Court File No: T-1984-22

FEDERAL COURT

BETWEEN:

SCOTT WILLIAM CHARLES MCFADDEN

Applicant

and

HIS MAJESTY THE KING

Respondent

Notice of Application

TO THE RESPONDENT(S): 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 Ontario.

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, 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 FURTHIS NOTICE TO YOU.

(Date) 28-SEP-2022

Issued by: Vanessa George (Registry Officer)

REGISTRAR, FEDERAL COURT

~~Thomas D'Arcy McGee Building~~
~~90 Sparks Street,~~
~~Ottawa, Ontario~~
~~K1A 0H9~~

180 Queen Street West
Toronto, Ontario
M5V 3L6

TO:

RESPONDENT:

DEPARTMENT OF JUSTICE CANADA

284 Wellington Street

Ottawa, Ontario

Canada K1A 0H8

Application
(For a Judicial Review)

This is an application for judicial review in respect of:

Minister of National Revenue decision dated September 9th 2022 received September 20th 2022 refusing to grant relief under section 204.1 (4) of the Income Tax Act pursuant to Part X.1 tax Assessments/Reassessments 2008, 2009, 2010, 2011, 2012, 2013, and 2014 tax years.

The decision was communicated to the Applicant on:

September 20th 2022

The Applicant makes application for:

1. An Order vacating the Part X.1 tax Assessments for 2008 through 2014 or otherwise setting aside all Part X.1 tax and interest thereon, and requiring the Respondent to refund all Part X.1 tax and interest thereon, plus interest within 30 days of the issue date of the Order.

2. In the alternative, an Order setting aside the decision by the Respondent not to waive or otherwise provide relief of the Part X.1 taxes, penalties and interest thereon in accordance with section 204.1(4) of the ITA and referring the matter back to the Respondent with instructions that his delegate is directed to conclude:

    1. That the Excess Contributions to which he refers was the result of a reasonable error made during the complex restructuring of the Applicant's compensation plan;

    2. That reasonable steps were taken to eliminate the excess;

    3. That all Part X.1 Tax arising from the excess contributions and related interest and penalties are to be reversed and the sum, including interest from the date refunds were withheld and payments were made, is to be repaid to the Applicant forthwith and in accordance with the reasons

of this Honourable Court;

3. An order directing the Respondent to stop the practice of denying equal treatment under the law, for Canadians and the Applicant, pursuant to registered retirement savings and pension plans, specifically disadvantaging those who do not have access to defined benefit pension plans..

4. The filing costs of this application and the two previous applications for a total of $150, plus any additional costs incurred, including travel and living expenses and retention of expertise; and,

5. Such further and other relief as the Applicant may advise and this Honourable Court may permit.

The grounds for the application are:

1. Contrary to what the Respondent's communications would lead one to believe, this matter arose from a single erroneous RRSP contribution in the amount of $21,000 made in 2009. This contribution was made at the conclusion of a relatively complex set of circumstances surrounding the Applicant's employment situation, and changes retroactively made to the Applicants remuneration, pension plan and benefits.

2. The Applicant had no reason to believe an excess contribution situation existed and diligently made RRSP contributions in accordance with the limits provided annually by the Respondent. Upon becoming aware of a problem, the Applicant took immediate steps to remedy the situation and eliminated the excess contribution situation in a timely manner (less than 60 days), in fact even before the Respondent had issued his Part X.1 assessments or provided any direction on the matter.

3. Based on the communications and advice from the Respondent, the Applicant pursued this matter through the Tax Court of Canada appeals process. Due to

either delay or preference by the Respondent the matter was divided into two appeals, one for 2008-2013 and a second for 2014. The appeal of the 2008-2013 assessments was heard by the Honourable Justice Visser April 26th 2018, and the Honourable Justice Lyon heard the second, for the 2014 assessment, October 18th 2018. While both Justices clearly wished they could do more, they were unable because of the relevant jurisdictional limitations of the Tax Court of Canada.

4. The Respondent, after initially taking the position at Tax Court that the Applicant had not been diligent in managing RRSP contributions and filings, ultimately abandoned that position and in fact conceded that the Applicant had exercised due diligence for all of the subject tax years. The Respondent agreed to withdraw the penalties and interest thereon in both cases, but refused to waive or reduce the Part X.1 tax (additional errors by the Respondent were found in Court that reduced the 2014 Part X.1 tax by a small amount). The same type of errors were made by the Respondent for each of the 2009 through 2013 tax years but the respondent has not attempted to remedy same.

5. The transcript of Justice Lyon's decision confirms that the Applicant exercised due diligence.

6. The Respondent testified at the Tax Court hearings that he was not aware of the erroneous contribution at the centre of this matter until 2014. However The Respondent reveals in his February 2022 decision that he was aware of same by May 2010 at the latest.

