Federal Court Cour fédérale

Date: 20231004

Docket: T-692-17

Citation: 2023 FC 1327

Ottawa, Ontario, October 4, 2023

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

JASON M. CLOTH

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Subsection 23(2) of the *Financial Administration Act*, RSC 1985, c F-11 [FAA] provides that the Governor in Council may, on the recommendation of the appropriate Minister, remit (i.e., forgive) any tax or penalty, including any interest paid or payable thereon, where it "considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty".

[2] In March 2016, Mr. Jason Cloth [the Applicant], along with approximately 257 other individuals, made a request to the Minister of Finance for the remission of taxes assessed and accrued interest relating to charitable donations made before December 20, 2002 to a leveraged donation scheme.

[3] In a letter dated April 11, 2017, the Minister of Finance denied the request to recommend remission.

[4] Mr. Cloth now brings an Application for judicial review [the Application] on the basis that the Minister's decision is unreasonable.

[5] For the reasons that follow, the Application is dismissed. While the Court understands the Applicant's concerns about unfairness arising from the different treatment of taxpayers based on the date of their donations and the date of the coming into force of the amendments to the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA] at issue, the Minister's decision is reasonable. The decision is justified, transparent and intelligible. Contrary to the Applicant's key argument, the Minister did not fail to engage with the Applicant's submissions.

I. Background

[6] From 2001-2003, the Applicant was one of over 400 individuals [the donors] who donated to the John McKellar Charitable Foundation's [McKellar Foundation] leveraged donation program. The leveraged donation program allowed the donors to make a partial cash donation (approximately 30%) and receive an interest free loan (approximately 70%, paid back

over time) for the balance of the donation. The donors received charitable tax receipts for the full amount of their donation, including the loaned portion. As subsequently noted by the Federal Court of Appeal in *Markou v Canada*, 2019 FCA 299 [*Markou*], this resulted in significant cash advantages for the donors: "[t]he Program was promoted on the basis that participants stood to obtain a [tax] return well in excess of their cash contribution as a result of making the donation depending on their province of residence" (at para 12).

[7] The Canada Revenue Agency [CRA] reassessed the donors' taxes and denied the tax credits. The donors, including Mr. Cloth, appealed to the Tax Court of Canada [TCC]. The CRA has since granted partial relief for only the cash portion of the donation and interest as part of a Settlement Agreement in the context of litigation. However, the Settlement Agreement applies only to donors who made donations after December 20, 2002. The Applicant donated to the McKellar Foundation both before and after December 20, 2002. The Applicant attests that there are well over 200 other taxpayers who, like him, made donations before December 20, 2002.

[8] In 2014, the group of pre-December 20, 2002 donors requested, by way of a letter to the Assistant Commissioner of the CRA, that the CRA extend the Settlement Agreement to them. Alternatively, they requested that the Assistant Commissioner recommend to the Governor in Council that a remission order be granted pursuant to subsection 23(2) of the FAA for the pre-December 20, 2002 donations to grant relief for all taxes and interest flowing from the cash portion of the donations.

[9] In late 2014, the CRA determined that the remission application related solely to issues of tax policy and transferred the matter to the Department of Finance. Counsel for the pre-December 20, 2002 donors subsequently submitted several letters regarding their request for remission to both the Department of Finance and to the Minister directly. On March 31, 2016, the group of pre-December 20, 2002 donors resubmitted their request to the Minister of Finance to recommend to the Governor in Council that remission be granted.

[10] In the March 31, 2016 letter addressed to the Minister of Finance, the donors set out the grounds on which they believed remission should be granted. The request to the Minister of Finance included the background to the request, the ongoing (at that time) litigation in the TCC, and the amendments to the ITA that were enacted in 2013 (as part of the *Technical Tax Amendments Act 2012*), but provided a retroactive application date of "after December 20, 2002".

[11] The request states:

> Given the pronouncements of both the former Minister of Finance and now the Federal Court of Appeal in *French* [*French v Canada*, 2016 FCA 64], the Taxpayers cannot understand why the CRA will allow a tax credit of the Cash Portion of a donation made on December 21, 2002 but not for an identical donation made on December 20, 2002. The Taxpayers regard the CRA's position, not unreasonably, essentially as punitive.

