

**Date: 20070727**

**Docket: A-471-05**

**Citation: 2007 FCA 262**

**CORAM:   SEXTON J.A.  
          MALONE J.A.  
          RYER J.A.**

**BETWEEN:**

**1346687 ONTARIO INC. ON BEHALF OF THE PENSION PLAN  
FOR PRESIDENTS OF 1346687 ONTARIO INC.**

**Appellant**

**and**

**MINISTER OF NATIONAL REVENUE**

**Respondent**

Heard at Toronto, Ontario, on April 25, 2007.

Judgment delivered at Ottawa, Ontario, on July 27, 2007.

**REASONS FOR JUDGMENT BY:**

**RYER J.A.**

**CONCURRED IN BY:**

**SEXTON J.A.  
MALONE J.A.**

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FOR PRESIDENTS OF 1346687 ONTARIO INC.**

**Appellant**

**and**

**MINISTER OF NATIONAL REVENUE**

**Respondent**

**REASONS FOR JUDGMENT**

**RYER J.A.**

**INTRODUCTION**

[1] Mrs. Susan Greenhalgh taught school for over 30 years prior to her retirement. As a result of her efforts, she became entitled to a pension from the Ontario Teachers' Pension Plan Board (the "Teachers' Pension Plan"). Upon her retirement, Mrs. Greenhalgh had a number of options with respect to her pension. She chose to have the commuted value of her pension, which amounted to \$564,478.56, transferred from the Teachers' Pension Plan to a newly created pension plan (the

“Plan”) that had been set up by 1346687 Ontario Inc. (the “Corporation”), itself a newly incorporated corporation.

[2] The Plan is called the Pension Plan for Presidents of 1346687 Ontario Inc. and, from its inception, Mrs. Greenhalgh was its sole member by virtue of her position as the President of the Corporation.

[3] Mr. Brian Jenkins is an experienced actuary and the principal of ActuBen Consulting Inc. (“ActuBen”). He was instrumental in the formation of the Plan and its registration with the Ontario pension regulatory authorities and the Canada Revenue Agency (the “CRA”). Mr. Jenkins has considerable experience in dealing with the Registered Plans Directorate (the “RPD”) of the CRA. Even before the creation of the Plan, Mr. Jenkins had been involved in detailed discussions with the RPD with respect to the income tax consequences that would arise out of the registration and operation of an individual pension plan (an “IPP”) such as the Plan.

[4] Not long after the registration of the Plan, the CRA expressed concerns to Mr. Jenkins and to Mrs. Greenhalgh, in her capacity as the contact person for the Plan, with respect to the validity of the Plan. Correspondence went back and forth between the CRA and each of them and an audit of the Plan was undertaken. This process culminated on September 8, 2005, when the CRA gave notice (the “Notice of Intent”) to the Plan, pursuant to paragraph 147.1(11)(a) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (the “ITA”), that the Minister of National Revenue (“the Minister”) proposes to revoke the registration of the Plan. A revocation of the Plan could have

adverse income tax consequences to Mrs. Greenhalgh. The present appeal relates to the decision of the Minister to give the Notice of Intent.

[5] The Minister stated that the Notice of Intent was given because the Plan fails to satisfy an essential registration condition, namely, that the primary purpose of the Plan must be to provide lifetime retirement benefits to employees in respect of their service as employees. Whether or not this essential condition has been fulfilled has been determined by this Court, in *Loba Limited v. Minister of National Revenue*, 2004 FCA 342, to be a question of fact. Accordingly, a detailed consideration of the facts is warranted.

## **FACTUAL BACKGROUND**

### **The Corporation**

[6] The Corporation was incorporated on July 30, 1999 and has a July 31st year-end for the purposes of the ITA. Corporate income tax returns for its 2000, 2001, 2002 and 2003 taxation years indicate that the Corporation had no material assets or revenues in any of those years. A CRA payroll account was opened by the Corporation on September 4, 2003. At the times that are material to this appeal, Ms. Brenda Hookings was the sole shareholder of the Corporation and Mrs. Greenhalgh was its president. The record does not disclose the nature of the relationship, if any, between Ms. Hookings and Mrs. Greenhalgh or how it was that Mrs. Greenhalgh came to be the president of the Corporation.

