Date: 20111026

Dockets: A-376-10
A-374-10
A-375-10
A-377-10
A-378-10
A-382-10

Citation: 2011 FCA 299

CORAM: **NOËL J.A.**
TRUDEL J.A.
STRATAS J.A.

BETWEEN:

Docket: A-376-10

STEMIJON INVESTMENTS LTD.

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-374-10

BETWEEN:

CANWEST COMMUNICATIONS CORPORATION

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-375-10

BETWEEN:

CANWEST DIRECTION LTD.

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-377-10

BETWEEN:

LEONARD ASPER HOLDINGS INC.

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-378-10

BETWEEN:

LENVEST ENTERPRISES INC.

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-382-10

BETWEEN:

SENSIBLE SHOES LTD.

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on October 11, 2011.

Judgment delivered at Ottawa, Ontario, on October 26, 2011.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NOËL J.A.
TRUDEL J.A.

Federal Court of Appeal  Cour d'appel fédérale

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] Before this Court are six appeals from six judgments of the Federal Court (*per* Justice Mandamin): 2010 FC 892, 2010 FC 893, 2010 FC 894, 2010 FC 895, 2010 FC 897, 2010 FC 898. In each, the Federal Court dismissed an application for judicial review brought by the taxpayer concerning a decision by the Minister of National Revenue. In each, for identical reasons, the Minister refused the taxpayer relief from penalties and interest under subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[2] Since the facts and the law are substantially the same in each matter, this Court consolidated the appeals, the appeal in file A-376-10 being designated as the lead appeal. A copy of these reasons for judgment will be filed in each of files A-374-10, A-375-10, A-376-10, A-377-10, A-378-10 and A-382-10, and shall serve as this Court's reasons for judgment in each appeal. Given the identical nature of the appellant's submissions, the Minister's decision for each appellant, and the Federal Court's decision, these reasons will speak of one decision, one decision letter and one Federal Court decision.

[3] In my view, for the reasons set out below, the Minister's decision falls outside the range of defensibility and acceptability and, thus, is unreasonable. However, the relief is discretionary. In these particular circumstances, no practical end would be accomplished by setting aside the Minister's decision and returning the matter back to him for redetermination: the Minister could not reasonably grant relief on these facts. Therefore, I would dismiss the appeals.

B. The basic facts

(1) Background information

[4] The Act requires persons to file certain forms in certain circumstances. These forms convey information to the Canada Revenue Agency. The Canada Revenue Agency uses this information to discharge its responsibilities under the Act.

[5] Form T1135 is one such form. This form must be filed by taxpayers who own specified foreign property, the total cost amount of which is over $100,000: subsection 233.3(3) of the Act.

[6] The appellants were obligated to file this form for each of the 2000 to 2003 taxation years. They did so, but were late. Due to their lateness, the Minister assessed penalties and interest against the appellants.

[7] The appellants sought relief from the penalties and interest from the Minister. The Minister can grant such relief under subsection 220(3.1) of the Act. Broadly speaking, the appellants alleged that they had made an innocent mistake and that it would be unfair to levy penalties and interest in the amounts assessed.

(2) How the late filings happened

[8] The appellants employed a common financial representative to make all tax filings on their behalf.

[9] For the 1998 and 1999 taxation years, the appellants' representative filed the appellants' Forms T1135 on time. However, for the 2000 to 2003 taxation years, the appellants' representative formed the view, contrary to the wording of subsection 233.3(3) of the Act, that it was unnecessary to file the forms. The appellants' representative felt that the Canada Revenue Agency was getting all the information it needed from other filings made by the appellants' Canadian investment managers.

[10] Specifically, the appellants' representative believed that Form T1135 did not need to be filed where a foreign investment portfolio was managed by a Canadian investment manager subject to Canadian tax reporting requirements. In his view, that was the case with each of the appellants. However, as the appellants' representative conceded in a letter dated June 2, 2005, that logic did not apply to the appellant Canwest Communications Corporation, which had U.S. investments administered by U.S. fund managers.

[11] Somewhat later, the Canada Revenue Agency alerted the appellants to the fact that they had not filed their forms for some time. The appellants complied, filing their forms late and explaining their misunderstanding.