[12] The request also notes the "Taxpayers' sense of grievance" with respect to the CRA's handling of their dispute, and requests a meeting with the Minister "should any doubt … remain in your mind about the justness of the Taxpayers' request for a remission order" and adds that

the taxpayers are “credible and sympathetic individuals who made their donations in good faith and for whom it is just and fair that this dispute be finally brought to an end.”

[13] The Applicant attests that in May 2016, Counsel for the group of pre-December 20, 2002 donors met with the Minister’s Policy Advisor and in subsequent correspondence requested a prompt decision from the Minister.

[14] The Minister of Finance communicated his decision via letter in April 2017, and as noted, decided not to recommend to the Governor in Council that a remission order be granted.

II. Preliminary Issues

[15] First, the style of cause is amended to reflect that the Respondent is the Attorney General of Canada, in accordance with Rule 303(2) of the *Federal Courts Rules*, SOR/98-106.

[16] Second, the Respondent notes that the Applicant’s affidavit in support of his Application contains exhibits that were not before the Minister of Finance when the Minister made the decision. The Court notes that, as a general rule, only material that was before the original decision maker is admissible on an application for judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 17-20; and *Sharma v Canada (Attorney General)*, 2018 FCA 48 at paras 7-9. However, the Respondent now agrees that the particular exhibits attached to Mr. Cloth’s affidavit fall within an exception to the general rule that permits the reviewing Court to receive

additional evidence containing background information that does not address the merits of the case (*Access Copyright* at para 20).

III. The Statutory Provision

[17] Subsection 23(2) of the FAA states:

Remission of taxes and penalties	**Remise de taxes ou de pénalités**
(2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.	**(2)** Sur recommandation du ministre compétent, le gouverneur en conseil peut faire remise de toutes taxes ou pénalités, ainsi que des intérêts afférents, s'il estime que leur perception ou leur exécution forcée est déraisonnable ou injuste ou que, d'une façon générale, l'intérêt public justifie la remise.

IV. The Decision

A. *The Minister's Decision letter*

[18] The Minister's decision letter notes the request made by the pre-December 20, 2002 donors, cites subsection 23(2) of the FAA, and clearly states that he has decided not to recommend to the Governor in Council that remission be granted. Given the Applicant's focus on the wording of the Minister's letter communicating the decision, key paragraphs are set out in full:

> It is your submission that remission should be granted to your clients on the grounds that because some tax cases involving charitable donation schemes have been settled on the basis of a change in the law, earlier cases not affected by the change in the law ought nonetheless to be settled on the same basis. You state that it is unreasonable, unjust and not in the public interest for the income tax treatment of your clients, who made their putative donations on or before December 20, 2002, to differ from the treatment accorded to those who made their purported donations after that date.
>
> As I understand it, the clients you represent participated in a leveraged donation program that was marketed between 2001 and 2004. The Canada Revenue Agency assessed those taxpayers to deny their charitable donation tax credits claimed on the basis that no gift had been made because a significant benefit (i.e., an interest free loan) was received in return for the donation. Many of the taxpayers involved are still either at the objections stage of their litigation or are in the process of appealing to the Tax Court of Canada.
>
> All amendments to the [ITA] have a coming-into-force date when the amended legislation is intended to apply. A change in the law, by its very nature, means that there will be some people or circumstances to which the new law will apply once it is in force and others that will continue to be covered by the previous law. It is therefore reasonable for taxpayers who made donations at a time when the Act allowed for split-receipting to be treated differently from others who transferred property or services when the Act did not allow for split-receipting.
>
> You have also submitted that the prior law contemplated split-receipting and that the 2002 amendments were merely clarifying. However, considering remission orders on the basis that the taxpayer's claim is consistent with the law would replicate the existing tax appeal process, would encourage taxpayers to contest tax assessments under both the appeal process and via remission order requests, and would undermine the appeal system.

B. *The Memorandum to the Minister*

[19] A Memorandum, dated March 3, 2017, prepared by a Tax Policy Officer at the Department of Finance and approved by the Deputy Minister, was submitted to the Minister to

provide information regarding the request for remission. The Memorandum illuminates the Minister's reasons.

