

CANADA / JUDGMENT

Foisy v. Canada (Attorney General)

2024 FC 1462

COURT

Federal Court

DECIDED

8 July 2025

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[ENGLISH TRANSLATION]

Ottawa, Ontario, July 8, 2025

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

ANDRÉE FOISY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

AMENDED JUDGMENT AND REASONS

I. Background [1] The applicant, Andrée Foisy, seeks judicial review of the decision of a Canada Revenue Agency [CRA] officer dated September 21, 2023, in which the officer determined that the applicant was ineligible for the Canada Recovery Benefit [CRB] because she did not meet the minimum income eligibility criteria [Decision]. The applicant argues that she met the eligibility requirements for the CRB and that the CRA should have considered her gross income rather than her net income in assessing her eligibility.

II. Facts and Decision under review [2] The applicant has been a lawyer since 1975 and is self-employed. During the pandemic, she applied for and received CRB payments for the periods of October 11, 2020 to December 5, 2020, and February 14, 2021 to March 14, 2021.

- [3] On January 16, 2023, the CRA sent a letter to the applicant indicating that she had been selected for a first review of her CRB ineligibility [First Review Letter]. The applicant provided additional documentation as part of the first review process. On February 20, 2023, she transmitted a summary of services rendered in 2019 and the associated invoices to the CRA. On February 23, 2023, she sent a copy of bank statements.
- [4] On February 28, 2023, the first review officer informed the applicant that she was not eligible for the CRB because she had not earned at least \$5,000 (before taxes) of employment or net self-employment income in 2019, in 2020, or in the 12-month period preceding the day on which she made her first application, and because she had been able to work but had not sought employment.
- [5] On March 24, 2023, the applicant submitted a request for a second review to the CRA. As part of the second review, she provided a letter dated March 24, 2023, outlining her challenge to the letters from the CRA and the reasons for her challenge. In the letter, she described her situation in relation to the CRB and noted that she had not quit her employment, voluntarily reduced her work hours or declined work during the CRB periods. In particular, the applicant described the files she had in 2019, in 2020 and in 2021; the impact that the pandemic had on her clients; and the resulting reduction in work that she did for them. On May 29, 2023, she wrote to the CRA requesting a follow-up on her file.
- [6] On September 21, 2023, the CRA sent a letter to the applicant informing her that, further to the second review, she was ineligible for the CRB because she had not earned at least \$5,000 (before taxes) of employment income and/or net self-employment income in 2019, in 2020, or in the 12-month period preceding the day on which she made her first application. The CRA asked her to repay the amounts paid under the CRB. That Decision is the subject of this judicial review.

III. Issues and standard of review [7] The issue is whether or not the CRA Decision regarding the applicant's ineligibility for the CRB was unreasonable.

- [8] The respondent correctly submits that the standard of review applicable to the merits of the Decision is reasonableness (*Milan v Canada (Attorney General)*, 2024 FC 17 at para 14 [Milan]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019] 4 SCR 653 at paras 10, 16 and 17 [Vavilov]). Indeed, the reasonableness standard applies in the context of a judicial review of a CRA decision to deny the CRB, among other things (*Veilleux c Canada (Procureur général)*, 2024 CF 587 at para 23; *He v Canada (Attorney General)*, 2022 FC 1503 at para 20; *Lapointe v Canada (Attorney General)*, 2024 FC 172 at para 6 [Lapointe]). I agree that the reasonableness standard applies in this case.
- [9] In applying the reasonableness standard, a court does not ask what decision it would have made in place of that of the administrative decision maker. This approach is meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, the reasonableness and the fairness of the administrative process. It is rooted in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers (*Vavilov* at para 13). It does not seek to ascertain the range of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the correct solution to the problem (*Vavilov* at para 83). A reviewing court cannot reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125).
- [10] A reasonable decision is one that is based on a coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85). The burden is on the party challenging the decision to show that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency (*Vavilov* at para 100).

IV. Analysis A. Preliminary issue: admissibility of new evidence [11] As a preliminary issue, the respondent objects to the admission into evidence of exhibits to the Affidavit of the Applicant in the applicant's record. The exhibits consist of three schedules (Schedules 3, 4, 5) containing the following documents: the 2019 income tax return amended on October 20, 2023 [Amended Income Tax Return], a copy of an invoice sent in the first quarter of 2020, and a copy of the GST and QST return for the first quarter of 2020. The respondent points out that these documents were not submitted to the decision maker in the second review and that the applicant is attempting to amend her 2019 income tax return after the fact in order to increase her net income.