(3) The appellants' request for relief from interest and penalties and the first level administrative decision

[12] The appellants' financial representative wrote on behalf of the appellants to the Fairness Committee of the Canada Revenue Agency, requesting relief under subsection 220(3.1) of the Act against the penalties and interest assessed against the appellants for their late filings of the forms. The representative conceded that the delay in filing was "a conscious decision" but was done in the mistaken belief, described above, that the forms did not need to be filed. The representative explained that it was guilty of "administrative oversight."

[13] In its first level administrative decision, the Canada Revenue Agency denied the appellants' request for relief. It found that the appellants did not fall within one of the three specific scenarios set out in Information Circular (IC) 07-01 ("Taxpayer Relief Provisions"), a policy statement issued by the Minister. These three specific scenarios are extraordinary circumstances beyond the taxpayer's control, actions of the Canada Revenue Agency, and inability to pay. The Canada Revenue Agency also denied the appellants' request for relief under a "one chance policy" that existed at the time. The appellants failed to qualify under that policy because they filed the forms only as a result of an inquiry made by the Canada Revenue Agency.

(4) The appellants' further request for relief from interest and penalties and the Minister's decision

[14] Dissatisfied, the appellants made a second level request for relief to a delegate of the Minister (hereafter, the "Minister"). They explained that their representative had engaged in an "administrative oversight." They enclosed their previous correspondence that explained that the representative believed that the forms did not need to be filed because the Canada Revenue Agency was getting information about the appellants' foreign holdings from other filings. They suggested that the delay of the Canada Revenue Agency should result in some relaxation in the interest charges. Finally, they also argued that there was an "error of omission common to all entities" and so the penalty, levied for each of the six appellants, should be substantially reduced.

[15] The Minister set out his reasons in a decision letter. In his decision letter, the Minister partly granted the appellants' request for relief. He was prepared to reduce the interest charged during six

months due to the Canada Revenue Agency's delay in replying to the appellants. The Minister denied the remainder of the appellants' request for relief.

(5) The applications to the Federal Court for judicial review

[16] The appellants applied to the Federal Court for judicial review of the Minister's denial of relief.

[17] In the Federal Court, and also in this Court, the appellants focused on the reasons set out in the Minister's decision letter. They submitted that the Minister improperly narrowed the scope of discretion permitted to him under subsection 220(3.1) of the Act. In their view, the Minister had regard only to the three scenarios of relief specifically set out in the Information Circular rather than the general concept of fairness under subsection 220(3.1) of the Act. In other words, the Minister improperly fettered his discretion.

[18] The appellants also submitted that the Minister's refusals of relief on the facts of this case could not be sustained under the standard of review of reasonableness.

(6) The Federal Court's decision

[19] The Federal Court rejected the appellants' submissions. It found that the Minister had not fettered his discretion. Instead, he was aware of the full extent of his discretion and decided against granting relief. The Federal Court based this conclusion on the fact that the Minister had before him an array of material that went beyond the three scenarios set out in the Information Circular, such as the submissions of the appellant and a wide-ranging Taxpayer Relief Report. The Federal Court also found that the Minister fully addressed the appellants' requests for relief and reached a conclusion that passed muster under the standard of review of reasonableness.

C. Analysis

(1) The standard of review to be applied

[20] The Federal Court held that the standard of review of the Minister's decision is reasonableness. In this Court, the parties accept this. This Court can interfere only if the Minister reached an outcome that is indefensible and unacceptable on the facts and the law: *Canada Revenue Agency v. Telfer*, 2009 FCA 23 at paragraphs 24-28; *Canada Revenue Agency v. Slau Ltd.*, 2009 FCA 270 at paragraph 27; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 S.C.R. 190.

[21] The appellants' submissions, while based on reasonableness, seem to articulate "fettering of discretion" outside of the *Dunsmuir* reasonableness analysis. They seem to suggest that "fettering of discretion" is an automatic ground for setting aside administrative decisions and we need not engage in a *Dunsmuir*-type reasonableness review.

[22] On this, there is authority on the appellants' side. For many decades now, "fettering of discretion" has been an automatic or nominate ground for setting aside administrative decision-making: see, for example, *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2 at page 6. The reasoning goes like this. Decision-makers must follow the law. If the law gives them discretion of a certain scope, they cannot, in a binding way, cut down that scope. To allow that is to allow them to rewrite the law. Only Parliament or its validly authorized delegates can write or rewrite law.

