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Ontario corporation disputes handling of Voluntary Disclosures Program | David Rotfleisch

By **David Rotfleisch**

Law360 Canada (January 23, 2024, 9:47 AM EST) -- **Case background**

David Rofleisch

Our office was approached to represent an Ontario corporation after its request for penalty and interest relief under the Canada Revenue Agency's (CRA) Voluntary Disclosures Program (VDP) was denied.

The corporation began operating in 2003 and earned significant income over the course of nearly two decades without filing any T2 corporate tax returns or GST/HST returns. The corporation was involuntarily dissolved in 2007 for failure to file yearly information returns with the Ontario Ministry of Finance, but the corporation's proprietors continued to operate its business. The corporation eventually filed a voluntary disclosure application in 2020 under the VDP to correct its non-compliance issues.

The corporation's proprietors sought to administratively revive the corporation after its voluntary disclosure application was filed. These efforts were thwarted very quickly, however, because of errors on the part of the Ontario Ministry of Finance and the CRA.

Specifically, the corporation's proprietors believed that the corporation had a tax year-end that matched a calendar year-end of Dec. 31. The proprietors prepared the corporation's tax returns on this basis.

However, the Ontario Ministry of Finance and the CRA had each registered the corporation with a different fiscal year-end. The corporation, therefore, required the consent of the Ontario Ministry of Finance and the CRA to consolidate its three different tax year-ends, so that it could prepare and file its outstanding returns correctly for its voluntary disclosure application.

The corporation's efforts were stonewalled by the CRA, which denied its initial request without any justification and subsequently took close to a year and a half to review and overturn its initial decision.

The CRA subsequently ceased communicating with the corporation and its representatives, while the corporation's proprietors and representatives continued to provide ongoing disclosure with respect to their efforts to revive the corporation for its voluntary disclosure application.

After nearly three years of silence from the CRA, it issued a letter concerning the corporation's voluntary disclosure application. That letter requested the corporation provide its articles of revival so that the CRA could continue to process its voluntary disclosure application. That letter imposed a 15-day deadline to respond and was sent exclusively by Canada Post to the corporation and its representatives.

The CRA's request was received late and was not replied to within the 15-day deadline imposed.

After receiving no response by the imposed deadline, the CRA quickly moved to deny the corporation's voluntary disclosure application on the basis its application was incomplete. Curiously, that letter also stated the corporation would not be entitled to apply for a second administrative review of the denial by an independent CRA decision-maker.

And even more egregious, the decision letter stated that the corporation's right to judicial review of the CRA's decision would be denied.

As a result of CRA's decision, the corporation risked facing millions of dollars worth of penalties and interest, on top of the extensive tax debt it would owe after filing its outstanding returns.

Our office was engaged by the corporation's proprietors almost a month after the CRA's decision to deny the corporation relief under the Voluntary Disclosures Program, to determine if a solution could be found.

Our approach

Our office immediately gathered all available evidence and filed an application for judicial review with the Federal Court of Canada.

In that application, we argued that the CRA's decision to deny the corporation's request for relief under the Voluntary Disclosures Program, and to deny the corporation a second administrative review of that decision, should be set aside.

Our office argued that the CRA's decision was unintelligible and that it deprived the corporation of its rights to procedural fairness.

The CRA's decision regarding the corporation was an administrative decision that affected the rights and privileges of the corporation, and one that attracted a duty of procedural fairness. Under the rules of procedural fairness, an adjudicator's decision must be intelligible. Further, an applicant must have the right to make submissions and to present evidence.

Our office argued the CRA's decision was a complete denial of natural justice and breached the corporation's right to procedural fairness in light of the principles above.

First, the CRA's letter imposed only a 15-day deadline to reply, and was issued by Canada Post. After nearly three years of silence from the CRA concerning the status of the corporation's voluntary disclosure application, the corporation was effectively ambushed with the CRA's request, and which failed to provide the corporation any meaningful opportunity to respond to its request for information.

Second, the corporation would have been unable to meet the CRA's request for information in large part because of the inadvertence of the CRA itself. By denying the corporation's reasonable requests to have its tax year-end adjusted, the CRA itself had prevented the corporation from being able to meet the CRA's demands.

Third, and perhaps most egregious, was that the CRA's decision explicitly denied the corporation's right to recourse. The decision letter denied the corporation's right not only to a second administrative review of the CRA's decision, but surreptitiously the corporation's right to file an application for judicial review. That right to file for judicial review is enumerated under s. 18.1 of the *Federal Courts Act*, and the CRA had no right to deny the corporation its statutory rights.

The severe disconnect between the CRA's reasoning and the outcome of its decision was untenable and rendered its decision wholly unreasonable.

Result

The CRA's legal counsel at the Department of Justice engaged in settlement discussions with our office to resolve the corporation's judicial review prior to cross-examinations.

The CRA consented to a settlement offer where the corporation's voluntary disclosure application would be referred back for reconsideration, and the corporation would be allowed to continue seeking its articles of revival.

As a result, our client avoided millions in penalties and interest owing for denial of relief under the Voluntary Disclosures Program, and their application was allowed to proceed on its merits.

David J. Rotfleisch is the founding tax lawyer of Rotfleisch & Samulovitch P.C., a Toronto-based boutique tax law and corporate law firm. He appears regularly in print, radio and TV. With over 35 years of experience as both a tax lawyer and chartered professional accountant, he has helped startup businesses, resident and non-resident business owners and corporations and cryptocurrency traders with their tax planning, with will and estate planning, voluntary disclosures and tax dispute resolution including tax audit representation and tax litigation.

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