### **Registration of the Plan**

[7] On October 6, 1999, ActuBen applied for registration of the Plan on behalf of the Corporation pursuant to section 147.1 of the ITA. In the registration documents, the Corporation was identified as both the sponsor and the administrator of the Plan and Mrs. Greenhalgh was identified as the contact person for both the Corporation and the Plan. The registration documents also indicated that the Corporation was newly incorporated, with no history of earnings and that its ability to pay salaries would be contingent upon the receipt of revenues, the source of which was then unknown. Nonetheless, those materials indicated that Mrs. Greenhalgh, as the sole member of the Plan, anticipated receiving annual earnings from the Corporation of \$65,000. No explanation was provided as to how this amount was determined.

[8] On November 15, 1999, the CRA accepted the Plan for registration with an effective date of August 1, 1999.

### **Amendment of the Plan**

[9] On March 21, 2000, ActuBen submitted materials to the RPD that related to an amendment to the Plan. The amendment permitted the Plan to credit Mrs. Greenhalgh with past service benefits and permitted the Plan to receive a transfer of the commuted value of her pension entitlement under the Teachers' Pension Plan. In his cover letter submitted with the materials, Mr. Jenkins stated:

It has been indicated that the CCRA wished an indication of the current salary levels of people prior to making amendments. To that end, we have attached a statement from the company indicating the member's salary once she returned from her unpaid leave of absence.

Accompanying the letter was a statement indicating that Mrs. Greenhalgh had received gross wages of \$6,000 in each of December 1999, January 2000 and February 2000. The record before us shows no evidence that any of the indicated amounts were paid by the Corporation or that any unpaid leave of absence was formally approved by the Corporation.

### **CRA Warnings**

[10] On May 16, 2000, the Director of the RPD wrote to the plan manager of the Ontario Public Service Employee's Union Pension Plan expressing a concern that IPPs that were established primarily for the purpose of accepting transfers of funds from existing registered pension plans might not meet the registration condition in paragraph 8502(a) of the *Income Tax Regulations*, C.R.C., c. 945 (the "ITR"). Under that provision, a plan cannot be registered unless its primary purpose is to provide post-retirement benefits to individuals in respect of their services as employees. The CRA warned that if compliance with this condition could not be demonstrated, the CRA registration of the IPP could be revoked retroactively, with potentially adverse income tax consequences.

[11] On May 29, 2000 a similar letter was sent to the Financial Services Commission of Ontario.

[12] On June 28, 2000, the CRA wrote to the Corporation in its capacity as administrator of the Plan, acknowledging receipt of the amendments to the Plan that allowed for the accrual of past service benefits. That correspondence, a copy of which was sent to ActuBen, clearly stated the concerns of the CRA with respect to the creation of IPPs for the purpose of receiving transfers of the

commuted value of previously accrued pension benefits. While the letter is somewhat lengthy, it is worthwhile to reproduce the relevant portion of it.

We have noticed a trend in which individuals near normal retirement age leave large public sector employers and establish their own corporation. The individual is hired by the corporation, and the corporation sponsors an individual pension plan (IPP) for the individual that recognizes the prior service under the public sector pension plan. Once the IPP is established, the full commuted value of the individual's prior pension is transferred to the IPP, as the transfer rules of the *Income Tax Act* do not limit transfers from one defined benefit plan to another. We are concerned that while many of these IPPs may be acceptable, others may not meet the requirements for registration under the Act.

The primary purpose of every registered pension plan must be to provide retirement benefits to individuals in respect of their service with the employer who has established the plan. This requirement is reflected in the Act as a condition of registration. If it is subsequently determined that a plan is established for a reason other than this primary purpose, it will cease to qualify for registration under the Act.

The first issue we have with these arrangements is the legitimacy of the employee/employer relationship. Our concern is that some of these arrangements may not exist if it were not for the purpose of avoiding the transfer rules of the Act. If there is not a *bona fide* relationship that has the employee rendering legitimate services to the employer, the plan will fail the primary purpose test.

Even if this relationship is established and nominal earnings are received, there may still be an issue with the primary purpose test. The Act only permits a pension plan to base retirement benefits on the earnings received from an employer who participates in the plan. In most cases, the earnings with the new corporation are much lower than what was received with the prior employer, and therefore the benefits under the IPP are significantly lower than the benefits that the individual would have received from the prior plan. This creates a large surplus in the IPP.