[23] This sits uncomfortably with *Dunsmuir*, in which the Supreme Court's stated aim was to simplify judicial review of the substance of decision-making by encouraging courts to conduct one, single methodology of review using only two standards of review, correctness and reasonableness. In *Dunsmuir*, the Supreme Court did not discuss how automatic or nominate grounds for setting aside the substance of decision-making, such as "fettering of discretion," fit into the scheme of things. Might the automatic or nominate grounds now be subsumed within the rubric of reasonableness review? On this question, this Court recently had a difference of opinion: *Kane v. Canada (Attorney General)*, 2011 FCA 19. But, in my view, this debate is of no moment where we are dealing with decisions that are the product of "fettered discretions." The result is the same.

[24] *Dunsmuir* reaffirms a longstanding, cardinal principle: "all exercises of public authority must find their source in law" (paragraphs 27-28). Any decision that draws upon something other than the law – for example a decision based solely upon an informal policy statement without regard or cognizance of law, cannot fall within the range of what is acceptable and defensible and, thus, be reasonable as that is defined in *Dunsmuir* at paragraph 47. A decision that is the product of a fettered discretion must *per se* be unreasonable.

[25] In the circumstances of this case, if the Minister did not draw upon the law that was the source of his authority, namely subsection 220(3.1) of the Act, and instead fettered his discretion by having regard only to the three specific scenarios set out in the Information Circular, his decisions cannot be regarded as reasonable under *Dunsmuir*.

(2) Subsection 220(3.1) of the Act

[26] Subsection 220(3.1) of the Act provides that if an application for relief is made in time, the Minister has discretion to grant relief against penalties and interest. Subsection 220(3.1) reads as follows:

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 (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before	**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 ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là,

that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, 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.	renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. 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.

[27] The scope of the Minister's discretion under this subsection is determined, like any other matters of statutory interpretation, by examining the statutory words setting out the discretion (here unqualified), the other sections of the Act which may provide context, and the purposes underlying the section and the Act itself. When that examination is conducted, it is fair to say that the scope of the Minister's discretion is broader than the three specific scenarios set out in the Information Circular.

(3) Does the Minister's decision pass muster under the standard of review of reasonableness?

[28] In my view, the Minister fettered his discretion, and thereby made an unreasonable decision. He did not draw upon subsection 220(3.1) of the Act to guide his discretion. He looked exclusively to the Information Circular. This is seen from the Minister's reasons for decision.

(a) The Minister's reasons for decision, as evidenced by his decision letter

[29] In his decision letter, the Minister sets out reasons for his decision. At the beginning of the decision letter, the Minister mentions that his decision falls under "Taxpayer Relief Legislation." He explains that this legislation "gives the Minister the discretion to waive or cancel all or part of any penalty or interest payable." At this point, he says nothing about the scope of his discretion under this legislation. He never does.

[30] In the next sentence in his decision letter, the Minister defines the scope of his discretion, limiting it somewhat. He does this by reference to the Information Circular, not subsection 220(3.1). Specifically, he states that his discretion is to be guided by "whether the penalty or interest resulted from extraordinary circumstances, is due mainly to actions of the Canada Revenue Agency (CRA), or…[is due to an] inability to pay." As we have seen in paragraph 13 above, these are the three specific scenarios set out in the Information Circular for the granting of relief. These words show that the Minister was limiting his consideration to the three circumstances set out in the Information Circular, and was not considering the broad terms of subsection 220(3.1) of the Act.

[31] Alone, reference to a policy statement, such as the Information Circular, is not necessarily a cause for concern. Often administrative decision-makers use policy statements to guide their decision-making. As I mention at the end of these reasons, such use is acceptable and helpful, within limits. But many administrative decision-makers are careful to note those limits – policy statements can only be a guide, and, in the end, it is the governing law that must be interpreted and

applied. In his decision letter, however, the Minister did not note any limits on his use of the Information Circular.