[20] The Memorandum restates the submissions made by Counsel for the pre-December 20, 2002 donors; namely, the allegation that the taxpayers who made donations before December 20, 2002 were treated unfairly because they were not offered the same settlement agreement as taxpayers who made donations after December 20, 2002; that the common law, including the Federal Court of Appeal's decision in *French v Canada*, 2016 FCA 64 [*French*], supports their position; and, that a remission order is the most efficient way to settle the tax dispute.

[21] The Memorandum sets out the background of the longstanding dispute, noting that the *Technical Tax Amendments Act 2012* implemented proposals that were originally announced and were the subject of consultations by the Department of Finance in 2002, and enacted provisions that allow for the issuance of charitable tax receipts for partial gifts (referred to as split-receipting) made after December 20, 2002 (i.e., the date the proposals were first announced). The Memorandum also describes the concept of a leveraged donation and the intention of the split-receipting rules.

[22] The Memorandum restates the Applicant's request to the Minister of Finance to recommend a remission order and describes the pre-December 20, 2002 donors' submission as follows:

> Davies [Counsel for the donors] contends that it is unreasonable, unjust and not in the public interest for taxpayers in the McKellar dispute to be treated differently under the Act on the basis of whether their donations were made on or before December 20,

> 2002 or after that time. In their view, the amendments brought forward in 2002 were merely clarifying, and the common law also contemplates spilt receipting. Therefore, it is argued that taxpayers who made donations prior to December 21, 2002 should benefit from the same settlement offered in respect of donations made after December 20, 2002. They contend that it is unreasonable, unjust and not in the public interest… to be denied charitable donation tax credits in relation to the cash portion of their gifts made as part of a leveraged donation tax shelter.

[23] The Memorandum also notes that, historically, the Minister of Finance has considered remission in cases involving exceptional circumstances where tax relief is called for but where an amendment is not the appropriate mechanism, or on the basis of "unintended consequences of legislation".

[24] The Memorandum explains that the coming into force date of the split-receipting provisions resulted in those who made donations after December 20, 2002 receiving more favourable tax treatment. It also notes that the proper comparator for the pre-December 2002 donors requesting remission is not the post-December 20, 2002 donors, but other donors who are not part of the ongoing litigation, and adds that taxpayers in the pre-December 20, 2002 period have all been treated the same.

[25] The Memorandum conveys the Policy Officer's view that it would not be in the public interest to apply the split-receipting rules to the pre-December 20, 2002 donors as this would show disregard for the law, which was intended to apply after December 20, 2002. The Memorandum cites *Waycobah First Nation v Canada*, 2010 FC 1188 [*Waycohbah* 2010], where the Federal Court found that consideration of the public interest should be centred on Canadian society as a whole, and not on the needs of a particular subset of taxpayers.

[26] The Memorandum also conveys the Policy Officer's view that it is in the broader public interest to know when legislation comes into force, noting the need for certainty in the application of the law.

[27] The Memorandum adds that "it is not clear that it is in the public interest to grant a remission order in circumstances where taxpayers participated in an unsuccessful arrangement designed to enrich the participants through the charitable donations tax credit".

[28] The Memorandum addresses the pre-December 20, 2002 donors' submission that the common law supports the application of split-receipting prior to the retroactive application date of the *Technical Tax Amendments Act 2012*. The Memorandum explains that if this assertion were correct, a remission order would not be necessary as the donors could advance this argument in their litigation in the TCC.

[29] The conclusion states, "we do not consider it unreasonable, unjust, or not in the public interest, for tax payers with donations made on or before the split-receipting legislation was proposed on December 20, 2002 to be treated differently than those with donations made after that date". The Memorandum notes the Deputy Minister's approval and attaches a draft letter for the Minister's signature in the event the Minister agrees with the recommendation not to recommend that a remission order be granted.

V. The Standard of Review

[30] There is no dispute that the standard of review for a Minister's decision under subsection 23(2) of the FAA is reasonableness, as confirmed in recent jurisprudence (*Bélanger v Canada (National Revenue)*, 2022 FC 1488 at paras 31 and 36; *Rahman v Canada (Attorney General)*, 2022 FC 806 at para 27 [*Rahman*]; *Mokrycke v Canada (Attorney General)*, 2020 FC 1027 at para 8 [*Mokrycke*]; *Escape Trailer Industries Inc v Canada (Attorney General)*, 2020 FCA 54 at para 13 [*Escape Trailer*]; *Fink v Canada (Attorney General)*, 2019 FCA 276 [*Fink*]). The judicial review of a decision regarding a remission order attracts a higher level of deference given the extraordinary and discretionary nature of the remedy: *Rahman* at para 27; *Fink* at para 1.

