

FEDERAL COURT

BETWEEN:

FCMI FINANCIAL CORPORATION

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at the Federal Court in Toronto.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date

Issued by:

(Registry Officer)

Address of
local office:

TO:

1. Deputy Attorney General of Canada
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8
2. Minister of National Revenue
7th Floor
555 MacKenzie Avenue
Ottawa, ON K1A 0L5

Application

This is an application for judicial review in respect of:

The discretionary decision of the Minister of National Revenue ("**Minister**") made on October 22, 2021 ("**Decision**") refusing to agree to a reference to the Tax Court of Canada pursuant to subsection 173(1) of the *Income Tax Act*. The Decision is unreasonable, lacks transparency and justification and fails to meet minimum standards under administrative law.

The matter was communicated to the Applicant on: October 22, 2021.

The Applicant makes application for:

1. A writ of certiorari.
2. An order quashing or setting aside the Decision and referring the matter back to the Minister for an impartial review and reconsideration.
3. A writ of prohibition and an order of injunction directing that the Minister shall await at least 30 days after the herein application is determined by this Court prior to reassessing the Applicant.
4. If necessary, an interim order pursuant to section 18.2 of the *Federal Courts Act* staying the Decision and prohibiting and restraining the Minister from reassessing the Applicant until at least 30 days after the herein application is determined by this Court (for clarity, this relief relates only to a timing issue; i.e., a discretionary matter).
5. The costs of this application.

6. Such further or other relief as this Court may consider just and appropriate in the circumstances.

The grounds for the application are:

7. If, before an assessment is issued, it is apparent that a taxpayer and the Minister have come to different conclusions as to the taxing of certain transactions, subsection 173(1) of the *Income Tax Act* (“ITA”) provides a procedure to settle the dispute. It enables questions of law, fact or mixed law and fact in respect of, *inter alia*, a proposed reassessment to be determined by the Tax Court of Canada. However, the Minister and the taxpayer must agree in writing to proceed with a reference to the court. In particular, subsection 173(1) reads as follows:

173(1) Where the Minister and a taxpayer agree in writing that a question of law, fact or mixed law and fact arising under this Act, in respect of any assessment, proposed assessment, determination or proposed determination, should be determined by the Tax Court of Canada, that question shall be determined by that Court.

8. An important feature of subsection 173(1) is that it enables taxpayers to have recourse to the Tax Court before the Minister issues an assessment that must be paid or secured. Notably, subsection 225.1(7) of the ITA allows the Minister to collect ½ of the amount assessed against a “large corporation” even if an objection or appeal is commenced.
9. Only the Director General, Appeals Branch and the Director, Appeals Branch are duly authorized to exercise the powers or perform the duties of the Minister under subsection 173(1).
10. By letter dated June 29, 2018 from Jenny Nguyen, CRA Audit Division, the Minister proposed to reassess the Applicant’s taxation year ending September 30, 2011 (the “**Proposed Reassessment**”). Among other things, the Minister proposed to increase the Applicant’s income in 2011 by \$176,857,186 in relation to foreign accrual property income (“**FAPI**”) deemed to be included in the Applicant’s income in respect of its shares of its subsidiary Pan Atlantic Bank and

Trust Limited (“**PABT**”) and to deny a deduction in computing its taxable income in respect of dividends received by the Applicant from PABT in the amount of \$261,543,743.

11. The Applicant would be required to pay or secure $\frac{1}{2}$ of the amount assessed (including interest) while an objection or appeal were underway. Such payment obligation would significantly prejudice the business operations of the Applicant.
12. By letter dated November 2, 2018 from Mr. John M. Ulmer, Davies Ward Phillips & Vineberg LLP, the Applicant made extensive written submissions in response to the Proposed Reassessment. Among other things, the Applicant questioned whether the Minister’s proposed reassessment in respect of the inclusion of FAPI was invalid due to the expiry of the statutory limitation period under subsection 152(4) of the ITA (the “**Statute Barring Issue**”), and in any case, whether in all circumstances the Applicant qualified for a dividend deduction under subsection 91(5) of the ITA in respect of the dividends received in 2011 based on the wording of subsection 91(5) of the ITA applicable prior to 2012 (the “**Dividend Deductibility Issue**”) (the Statute Barring Issue and the Dividend Deductibility Issue being referred to collectively as the “**Questions**”).
13. In the letter, the Applicant requested the Minister to agree to have the Questions determined by a reference to the Tax Court of Canada under subsection 173(1).
14. At a meeting on February 21, 2019 with representatives of the Minister, the Applicant repeated its request for the Minister to agree to have the Questions determined by a reference to the Tax Court of Canada. The Minister agreed to consider the Applicant’s request, and asked the Applicant to propose in writing the Questions to be referred to the Tax Court in Canada for review by the Minister.
15. By letter dated May 13, 2019 from Mr. John M. Ulmer, the Applicant proposed the Questions in writing as it had been asked to do by the Minister’s representatives and the Applicant restated its request for the Minister’s

agreement in writing to a section 173 reference to the Tax Court. The May 13, 2019 letter stated the Questions as follows:

- i. Whether the proposed reassessment of tax in respect of foreign accrual property income of PABT imputed to FCMI for its 2011 taxation year pursuant to subsection 91(1) of the ITA will be made as a consequence of a transaction involving FCMI and a non-resident person with whom FCMI was not dealing at arm's length within the meaning of subparagraphs 152(4)(b)(iii) and 152(4.01)(b)(iii) of the ITA; and
 - ii. Whether FCMI would have qualified for a dividend deduction under subsection 91(5) in respect of dividends it received from PABT in the 2011 taxation year on the assumption that all of the income of PABT earned in the 2011 and prior taxation years was FAPI.
16. By letter dated October 22, 2021 from Mr. Tony Musolino, CRA Auditor (the "**Decision Letter**"), the Applicant was informed that the Minister had decided to refuse to agree to have the Questions determined by a section 173 reference to the Tax Court. It was not evident that the Decision was made by a duly authorized officer (i.e., either the Director General, Appeals Branch or the Director, Appeals Branch).
17. Although the Minister enjoys discretion in deciding whether to agree to a reference to the Tax Court under subsection 173(1), nonetheless that discretion must be exercised by a duly authorized officer, and must be exercised reasonably and without unnecessary prejudice to taxpayers.
18. The impugned Decision was not reasonable because, among other things, it lacked justification, transparency and intelligibility. The Decision does not indicate the facts reviewed, nor any line of analysis that could reasonably lead to the conclusions reached. In arriving at her Decision, the Minister failed to observe principles of natural justice and procedural fairness.
19. The impugned Decision is particularly prejudicial to the Applicant because no reasonable person can have made the determinations made by the Minister on the legal Questions on the basis of the reasons set out in the Decision Letter. In the case of each of the Questions, it is apparent that the Applicant's submissions

were accepted by the Minister only to be replaced with spurious alternate interpretations.

20. In the case of the Statute Barring Issue, the Minister based her decision relying on an alleged “transaction” which the Minister concedes did not involve the Applicant, but in which a related party of the Applicant was involved. There is no precedent upon which the Minister can rely in order to reassess the Applicant beyond the statute barring period based on the involvement of a taxpayer in an alleged “transaction” other than the Applicant.
21. With respect to the Dividend Deductibility Issue, the rationale provided in the Decision Letter is that “There is a principle that the courts should interpret legislation that avoids absurdity, even if it means ignoring the plain meaning of the words”. The “absurdity” alleged by the Minister is simply that the Applicant would not be subject to tax on a Dividend from prior years earnings of its subsidiary in conformity with the conclusions of prior audits by the CRA and accepted by the Applicant. Moreover, the Minister wrongly ignored the jurisprudence of the Tax Court which interpreted the identical wording in another section of the ITA in accordance with the Applicant’s interpretation.
22. These spurious legal interpretations are precisely the type of issue that can be resolved expeditiously in a Section 173 reference without the Applicant suffering the prejudice that would otherwise be caused by the Minister proceeding with her proposed reassessment. The Applicant therefore requests that the impugned Decision be set aside or quashed and that the matter be referred back to the Minister for an impartial review and reconsideration.
23. If the Minister should refuse to maintain the status quo pending this Court’s determination of this application, then the Applicant requests an interim order pursuant to section 18.2 of the *Federal Courts Act* staying the Decision and prohibiting and restraining the Minister from reassessing the Applicant until at least 30 days after the herein application is determined by this Court (for clarity, this relief relates only to a timing issue; i.e., a discretionary matter).

24. The Applicant relies upon sections 18, 18.1 and 18.2 of the *Federal Courts Act*, and subsections 173(1), 225.1(7) and 225.1(8) of the ITA.

This application will be supported by the following material:

25. An affidavit to be sworn or affirmed.
26. Such further and other evidence as counsel may advise and this Court may permit.

The Applicant requests the Minister to send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Minister and/or the CRA to the Applicant and to the Registry:

27. All records and information (including all notes, correspondence, T2020 memos to file, diary notes, policies, printed copies of all relevant electronic records, etc.) of every kind relating in any manner whatsoever to the Decision.

Dated at Toronto this 22nd day of November, 2021.



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