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Court File No. A-167-22

FEDERAL COURT OF APPEAL

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
AOUT AUG 18 2022	DÉPOSÉ
SORAYA PREMJI	
VANCOUVER, BC	

Between

FORTIUS FOUNDATION

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

NOTICE OF APPLICATION

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 Vancouver.


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.

August 18, 2022

Issued by:


SORAYA PREMJI
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Minister of National Revenue

APPLICATION

This is an application pursuant to subparagraph 168(2)(b) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (the "Act").

THE APPLICATION IS FOR:

1. An order pursuant to Rule 300(b) of the *Federal Courts Rules*, SOR/98-106 and section 168(2)(b) of the Act for an order extending the period of time that must expire before the Minister of National Revenue is permitted to publish in the Canada Gazette a copy of the notice proposing to revoke the applicant's charitable registration until such time as the applicant has completed the objection process under subsection 168(4) of

the Act and, if necessary, an appeal to this Court under subsection 172(3) of the Act;

2. Costs of this application; and
3. Such further relief as to this Court may seem just.

THE GROUNDS FOR THE APPLICATION ARE

1. By letter dated 21 July 2022, the Director General of the respondent's Charities Directorate (the "Director") advised the applicant of her intention to revoke the applicant's charitable registration by means of publication of a notice in the Canada Gazette pursuant to subsection 168(1) of the Act.
2. In her letter, the Director expressed her intention to publish the aforementioned revocation notice in the Canada Gazette immediately after the expiration of 30 days from 21 July 2022. The Director's letter stated as follows:

In addition, due to the egregious and continuous nature of non-compliance found in the audit, the CRA has decided to publish a copy of the notice in the Canada Gazette immediately after the expiration of 30 days from the date of mailing of this notice pursuant to paragraph 168(2)(b) of the Act.
3. Pursuant to section 168(4) of the Act, the applicant has a statutory right to object to the Director's determination by filing a notice of objection within 90 days of 21 July 2022. The applicant intends to file an objection within this time period.
4. In the event that the objection process is unsuccessful in overturning the Director's decision to revoke the applicant's charitable registration, the applicant has a further statutory right to appeal the result of the section 168(4) objection process by commencing an appeal to this Court pursuant to section 172(3) of the Act.
5. If the applicant is unable to overturn the Director's decision in its section 168(4) objection, it plans to commence an appeal to this Court pursuant to section 172(3) of the Act.
6. The Director's 21 July 2022 letter makes clear that the Director plans to publish the revocation of the applicant's charitable registration in the Canada Gazette immediately upon the expiry of 30 days from 21 July 2022, despite the existence of these statutory rights of objection and appeal:

...please note that even if the Organization files a notice of objection with the CRA, this will not prevent the CRA from publishing the notice of revocation in the Canada Gazette immediately after the expiration of 30 days from the date of mailing of this notice.

7. The Director's letter makes no attempt to argue that the revocation of the applicant's charitable registration is in any way urgent, let alone sufficiently urgent to justify publishing the revocation notice in the Canada Gazette prior to the end of the 90 day period in which the applicant has a statutory right to object to the revocation notice.
8. The applicant's planned section 168(4) objection is meritorious. The applicant intends to submit in its section 168(4) objection that the alleged "continuous" and "egregious" non-compliance is neither continuous nor egregious, and does not justify the draconian result of revocation. Certain of the allegations of non-compliance address very minor aspects of Fortius' receipting practices, including the failure to issue a proper receipt for the donation of a small amount of used gym equipment, the failure to keep a record of a single specific receipt, and the use of a web address on certain receipts that the Canada Revenue Agency no longer uses. The respondent also takes issue with Fortius' failure to collect rent from an entity that was unable to pay rent and had no assets against which Fortius could have executed on any potential judgment.
9. Fortius disputes that these issues rise to the level of non-compliance with the Act, and even if they do, Fortius plans to argue in its objection that any such non-compliance is certainly not "egregious" as alleged by the respondent.
10. In addition, Fortius sold its major asset, a 5.2 acre property in Burnaby and a 146,000 square foot integrated athletic development centre, to the City of Burnaby pursuant to an agreement reached in December 2020. Fortius' alleged transgressions, even if they are described accurately by the respondent and rise to the level of "egregious" non-compliance, both of which Fortius disputes, cannot be "continuous", as Fortius no longer holds these assets or carries on the same activities that it engaged in during the audit period in question.
11. The applicant has serious concerns that it has been targeted for audit and revocation by the respondent as a result of a vociferous letter-writing campaign by a self-described citizen journalist, Vivian Krause, who has been writing correspondence for several years in which she makes a variety of accusations about the applicant and others. Ms. Krause's correspondence is regularly copied to the Director and other

representatives of the respondent. It would be highly inappropriate for the respondent to be influenced by Ms. Krause's letter-writing campaign in its dealings with Fortius or any other taxpayer.

