with Me Leibovich were informal also explains why no additional letter was sent to Me Leibovich and the Applicant's owner separately to confirm that an extension of time was granted to April 15, 2023, as was done before. It is also indicative that Ms. Trites, and the CRA, could communicate with Me Leibovich without also informing the Applicant's owner separately at all times by way of letter under separate cover. Rather, Ms. Trites, as a diligent public servant, simply tried to follow up informally, given that no communication had been made by the Applicant on its VDP application for more than 2 months, with the last communication of May 11, 2023, indicating that the T2 return would be provided in short order, which was not the case.

(3) Conclusion

[95] In the end, the issue of Ms. Trites' voicemail is inconsequential. Regardless of whether the voicemail of August 1, 2023, was actually made, the Applicant was properly notified of the VDP and its process, and of the consequences of not being responsive to requests from the CRA in due course. Indeed, because there was no additional request for an extension of time, when the deadline indicated in the CRA letter (extended by the March 16, 2023, telephone call) lapsed, it was open for the CRA to make its decision without providing the Applicant another opportunity to produce the documents. In that sense, the August 1, 2023, call is not determinative. Had the CRA made the decision without that call, the CRA Decision would remain reasonable in the

circumstances and would not have breached the Applicant's right to procedural fairness or reasonable expectations, because of the Applicant's failure to request another extension of time and provide the CRA with adequate information on its efforts to file the T2 return for the 2007 taxation year.

[96] The Information Circular and the CRA letters properly explained to the Applicant that it had to be responsive to the CRA's demands and that its VDP application could be denied if it was incomplete or if the Applicant failed to respond. The Information Circular is also clear that no second review level or second application is possible when a VDP application is denied for being incomplete.

[97] Nevertheless, I find that there was indeed notice given on August 1, 2023, and that Ms. Trites properly used the existing line of communication to do so, by communicating with the Applicant's "authorized representative" at the same telephone number used before. I also find that she did not have to send a letter to Me Leibovich and the Applicant's owner, which was also not done when an extension of time was granted on March 16, 2023. The fact that the communication may not have been received lies on the Applicant, in the circumstances of this case. There was adequate notice. The Applicant knew, or ought to have known, that it had to provide the T2 2007 tax return by the date set in the CRA request, which at that time had been extended to about April 15, 2023. The Applicant knew the case to meet. It had full, fair, and ample time or opportunity to respond, make submissions, provide the T2 return, or to at least notify the CRA as to when the T2 return would eventually be provided, and/or seek an extension of time (*McCracken* at para 20; *Canadian Pacific Railway* at para 56). The Applicant failed to do

so and, regardless, also failed to ensure completion of the T2 return upon Me Leibovich's return from vacation (as stated in Me Leibovich's affidavit) and provide the CRA with the T2 return before the Decision of October 10, 2023 (a period of about five months following the last communication of May 11, 2023, without any reasonable explanation on the delay).

[98] There is also no additional duty of procedural fairness imposed upon the CRA (in the Information Circular or otherwise) to, once the deadline has passed and the CRA is about to make a decision, notify the taxpayer once more on the missed deadline and grant an additional "final delay" to comply, especially when no extension of time was requested. No judicial precedent was presented to the Court demonstrating otherwise.

[99] It is not incumbent upon the Minister to take taxpayers by the hand and lead them through a process in which they are essentially requesting ministerial clemency. The CRA has no duty to continuously advise taxpayers that documents remain missing and indefinitely wait to make a decision despite a deadline having passed, or continuously offer new deadlines to file documents when taxpayers did not seek one.

[100] As discussed, the evidence demonstrates that the Applicant was in possession of the necessary documents by about May 2023, but that its accountant simply could not prepare the T2 return. In such a case, it was incumbent upon the Applicant to consult an available accountant and make a reasonable effort in completing its disclosure (*McCracken* at para 17).

[101] Indeed, the Applicant's request for an extension of time on March 14, 2023, was related to the Applicant's accountant being busy during personal tax season. In its reasons for the Decision, the CRA rejected the Applicant's VDP application in part because it had "not demonstrated that extraordinary circumstances existed which prevented [it] from submitting all the required information with [its] application" (Exhibit A of the Affidavit of Me Leibovich, AR at 34). That conclusion is reasonable on the basis of the evidence.