When an individual foregoes a substantial retirement benefit by transferring the associated funds to a recently established IPP that provides a much smaller retirement benefit, it can be argued that the primary purpose test is not met. In these cases, we may conclude that the primary purpose of establishing the IPP was to facilitate a transfer of funds from a prior plan that would have been limited by the Act had it been transferred to a registered retirement savings plan. The conclusion that the primary purpose condition is not met is further supported by the fact that following the transfer, the IPP holds significant surplus assets rather than providing retirement benefits of a level comparable to those that would have been

paid from the prior plan. As mentioned earlier, if the primary purpose of a plan is for any reason other than providing retirement benefits with respect to the individual's service as an employee with the current employer, the plan will fail to qualify for registered status.

If it is apparent at the time of submission of the past service amendment that the IPP will not meet the primary purpose test, we will refuse to accept the amendment. Unfortunately, in many cases, it will not be apparent until a year or two later that the primary purpose test was not met. This situation can be more problematic for individuals as they may have already transferred funds into the IPP.

If it is determined that a registered plan does not, and never did, meet the primary purpose test, the plan's registered status can be revoked as of the original effective date. The consequences to the member could be severe if the CCRA were to revoke the registration of the plan upon discovering that the purpose of incorporating a company was simply to establish a pension plan to hold the transferred pension for a specific member. The impact of this action is that all the assets of the plan would become taxable.

It is for this reason that we want to ensure that you are made aware of these concerns. While it is not immediately evident that this plan will not meet the primary purpose, we ask you to confirm the following within the next 30 days:

- the company was established for a reason other than to establish a pension plan for the purpose of transferring benefits from a prior plan;
- there is a *bona fide* employer/employee relationship between the plan member and this company; and
- the plan member expects to receive earnings at a level comparable to the earnings they received from the prior employer.

If you cannot confirm this information we will consider that the plan will not meet the primary purpose and its registration may be revoked.

[13] On August 22, 2001, the RPD corresponded with the Corporation, again with a copy to ActuBen, indicating that a reply to its June 28, 2000 correspondence had not yet been received. This correspondence indicated that the CRA was considering the revocation of the Plan and invited the



Corporation to submit any additional information or to make representations that might be relevant to a potential revocation of the Plan.

[14] By correspondence dated June 22, 2001 (but post-marked December 4, 2001, according to the Minister), the Corporation responded to the June 28, 2000 correspondence from the CRA. The body of the response reads as follows:

Dear Sir:

Re: Pension Plan for Presidents of 1346687 Ontario Inc. – Reg. No.  
1051923

I am sorry to say that we did not receive your letter dated June 28, 2000.

This company was established to enter into various businesses with the intention of making a profit. This company was not formed “simply to establish a pension plan to hold the transferred pension for a specific member.”

I am employee of the company and I expect to be paid by my employer. I did not directly or indirectly own *any* shares of the company as of June 28, 2000.

I expect to receive compensation from the company at a level comparable to the earnings I received by my previous employer and that my highest average compensation will be at least as high.

Yours truly,

Susanne Greenhalgh  
President

### **The Audit**

[15] On January 29, 2003, an audit of the Plan was commenced by the CRA and approximately one year later that audit was completed. In the course of the audit, the CRA spoke and corresponded with both Mrs. Greenhalgh and Mr. Jenkins on a number of occasions.

[16] On May 14, 2003, the CRA auditor advised the Corporation that the additional information was required, in particular:

- (a) the names of all participants in the Plan;
- (b) the names of all of the shareholders of the Corporation;
- (c) the amounts and dates of any transfers of funds into the Plan;
- (d) the details of the accrued pension entitlement, as of December 31, 2002, of each member of the Plan; and
- (e) the details of any distributions out of the Plan.

[17] During the summer of 2003, the CRA had a number of telephone conversations with Ms. Greenhalgh in her capacity as the person responsible for the Plan. In the course of those conversations, Mrs. Greenhalgh advised that she was suffering from anxiety and depression and that she was separated from her husband, who also had serious health problems. She also advised that the Plan had been her husband's "brainchild" and that much of the information that was requested by the CRA was in the possession of Mr. Jenkins, who was going to compile it for delivery to the CRA.

[18] The audit revealed that on January 20, 2000, the Teachers' Pension Plan transferred \$564,478.56 to the Plan. From that amount, Mrs. Greenhalgh had received payments aggregating \$90,271.83 as withdrawals of "surplus", the first payment of which occurred within days of the transfer of the funds by the Teachers' Pension Plan.