[31] The Applicant highlights the requirements for a reasonable decision established in *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 [*Vavilov*], and argues that the Minister's decision fails to reflect the hallmarks of reasonableness. Therefore, some of the key principles in *Vavilov* and the subsequent jurisprudence are worth highlighting.

[32] In *Vavilov*, the Supreme Court of Canada provided extensive guidance to the courts in reviewing a decision for reasonableness, noting that a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (paras 85, 102, 105–10). The basic principle is that a decision must be "justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (para 95). However, a Court does not assess the reasons against a standard of perfection (para 91), nor does the Court conduct a "line-by-line treasure hunt for error" (para

102). Decisions should not be set aside unless there are "sufficiently serious shortcomings" that are "sufficiently central or significant to render the decision unreasonable" (para 100).

[33] In *Canada (Citizenship and Immigration*) *v Mason*, 2021 FCA 156 [*Mason FCA*], the Federal Court of Appeal noted the extensive guidance provided in *Vavilov* and stated, at para 30, that "[c]ollecting the pieces and consolidating them advances clarity." *Mason FCA* also notes at paras 31-32 that the reviewing court must "investigate whether a reasoned explanation can be discerned" and that this explanation may be express or implied and "can also be outside the reasons". The record is part of a holistic reading of the decision (at paras 32 and 38).

[34] In *Mason FCA*, the Federal Court of Appeal explains that "the failure of the reasons to mention something explicitly is not necessarily a failure of 'justification, intelligibility or transparency'" (at para 32, citing *Vavilov* at paras 94 and 122). In reviewing an administrators' reasons, the reviewing court is allowed to "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn" (at para 32, citing *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11; *Vavilov* at para 97). The reviewing court's goal is to discern a coherent and rational chain of analysis from the express or implied reasons (*Mason FCA* at para 33).

[35] In *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason SCC*], the Supreme Court of Canada allowed the appeal from the Federal Court of Appeal, overturning the Federal Court of Appeal's finding regarding the reasonableness of the decision at issue. The Supreme Court of Canada re-emphasized the key principles from *Vavilov* quoted above (see for

example *Mason SCC* at paras 60-63), and with respect to the need for reasons to be responsive to the submissions of the parties, the Supreme Court of Canada stated, at para 74:

> An administrative decision maker's reasons must "meaningfully account for the central issues and concerns raised by the parties" ([*Vavilov* at] para. 127). Reasons must be "responsive" to the parties' submissions, because reasons are the "primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties" (para. 127 (emphasis in original)). Although an administrative decision does not have to "respond to every argument or line of possible analysis" raised by the parties, "a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" (para. 128).

VI. The Applicant's Submissions

[36] The Applicant initially challenges the reasonableness of the Minister's decision on several grounds.

[37] First, the Applicant initially argued that the Minister's concern about the duplication of the tax appeal process is now moot. The Applicant took the position that because the Federal Court of Appeal rendered its decision in *Markou* (the Supreme Court of Canada denied leave to appeal in May 2020) after the initial remission application, the remission order request is now ripe for reconsideration by the Minister. However, the Applicant has not pursued this argument.

[38] Second, the Applicant argues that the Minister misunderstood the state of the law in 2002, and points to the following passage in the Minister's letter:

> It is therefore reasonable for taxpayers who made donations at a time when the Act specifically provided for split-receipting to be

> treated differently from others who transferred property or services when the Act did not so provide… [Applicant's emphasis].

The Applicant submits that the ITA did not provide for split-receipting at the time the post-December 20, 2002 donations were made because the amendments to the ITA were not enacted until 2013 with a retroactive application date. The Applicant submits that there were no "2002 amendments"; the Minister's statement is clearly wrong and signals that the Minister misunderstood the state of the law at that time. The Applicant emphasizes that taxpayers would have had no way of knowing with any certainty that the law would change 11 years later and be retroactive to December 20, 2002. The Applicant characterises the Minister's misstatement of the law as a fundamental flaw that underpins the whole decision.