[102] In the *McCracken* case, this Court also upheld a decision of the CRA refusing an extension of time, given that the applicant could have produced the return had he been more diligent. That case is also indicative that when a delay has lapsed and the document was not provided, a taxpayer must seek an extension of time to provide documents, which may be refused. In this case, the Applicant did not even seek an extension of time. Similarly to *McCracken*, had the Applicant been more diligent, there is no evidence that the T2 return could not have been provided to CRA before August 2023, or before the Decision was made in October 2023.

[103] In *Williams* and *Palonek*, this Court likewise upheld a CRA (and CCRA) decision to deny eligibility for relief under the VDP, in the context where an applicant failed to provide documents within the deadline set by the Minister. Importantly, there was no additional "notice" given by the Minister in those cases granting a "final delay" to the taxpayers before the Minister made their decision at the second review level. Once the deadline has passed, it is open to the Minister to make the decision, and procedural fairness does not require the Minister to communicate with the taxpayer beforehand to give them one final chance to comply.

[104] The Applicant's right to procedural fairness, or its legitimate expectation that a "final delay" would be provided by the CRA before a final decision was made, were therefore not breached on the evidence adduced in this case.

D. *The Information Circular Did Not Constitute an Offer to Contract*

[105] At the hearing, the Applicant relied on its written representations and did not make any other arguments relating to this ground. The Applicant submits that the VDP program is akin to an offer to contract made by the CRA to all taxpayers who qualify, and is thus covered under articles 1388 and 1399 of the *Civil Code of Québec* [CCQ]. The Applicant submits that the filing of its VDP application constitutes an acceptance of the offer, there was an exchange of consents within the meaning of article 1386 CCQ and, therefore, a binding contract was created pursuant to article 1385 CCQ (see *Rosenberg v Minister of National Revenue*, 2016 FC 1376 [*Rosenberg*]).

[106] Having concluded a contract, the Applicant argues that it is legally entitled to rely on the rules set forth in the Information Circular. The Applicant is of the view that its VDP application met all the criteria established under the VDP program, as set out in paragraph 28 of the Information Circular, and that the CRA even acknowledged that its VDP application was complete. Consequently, the Applicant's penalties and interests, as well as potential prosecution, should be waived.

[107] The Respondent submits that the Applicant's argument has no basis in law. Indeed, the Applicant did not cite any case law in support of its argument that a guideline or a circular such

as the Information Circular created the circumstances within which a contract might be created, and that there is no legal precedent having determined that the VDP program created a private law contract with an eligible taxpayer.

[108] The Respondent also argues that this case is factually distinguishable from *Rosenberg*. In that case, the Minister agreed not to assess the taxpayer in respect of specific transactions, in consideration for the taxpayer's agreement not to engage in similar transactions in the future and the waiver of his right of objection and appeal in respect of the assessments for the two years at issue. The Minister and the taxpayer executed a detailed document that defined the CRA's concessions and the taxpayer's commitment. The rationale for settling in that case resulted from a recent Supreme Court of Canada decision that had created uncertainty as to the applicable law (*Rosenberg* at paras 15–17).

[109] In my view, no contractual relationship is created by mere reliance on the Information Circular. First, paragraph 8 of the Information Circular specifically states that: "[t]he information provided on the VDP process is only a guideline, is not intended to be exhaustive, and is not meant to restrict the spirit or intent of the legislation, or to unduly limit the Minister's discretion." Second, the Court has already ruled that the Information Circular is an administrative policy statement that is not binding in law (*Bozzer* at para 23; *Karia* at para 7). Finally, the exchange of documents and information between a taxpayer and the CRA cannot be considered to be a valid contract. Unlike the case in *Rosenberg*, no detailed document setting out the terms, conditions and consideration, was executed between the Minister and the Applicant.

[110] Consequently, the Information Circular cannot constitute an offer to contract and cannot be relied upon to form, on its own, the basis of a contractual relationship.