[19] An Actuarial Valuation for the Plan, as of January 1, 2002, that was prepared by ActuBen and signed by Mrs. Greenhalgh, indicated that she had “Estimated Annualized 2002 Earnings” of \$65,000. However, in response to CRA questions, she stated that she had not received any earnings from the Corporation. In addition, in correspondence to the CRA, dated November 13, 2003, Mrs. Greenhalgh stated that she had taken an unpaid leave of absence from the Corporation to enable the Corporation to accrue sufficient capital to support the level of salary that the CRA allegedly demanded. No indication was given as to how this capital accumulation process was expected to occur. Moreover, the T2 corporate income tax returns for its 2001, 2002 and 2003 taxation years indicated that the Corporation had total assets of approximately \$1,045 and liabilities of a slightly higher amount.

[20] In correspondence to the CRA, dated September 12, 2003, the Corporation advised that Mrs. Greenhalgh had begun to receive employment income from the Corporation in 2003.

[21] In correspondence to the Corporation, dated September 23, 2003, the CRA asked for an explanation as to why Mrs. Greenhalgh had “no months worked” for the Corporation since August 1, 1999 (the effective date of the Plan) and for proof of employment income in 2003. The CRA also asked for an explanation as to how the Corporation met the “primary purpose” requirement in paragraph 8502(a) of the ITR.

[22] In correspondence to the CRA, dated November 13, 2003, the Corporation advised that contrary to the information contained in its September 12, 2003 correspondence, Mrs. Greenhalgh was not *in fact* receiving employment income in 2003, but that it was anticipated that she would begin to work for the Corporation in 2003. With respect to the question of why Mrs. Greenhalgh had “no months worked” with the Corporation since August 1, 1999, the Corporation replied:

The member has no months worked with the company because there was no available eligible “work”. Of course, work can only be offered to the member when it complies with the special rules imposed by Registered Plans.

With respect to the explanation as to how the Corporation met the “primary purpose” requirement in paragraph 8502(a) of the ITR, it replied:

The primary purpose of the pension plan remains that which is required under the Regulations to the *Income Tax Act* 8502(a). To provide pension benefits to individuals after retirement or death in respect of their service. This primary purpose as defined in the legislation was the primary reason the Pension Plan for Presidents of 1346687 Ontario Inc. was established, and this continues to be the primary purpose of the plan. We believe we comply with the legislation.

[23] The audit also revealed that in the period from 1999 to 2003, Mrs. Greenhalgh reported employment income from the Niagara South Board of Education, the LCBO, the District School Board of Niagara and the Lincoln County Board of Education. The anticipated commencement of employment with the Corporation in late 2003 did not occur.

### **Post-Audit Correspondence**

[24] By correspondence, dated November 2, 2004, the RPD advised the Corporation that it was considering the revocation of the Plan, effective from and after its initial registration date, on the

basis that the Plan failed to meet the “primary purpose” requirement in paragraph 8502(a) of the

ITR. In reaching that preliminary conclusion, the RPD stated that the following facts were relevant:

- Application for registration of the Plan was submitted on October 6, 1999 with a request to register the Plan effective August 1, 1999.
- The Plan was deemed registered on November 10, 1999.
- The Plan was registered on November 15, 1999 with effect from August 1, 1999.
- On June 28, 2000, our warning letter was sent to you. In our letter, we stated in part that,

Based on the terms of the pension Plan as registered, plan members can only accrue a pension benefit with respect to service from August 1, 1999 onwards. Currently, the pension Plan does not provide a pension benefit in respect of pre-August 1, 1999 service. Before such a pension benefit can be provided, the pension plan will have to be amended in order to allow Plan members to accrue a pension benefit in respect of pre-August 1, 1999 service. Also, until such time as the pension plan is amended, funds from another registered pension plan cannot be transferred into this Plan.

We note that on April 3, 1999 we received an amendment to the pension Plan allowing the Plan members to accrue a pension benefit in respect of pre-August 1, 1999 service. We would like to make you aware of our concern about the circumstances surrounding the establishment of this plan and the potential consequences that could arise...

...It is for this reason that we want to ensure that you are made aware of these concerns. While it is not immediately evident that this plan will not meet the primary purpose, we ask you to confirm the following with the next 30 days:

- the company was established for a reason other than to establish a pension plan for the purpose of transferring benefits from a prior plan;
- there is a *bona fide* employer/employee relationship between the plan member and this company; and
- the plan member expects to receive earnings at a level comparable to the earnings they received from the prior employer.