[32] In the next portion of his decision letter, the Minister stated that the appellants sought relief on the basis of "administrative oversight." This was incomplete: as mentioned in paragraph 14, above, the appellants offered other explanations and justifications. The Minister never addressed these in his decision letter. The Minister responded to the appellants' explanation of "administrative oversight" by reminding them about their responsibility to determine and follow the deadlines set out in the Act.

[33] Next, the Minister turned to the appellants' request for interest relief due to the Canada Revenue Agency's delay. Here, as mentioned in paragraph 15 above, he granted limited relief. In granting that relief, the Minister did not refer to the Information Circular. However, delay by the Canada Revenue Agency does fit within the second scenario set out in the Information Circular for the granting of relief, namely conduct by the Agency.

[34] At the end of his decision letter, the Minister refused the rest of the relief sought by the appellants. In support of this, he offered the following explanation:

> While I can sympathize with your position, the Taxpayer Relief Provisions do not allow for cancellation of penalties and interest when a Taxpayer, or their representative, lacks knowledge or fails to meet filing deadlines. I trust this explains the Agency's position in this matter.

[35] This passage offers further evidence that the Minister was restricting his consideration to the three scenarios set out in the Information Circular and was not drawing upon subsection 220(3.1) of the Act as the source of his decision-making power. This is seen from the Minister's reference to the "Taxpayer Relief Provisions" – the title of the Information Circular – as the source of his decision-making power, not subsection 220(3.1) of the Act. On a fair reading of this passage, the Minister denied the appellants relief because their claims for relief did not fit within the scenarios set out in the Information Circular.

(b) Does the record before the Minister shed any further light on the Minister's decision?

[36] The respondent urges us to go beyond the stated reasons in the Minister's decision letter. It points to the record that was placed before the Minister, and an affidavit filed with the Federal Court. The respondent submits that these materials demonstrate that the Minister drew upon more than the Information Circular as the source of his authority.

[37] I agree that the reasons in a decision letter should not be examined in isolation. Reasons can sometimes be understood by appreciating the record that was placed before the administrative decision-maker: *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158 at paragraph 17.

[38] But sometimes the record is of no assistance. That is the case here. While the Minister had a broad record before him, his decision letter shows no awareness that he could go beyond the

Information Circular. To the contrary, his decision letter shows an understanding – faulty – that he was governed exclusively by the Information Circular. Further, as explained in paragraph 32, above, the Minister did not seem to have full and accurate regard to key portions of the record before him, namely the explanations and justifications in letters sent by the appellants. In such circumstances, resort to the record to explain why the Minister decided in the way that he did is not possible.

[39] The Federal Court was willing to assume that the Minister considered the record before him. In my view, that assumption was not open to it given the reasons in the preceding paragraph.

(c) Does an affidavit filed in the Federal Court shed any further light on the Minister's decision?

[40] During argument of this appeal, the respondent referred us to an affidavit that was filed with the Federal Court. The affidavit is from the delegate of the Minister who made the decision that is the subject of judicial review in these proceedings. In that affidavit, and also in cross-examination on that affidavit, the delegate testified that he relied on other matters when he made his decision, including "the relevant sections of the *Income Tax Act*." The respondent points to this affidavit as evidence that the Minister had regard to the full extent of his discretion under subsection 220(3.1) of the Act and drew upon that section as the source of his authority.

[41] The Federal Court appears to have placed no weight on this evidence. I also place no weight on it. This sort of evidence is not admissible on judicial review: *Keeprite Workers' Independent Workers Union et al. and Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.). The

decision-maker had made his decision and he was *functus*: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. After that time, he had no right, especially after a judicial review challenging his decision had been brought, to file an affidavit that supplements the bases for decision set out in the decision letter. His affidavit smacks of an after-the-fact attempt to bootstrap his decision, something that is not permitted: *United Brotherhood of Carpenters and Joiners of America v. Bransen Construction Ltd.*, 2002 NBCA 27 at paragraph 33. As a matter of common sense, any new reasons offered by a decision-maker after a challenge to a decision has been launched must be viewed with deep suspicion: *R. v. Teskey*, 2007 SCC 25, [2007] 2 S.C.R. 267.

[42] In this case, the Minister was obligated to disclose the full and true bases for his decision at the time of decision. The decision letter, viewed alongside the proper record of the case, is where the bases for decision must be found. In this case, the proper record sheds no light on the bases for the Minister's decision, and so the bases set out in the Minister's decision letter must speak for themselves.