[39] Third, the Applicant argues that the Minister misunderstood the facts, and points to the following passage in the letter:

> It is your submission that remission should be granted to your clients on the grounds that because some tax cases involving charitable donations schemes have been settled on the basis of a change in law, earlier cases not affected by the change of law ought nonetheless to be settled on the same basis.

The Applicant submits that the Minister erred by comparing him and other pre-December 20, 2002 McKellar Foundation donors to participants in other "charitable donation schemes". The Applicant argues that the Minister should have considered the unfairness to the donors participating in the same donation program.

[40] Fourth, the Applicant argues that the Minister failed to consider and respond to his submissions regarding inequity and unfairness. The Applicant submits that where the strict

interpretation of the law gives rise to inequity between taxpayers in identical situations, decision-makers should exercise discretion to correct the inequity. The Applicant submits that the Minister failed to do so. In addition, the Applicant argues that the retroactive application date of December 20, 2002 is arbitrary.

[41] The Applicant further submits that, at the time of the decision, the Minister of Finance did not have the benefit of the Federal Court of Appeal's decision in *Barrs v Canada (National Revenue)*, 2022 FCA 147 [*Barrs*], which the Applicant characterises as finding that discretion to alleviate tax liability should be exercised to ensure equality between similarly situated tax payers and that a decision-maker's failure to engage in a request for relief to ensure equitable treatment is a reviewable error. The Applicant suggests that *Barrs*, and also *Mokrycke*, demonstrate the court's openness to relaxing the application of the principle that a remission order is an extraordinary remedy with a view to promoting equitable treatment.

[42] The Applicant submits that *Vavilov* instructs reviewing courts to "strengthen a culture of justification in administrative decision-making" (at para 2) and emphasizes that "it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies" (at para 86). The Applicant submits that the Minister's decision is not justified; the Minister did not grapple with the submissions regarding inequity and unfairness and did not explain why the Minister did not recommend that remission be granted.

[43] The Applicant submits that the Minister cannot simply rely on the coming into force date of the amendments to the ITA without addressing the unfairness to the pre-December 20, 2002

donors. The Applicant argues that it is fundamentally unfair to be treated differently based whether a donation was made on December 20 or December 21, 2002, and this unfairness and inequitable treatment should be addressed by recommending remission.

[44] The Applicant also submits that the amendments to address split-receipting were intended to be remedial (i.e., to relieve a tax burden), and therefore, the pre-December 20, 2002 donors should benefit from the remedial provision rather than be penalised.

VII. The Respondent's Submissions

[45] The Respondent submits that the Minister's decision is reasonable, responsive to the Applicant's submissions, and reflects the law. The Respondent points to the jurisprudence, noting that a remission order is a highly discretionary remedy and judicial review demands deference to the decision-maker.

[46] The Respondent disputes the Applicant's written argument that the Minister should reconsider the remission application based on the passage of time and the conclusion of the appeal process. The Respondent submits that the Minister based his decision on the facts known at the time of the decision in 2017 and could not have predicted the outcome of the appeal process that concluded only in 2020. Although the Applicant did not pursue this argument further, the Respondent adds that the Minister's concerns about the duplication of process remain relevant because the pre-December 20, 2002 donors made the same arguments before the TCC and the Federal Court of Appeal proceedings as in their remission application.

[47] The Respondent also disputes that the Minister misstated or misunderstood the facts or the law. The Respondent notes that although the amendments were not enacted until 2013, they were retroactive and retroactive legislation is deemed to come into force on a date prescribed by the date in the legislation (in this case, after December 20, 2002). The decision conveys that the Minister considered that the proposed change in the law retroactively came into effect in 2002 – as stated by the Minister, "the dates the proposals were first announced".

[48] The Respondent disputes the Applicant's submission that the pre-December 20, 2002 donors were not aware of the proposed amendments to the ITA. The Respondent submits that taxpayers were made aware of the proposed changes to the ITA as of December 20, 2002. In addition, the Respondent notes that as a general principle, amendments to the ITA are made retroactive to the date that a proposed amendment was first announced to the public or made available for public consultation.

[49] The Respondent argues that the retroactive amendments to the ITA did not result in unintended unfairness for the Applicant or other pre-December 20, 2002 donors. The Respondent submits that Parliament would have been aware that some taxpayers would not be able to avail themselves of the amendment if they made donations prior to December 21, 2002.