If you cannot confirm this information we will consider that the plan will not meet the primary purpose and its registration may be revoked.

- We received a letter dated June 22, 2001 (the letter was postmarked December 4, 2001) from you. In your letter, we are advised that,

I am sorry to say that we did not receive your letter of June 28, 2000.

This company was established to enter into various businesses with the intention of making a profit. This company was not formed “simply to establish a pension plan to hold the transferred pension for a specific member.”

I am employee of the company and I expect to be paid by my employer. I did not directly or indirectly own *any* shares of the company as of June 28, 2000.

I expect to receive compensation from the company at a level comparable to the earnings I received by my previous employer and that my highest average compensation will be at least as high.

- We note from your letter of September 12, 2003 that \$564,478.56 was transferred into the Plan on January 20, 2000 from the “Teachers Pension” plan. Also, we note from the September 12, 2003 letter that you received five payments of “Surplus Amount” totalling \$90,271.83 during the period January 24, 2000 to October 12, 20002. In addition, we note that the first payment of “Surplus Amount” you received was paid on January 24, 2000, within days from the date of the January 20, 2000 transfer.
- In our letter of May 14, 2003, we requested “...a detailed calculation of each member’s accrued pension entitlement as of December 31, 2002.” We note from your letter of September 12, 2003 that you had “0.00” years of service with 1346687 Ontario Inc. from the effective date of the Plan (August 1, 1999) onward. Also, we note that “30.57” years of pre-effective date service with the former employer was being recognized.
- Also, in our letter of May 14, 2003, we requested for each member “...detailed calculations of all pension adjustments (PA) and any past service pension adjustments (PSPA) in relation to their participation in this pension plan.”

In your letter of September 12, 2003, we are advised that you had no “Months Worked”, no “Paid Employment Income” from 1346687 Ontario Inc. and no “Pension Adjustment”. Also, we are advised that “Susanne

Greenhalgh is receiving employment income in 2003. No T4s have been issued, so no pension adjustment have [sic] been computed yet”.

- In your November 13, 2003 letter, we are advised in part that “...To date Ms. Greenhalgh has not started to take a salary from 1346687 Ontario Inc. At this time, we anticipate she will begin work in December 2003.”
- Also, in your letter of November 13, 2003, you advised us in part that, “...The member was not actively at work during the entire period, and was on unpaid leaves of absence. Under the terms of the plan no benefits accrue during such a period and contributions would be inappropriate...”.
- Based on our audit findings, we note that you did not have any employment earnings from 1346687 Ontario Inc. during the period 1999 (the Plan’s effective date is August 1, 1999) through 2003.

The correspondence closed with an invitation to the Corporation to make any submissions that it may consider relevant.

[25] By correspondence dated November 18 and 28, 2004, Mr. Jenkins responded to this letter, on behalf of the Corporation. His correspondence contained a number of general questions about the RPD’s interpretation of the ITA and ITR and requested that the RPD justify its position on substantive issues, such as its position with respect to retroactive deregistration of plans, its requirement that earnings with a current employer must be comparable to earnings received from a prior employer and its apparent new policy under which a plan would have to establish an employee-employer relationship rather than just having to demonstrate that its members were employees.

[26] In an initial response to these letters, on December 10, 2004, the RPD indicated that the letter of November 18, 2004 was too general in nature and did not address any of the RPD’s

concerns outlined in its letter of November 2, 2004. The RPD further stated that Mr. Jenkins should ensure that any response should be specific to the Plan and respond specifically to the concerns outlined in the correspondence of November 2, 2004.

[27] In a letter dated December 21, 2004, the RPD advised Mr. Jenkins that they had forwarded his November 28, 2004 correspondence to the Income Tax Rulings Directorate of the CRA for their consideration.

[28] By correspondence dated December 22, 2004, the RPD responded to the inquiries made by Mr. Jenkins in his letters of November 18 and 28, 2004. After addressing his concerns, the RPD concluded that they were still of the opinion that the Plan did not meet the “primary purpose” requirement in paragraph 8502(a) of the ITR.

[29] Mr. Jenkins replied to the December 22, 2004 correspondence from the RPD with a final letter on January 5, 2005. In it he complained of the unfair timelines imposed by the RPD, indicated that he did not agree with several of their positions and sought further clarification on some of their responses.