- [12] In her memorandum, the applicant submits that the Amended Income Tax Return is admissible because she had simply made an honest mistake and there are no valid reasons for the CRA to refuse it. Furthermore, it complies with the CRA's criteria and standards. At the hearing, the applicant confirmed that the Amended Income Tax Return is awaiting processing by the CRA. She says that the amendment corrects the deduction she made by

including her professional fees for 2019. If the Amended Income Tax Return is accepted, she will be able to meet the minimum financial threshold of \$5,000 net by moving the amount claimed for her income and expenses to net income.

- [13] As I explained to the applicant at the hearing, the role of this Court on judicial review is to review the administrative decision maker's decision in the legal and factual context presented to that decision maker. In light of this role, the evidentiary record before this Court on judicial review is generally restricted to the evidentiary record that was before the decision maker. Thus, as a general rule, documents and information that were not before the decision maker are not admissible in an application for judicial review in this Court (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 97–98; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19–20 [Access Copyright]).
- [14] Exceptions to this general principle include the following: (1) to provide general background to assist the Court in understanding the issues relevant to the judicial review; (2) to highlight the complete absence of evidence before the administrative decision maker when it made its finding; and (3) to bring to the attention of the Court procedural defects that cannot be found in the evidentiary record of the administrative decision maker (Access Copyright at para 20).
- [15] The Amended Income Tax Return that seeks to amend the 2019 income tax return was signed on October 20, 2023, i.e. one month after the second review decision. Clearly, the officer did not have this document (or the information amending the income claimed for 2019) in front of her. The second review officer also confirmed by affidavit that the documents in Schedules 3, 4 and 5 had not been submitted as part of her decision-making process.
- [16] Furthermore, if the Amended Income Tax Return is accepted by the CRA, it will not necessarily have the impact that the applicant alleges on her eligibility for the CRB. Indeed, the respondent cites the principle of prohibition against rectification aiming to achieve retroactive tax planning established by the Supreme Court of Canada in *Canada (Attorney General) v Collins Family Trust*, 2022 SCC 26 at paragraphs 1, 7 and 29. In the context of CRB benefits, “one cannot simply go back and reclassify income after the fact in order to qualify for the CRB” (*Laplane v Canada (Attorney General)*, 2023 FC 1450 at para 19; *Morin v Canada (Attorney General)*, 2023 FC 751 at para 22) and “the fact that the applicant made adjustments to her income after the fact to become eligible for benefits does not require the Officer to agree with her” (*Lapointe* at para 21).
- [17] Citing the Federal Court of Appeal in *Access Copyright*, Justice Gascon pointed out that the essential purpose of judicial review is the review of administrative decisions, not the determination, by trial de novo, of questions that were not adequately canvassed in evidence by the relevant administrative decision maker. An application for judicial review is not an appeal (*Labrosse v Canada (Attorney General)*, 2022 FC 1792 at para 32 [Labrosse]).

[18] Schedules 3, 4 and 5 do not meet any of the exceptions set out in Access Copyright and were not before the second review officer. These three documents are therefore not admissible in this case. The Court cannot examine them on judicial review to determine the reasonableness or legality of the Decision (Labrosse at para 33; Lapointe at para 13, citing *Fortier v Canada (Attorney General)*, 2022 FC 374 at para 17).

B. Is the Decision unreasonable? [19] The applicant applied for the CRB, which is part of a set of measures introduced by the Government of Canada in response to the impacts of the COVID-19 pandemic. She submits that it was not clear that the eligibility criteria required a minimum threshold of \$5,000 in net income. She adds that the legislation was vague because the French version uses the term “revenu” while the English version uses the term “total income”. The applicant argues that the CRA is defending an inadequate interpretation of her file. She emphasizes that she believed she followed the information available regarding the eligibility criteria at the time of her CRB applications.

[20] By contrast, the respondent submits that the legislation is clear and that the First Review Letter explained that she did not meet the net income criterion.