(d) Conclusion: the Minister's decision was unreasonable

[43] I conclude that in making his decision the Minister did not draw upon the law that was the source of his authority, namely subsection 220(3.1) of the Act. Instead, he drew upon the Information Circular, and nothing else. His decision thereby became unreasonable.

(4) Should the decision be set aside and the matter returned to the Minister for redetermination?

[44] Just because a decision is unreasonable does not mean that it must automatically be set aside and returned to the decision-maker for redetermination. Relief on an application for judicial review is discretionary.

[45] In particular, this Court may decline to grant relief for an unreasonable decision where, for example, there is no substantial miscarriage of justice or the granting of relief would serve no practical end: *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *Community Panel of the Adams Lake Indian Band v. Adams Lake Band*, 2011 FCA 37.

[46] In this case, there would be no practical end served in setting aside the Minister's decision and returning the matter to him for redetermination. The excuses and justifications offered by the appellants for the delay in filing and the grounds offered in support of relief have no merit. The Minister could not reasonably accept them and grant relief under subsection 230(3.1) of the Act. Returning the matter back to the Minister would be an exercise in futility.

[47] The appellants say that their financial representative had a reasonable but mistaken belief that filing the form was not obligatory. This is belied by the fact that it did file the forms for the 1998 and 1999 taxation years. It knew that the Act required that the forms be filed and filed them.

[48] After the 1999 taxation year, the appellants' representative consciously chose not to comply with the Act. It did so on the basis that the Canada Revenue Agency was getting information from other sources, such as the appellants' Canadian money managers. As it turned out, this basis did not apply to the appellant Canwest Communications Corporation.

[49] Even if the Canada Revenue Agency was getting the information from other sources, this cannot be an acceptable excuse or mitigating factor for non-compliance in the circumstances of this case, especially where we are dealing with the appellants' representative, a professional firm that deals with tax matters. It is notorious that in various provisions of the Act, the Canada Revenue Agency is allowed to obtain the same type of information from different sources. This allows it to verify compliance with the Act. For example, an employer is obligated to file T-4 slips reporting the income it has paid to its employees. At the same time, the employees disclose their income from employment. The employers' and employees' figures should match. What if the employer, after filing T-4 forms for a period of years, consciously declined to file the T-4 slips and then argued that it should avoid penalties because the Canada Revenue Agency would get information about the employees' income from the employees? In those circumstances, would there be any case for relief? Of course not.

[50] In this case, compliance was fully within the appellants' control. Compliance happened in the 1998 and 1999 taxation years and there were no new extenuating circumstances that might explain the later non-compliance. These facts fall outside of what this Court has identified as being a focus of subsection 220(3.1), namely the granting of relief where there are extenuating

circumstances beyond the control of the person seeking relief: *Bozzer v. Canada*, 2011 FCA 186 at paragraph 22.

[51] The appellants also argued that it is unfair for the Minister to levy six separate, sizeable penalties against the six appellants when there was really only one mistake made by their one common representative. The appellants contended that the penalties should be substantially reduced for that reason. This argument, smacking of a plea for a "volume discount," has no merit. Each of the appellants is a separate legal entity and a separate taxpayer, potentially subject to penalties and interest for its own non-compliance. Each is capable of independent decision-making concerning the forms that are to be filed. Each, accepting the risk, chose instead to have a representative look after the filings. That risk materialized: their representative made a conscious decision not to file the forms, a decision made without reasonable excuse or justification, as explained above. Granting relief under subsection 220(3.1) on the basis of this argument would be an unreasonable exercise of discretion.

[52] I accept that the normal remedy for an unreasonable decision is to set it aside and return the matter back to the decision-maker for redetermination. I also accept that this Court should be reluctant to wade into the merits of administrative decision-making. But there are cases, perhaps rare, where no practical end would be served by returning the matter back to the decision-maker. This is just such a case.

[53] In these circumstances, the appellants' explanations and justifications are entirely without merit. The appellants could not succeed on them if we returned the matter to the Minister for redetermination. Similar to what happened in *MiningWatch Canada*, *supra*, the Minister made an unreasonable decision but no practical end would be served in returning the matter back to him for redetermination. Therefore, in this case, I would decline to do so.

