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ID#1

T-692-17

IN THE FEDERAL COURT OF CANADA

BETWEEN:

JASON M. CLOTH

Applicant

AND:

MINISTER OF FINANCE

Respondent

NOTICE OF APPLICATION FOR JUDICIAL REVIEW
(Section 18.1 of the Federal Courts Act, RSC, 1985, c F-7, as amended)

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TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU 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 in Montreal.

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.

Copy 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 AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

DATED this 9 May 2017

Issued by:

(Registry Officer)

KATIA KYRIAKOPOULOS
AGENT DU GREFFE
REGISTRY OFFICER

Address of local office: Federal Court of Canada
30 McGill Street
Montréal, Québec
H2Y 3Z7

TO: The Honourable William Francis Morneau
Minister of Finance
Department of Finance Canada
90 Elgin Street
Ottawa, Ontario
K1A 0G5

APPLICATION

THIS IS AN APPLICATION FOR JUDICIAL REVIEW IN RESPECT OF a decision rendered by the Minister of Finance, the Honourable William F. Morneau (the "**Minister**"), communicated in a letter dated 5 April 2017 and postmarked 11 April 2017 (the "**Decision**"), not to recommend that the Governor in Council grant a remission order for taxes, penalties and interest in favour of certain taxpayers that made donations to the John McKellar Charitable Foundation (the "**Foundation**") prior to 20 December 2002 (the "**Pre-Donations**"), applied for by the Applicant pursuant to subsection 23(2) of the *Financial Administration Act*, RSC, 1985, c F-11, as amended (the "***FAA***") (the "**Application**").

This Application is made, *inter alia*, in accordance with section 18.1 of the *Federal Courts Act*, RSC, 1985, c. F-7, as amended.

THE APPLICANT MAKES APPLICATION TO:

(a) **SET ASIDE** the Decision of the Minister;

(b) **REFER** the matter back to the Minister for determination in accordance with directions that relief be granted for taxes, penalties and interest flowing from the Cash Portion (as defined below) of the Pre-Donations;

(c) **GRANT** the Applicant all reasonable and proper costs that this Court deems just and equitable in the circumstances; and

(d) **GRANT** such further and other relief as counsel may advise and this Court may permit.

THE GROUNDS FOR THIS APPLICATION ARE:

1. The Minister's Decision is made unreasonable by the following errors:

   (a) the Decision was based on a fundamental misapprehension of the relevant facts; and

   (b) the Decision was not based on the principles of equity and fairness, and failed to consider the public interest implications as required by subsection 23(2) *FAA*.

A. BACKGROUND

2. The Applicant is one of a group of over 400 taxpayers (the "**Group**") who have been involved in a dispute with the Minister of National Revenue (the "**MNR**") relating to tax credits claimed for the 2001, 2002 and/or 2003 taxation years in connection with leveraged donations (the "**Donations**") made to the John McKellar Charitable Foundation through the Donation Program for Science and Technology (the "**McKellar Donation Program**") (the "**Dispute**").

3. A portion of each Donation was made from the donor's (or his or her spouse's) personal funds (the "**Cash Portion**"), and the remainder from the proceeds of a loan.

4. The donors claimed tax credits for their Donations, which were subsequently refused by the MNR, acting through the Canada Revenue Agency (the "**CRA**"). The Applicant, and other members of the Group, have appealed the denial of these tax credits to the Tax Court of Canada (the "**TCC**"). Due to the passage of time, the interest that has accumulated on the amounts in dispute has grown to exceed, for many members of the Group, the amounts of tax at issue.

5. On 7 January 2013, the Group made a settlement offer to the MNR, that proposed a compromise solution on the merits of the Dispute whereby each Group member would be allowed to claim a tax credit for the Cash Portion of his or her Donation, along with interest relief.

6. On 26 June 2013, the Technical Tax Amendments Act 2012 ("**Bill C-48**") received royal assent and added new provisions to the *ITA* that apply retroactively to all donations made after **20 December 2002**.

7. Following the enactment of Bill C-48, the CRA proposed to settle the Dispute as it pertained to Donations made **after** 20 December 2002, on the basis that donors could obtain tax credits for the Cash Portion of these Donations, along with significant interest relief.

8. On 15 January 2014, all members of the Group who made Donations after 20 December 2002 accepted the CRA's settlement offer (the "**Settlement**"). The Settlement has completely resolved the Dispute for around 210 Group members, and partly resolved the Dispute for 75 others.

9. Despite repeated requests by the Applicant and the Group, the CRA has continuously and repeatedly refused to extend the Settlement to all Donations, even after the Federal Court of Appeal, in *French v. Canada,* noted that it was plausible that Bill C-48 did not actually change the law but "clarified an area of the law that was uncertain".

10. As it stands, there are around 258 taxpayers with outstanding disputes with the CRA over Donations made on or prior to 20 December 2002, including the Applicant.