7. The Respondent has demonstrated contempt for the Federal Court, Tax Court of Canada and the Honourable Justices by providing inaccurate testimony in writing and in Court, ignoring Orders, failing to provide refunds and refusing to acknowledge all requests for information or financial statements pursuant to these matters. This is the 5th application the Applicant has made and the

third to the Federal Court. The Respondent has behaved without accountability, executing settlements, leading the Applicant to believe a reasonable decision will be rendered, but then making another unreasonable decision. There is no downside for the Respondent in following this modus operandi as taxpayers pick up the tab, the Respondent can follow this process over and over again, exhausting applicants' resources and, predictably, faith in the system.

8. The Applicant filed a Motion to Extend Timeline to apply for judicial review with the Federal Court of Canada which was granted December 7th 2018 (Docket 18-T-73). The application was filed, and certified January 7th 2019 (T-32-19), and the Court process was followed, including granting several requests from the Respondent for timeline extensions, and the Applicant's record filed May 3rd 2019 (T-32-19).

9. May 31st 2019 the Respondent offered to settle, conceding that the Minister's decisions had been unreasonable. The Applicant again requested a detailed accounting of some kind including the adjustment from the Tax Court of Canada decisions and cancellation of penalties and interest thereon. The Applicant also requested a reasonable timeline be specified for the proposed redetermination, which was refused by the Respondent. Believing that a reasonable decision was now possible, and believing it would bring a more timely resolution for all including the Court, the Applicant decided to agree to the settlement offer. The Respondent file a consent to judgment with the Court and the Court allowed the Application for Judicial Review.

10. Pursuant to the Respondent's Consent to Judgement, an Order was issued June 7th 2019 by this Court as follows:
    1. *The Applicant's Application for judicial review filed on January 7, 2019 is allowed;*
    2. *The Minister of National Revenue's decision dated June 5, 2015 with respect to the Applicant's 2008 to 2014 taxation years is set aside; and*

3. *The Applicant's request for a waiver of Part X.1 tax with respect to the Applicant's 2008 to 2014 taxation years pursuant to subsection 204.1(4) of the Income Tax Act, RSC 1985, c. 1 (5th Supp.) (the "Act") and a waiver or cancellation of any related interest or penalty pursuant to subsection 220(3.1) of the Act is hiseby referred back to the Minister of National Revenue for redetermination by an individual or individuals not previously involved in the matter;*
4. *Without costs.*

11. No subsequent communications were received from the Respondent for over two years. When contacted by the Applicant no information was forthcoming from the Respondent. The Respondent failed to return calls, and generally evaded the Applicants attempts to obtain an update on any of the three Orders issued by the courts. Over 6 months later the Applicant received a letter stating that a review was scheduled to take place and asking for submissions in support of the "request." No other communications were received from or solicited by the Respondent before the decision was made.

12. The Respondent's decision letter received February 19th 2022 essentially again, without justification and contrary to what the Respondent conceded twice in two separate Tax Court hearings, accused the Applicant of not exercising diligence pursuant to understanding the RRSP plans and limits, reviewing notices of assessment, verifying employer's plan activities etc..

13. In the February 2022 decision letter the Respondent also revealed that he was aware of the erroneous contribution as early as May 7th 2010. This directly contradicts the Respondents Tax Court testimony that he was not aware of the erroneous contribution until 2014.

14. It is important to understand that although the Respondent now acknowledges he was fully aware of this contribution, he did not include the amount in any of the assessments sent to the Applicant through 2014.

15. The Applicant diligently managed his RRSP contributions based on the assessments provided by the Respondent as any diligent taxpayer would. The Court has confirmed that taxpayers have a right to rely on the assessments provided by the Respondent.

16. April 14th 2022 the Respondent again offered to settle. May 20th 2022 the parties agreed to Minutes of Settlement wherein the Respondent conceded that the February 11th 2022 decision was again unreasonable, and set out a list of documents and information, including case law, to be considered by a new decision-maker delegated by the Respondent. Paragraph 4(d) of these minutes states "…Tax Court vacated the late-filing penalties because the Respondent conceded that the Applicant fulfilled the test of due diligence pursuant to section 162 of the Act;" There is no indication that any serious consideration was given to the referenced documents and information.

17. The Court has confirmed that "given the context and purpose of subsection 204.1(4) of the ITA, the notion of reasonable error is broader and thus is not necessarily limited to what would constitute due diligence." That is even in the absence of due diligence, an error pursuant to 204.1(4) can still be reasonable, demonstrating just how far off the mark the Respondent has strayed.

18. The Respondent's decision dated September 9th 2022, essentially, once again, with no new information, and again in contradiction of the Respondent's testimony before Justices Visser and Lyons, essentially accuses the Applicant of failing to exercise due diligence in managing RRSP contributions. Then, astonishingly, based on a telephone conversation that occurred March 5th 2015, more than two months <u>after</u> the excess had been eliminated, goes on to conclude that reasonable steps to remedy the over contribution were not taken. The referenced phone conversation indicates the respondent has some form of transcript or recording of same, yet has failed to provide this information in discovery for two Applications before this Court.