[50] The Respondent submits that in determining the fairness of the outcome to the Applicant and other pre-December 20, 2002 donors, the proper comparator group is other taxpayers who made similar charitable donations before December 21, 2002, and not the post-December 20, 2002 McKellar Foundation donors covered by the Settlement Agreement. The Respondent

submits the Applicant was treated the same as other taxpayers who may have made similar donations before December 20, 2002.

[51] The Respondent submits that the Minister considered whether it was in the public interest to remit the tax owing and that this requires consideration of the broader public interest: *Waycobah 2010* at para 30*; Internorth Ltd v The Minister of National Revenue*, 2019 FC 574 at paras 21-22

[52] The Respondent notes that the Applicant's 2016 request for remission was, essentially, that the pre-December 20, 2002 taxpayers did not understand why they were being treated differently than the post-December 20, 2002 donors. The Respondent argues that the Minister responded to this submission.

[53] The Respondent points to *Twentieth Century Fox Home Entertainment Canada Limited v Canada (Attorney General)*, 2012 FC 823 [*Twentieth Century Fox*], where the Court noted that limitation periods "cut both ways" (at para 38). The Respondent submits that the present circumstances are analogous; the December 20, 2002 retroactive application date resulted in some donors being granted relief, and others not. The coming into force date of the split-receipting provisions is not arbitrary and does not result in the Minister's decision being unreasonable for adhering to this date (*Twentieth Century Fox* at para 38).

[54] The Respondent further submits that while the Minister was aware that unintended effects of legislation could be considered to support a recommendation for remission, the effect of the retroactive coming into force date was not unintended.

VIII. The Minister's Decision is Reasonable

[55] The jurisprudence has established that a remission order is a highly discretionary and exceptional relief from taxes or penalties, to which an applicant is not entitled (*Rahman* at para 42; *Aronson v Canada (Attorney General)*, 2021 FC 1451 at para 41; *Meleca v Canada (Attorney General)*, 2020 FC 1159 at para 21; *Escape Trailer Industries v Canada (Attorney General)*, 2020 FCA 54 at para 5; *Fink* at para 1; *Twentieth Century Fox* at para 36; *Waycobah 2010* at para 30).

[56] In *Waycobah First Nation v Canada (Attorney General)*, 2011 FCA 191 at paras 17-18 [*Waycobah*] (affirming the Federal Court's decision), the Federal Court of Appeal emphasized that even if a request for remission falls within the CRA's Guidelines for when remission may be warranted, remission is not guaranteed.

[57] The Applicant's submission – that *Mokrycke* and *Barrs* demonstrate that the Court will intervene to address unfairness and inequity and that the principle that a remission order is exceptional relief has been softened – overlooks that in both cases the Court applied the same principles governing reasonableness review and found that the respective decisions were not reasonable because the decision-makers did not address relevant submissions. The jurisprudence continues to confirm that a remission order is exceptional relief and a decision to recommend such relief is highly discretionary.

[58] As noted, the Applicant did not pursue his argument that, given the conclusion of the statutory appeal process, there is no impediment to the Minister considering his remission application as it will not duplicate the appeal process. In any event, the Court notes that the issue is whether the Minister's decision in 2017 is reasonable. At the time of the Minister's decision, concerns about the remission application replicating the appeal process were relevant. As the Respondent notes, the Minister could not have known the outcome of the appeal process.

[59] In addition, concerns about duplication remain due to the Applicant's submission that his request for remission is consistent with the common law, which he also argued in the TCC and Federal Court of Appeal proceedings. As the Minister reasonably noted, to consider the donors' request on the basis that the law supported their application would encourage taxpayers to apply for remission orders to contest tax assessments, which would undermine the appeal system. In *Rahman*, at para 48, the Court held that "remission is not a normal or usual mechanism by which to challenge a tax assessment and therefore, should not be used as a commonplace or expected override of statutory appeals... [o]therwise, the integrity and efficacy of the tax system would be undermined".

[60] Contrary to the Applicant's submission, the Minister did not misapprehend the law or the facts. Although the decision letter is concise, *Vavilov* explains that a decision must be read holistically, including with the record before the decision-maker. As noted above in *Mason FCA*, at para 33 (citing *Vavilov* at para 85), reasons may be express or implied and the Court must be able to "discern an 'internally coherent and rational chain of analysis'". In the present case, the chain of analysis is easily discerned from the Minister's decision and the record.