[30] On September 8, 2005, the CRA issued the Notice of Intent stating as follows:

The Minister intends to revoke the Plan’s registration effective August 1, 1999 because:

It appears that the Plan fails to satisfy paragraph 8502(a) of the Regulations, one of the prescribed conditions for registration set out in paragraph 8501(1)(a) of the Regulations. This condition, the



“primary purpose” test requires that the Plan provide lifetime retirement benefits to employees in respect of their service with the employer.

The relevant facts and documentation used in coming to our conclusion are set out in our letter of November 2, 2004.

### **Consequences of Revocation of a Plan**

[31] The revocation of registered pension plans is a matter that has been recently considered by this Court in *Loba* and in *Boudreau v. Canada (Minister of National Revenue – M.N.R.)*, [2005] F.C.J. No. 1551, 2005 FCA 304. These cases dealt with registered pension plans that were maintained for the benefit of a number of employees, unlike the Plan, which was an IPP created solely for the benefit of Mrs. Greenhalgh. Notwithstanding this material factual distinction, the *Boudreau* decision, in particular, sheds some light on the overall context of registered pension plan revocations. At paragraphs 5, 6 and 7, Sharlow J.A. states:

[5] Generally, any payment made by any pension plan, registered or unregistered, is taxable if it is made to or for the benefit of a member. That is so whether the payment is made in the form of a periodic pension payment, or in a lump sum (paragraph 56(1)(a) of the *Income Tax Act*).

[6] A number of income tax advantages are obtained by the registration of a pension plan under the *Income Tax Act*. First, any contribution made to a registered pension plan by a member of the plan is deductible, subject to certain limitations, in computing the member's income for income tax purposes. Second, income earned on investments held in a registered pension plan is exempt from income tax as long as the investment is held in the plan (provided certain conditions are met). Third, in a number of situations, money can be transferred from one registered pension plan to another registered pension plan (or certain other recognized tax deferred plans) for the benefit of a member, without the member incurring a tax liability in respect of the transfer.

[7] The revocation of the registration of a pension plan does not cause the pension plan to cease to exist. It remains in existence, but the special tax advantages of registration would be lost. It would no longer be possible for a member to make deductible contributions to the plan. Income earned on investments held in the plan would be taxable. It would no longer be

possible to make a tax-free transfer of money from the pension plan to another plan. Such a transfer of funds probably would be taxed in the hands of the member, either as a pension benefit under paragraph 56(1)(a) of the *Income Tax Act* or as a distribution from a trust under paragraph 12(1)(m) of the *Income Tax Act*, depending upon the circumstances. If funds are transferred from an unregistered pension plan to a registered plan, the member could be at risk of double taxation because the transfer itself would be taxable, and any payments subsequently made out of the transferee plan to the member could also be taxable.

## **STATUTORY PROVISIONS**

[32] The relevant statutory provisions are paragraphs 147.1(11)(a) and 172(3)(f) and section 180 of the ITA, as well as paragraph 8502(a) of the ITR. These provisions are reproduced in Appendix “A”.

## **ANALYSIS**

### **Nature of the Appeal**

[33] An appeal that is brought under subsection 172(3) and section 180 of the ITA will be decided on the basis of a record presented to this Court. The record must reflect not only the position of the Minister but also the position of the affected party. This requires the Minister to comply with the rules of natural justice and procedural fairness by ensuring that the affected party has a reasonable opportunity to respond to the concerns of the Minister. (See *Renaissance International v. Minister of National Revenue*, [1983] 1 F.C. 860 (C.A.).)

[34] In such an appeal, the onus is on the appellant to demonstrate that the Minister erred in reaching the conclusions that underpin the decision to give a notice of proposed revocation of a

pension plan. (See *Human Life International in Canada Inc. v. M.N.R. (C.A.)*, [1998] 3 F.C. 202 and *Canadian Committee for the Tel Aviv Foundation v. Canada*, 2002 FCA 72, [2002] F.C.J. No. 315.)

