

Court File No. T-2618-22

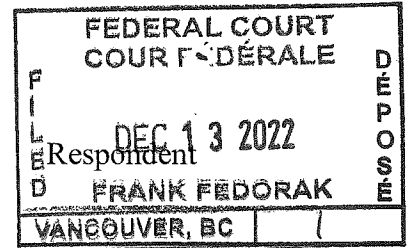
FEDERAL COURT

594702 BRITISH COLUMBIA LTD., 594705 BRITISH COLUMBIA LTD., and
594710 BRITISH COLUMBIA LTD.

Applicants

– and –

THE ATTORNEY GENERAL OF CANADA



NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants 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 applicants. The applicants request that this application be heard at Vancouver, British Columbia.

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 applicants' solicitor or, if the applicants are self-represented, on the applicants, **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.

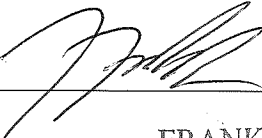
IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

DATED: December 13, 2022.

OSLER, HOSKIN & HARCOURT LLP
1055 West Hastings Street
Suite 1700, The Guinness Tower
Vancouver, BC V6E 2E9

David Jacyk
Telephone: (604) 692-2792
Facsimile: (778) 785-2745

Theo Stathakos
Telephone: (604) 803-0759
Facsimile: (778) 785-2745

Issued by  on the day of DEC 13 2022, 2022

Address of local office: **FRANK FEDORAK**
REGISTRY OFFICER
AGENT DU GREFFE
Federal Court of Canada
Pacific Centre, P.O. Box 10065
701 West Georgia Street
Vancouver, BC V7Y 1B6

TO: Attorney General of Canada

AND TO: Minister of National Revenue

APPLICATION

1. This is an application for judicial review in respect of the decision (the “**Decision**”) of the Minister of National Revenue (the “**Minister**”), through her delegates, to deny the request of 594702 British Columbia Ltd., 594705 British Columbia Ltd., and 594710 British Columbia Ltd. (the “**Applicants**”) for documents relied upon by the Minister, or otherwise relevant, to the Minister’s proposal to assess the Applicants under the *Income Tax Act*, RSC 1985, c 1 (5th Supp), or to redact said documents in such a manner as to render them unintelligible or unusable for the purpose of responding to the Minister’s proposal, in respect of the “Elmbridge” transaction.
2. The Decision was communicated to the Applicants on November 14, 2022 by way of a letter from Christine Yun of the Canada Revenue Agency (the “**Decision Letter**”).
3. The Minister proposed to reassess the Applicants under section 245 of the *Income Tax Act* by letters dated June 28, 2019 (the “**2019 Proposal Letters**”). Specifically, the Minister proposed that section 245, the general anti-avoidance rule, permitted her to reassess the Applicants as if section 160 applied.
4. The Minister proposed, in subsequent letters dated November 26, 2020 (the “**Proposal Letters**”), to reassess the Applicants under section 160 of the *Income Tax Act*. Additionally, the Minister revised the proposal in the 2019 Proposal Letters such that the primary proposal was that section 160 permitted her to reassess the Applicants, and in the alternative, the section 245 proposal in the 2019 Proposal Letters applied.
5. The Proposal Letters disclosed taxpayer information about third parties involved in the transactions giving rise to the underlying tax liability of an unrelated taxpayer that did not involve the Applicants. In the Proposal Letters, the Minister proposed to assess the Applicants for an alleged joint and several liability for the underlying tax liability of the unrelated taxpayer.