D. Postscript

[54] So that these reasons provide proper guidance and are not misunderstood and misapplied in future cases, I wish to make three brief observations.

- I -

[55] Portions of the language used in the decision letter in this case are identical to that used in other decision letters: see, for example, *Spence v. Canada Revenue Agency*, 2010 FC 52. In itself, there is nothing wrong with using form letters or stock language taken from other decision letters. The reasons offered in one case can be appropriate for other cases, and the repeat use of those reasons is efficient. However, as this case shows, a blind use of form letters or stock language can sometimes lead to trouble.

[56] Whether the reasons are cut and pasted from a previous letter, are slightly modified from a previous letter or have to be drafted from scratch, the final product issued to the applicant for relief

under subsection 220(3.1) of the Act should show an awareness of the scope of the available discretion under the Act, offer brief reasons why relief could or could not be given in the particular circumstances, and meaningfully address the arguments made that have a chance of success. If the reasons do not deal with one or more of these matters – something that can happen through careless or unthinking use of a form letter or stock language – the decision may not pass muster under the standard of review of reasonableness.

- II -

[57] The foregoing comment and these reasons should not be taken to impose onerous new reasons-giving requirements upon the Minister. In this case, all that was required was perhaps a few additional lines in a letter that was just 33 lines long: *Vancouver International Airport Authority*, *supra* at paragraphs 16 and 17.

- III -

[58] Finally, these reasons should not be taken to cast any doubt on the ability of administrative decision-makers, such as the Minister, to use policy statements, such as the Information Circular in this case, as an aid or guide to their decision-making.

[59] Policy statements play a useful and important role in administration: *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385. For

example, by encouraging the application of consistent principle in decisions, policy statements allow those subject to administrative decision-making to understand how discretions are likely to be exercised. With that understanding, they can better plan their affairs.

[60] However, as explained in paragraphs 20-25 above, decision-makers who have a broad discretion under a law cannot fetter the exercise of their discretion by relying exclusively on an administrative policy: *Thamotharem*, *supra* at paragraph 59; *Maple Lodge Farms*, *supra* at page 6; *Dunsmuir*, *supra* (as explained in paragraph 24 above). An administrative policy is not law. It cannot cut down the discretion that the law gives to a decision-maker. It cannot amend the legislator's law. A policy can aid or guide the exercise of discretion under a law, but it cannot dictate in a binding way how that discretion is to be exercised.

[61] In this case, the Minister ran afoul of these principles. Fortunately for him, however, he reached the only reasonable outcome on these facts.

E. Proposed disposition

[62] For the foregoing reasons, I would dismiss the appeals. However, in light of the unreasonableness of the Minister's decisions, I would not award the respondent in each appeal its costs of the appeal.

"David Stratas"
J.A.

"I agree
Marc Noël J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATE OF HEARING:	October 11, 2011
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Noël and Trudel JJ.A.
DATED:	October 26, 2011

APPEARANCES:

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FEDERAL COURT OF APPEAL

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DOCKET:	A-375-10
APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE MANDAMIN DATED SEPTEMBER 10, 2010	
STYLE OF CAUSE:	Canwest Direction Ltd. v. The Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 11, 2011
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Noël and Trudel JJ.A.
DATED:	October 26, 2011

APPEARANCES:

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Josée Tremblay Julian Malone	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-377-10
APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE MANDAMIN DATED SEPTEMBER 10, 2010	
STYLE OF CAUSE:	Leonard Asper Holdings Inc. v. The Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 11, 2011
CONCURRED IN BY:	Noël and Trudel JJ.A.
DATED:	October 26, 2011

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-378-10
APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE MANDAMIN DATED SEPTEMBER 10, 2010	
STYLE OF CAUSE:	Lenvest Enterprises Inc. v. The Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 11, 2011
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Noël and Trudel JJ.A.
DATED:	October 26, 2011

APPEARANCES:

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-382-10
APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE MANDAMIN DATED SEPTEMBER 10, 2010	
STYLE OF CAUSE:	Sensible Shoes Ltd. v. The Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 11, 2011
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Noël and Trudel JJ.A.
DATED:	October 26, 2011

APPEARANCES:

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