

FEDERAL COURT

B E T W E E N

ALKARIM JIVRAJ

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 Montreal, Quebec.

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 (t. 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: 30 rue McGill
Montréal, QC
H2Y 3Z7

TO: MINISTER OF NATIONAL REVENUE

Bureau régional du Québec
Ministère de la Justice du Canada
Complexe Guy-Favreau
Tour Est, 9e étage
200, boul. René-Lévesque Ouest
Montréal, Québec H2Z 1X4

AND TO: ATTORNEY GENERAL OF CANADA

Bureau régional du Québec
Ministère de la Justice du Canada
Complexe Guy-Favreau
Tour Est, 9e étage
200, boul. René-Lévesque Ouest
Montréal, Québec H2Z 1X4

APPLICATION

THIS APPLICATION is an application for judicial review, pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, in respect of a decision made by the Minister of National Revenue (the “**Minister**”) and communicated by the Department of Justice (the “**DOJ**”) on December 14, 2023, refusing to accept 1,332,429 Class B Series Common shares (the “**Shares**”) in the capital of Espresso Capital Ltd (the “**Corporation**”), furnished by Mr. Alkarim Jivraj (“**Mr. Jivraj**”) as security for his departure tax under subsection 220(4.5) of the *Income Tax Act*, RSC 1985 c 1 (5th Supp) (the “**Act**”) (the “**Decision**”).

THE APPLICANT MAKES THIS APPLICATION FOR:

1. a declaration that the Shares constitute adequate security within the meaning of subsection 220(4.5) of the Act;
2. a declaration that the Decision is incorrect and unreasonable;
3. a writ of *certiorari* quashing and setting aside the Decision and referring the matter back to the Minister for determination in accordance with a direction that the Minister shall accept the Shares as security for the departure tax pursuant to subsection 220(4.5) of the Act, and without the need for the consent of the other shareholders of the Corporation;
4. a writ of *mandamus* compelling the Minister to fulfil Her obligation under section 220(4.5) of the Act to accept the adequate security furnished by Mr. Jivraj;
5. costs of this application; and
6. such further and other relief as counsel may advise and this Court may deem just.

THE GROUNDS FOR THE APPLICATION ARE:

Mr. Jivraj’s departure from Canada

7. Mr. Jivraj is the legal and beneficial owner of the Shares;
8. the Corporation is a private Canadian corporation;
9. Mr. Jivraj ceased to be a resident of Canada on September 4, 2021;

10. upon emigration from Canada, Mr. Jivraj was deemed to have disposed of the Shares, along with certain other capital property (the “**Deemed Disposition**”), in the taxation year ending December 31, 2021 (the “**Emigration Year**”), pursuant to subsection 128.1(4) of the Act;
11. the fair market value of the Shares on September 4, 2021, was reported as \$4,929,500;
12. the Deemed Disposition resulted in tax owing of \$1,281,752.48, and more specifically, tax owing of \$1,171,918.55 resulting from the deemed disposition of the Shares;
13. Mr. Jivraj elected, in the prescribed manner using Form T1244 – Election under Subsection 220(4.5) of the Income Tax Act, to Defer the Payment of Tax on Income relating to the Deemed Disposition of Property, to defer the payment of tax on income relating to the Deemed Disposition (the “**Election**”);
14. the Election was filed on or before Mr. Jivraj’s balance-due date for the Emigration Year;

The Security Agreement and Discussions with the DOJ

15. Mr. Jivraj furnished the Shares as security for the tax arising from the deemed disposition of the Shares;
16. the DOJ sent Mr. Jivraj a draft security agreement with respect to the Shares;
17. prior to December 14, 2023 (the “**Discussion Period**”), Mr. Jivraj and the DOJ (on behalf of the Minister) corresponded regarding the terms of the security agreement in respect of the Shares;
18. during the Discussion Period, Mr. Jivraj sent the DOJ *inter alia* the following documents:
 - (a) the Consolidated Amended and Restated Shareholders Agreement for the Corporation dated September 18, 2019, with amendments approved on March 10, 2022, September 9, 2022, and March 16, 2023 (the “**Shareholders Agreement**”);

- (b) comments on the draft security agreement;
 - (c) representations on certain terms contained in the Shareholders Agreement;
and
 - (d) financial statements for 1320523 BC ULC;
19. as the parties were having ongoing discussions regarding the security furnished by Mr. Jivraj, the Minister extended the deadline to provide security twice – first to December 31, 2023, and then to March 1, 2024;

