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Court File No.

FEDERAL COURT

BETWEEN:

JENNINGS-CLYDE, INC. D/B/A/ VIVATAS, INC.

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

NOTICE OF APPLICATION
SECTION 18.1 OF THE FEDERAL COURTS ACT

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

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 Calgary, Alberta.

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 file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if 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: Canadian Occidental Tower
635 Eighth Avenue S.W.
3rd Floor
Calgary, Alberta
T2P 3M3

TO:
Respondent

Attorney General of Canada
c/o Alexander S. Millman
Counsel
Prairie Regional Office (Edmonton)
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AND TO:
A tribunal affected per Rule 304(1)(b)(i)

Canada Revenue Agency
Prince Edward Island Tax Center
Attn: Director
275 Pope Road
Sommerside, PE C1N 6A2
(877) 728-0012 (fax)
(902) 450-8558 (toll fax)

APPLICATION

THIS IS AN APPLICATION FOR JUDICIAL REVIEW in respect of The Canada Revenue Agency (CRA). On June 26, 2023, Applicant received a letter, dated June 19, 2023, via Post Canada. In the letter, T2 Development and Legislation stated that it had conducted a statutory interpretation exercise. The result of this exercise was that the Applicant's request for ministerial discretion was denied because Applicant's request was found to be distinguisable from the Bonnybrook case; as such, CRA concluded that the Minister lacked the authority to excercise discretion on Applicant's request to extend the deadline imposed in subsection 164(1) of the Income Tax Act (Act). Specifically, CRA's reasoning was that, while subsections 129(1) and 164(1) are similar in construction, the provisions contained in subsection 164(1.5) preclude the application of subsection 220(3) to subsection 164(1).

THE APPLICANT MAKES APPLICATION FOR:

1. An Order that the Income Tax Act does grant the Minister the power to apply discretion under subsection 220(3) to subsection 164(1) (and, subsequently, that the relief sought under subsection 220(3) is not limited by the additional relief provisions of subsection 164(1.5.)).

2. Reimbursement of court costs necessary for Applicant to file and pursue this application for judicial review.

THE GROUNDS FOR THE APPLICATION ARE:

Background

Applicant

3. The Applicant is a Louisiana corporation (United States) that performed work in Canada as a subcontractor to BMC Software, Inc. from the years 2012 to 2015. BMC Software, Inc. withheld 15% of its payments to Applicant in compliance with ITA 153(1)(g) and Regulation 105.

Extraordinary Circumstances

4. Applicant's certified public accountant (CPA) in Houston, Texas, was dealing with his wife's terminal cancer and as well as serving as the primary caregiver during his sister's end of life issues (early onset of Alzheimers since 2011), both of whom died, respectively, on January 16, 2016 and July 13, 2018. These extraordinary circumstances distracted and delayed the CPA from submitting the Applicant's T2 Corporation Income Tax returns to Canada Revenue Agency (CRA).

T2 Tax Returns Filed

5. In May of 2018, Applicant hired a Canadian-based CPA, Joe Truscott, to prepare and file Applicant's T2 tax returns with CRA. On or about August 13, 2018, Mr. Truscott submitted the Applicant's T2 tax returns for the years 2012, 2013, 2014 and 2015. CRA issued the Notices of Assessment for each return on or about October 31, 2018 and issued a refund check for the amount due on the 2015 tax return.

Application for Ministerial Discretion

6. CRA did not issue refund checks for the years 2012, 2013 and 2014 because the T2 tax returns were not filed within the period set out in subsection 164(1) of the Act. On February 26, 2019, Mr. Truscott e-filed and mailed an application for ministerial discretion asking the Minister to extend the time for filing the T2 tax returns for the years 2012, 2013, and 2014.

CRA Internal Review of Administration of Section 220(3)

7. At the time that Applicant submitted its request for ministerial discretion, CRA had initiated an internal review of its administration of subsection 220(3) and, therefore, the Applicant's request to extend the time for making a return under subsection 220(3) had been put on hold until the review was completed. Upon information gleaned from numerious phones calls with CRA representatives, the internal review had been spurred by the Bonnybrook decision of the Federal Court of Appeal. While the internal review was formally made known to Applicant via a letter dated February 16, 2021, Applicant had also had several earlier phone calls with CRA representatives who explained to Applicant the processing delay was the result of waiting on the "Section 220(3) Working Group" to be formed and then to establish the regulatory framework to incorporate the Federal Court of Appeal's Bonnybrook decision.