6. In disclosing this taxpayer information, the Proposal Letters explained that paragraph 241(4)(b) of the *Income Tax Act* permitted the Minister to disclose taxpayer information to any person “that can reasonably be regarded as necessary for the purposes of determining any tax, interest, penalty or other amount that is or may become payable by the person under this Act or any other amount that is relevant for the purposes of that determination”.
7. The Proposal Letters provided 30 days for the Applicants to respond to and make submissions regarding the Proposal Letters.
8. By letter dated and sent on December 10, 2020, the Applicants requested disclosure pursuant to paragraphs 241(4)(a) or (b) of the *Income Tax Act* of the documents being relied upon and otherwise relevant to the facts alleged by the Minister in the Proposal Letters (the “**Relevant Documents**”).
9. The Applicants made the request for the Relevant Documents in order to be able to respond to the Proposal Letters. The Applicants requested an extension to respond to the Proposal Letters until February 26, 2021 if the Relevant Documents were provided by the end of December 2020, with a corresponding further extension if the Relevant Documents were provided after the end of December 2020.
10. On January 11, 2021, the Minister issued a letter refusing to provide the Relevant Documents on the basis that the Relevant Documents were not necessary for the Applicants because that January 11, 2021 letter and the Proposal Letters provided all the necessary information, but agreeing to extend the period for the Applicants to respond until February 26, 2021.
11. On February 3, 2021, the Applicants brought an application for judicial review challenging the Minister’s decision set out in the January 11, 2021 letter, in Federal Court File No. T-204-21 (the “**2021 JR Application**”).
12. On February 22, 2021, the Applicants and the Attorney General of Canada agreed to settle the 2021 JR Application on the basis that the Applicants would

discontinue the application and a representative of the Minister would conduct a “fresh review” of the Applicants’ request for documents made on December 10, 2020. In accordance with that agreement, and on that understanding, the Applicants discontinued the 2021 JR Application on February 22, 2021.

13. On November 14, 2022, the Minister issued the Decision Letter:
 - (a) agreeing to provide some of the Relevant Documents to the Applicants, and enclosing certain documents (the “**Disclosed Documents**”); and
 - (b) explicitly refusing to provide the following documents (collectively the “**Audit Documents**”):
 - (i) the T20 audit reports of the Minister’s audit of the third party transactions giving rise to the underlying tax liability; and
 - (ii) the correspondence between the Minister and the audited third parties regarding the Minister’s audit of the transactions giving rise to the alleged underlying tax liability.
14. The Decision Letter provided until December 14, 2022 for the Applicants to respond to and make submissions regarding the Proposal Letters.
15. In the Decision Letter, the Minister refused to provide the Audit Documents to the Applicants by taking the position that the Audit Documents were not used by the Minister to determine the taxes payable. The Minister admitted, however, that the audit reports “record the basis for the reassessment” of the third party transactions giving rise to the underlying tax liability.
16. The Disclosed Documents enclosed with the Decision Letter are so heavily redacted that they are, in many cases, unintelligible, and in any event unusable for the purpose for which they were requested, namely, for the Applicants to be able to respond to the Proposal Letters.


17. Moreover, in some cases, the redactions in the Disclosed Documents appear to be of information that is the Applicants' own information, or information that was otherwise disclosed to the Applicants in the Proposal Letters, or information that is not taxpayer information. There is no rational or logical basis for such redactions.
18. The Disclosed Documents enclosed with the Decision Letter constitute an incomplete and selective disclosure of the Relevant Documents, namely the documents relied upon by the Minister, or that are otherwise relevant, to the Minister's proposal to assess the Applicants under the *Income Tax Act*.
19. Apart from the Audit Documents, the Minister possesses other Relevant Documents, which are necessary for the Applicants to properly respond to the Proposal Letters (the "**Undisclosed Relevant Documents**"), but that were not included among the Disclosed Documents. The Minister has decided not to disclose these Undisclosed Relevant Documents without explicitly advising the Applicants that the documents have been withheld, or of the Minister's basis for doing so.
20. Paragraphs 241(4)(a) and (b) of the *Income Tax Act* permit the Minister to provide to any person taxpayer information that can reasonably be regarded as necessary for the purposes of, respectively, the "administration or enforcement of this Act" or "determining any tax, interest, penalty or other amount that is or may become payable by the person under this Act".
21. Taxpayers reassessed under section 160 of the *Income Tax Act* in respect of the tax liability of a third party are entitled to dispute that reassessment on the basis that the Minister erred in determining the tax liability of that third party.
22. To be able to respond to the Proposal Letters, the Applicants require all the Relevant Documents in unredacted form, including the Disclosed Documents, the Audit Documents, and the Undisclosed Relevant Documents.