B. THE REMISSION APPLICATION

11. On 18 June 2014, the Group wrote to Anne-Marie Lévesque, Assistant Commissioner of the CRA, asking that the Settlement be extended to all Donations, *inter alia* on the basis of subsection 23(2) *FAA* (the "**Remission Application**"), on the basis, *inter alia*, that:

    (a) Bill C-48 served primarily to clarify pre-existing law, not change it;

(b) distinguishing between essentially identical Donations made on or after 20 December 2002 was arbitrary, inequitable and had no fiscal policy justification; and

(c) there was no public interest being served by compelling taxpayers to litigate a twelve-year old dispute over issues which Parliament had settled through legislation.

12. The Group made supplemental representations to this Remissions Application to counsel for the CRA on 6 August 2014.

13. The CRA decided to transfer the Remissions Application to the Department of Finance on 3 November 2014, allegedly on the basis that the issues raised in the Remissions Application related solely to tax policy.

14. The Group made supplemental representations to the Department of Finance on 19 January 2015; 13 October 2015 and 5 November 2015. Following those submissions, officials in the Department of Finance decided to escalate the Remissions Application to the Minister personally for review and decision.

15. The Group made supplemental representations addressed to the Minister personally on 31 March 2016, which included discussion of the *French* decision of the Federal Court of Appeal (which had just been issued).

16. On 31 May 2016, counsel for the Group were invited to Ottawa for a meeting with Elliot Hughes, Senior Policy Advisor to the Minister, to discuss the Remissions Application.

17. The Group made supplemental representations to Mr. Hughes on 6 July 2016.

18. On 29 September 2016, Mr. Hughes advised the Group that the Remissions Application was "not on the front burner" and that no timetable could be provided for the Minister's decision. The Group made further submissions to Mr. Hughes dated 7 October 2016 concerning the prejudice to the Group members caused by the great delay in processing the Remissions Application.

19. Over six months later, the Decision was sent on 11 April 2017. The decision, which was just over a page long, advised that the Minister would not be recommending that remission be granted.

C. MISAPPREHENSION OF THE RELEVANT FACTS

20. The Minister, in his Decision, misapprehended the factual basis for the Remissions Application:

> 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. 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 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.

21. In making his decision, the Minister was apparently under the misapprehension that Donations made in the context of the McKellar

Donation Program in 2003 and 2004 were still in dispute, and that the Remissions Application was based on differential treatment between the McKellar Donation Program and other "charitable donations schemes" settled following the adoption of Bill C-48.

22. The Minister did not seem to have appreciated the fact that the CRA settled the cases of actual Group members, involving Donations made after 20 December 2002 in the context of the McKellar Donation Program. Donations made in 2003 were no longer subject to dispute following the Settlement.

23. The fact that the Decision states that the McKellar Donation Program was marketed in "2004" further confirms that the Minister was been thinking about some different donation program or programs in making his decision, given that the Remissions Application and related submissions all make clear that Donations were made only between 2001 and 2003.

D. FAILURE TO BASE DECISION ON EQUITY, FAIRNESS AND PUBLIC INTEREST

24. The Minister's Decision refers to the general principle that a change in the law should not give rise to an expectation of remission for taxes assessed for years prior to the change, or that if a legislative amendment merely clarifies the state of the law, then relief should not be sought through means of a remissions application, but through the ordinary objections and appeals process.

25. Such a reasoning does not address the particular and unusual circumstances giving rise to of the Remission Application. Remission, by definition, concerns exceptions from general principles. In deciding the Remission Application, the Minister cannot simply recite general principles, but rather determine whether the application of those general principles in a particular situation results in an inequity or injustice. The

Decision does not reveal that any such analysis was carried out by the Minister.

E. UNREASONABLE NATURE OF THE DECISION

26. In light of these deficiencies, the Decision not to recommend a remission of taxes, interest and penalties in the situation at bar is unreasonable. A decision based on an accurate understanding of the facts, as well as proper consideration of the principles of equity, fairness and public interest would have likely yielded a different result.

27. Indeed, there is no legitimate reason of policy or fairness to treat a taxpayer with a Donation made on 20 December 2002 radically differently than another taxpayer with a completely identical Donation—made to the same registered charity using the same transactional documents—made the following day. The refusal of the CRA to extend the Settlement to all Donations results in tax consequences that are clearly inequitable, unfair, and inconsistent with policy objectives that underlay Bill C-48.

28. The Minister's refusal to recommend the Applicant's request for a remission order was therefore not a proper exercise of his discretion.

29. The Applicant intends to invoke such further grounds as counsel may advise and this Court may permit.

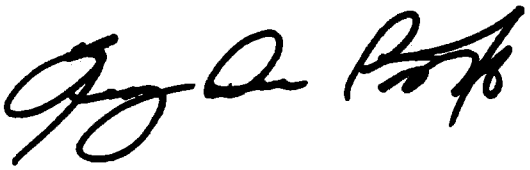
THE APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

(a) the Affidavit of Jason M. Cloth and its attached exhibits;

(b) such other evidence as counsel may advise and this Court permit.

DATED AT MONTRÉAL, this 9th day of May 2017.

DAVIES WARD PHILLIPS & VINEBERG, LLP



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