CRA Letter to Proceed/Request for Information Prior to Decision

8. In a letter dated July 6, 2022, CRA informed Applicant that CRA was ready to make the decision on Applicant's request for ministeral discretion "to extend the time for filing the T2 Corporation Income Tax return and/or waive the requirement to file a prescribed form, prescribed information, or other document under subsection(s) 220(3) and/or 220(2.1) of the Income Tax Act." The July 6, 2022 letter clearly stated that CRA understood that the purpose of Applicant's request was to "obtain refunds of overpayments of tax...despite not filing the tax return within the period set out in subsection 164(1) of the Income Tax Act." The second paragraph of the July 6, 2022 letter clearly stated the criteria for granting Applicant relief from the filing requirement of subsection 164(1). Applicant thereupon provided the additional requested information to CRA via fax on July 20, 2022 and proceeded to wait for CRA's decision.

CRA Alters Course

9. In a November 10, 2022 phone call, Corey Montgomery informed Applicant that he had asked for additional guidance on refund of overpayments and the application of subsection 220(3) to subsection 164(1). In subsequent phone calls on November 28, 2022 and November 29, 2022, Corey Montgomery informed Applicant that an August 2022 legal opinion from CRA had taken the position that, while subsection 220(3) did apply to subsection 129(1), it did not apply to subsection 164(1) because the exemptions contained in subsection 164(1.5) should be read as excluding any other relief under subsection 164(1). The August 2022 legal opinion was technical interpretation 2019-0810061, authored by Julia Clarkson and dated August 22, 2022 (Note: the Bonnybrook appeals decision was issued on July 18, 2018).

A. Procedural Fairness Grounds

CRA Denied Applicant Procedural Fairness

10. The records that have been shared with Applicant, with specific reference to the July 6, 2022 letter, are clear evidence that, at the time that Applicant's request was under consideration, CRA's regime for applying ministerial discretion was inclusive of the application of subsection 220(3) to subsection 164(1).

11. As stated in paragraph 7 herein above, Applicant's request for ministerial discretion was delayed for several years because, in the wake of the Bonnybrook decision, CRA had initiated an internal review of its administration of subsection 220(3). This review was formally disclosed to Applicant via a letter dated February 16, 2021.

12. The Applicant's receipt of the July 6, 2022 letter was incontravertable evidence that Applicant's request was in keeping with the parameters established at the time of the July 6, 2022 letter. It is difficult to fathom that the established regime, which took many years of deliberations in the wake of Bonnybrook, were quicky cast aside by one technical interpretation issued weeks after CRA had begun the final process of considering the merits of Applicant's request for discretion.

13. If CRA's regulatory scheme has changed since the July 6, 2022 letter, it has only changed after Applicant's request was already under consideration, with technical interpretation 2019-0810061 issued on August 22, 2022, a day shy of seven weeks after the July 6, 2022 letter stated that CRA had started the process to evaluate Applicant's request for discretion, and a day shy of four weeks after Applicant had provided the requested materials via fax on July 20, 2022.

14. Applicant believes that it complied in all respects with the criteria and instructions provided in the July 6, 2022 letter and that Applicant's request should be completed as explained in the July 6, 2022 letter.

15. Not only is technical interpretation 2019-0810061 adverse to the Bonnybrook judgment, it is also adverse to Respondent's argument in Bonnybrook. Technical interpretation

2019-0810061 would have the court believe that the application of subsection 220(3) to subsection 164(1) is completely different than the application of subsection 220(3) to subsection 129(1). In fact, there is no difference in the application of subsection 220(3) to either subsections 129(1) or 164(1). The two subsections are so similar that the Appeals Division of CRA had confusingly denied Bonnybrook's application for ministerial discretion with this response in the letter dated October 12, 2016:

> "It is our position that Subsection 220(3) is only applicable to the provisions of Subsection 150(1) and has no application to Subsection 164(1)."[1]

The Bonnybrook judgment addressed the Minister's error in the October 12, 2016 letter, that of conflating subsection 164(1) with subsection 129(1).[2] The Bonnybrook judgment states that both parties urged the Court to treat these errors as minor in nature that should be ignored.[3] Applicant urges this Court to remember the words of Respondent in the Bonnybrook judgment, i.e. that any references to a difference between 129(1) and 164(1) should be ignored.

B. Legal Basis

16. The proper approach to statutory interpretation was described in Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10:

> [10] It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire contecxt and their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see 65302 British Columbia Ltd. v. Canada, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmounious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interprettive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lessor role. The relative effects of ordinary meaning,context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

17. The language of subsection 220(3) should play the dominant role in the interpretitive process. Parliament's text in subsection 220(3) is very clear and concise:

> "The Minister may at any time extend the time for making a return under this Act."