E. *The Doctrine of Promissory Estoppel Is Not Engaged*

[111] At the hearing, the Applicant also relied on its written representations and did not make any other additional arguments in relation to this ground. The Applicant submits that the doctrine of promissory estoppel is applicable in the context of its VDP application because the Minister made a promise, through the Information Circular, that relief would be granted if the Applicant met the criteria described in the Information Circular. The Applicant then relied on this promise in making its VDP application. Otherwise, if that promise had not been made by the Minister, the Applicant would not have made the disclosure because "a person knowledgeable about the VDP […] would [not] commit tax 'suicide' and confess to undisclosed income without a belief that he had obtained a promise of protection" (*Wong v Minister of National Revenue*, 2007 FC 628 at para 39 [*Wong*]; see also *Karia*).

[112] As evidence of a promise, the Applicant relies on the affidavit of Me Leibovich in which he states that the CRA acknowledged that the Applicant's VDP application "contains the required information and documentation" and was therefore complete (Affidavit of Me Leibovich at paras 21, 23, AR at 27).

[113] The Respondent denies that a promise was made, through the Information Circular or otherwise, such that the doctrine of promissory estoppel would be engaged. Promissory estoppel requires proof of a clear and unambiguous promise made by a public authority to induce a person

to perform certain acts. In addition, the person must have relied on the promise and acted on it by changing their conduct (*Immeubles Jacques Robitaille Inc v Québec (City)*, 2014 SCC 34 at para 19).

[114] Relying on *Christen c Canada (Procureur général)*, 2023 CAF 101 at paragraphs 18–19 and *Grewal FCA*, the Respondent submits that the Applicant does not demonstrate that a promise, even tacit, has been made to it on its VDP application.

[115] The Respondent also argues that the Applicant's reliance on *Wong* and *Karia* is misplaced. In *Wong*, the taxpayer had been under an audit for the year 2005 and had been told that although he did not qualify for the VDP for 2005, disclosure for the years prior to 2005 would be accepted. When the applicant then made a VDP application, no warning that "voluntariness" might be an issue was given, even if the disclosure did not comply with the VDP criteria and the CRA would consider the disclosure to be involuntary. Since Mr. Wong received no indication of issues relating to his qualification to the VDP, he proceeded to disclose unreported income, to his detriment, as he later found out that he did not qualify for the VDP (see also *Grewal FCA*; *Grewal FC*; *Williams* at para 25; *Livaditis* at paras 27, 43–44.)

[116] In *Karia*, the Court held that a CCRA letter stating that "based on the circumstances described we consider that the disclosure would be valid as presented" (at para 12) constituted evidence of a promise and of an invitation to proceed with disclosure, and created an assumption that the disclosures would be considered voluntary. The taxpayers proceeded on this promise to their detriment.

[117] In this case, the Respondent submits that the Applicant was never given any implicit or explicit promises by the CRA that its VDP application would be accepted. There were no CRA promises that penalties or interest would be waived or that the VDP application would be accepted. No promise has therefore been made, and the Applicant did not rely on a promise to its detriment in this context.

[118] I find that, on the basis of the evidence adduced, no promise was made by the CRA on which the Applicant relied upon to its detriment. The Applicant did approach the CRA on a no-name basis, as permitted under the Information Circular, and the Applicant then filed the VDP application. The CRA never made any representation on completeness or eligibility, but instead specifically stated that the application contained the required information "to allow us to determine your eligibility for relief" (Exhibit K of the Affidavit of Me Leibovich, AR at 148). At no time was the Applicant induced by the CRA to complete the disclosure, to its detriment, as was the case in *Wong*. The Applicant knew or ought to have known, from the correspondence of the CRA, that its VDP status had not yet been determined (*Christen c Canada (Procureur général)*, 2023 CAF 101 at paras 18–19; *Livaditis* at paras 27, 43–44).

V. Conclusion

[119] For the reasons above, the application for judicial review is dismissed, with costs set at the middle of column 3 of Tariff B.

JUDGMENT in T-2368-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, with costs set at the middle of column 3 of Tariff B.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2368-23
STYLE OF CAUSE:	CRÉATIONS GUIMEL INC. v MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	MONTRÉAL (QUÉBEC)
DATE OF HEARING:	FEBRUARY 26, 2025
JUDGMENT AND REASONS:	RÉGIMBALD J.
DATED:	MAY 6, 2025

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