[21] The CRB is governed by the Canada Recovery Benefits Act, SC 2020, c 12, s 2, in force since October 2, 2020 [CRB Act]. In particular, the eligibility criteria for the CRB that apply to the applicant are set out in paragraphs 3(1)(d) and (e) and section 4 of the CRB Act. To qualify, the applicant had to demonstrate that she had earned a total income of at least \$5,000 from employment or self-employment for 2019 or for 2020 or in the 12-month period preceding the day on which she made her application. For the purposes of paragraphs 3(1)(d) and (e), subsection 3(2) of the CRB Act defines income from self-employment as “revenue from the self-employment less expenses incurred to earn that revenue”. Subsection 3(2) of the CRB Act accordingly specifies that the term “income” in paragraphs 3(1)(d) and (e) refers to net income.☐

[22] The respondent pointed out to me that the facts and the analysis in *Milan and Flock v Canada (Attorney General)*, 2022 FC 305 [Flock] are relevant to this judicial review because the parties in those cases also focused on the issue of the net income required to qualify for the CRB.

[23] In *Milan*, Justice Walker (as she then was) confirmed that the eligibility criteria set out in subsection 3(2) of the CRB Act clearly require that the relevant income from self-employment is revenue from the self-employment less expenses incurred to earn that revenue, which constitutes net income (*Milan* at para 19). In *Milan*, the applicant had relied on online questionnaires and argued that they did not mention that the minimum threshold was a calculation of net income, not gross income. Justice Walker also confirmed that the criteria established in subsection 3(2) of the CRB Act are statutory and non-discretionary (*Milan* at para 23, citing *Flock* at para 23).

- [24] In *Flock*, Justice Fothergill confirmed that for the purposes of the eligibility criteria under subsection 3(2) of the CRB Act, a person who is self-employed is assessed on their net self-employment income following expenses and other deductions, not their gross self-employment income (*Flock* at para 20). The eligibility criteria are statutory, not discretionary. The officer had no choice but to apply them. There can be no estoppel in the face of an express provision of a statute: the legislation is paramount (*Flock* at para 23, citing *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at paras 35, 47).
- [25] In this case, the applicant says that she never received confirmation that there was a minimum net income threshold to meet the eligibility criteria: not when the CRB was introduced, in the First Review Letter, verbally from the CRA, or on the website. She argues that the CRA never specified whether the income was gross or net.
- [26] With respect, the applicant's argument cannot succeed. First, the information described by the applicant cannot supersede legislation. In fact, I can confirm that, contrary to the applicant's submissions, the First Review Letter did indicate that the net income could be earned through self-employment (after deducting expenses). Second, the eligibility requirements and criteria established by the CRB Act take precedence, and the second review officer had no choice but to apply them (*Milan* at para 23). The criterion requiring that the minimum threshold be calculated based on net income is clear.
- [27] Regarding the calculation of the applicant's net income during the relevant CRB periods, the respondent indicated that the file before the second review officer included the documents that the applicant provided, the information that the officer noted based on the file, and the applicant's statement that her tax returns are in good order. For the relevant CRB periods, the file shows that the applicant reported net self-employment income of less than \$5,000.
- [28] The finding that the applicant did not meet the minimum income requirement and therefore did not qualify for the CRB was therefore not unreasonable. This conclusion is based on the evidence and is consistent with the constraints of the CRB Act. Accordingly, it meets the *Vavilov* test because it is internally coherent as well as transparent, justified, and intelligible.
- [29] In her reply, the applicant also mentioned for the first time that she is disputing the correctness of the amount that the CRA is asking her to repay. I explained to her that this was not an appropriate reply because it had never been part of her arguments.

V. Conclusion [30] The application for judicial review is dismissed. The applicant has failed to demonstrate that the Decision was unreasonable.

- [31] By virtue of my discretion under Rule 400 of the Federal Courts Rules, and given the circumstances of the case, I agree with the respondent that an order as to costs would not be appropriate.

JUDGMENT in T-2228-23

THIS COURT’S JUDGMENT is as follows:

The application for judicial review is dismissed, without costs.

“Phuong T.V. Ngo”

Judge

Certified true translation,

Vera Roy, Senior Jurilinguist

FEDERAL COURT

SOLICITORS OF RECORD

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NGO J

DATED AMENDED:

JULY 8, 2025

APPEARANCES:

Andrée Foisy

FOR THE APPLICANT

(ON HER OWN BEHALF)

Caroline Berthelet

For the respondent

SOLICITORS OF RECORD:

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Montréal, Quebec

For the respondent

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