[61] The Memorandum that informed the Minister clearly sets out how the amendments enacted in 2013 were made retroactive to December 2002. The decision letter also conveys that the Minister clearly understood the effect of the retroactive coming into force date. The Minister's reference to the "2002 amendments" does not suggest that the Minister was under the impression that amendments were enacted in 2002. This term has been used in correspondence and in the jurisprudence (including the *French* decision cited by the Applicant) to refer to the amendments at issue that, due to retroactive application, were enacted in 2013 but were in force "after December 20, 2002".

[62] Similarly, the Minister's reference to "taxpayers who made donations at a time with the Act allowed for split-receipting" does not suggest that the Minister was under the mistaken view that the law was amended in 2002, but rather that the Minister understood how retroactive legislation operates.

[63] The Applicant argues that in 2002 the donors could not have known that changes to the ITA would not be enacted until 2013 but would be retroactive to 2002. The Applicant submits that all donors were guided by the law at the time their donations were made. However, the Applicant's own exhibits refer to the proposals for split-receipting being announced in 2002.

[64] Contrary to the Applicant's submission, the dividing line of December 20, 2002 was not an arbitrary date seemingly picked out of thin air. On December 20, 2002, the Department of Finance released a package of proposed technical amendments to the ITA, which included the split-receipting provisions (Government of Canada, Department of Finance, *Draft Technical*

Legislation and Explanatory Notes to Amend the Income Tax Act, December 20, 2002 (Toronto: Thomson Carswell, 2002)). While the Applicant's submission that taxpayers cannot know when amendments might be enacted is acknowledged, the arbitrariness argument is undermined by the December 20, 2002 announcements. The reality is that any amendment to tax legislation or tax policy will result in taxpayers falling on either side of the coming into force date.

[65] The Applicant's suggestion that the unfairness stems from different treatment based only on whether the donations fell "on the wrong side of an arbitrary calendar" was not ignored by the Minister. The decision clearly addressed this allegation by reiterating that the application of a coming into force date does not equate to unfairness. The Memorandum to the Minister expands on this general submission and sets out all the relevant considerations, including unjustness, unfairness, and the public interest.

[66] The Applicant's submission – that if the Minister can refuse to recommend remission on the basis of a coming into force date for legislation, then remission orders would never be granted to donors who made their donations before that date – overlooks that a taxpayer could base a request for remission on other grounds.

[67] The Minister did not misunderstand that the Applicant sought the same treatment as the post-December 20, 2002 McKellar Foundation donors. Rather, the Applicant's request for relief set out the context and the Minister responded to that context (i.e., the pre and post-December 20, 2002 donations to the McKellar Foundation charitable donation program). The Minister captured the Applicant's submission by noting "[y]ou state that it is unreasonable, unjust and not in the public interest for the income tax treatment of your clients, who made their putative

donations on or before December 20, 2002, to differ from the treatment accorded to those who made their purported donations after that date". The Minister's reasons for not finding that it was unreasonable, unjust or not in the public interest are apparent when the decision is read holistically, including with reference to the Memorandum. The Minister was not required to address submissions that were not made.

[68] While the wording of the Minister's letter could have been expanded to provide greater clarity for an uninformed reader, when the letter is read with the Memorandum and the other documents on the record, it conveys the Minister's correct understanding of the law and the facts and responds to the submissions made by the donors in their request for remission.

[69] The Minister did not fail to engage with the Applicant's submissions regarding inequitable treatment and unfairness arising from the date that he and others made their donations. As noted above, the Memorandum prepared for the Minister's consideration laid out the fairness arguments in a more expansive way than in the Applicant's request for a remission to the Assistant Commissioner or in his direct request to the Minister.

[70] The Memorandum also describes the circumstances and relevant considerations that may warrant a recommendation for remission. The Memorandum explains that historically the Minister considered remission in "exceptional circumstances where tax relief is called for but an amendment is not the appropriate mechanism" or based on the "unintended consequences of legislation". The Memorandum also explained the public interest considerations.

[71] The Court does not agree that *Barrs* and *Mockryke* show the court's openness to softening the principle that remission decisions are highly discretionary and that remission is not an extraordinary remedy.