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1 Bonnybrook v. Minister, A-230-17, 2018 FCA 136, paragraph 10

2 Bonnybrook v. Minister, A-230-17, 2018 FCA 136, paragraph 27

3 Bonnybrook v. Minister, A-230-17, 2018 FCA 136, paragraph 29

As the Bonnybrook court found:

> Subsection 220(3) of the Act provides the Minister with a broad discretion to extend the time to file a "return". The provision is not new, as it can be traced back to the Income War Tax Act, 1917, S.C. 1917, c. 28. Given its long history, and its broad langauge, the reach of subsection 220(3) has no doubt expanded over time as new "return" filing requirements have been enacted.[4]
>
> Based on the text alone, subsection 220(3) provides the Minister the descretion to grant the relief that Bonnybrook seeks.[5]
>
> Subsection 220(2.1) and (3) are examples of relief measures which have broad application and give the Minister the authority to provide relief from filing requirements throughout the Act. The decision of the Minister regarding subsection 220(3) fails to give due regard to the breadth of this provision.[6]

18. Parliament's text does not place any modifiers or exeptions on the broad power of discretion that is granted to the Minister in subsection 220(3). Parliament's text does not say or suggest that subsection 220(3) is subject to limitation by any other part of the Act. However, CRA has identified other areas of the Act that were adopted to suit scenarios other than subsection 220(3) to then argue that the existence of these additional sections, notably subsection 164(1.5), should somehow be seen to limit the broad power of discretion granted in subsection 220(3) when it is obvious that these other sections exist in addition to the powers granted in subsection 220(3). In effect, Parliament's addition of the language of subsection 164(1.5) is cumulative to the broad powers of subsection 220(3) and should not be read so as to perempt those broad powers.

19. The Bonnybrook judgment actually contains a discussion of the history of subsection 164(1.5) as one of the "1994 amendments"[7] that Parliament added to address specific issues that were unrelated to corporations, i.e. subsection 220(3) was pre-existing to these 1994 amendments and the 1994 amendments had no effect on the existing privileges available to corporations; therefore the addition of these 1994 amendments should in no way invalidate the pre-existing privileges of subsection 220(3) unless the peremption was explicit, which it was not. CRA is reading something into the text of the Act that is not there.

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4 Bonnybrook v. Minister, A-230-17, 2018 FCA 136, paragraph 42

5 Bonnybrook v. Minister, A-230-17, 2018 FCA 136, paragraph 46

6 Bonnybrook v. Minister, A-230-17, 2018 FCA 136, paragraph 48

7 Bonnybrook v. Minister, A-230-17, 2018 FCA 136, paragraph 54

20. The Bonnybrook judgment shows that CRA used this same argument in Bonnybrook and has simply recycled it herein.[8] Having lost on arguing against applying subsection 220(3) to subsection 129(1), CRA is attempting to fight the same battle with subsection 164(1). The court was not persuaded then and it should not be persuaded now.

    As the Bonnybrook court found:

    > "In my view, counsel suggests a leap too far in suggeting that subsection 220(3) of the Act does not apply to dividend refunds in light of the 1994 amendments. In circumstances where a provision provides relief to taxpayers, such as subsection 220(3), the provision should be given effect unless it is quite clear that Parliament intended otherwise. Parliament has not done so in subsection 129(1), even taking into account subsection 152(4.2) and 164(1.5) of the Act. If Parliament had intended that the general relief provisions in subsection 220(3) not apply to subsection 129(1), it would have been an easy matter for Parliament to have provided for this explicitly."[9]

    Every element that held true for the application of subsection 220(3) to subsection 129(1) in the Bonnybrook decision holds just as true for the application of subsection 220(3) to subsection 164(1) for the Applicant's request for ministerial discretion.

21. The Applicant pleads and relies on:

(a) The Income Tax Act, RSC 1985, c. 1 (5th Supp.)

(b) Bonnybrook v. Minister, A-230-17, 2018 FCA 136

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

(a) Copy of February 16, 2021 letter from CRA to Applicant.

(b) Copy of July 6, 2022 letter from CRA to Applicant.

(c) Copy of June, 19, 2023 letter from CRA to Applicant.

(d) Copy of Technical interpretation 2019-0810061

(e) Copy of October 12, 2016 letter from CRAAppeals Division to Bonnybrook.

(f) Such further and other material as is advised and this Honourable Court permit.

THIS APPLICATION REQUESTS Pursuant to Rule 317 that CRA send a certified copy of the below material:

(a) Copy of February 16, 2021 letter from CRA to Applicant.

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8 Bonnybrook v. Minister, A-230-17, 2018 FCA 136, paragraph 50

9 Bonnybrook v. Minister, A-230-17, 2018 FCA 136, paragraph 56

(b) Copy of July 6, 2022 letter from CRA to Applicant.

(c) Copy of June 19, 2023 letter from CRA to Applicant.

(d) Copy of Technical interpretation 2019-0810061.

(e) Copy of October 12, 2016 letter from CRAAppeals Division to Bonnybrook.

October 20, 2023

/ s / Patrick Lacour

_____

Patrick Lacour
(granted leave of the Court pursuant to Rules 120 and 369 in Docket #23-T-55)
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