12. The applicant submits that the immediate revocation of its charitable registration will significantly undermine its ability to exercise its statutory rights of objection and appeal from the Director's decision. In particular:
 - (1) Once revocation takes place through publication in the Canada Gazette, the applicant will not be permitted to issue official donation receipts to donors, or receive gifts from other registered charities. This will prevent the applicant from procuring the funds that it needs to pursue its statutory rights of objection and appeal.
 - (2) The applicant will be required by section 188 of the Act to pay a tax within one year from the date of the notice of intention to revoke (i.e., 21 July 2023) equivalent to the total value of its assets after paying outstanding liabilities (the "Revocation Tax"). This will deprive the applicant of the ability to use its existing resources to pursue its statutory rights of objection and appeal, should those processes take more than one year from 21 July 2022 to conclude.
 - (3) Publication will deprive the applicant of the relief from the Revocation Tax provided in subsection 188(2.1) of the Act because it will no longer be legally possible for the respondent, Minister of National Revenue (the "Minister"), to abandon the intention to revoke after revocation is finalized by publication in the Canada Gazette, and it is not reasonable to expect the Minister to re-register the applicant prior to 21 July 2023.
 - (4) Publication will deprive the applicant of procedural fairness in the section 168(4) objection process, because it is not reasonable to expect the same respondent which has already resolved to publish revocation prior to considering the applicant's objection to vacate or refuse to confirm the notice of intention to revoke upon review of the applicant's objection.
13. The practical effect for the applicant of these four consequences of revocation is to put an end to its existence as a viable charitable foundation and largely stifle its opportunity to pursue its statutory rights of objection and appeal. In effect, by forcing the publication of a revocation notice on an unreasonable and unjustified timeline, the Director is able to practically immunize herself from the applicant's ability to challenge her revocation determination.

14. Moreover, in the event that the applicant's objection is sustained, or its appeal is allowed, the applicant's charitable registration will have already been revoked, and it will have already paid the Revocation Tax unless the objection and appeal process is completed within 366 days of 21 July 2022. This is very unlikely.
15. There is nothing in section 172(3) of the Act to suggest that an appellant who is successful in an appeal to this Court will have their charitable registration reinstated, nor does the Act suggest that a successful section 172(3) will result in the nullification of the initial revocation of charitable registration.
16. Even if it were somehow re-registered at the conclusion of the objection and appeal process, the applicant will have suffered irreparable harm from the Director's decision to proceed to revocation before hearing the applicant's objection and responding, if needed, to its appeal.
17. For the Director to revoke the applicant's registration before the applicant has had time to exercise its statutory rights of objection and appeal is procedurally unfair in the extreme.
18. The balance of convenience strongly favours the order sought by the applicant. The respondent suffers no prejudice from the granting of the order sought by the applicant. The respondent's ability to revoke the applicant's charitable registration is preserved, and may be exercised when and if the applicant is unsuccessful in overturning the Director's decision through the applicant's statutory rights of objection and appeal.
19. The applicant relies on subparagraph 168(2)(b) of the Act, and rules 300(b) and 400 of the *Federal Court Rules*.

MATERIAL IN THE POSSESSION OF A TRIBUNAL

Pursuant to sections 317 and 318 of the *Federal Courts Rules* the applicant requests that the respondent send the following material to the applicant and to the Registry:

1. A certified copy of any and all materials produced by, referenced, consulted or relied upon in any way by the Director in the planning, decision, execution and any other step involved in the drafting and issuance of the 21 July 2022 letter; and
2. A certified copy of any and all emails and other materials sent to the Director or any other representative of the respondent by Vivian Krause relevant to allegations about the activities, financing, receipting of donations and other affairs of the applicant; and
3. If the Minister objects to production under Rule 318(2), a list describing each document that the Minister objects to producing, including any materials not produced because the Minister believes the material is already in the possession of the applicant.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

Affidavit #1 of Scott Cousens, affirmed 17 August 2022; and such other evidence as this Court may allow.

18 August 2022



Allen / McMillan Litigation
Counsel

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