[72] In *Barrs*, the Federal Court of Appeal allowed the appeal of the Federal Court's dismissal of Mr. Barrs' judicial review of the decision of the Minister's delegate pursuant to a provision of the ITA regarding tax payer relief. The detailed history of the litigation involving Mr. Barrs and other taxpayers is set out in *Barrs* and need not be explained here. Mr. Barrs applied for tax relief in 2014, whereas other similarly situated taxpayers applied in 2004. Those that applied in 2004 were granted relief for a much longer period than Mr. Barrs due to an amendment in 2005 that imposed a limitation on relief to the previous ten-year period. Mr. Barrs was therefore limited to relief dating back only to 2004. The Federal Court of Appeal noted that Mr. Barrs and other taxpayers had made submissions at three levels of independent reviews, but that the third level review officer failed to consider Mr. Barrs' more unique submission regarding relief for interest accrued over a period not covered by the ten-year limit. The Federal Court of Appeal noted, at para 36, that the ten-year limitation period was not a complete answer to Mr. Barrs claim for equitable treatment.

[73] The Applicant relies on para 37 of *Barrs*, where the Court stated that "Mr. Barrs' claim for equality of treatment is not a frivolous one" and that "they all invested in the same scheme and had their claims for interest relief examined by the same review officers based on the same facts", to argue that this Court should follow a similar approach to address the inequitable treatment of the pre-December 20, 2002 donors. However, the reason for the Federal Court of

Appeal's finding that the decision was unreasonable was the decision maker's failure to engage with Mr. Barrs' submission. The Court of Appeal stated at para 38:

> Given that the independent third-level review officer failed to engage with the request for greater relief in the open years to ensure equitable treatment, his decision must be set aside. This request was before the independent third-level review officer, yet he failed to meaningfully address it. Failure to engage with an important argument advanced by a party will generally render an administrative decision unreasonable, as was noted by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 127–128, [2019] 4 S.C.R. 653.

[74] Also, contrary to the Applicant's suggestion, *Mokrycke* does not demonstrate a departure from the jurisprudence that confirms a remission order is an extraordinary measure and highly discretionary. In *Mockryke*, the Court reiterates the principles established in the jurisprudence (at para 64). The Court notes the guidance from *Vavilov* that a decision must be justified, not only justifiable, and that the decision maker must "grapple with key issues or central arguments" (at para 65).

[75] In *Mokrycke*, the Court applied the *Vavilov* principles and found on the facts that the Assistant Commissioner's decision was not reasonable because the decision did not "grapple" with the submissions regarding Mr. Mokrycke's broader personal circumstances (related to family, financial, and business issues) that caused him to rely on tax professionals. The Court found that the Assistant Commissioner erred by relying on "the principle that errors or omissions by tax professionals 'are not considered extenuating circumstances for the purpose of remission'" and treating this as the complete answer to Mr. Mockrycke's submission (at para 72). The Court found that the Assistant Commissioner did not explain why the errors caused by

Mr. Mokrycke's reliance on tax professionals would not constitute an extenuating circumstance in the context of his broader personal circumstances (at para 73).

[76] In the present case, the Minister's decision addresses the Applicant's primary arguments regarding unfairness and equality of treatment *vis-à-vis* the impact of the coming into force of the split-receipting amendments. The Minister did not fail to grapple with the Applicant's submissions or the relevant considerations, including those set out in the FAA. The Minister acknowledged, but ultimately rejected, the proposition that the pre-December 21, 2002 and post-December 20, 2002 donors should be treated the same. The Minister's decision is justified in relation to the facts and the law and is both transparent and intelligible.

IX. Costs

[77] The Applicant and Respondent noted that they had reached an agreement on the costs to be awarded depending on the outcome of the Application. Given that the Application is dismissed, the Respondent shall have their costs in the lump sum amount of $4420.

JUDGMENT in file T-692-17

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.
2. The Applicant shall pay to the Respondent a lump sum of $4420 for costs and disbursements.
3. The style of cause is amended to reflect that the Respondent is the Attorney General of Canada.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-692-17
STYLE OF CAUSE:	JASON M. CLOTH v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTREAL, QUEBEC
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JUDGMENT AND REASONS:	KANE J.
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APPEARANCES:

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