The Shareholders Agreement

20. much of the correspondence during the Discussion Period concerned whether the Minister would require all of the Corporation's shareholders to sign the security agreement;
21. on November 28, 2023, Mr. Jivraj's counsel sent a letter to the DOJ explaining that such a condition would be unduly onerous;
22. on November 30, 2023, the DOJ sent an email to Mr. Jivraj's counsel in response, stating "I may have some good news;"
23. on December 1, 2023, the DOJ sent a further email to Mr. Jivraj's counsel, stating:
- (a) "essentially, we are of the view that requiring the signature of the 68 shareholders of Espresso is impractical and we adhere to your letter on that aspect;" and
 - (b) "therefore, we would not require all the shareholders to sign the consent and waiver, as you mentioned, they are not required to pledge the shares;"
24. that email also contained the following statement:
- (a) "one caveat, CRA requires unrestricted pledge of the shares. Therefore, if CRA wants to act upon the security and sell the shares (whether internally or to a third party), we need to be sure that the SA does not prohibit us from disposing of the shares, if need be, without the consent of the 68 shareholders. Also, CRA is not willing to sign a participation agreement,

we do not intend to become a shareholder, which seems to be a requirement under section 6.2 of the SA. I don't see any issue with a right of first refusal or to whom we shall dispose of the shares to but we may be able to dispose of them at our will if necessary;"

25. following further exchanges, on December 12, 2023, the DOJ sent an email to Mr. Jivraj's counsel, stating:

- (a) "I've looked carefully at the USA and I am unsure that signing the Security agreement without a participation agreement would permit the execution of CRA's security Herein."
- (b) "Transfer is defined at 1.1 (dd) and the definition appears broad."
- (c) "Furthermore, at 6.1, the agreement mentions : 'No party shall, except as expressly provided for in this Agreement, directly or indirectly, sell, assign, pledge, or otherwise Transfer or encumber any Securities...'"
- (d) "And at 6.2 : 'Every Transfer ([...]) of all or a portion of Shares shall be conditional [...] [to] a Participation Agreement.'"
- (e) "I feel that the section that I underlined in 6.1, with the use of (or otherwise Transfer) kind of leans toward the plausible interpretation that a pledge is a transfer for the purpose of this USA. I am reading it correctly?;"

26. on December 12, 2023, Mr. Jivraj's counsel responded:

- (a) "that's an interesting point. The way I read it, though, is that a pledge does not trigger the requirement to sign the Participation Agreement. That's bc 'Transfer' is defined in section 1.1 as a change in the legal or beneficial ownership of the shares. That does not occur on a pledge, and therefore there would be no need to sign a Participation Agreement;"

27. on December 12, 2023, the DOJ wrote back:

- (a) "I'm not sure Dov, I feel like the overall intention of all of this is to restrict as much as possible any activities related to the shares."

- (b) “I feel like if a Shareholder was to contest the pledge, they might have some solid arguments in that matter.”
- (c) “If what you are suggesting is the appropriate view, 6.1 is a general restriction, meaning that if we are not in 6.2 as a pledge is not a transfer, no pledge would be permitted for that corporation as the only exception to 6.1 is at 6.2. I feel that arguing that the pledge is not a transfer makes it more complex. Therefore, that makes me comfortable with my first interpretation as it would seem more logical that a pledge can occur in certain circumstances.”
- (d) “I know that I sound a bit stubborn regarding this, but I really do need to make sure that CRA gets unrestricted pledge. I may not be able to sell it to them as is;”

28. on December 13, 2023, Mr. Jivraj’s counsel responded:

- (a) “I believe section 6.1 must be read inversely, for the following reasons:”
 - 1) “Section 6.2, as drafted, is not an exception to section 6.1; rather it imposes an additional condition on Transfers;”
 - 2) “Therefore, if section 6.1 was meant as a general, over-arching restriction on transfers, no transfers would ever be permitted (except to a Permitted Transferee) which is contradictory to section 6.2 itself, as it clearly contemplates transfers to those who are not Permitted Transferees;”
 - 3) “That being so, section 6.1 must be read as simply saying that transfers (and pledges) are not permitted to the extent they do not conform with the Shareholders Agreement;”
 - 4) “As there are no provisions which specifically restrict or set conditions on the pledge of shares, it follows that a pledge of shares may be made, without the need to sign a Participation Agreement;”

29. on December 14, 2023, the DOJ wrote back:

- (a) “I forwarded our chain of emails and will discuss with my client at CRA at 2 PM today, I’ll let you know what came out of this meeting and circulate back;”

The Decision

30. on December 14, 2023, the DOJ communicated the Decision refusing to accept the Shares furnished by Mr. Jivraj, on the basis that the Shares were not an acceptable security for the following reasons (the “**December 14 Reasons**”):

- (a) the Minister does not have the authority to bind His Majesty the King for agreements outside of its legislated authority;
- (b) His Majesty the King does not intend to become a shareholder of the Corporation – the objective is only to have the amount of tax deferred secured if Mr. Jivraj was to default on his tax liabilities;
- (c) security agreements of private corporations are by their very nature, risky securities; and
- (d) CRA is reluctant to go forward with a security agreement based on possibly diverging interpretations of how the Shares should be transferred and/or pledged and is deciding to err on the side of caution;

31. during a telephone conversation on December 15, 2023, Mr. Jivraj’s counsel advised the DOJ that:

- (a) the Minister is wrong to suggest that She does not have the statutory authority to enter into a participation agreement pursuant to the Shareholders Agreement; and
- (b) in any event, a plain reading of the Shareholders Agreement together with the relevant provisions of the *Canada Business Corporations Act*, RSC, 1985, c C-44 (the “**CBCA**”) leads to the inescapable conclusion that the Minister would not be required to enter into a participation agreement pursuant to the Shareholders Agreement;

32. during that conversation, the Minister provided additional reasons for the Decision (the “**December 15 Reasons**” and, with the December 14 Reasons, the “**Reasons**”), including:
 - (a) CRA is concerned about setting a bad precedent; and
 - (b) accepting the Shares as security does not align with CRA policy;
33. on December 21, 2023, the DOJ advised that the Minister confirmed Her Decision to refuse the Shares as security for the Deemed Disposition;
34. on December 21, 2023, Mr. Jivraj’s counsel asked the DOJ to advise the name of the Minister’s delegate who rendered the Decision;
35. the DOJ has not responded to that request as of the date of this Application;
36. neither Mr. Jivraj nor his counsel were ever afforded the opportunity to speak with the Minister’s delegate;

The Shares are adequate security

37. the Shares are adequate security furnished by Mr. Jivraj as their value necessarily covers the amount of tax owing from their Deemed Disposition;
38. the Shares are not encumbered;
39. the transfer restrictions in the Shareholders’ Agreement do not apply to pledges of shares;
40. the Minister is wrong to suggest that She does not have the statutory authority to enter into a participation agreement pursuant to the Shareholders Agreement;
41. in any event, a plain reading of the Shareholders Agreement together with the relevant provisions of the *CBCA* and the *Business Corporations Act* (Ontario), RSO 1990, c B16 (the “**OBCA**”) leads to the inescapable conclusion that the Minister would not be required to enter into a participation agreement pursuant to the Shareholders Agreement;

Certiorari

42. the Decision is both incorrect and unreasonable for the following reasons:
- (a) the Decision is not consistent with the statutory grant of power given to the Minister;
 - (b) the Reasons contain circular analysis, state unfounded generalizations, and rely on absurd premises;
 - (c) the Reasons do not demonstrate how the evidentiary record was considered and the Decision does not show how the outcome is justified or supported by the evidence tendered before the Minister;
 - (d) the Reasons do not demonstrate a connection, or a path of analysis, between the evidence and the decision made by the Minister;
 - (e) the Decision does not exhibit the requisite degree of justification, intelligibility, or transparency and is not justified in relation to the constellation of law and facts that are relevant to the Decision;
 - (f) the Minister has ignored the application of subsections 146(3) of the *CBCA* and 108(4) of the *OBCA*;
 - (g) the Minister cannot elevate Her guidelines or policies to the level of law, and accordingly, She improperly fettered Her decision-making authority conferred on Her by Her enabling statute;
43. the Minister accordingly erred by refusing to accept adequate security furnished by Mr. Jivraj;

Mandamus

44. the Minister has a public legal duty, under subsection 220(4.5) of the Act, to accept adequate security furnished by a taxpayer (the “**Duty**”);
45. the Duty is mandatory and is not subject to the Minister’s discretion;
46. there is a clear right to performance of the Duty and Mr. Jivraj has satisfied all conditions precedent giving rise to the Duty;

47. there is only one particular outcome that is reasonable or “inevitable” based on the evidence that was before the Minister;
48. the Application is not barred by section 18.5 of the *Federal Courts Act*, RSC 1985, c F-7 and Mr. Jivraj cannot seek adequate alternative relief elsewhere or by other means;

Legislation

49. subsection 128.1(4) and section 220 of the Act;
50. subsection 108(4) of the *OBCA*;
51. sections 48 and 146 of the *CBCA*;
52. sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7; and
53. such further and other grounds as counsel may advise and this Court may deem just.

THE APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

54. the affidavit of Mr. Jivraj; and
55. such further and other material as counsel may advise and this Court may deem just.

REQUEST PURSUANT TO RULE 317

Mr. Jivraj requests the Minister to send a certified copy of all materials in the Minister’s possession relevant to this application for judicial review, pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106 including, but not limited to:

- (a) all information, documents, and records that were before the Minister and the DOJ in respect of the Decision;
- (b) all documents (including draft versions), correspondence, electronic or other communications, and notes;
- (c) any documents or materials identifying the decision-maker; and
- (d) any analysis undertaken by the Minister or the DOJ in support of the Decision.

DATED at the City of Montreal, in the Province of Quebec, on January 15, 2024.



KPMG Law LLP
KPMG Tower 600 de
Maisonnette Blvd Montreal,
Québec H3A 0A3

Dov Whitman
dwhitman@kpmg.ca

Shara Sullivan
sharasullivan@kpmg.ca

f. 514.840.2118

Counsel for the Applicant