23. The Applicants make application for:
- (a) an order setting aside the Decision and an order for *mandamus* requiring the Minister to provide unredacted versions of the Audit Documents to the Applicants;
 - (b) an order setting aside the Decision and an order for *mandamus* requiring the Minister to provide unredacted versions of the Disclosed Documents to the Applicants;
 - (c) an order setting aside the Decision and an order for *mandamus* requiring the Minister to provide unredacted versions of the Undisclosed Relevant Documents to the Applicants;
 - (d) in the alternative, an order referring the Applicants' request back to the Minister for determination on the basis that the only reasonable decision is that the request be granted;
 - (e) the Applicants' costs; and
 - (f) such further and other relief as counsel may advise and this Honourable Court may permit.
24. The grounds for the application are:
- (a) the Minister erred in law in making a decision that failed to correctly apply paragraphs 241(4)(a) and (b) of the *Income Tax Act*;
 - (b) the Minister failed to observe a principle of natural justice, procedural fairness or other procedure that she was required by law to observe;
 - (c) the Minister based her Decision or order on an erroneous finding of fact that she made in a perverse or capricious manner or without regard for the material before her;

- (d) the Minister erred by ignoring the Minister's own published positions on providing a taxpayer with all documents upon which the Minister relies during an audit;
 - (e) the Decision is not correct because the Minister misinterpreted paragraphs 241(4)(a) and (b) of the *Income Tax Act*, resulting in a breach of procedural fairness and natural justice;
 - (f) the Decision is unreasonable because (i) the reasons are not both rational and logical, and (ii) it is untenable in light of the relevant factual and legal context;
 - (g) sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, and Rule 317 of the *Federal Courts Rules*, SOR/98-106;
 - (h) paragraphs 241(4)(a) and (b) of the *Income Tax Act*; and
 - (i) such further and other grounds as counsel may advise and this Honourable Court may permit.
25. This application will be supported by the following material:
- (a) one or more affidavits to be sworn; and
 - (b) such further and other evidence as counsel may advise and this Honourable Court may permit.
26. The Applicants request that pursuant to Rule 317 of the *Federal Courts Rules*, the Minister transmit a certified copy to the Applicants and to the Federal Court Registry of all materials in the possession of the Minister and Canada Revenue Agency that were before or reviewed by the Minister through her delegates in issuing the Proposal Letters and the Decision Letter, or that are otherwise relevant to the Decision of the Minister to refuse to provide the Applicants with the Audit Documents, unredacted versions of the Disclosed Documents, and the Undisclosed Relevant Documents.

Dated at Vancouver, British Columbia this 13th day of December, 2022

OSLER, HOSKIN & HARCOURT LLP

Per: 

David Jacyk / Theo Stathakos

1055 West Hastings Street
Suite 1700, The Guinness Tower
Vancouver, BC V6E 2E9

Telephone: (604) 692-2792 / (604) 803-0759

Facsimile: (778) 785-2745

Counsel for the Applicants

TO: Attorney General of Canada

AND TO: Minister of National Revenue

Court File No.

FEDERAL COURT

B E T W E E N:

**594702 BRITISH COLUMBIA LTD., 594705
BRITISH COLUMBIA LTD., and 594710
BRITISH COLUMBIA LTD.**

Applicants

– and –

THE ATTORNEY GENERAL OF CANADA

Respondent

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1055 West Hastings Street
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Vancouver, BC V6E 2E9

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Counsel for the Applicants