19. The facts are that the Applicant sent a letter to the Respondent November 24th 2014 after back and forth with the respondent since September 2014 and within hours of concluding that an error had indeed been made. The letter offered two ways to remedy the excess in a timely way and specifically requested direction from the Respondent. No response was ever received to this request and the excess situation resolved January 1st 2015 with the annual contribution limit becoming higher than the excess. Again theses facts are recorded in the Minutes of Settlement signed by the Respondent May 20 2022.

20. The Respondent also asserts that the Applicant was *"…aware of the error. The notices of assessments confirmed your excess situation*." This statement is completely false and the Respondent is fully aware of the truth. Despite the fact that the Respondent by his own admission was aware of the error by May 2010 at the latest, the Applicant's assessments through 2014 show no excess contributions.

21. The Respondent demonstrates bias when it come to the two groups of Canadians (those with defined benefit pension plans and those without). The Respondent grants significantly higher registered plan contribution limits to those Canadians participating in defined benefit pension plans, including the option, and often requirement, for these plans to be topped up in order to meet projected long term pension benefit payouts. None of these options are available to the majority of Canadians, who participate in defined contribution plans, or have no plan at all other than RRSPs. This systemic preferential treatment of defined benefit plan members means that it is not possible to be accorded unbiased decision-making by the Respondent or his delegates.

22. The Respondent erred in law and made unreasonable and incorrect decisions in assessing Part X.1 taxes, penalties and interest for the tax years 2008 through 2014.

23. The Respondent erred in law and made unreasonable and incorrect decisions in refusing to provide relief of Part X.1 taxes pursuant to section 204.1(4) even though the Applicant applied for a met the stipulated prerequisites of the ITA.

24. The Respondent erred in law and made unreasonable and therefore incorrect decisions in both assessing, and refusing to waive, Part X.1 taxes, penalties and interest pursuant to section 204.1(4) of the ITA, even though the Respondent was and remains fully aware of his associated inequitable treatment of the Applicant and all other Canadians participating in defined contribution pension plans or those Canadians having no pension plan at all.

This application will be supported by the following material:

1. The supporting affidavits of the Applicant;

2. Assessments by the Respondent and other documentary exhibits;

3. Such further and other materials as the Applicant may advise and this Honourable Court may permit.

The Applicant requests the Respondent 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 Respondent to the Applicant and to the Registry:

1. All materials that were before the Respondent and considered by the Respondent when it made the decisions to deal with the Applicant's requests pursuant to these matters, including annotations, notes, emails, texts, transcripts and minutes, and the instructions given to the Respondent's delegates, verbally, in writing, via email, text, in policies guidelines and standards, or in any other form.

2. Specific instructions provided to the Respondents delegate pursuant to the Minutes of Settlement executed by the Respondent and Applicant May 20th 2022.

3. The policy, guidelines, definitions, training materials and all other documents, videos, recordings, electronic documents or any other form used by the Respondent in making determinations or learning to make determinations pursuant subsection 204.1(4) (a) and (b) of the ITA.

4. Transcripts, recordings, notes, annotations, emails, texts and any other records of telecommunications between the Applicant and Respondent pursuant to these matters.

5. Accurate accounting of the current T1 and Part X.1 tax accounts showing the T1 refund withholdings with written explanations of how and when they were applied to the X.1 balances, interest accrued and how it was calculated on withheld refunds and how it was applied, showing the periods within which the Respondent was both in possession of the withheld T1 refunds while at the same time applying 6% interest compounded daily to the Part X.1 balances, and when and how the various corrections, penalty cancellations, and interest thereon have been applied/credited. Note that refunds withheld from 2014 through 2017 could have, and should have been applied to retroactive T1OVP assessments back to 2008, so the requested data and associated explanation should extend back to 2008.

6. Documents, emails, texts and any other communications pursuant to how the Respondent maintains the public expectation and requirement to be unbiased in its decision-making including the differences in tax treatment between defined benefit plan sponsors and participants, and those without a defined benefit plan such as the Applicant.

7. Information, in any form, of how the Respondent exempts tax on payments made by defined benefit plan sponsors to plan participants via "special payments" or other payments made pursuant to the Pensions Standards Act. All communications and records of discussions on allowable limits for registered plan contributions, and how the Respondent chooses (despite not having the authority under the ITA) to exempt from taxation special payments made to defined benefit pension plans in accordance with the Pension Standards Act, or any other means of topping up pension plans to reduce real, projected or perceived under-funding of pension future liabilities and,

8. Again pursuant the need for taxpayers to have access to unbiased decision-makers within the Respondent, all internal and intergovernmental communications of the Respondent pursuant to its pension policies and practices being in compliance or not in compliance with the Canadian Charter of Rights and Freedoms subsection 15.(1).

DATED at Thunder Bay Ontario this 28th day of September, 2022.

_____

Signature of Applicant

The Applicant's Name and Address is:
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