### **Procedural Fairness**

[35] In the present circumstances, the Notice of Intent is based upon the application of paragraph 147.1(11)(a), which permits a revocation of a pension plan that does not comply with the prescribed registration conditions specified in section 8502 of the ITR. In particular, the CRA asserted that the primary purpose of the Plan was not to provide periodic payments to individuals after retirement and until death in respect of their service as employees, as required by paragraph 8502(a) of the ITR. This concern was communicated to the Corporation and Mr. Jenkins in three letters (June 28, 2000, August 22, 2001 and November 2, 2004) that were sent by the CRA during the period from the date of the registration of the Plan to the date of the Notice of Intent. Moreover, each of those letters invited the Corporation and Mr. Jenkins to make further submissions. Clearly, the Corporation was provided with multiple opportunities to provide additional information to the CRA.

[36] Counsel for the appellant argued that the CRA should have asked about Mrs. Greenhalgh's job description at the Corporation, what the Corporation's business plan entailed and why the Corporation failed to achieve anything at all by way of business development.

[37] In my view, there is no basis for the appellant's contention that it did not know the nature of the CRA's concerns and that it did not have an opportunity to respond to those concerns. As such, the CRA cannot be said to have failed to comply with the rules of natural justice and procedural

fairness in giving the Notice of Intent, having regard to its dealings with the appellant and its representatives over the approximately six year period since the Plan was registered.

[38] The alleged failure to meet the condition in paragraph 8502(a) of the ITR was known to the appellant and it was open to the appellant to provide any submissions that it thought would be useful to it in dealing with that matter. The appellant was aware of the possibility that the Notice of Intent would issue since August 22, 2001, at the latest. As decided in *Human Life International in Canada Inc.*, the appellant has the burden of demonstrating that the decision of the CRA to give the Notice of Intent was in error. If it had chosen to do so, the appellant could have easily provided answers to the questions that the CRA “neglected to ask” and those answers would have been part of the record upon which the CRA based its decision to give the Notice of Intent.

### **The Minister’s Decision**

[39] Paragraph 147.1(11)(a) of the ITA permits the Minister to issue a notice of intent to revoke a pension plan where that plan does not comply with prescribed registration conditions specified in section 8502 of the ITR. Paragraph 8502(a) of the ITR contains such a condition. Accordingly, the decision of the Minister to issue the Notice of Intent pursuant to paragraph 147.1(11)(a) of the ITA based upon the failure of the Plan to comply with the registration condition contained in paragraph 8502(a) of the ITR is a correct application of the law.

[40] As indicated in *Loba*, the determination of whether the provisions of paragraph 8502(a) of the ITR have been met is essentially a question of fact.

[41] The Minister provided two reasons for his determination that the condition in paragraph 8502(a) of the ITR – that the primary purpose of the Plan was not to provide lifetime retirement benefits to Mrs. Greenhalgh with respect to her service as an employee – had not been met. First, the Minister contended that there was no *bona fide* employment relationship between Mrs. Greenhalgh and the Corporation. To the Minister, this was apparent for several reasons: Mrs. Greenhalgh received no remuneration from, and provided no services to, the Corporation from the inception of the Plan until at least the end of 2003; she was employed by, and received remuneration from third parties, during that period; and a number of inconsistent statements were made with respect to her employment with, and earnings from, the Corporation.

[42] The second reason given by the Minister for his determination that the primary purpose requirement was not met was that the Plan was established primarily for the purpose of receiving a transfer of funds from the Teachers' Pension Plan rather than for the provision of lifetime retirement benefits to Mrs. Greenhalgh in respect of her service as an employee of the Corporation. According to the Minister, this purpose is evident from the fact that within days of the transfer of funds from the Teachers' Pension Plan to the Plan, Mrs. Greenhalgh caused a portion of the transferred funds to be paid to herself as a payment out of a "surplus" in the Plan that was apparently created by virtue of her relatively low or non-existent earnings from the Corporation. According to the Minister, this ability to withdraw surplus was only available to Mrs. Greenhalgh by virtue of the structure of the Plan. In contrast, no such "surplus" removal would have been available if the funds would have

been left in the Teachers' Pension Plan. The immediate removal of the surplus demonstrated to the Minister that the primary purpose of the plan was not to provide lifetime retirement benefits.

[43] In my view, the appellant has failed to demonstrate that either of these reasons is unsound or unsupported by the record that is before this Court. It follows that the appellant has similarly failed to demonstrate that it was unreasonable for the Minister to conclude that the condition in paragraph 8502(a) of the ITR was not met.

#### **DISPOSITION**

[44] The determination of the CRA that the condition in paragraph 8502(a) of the ITR has not been met must stand, with the consequence that the Plan has been shown to have failed to comply with a prescribed condition, as contemplated by paragraph 147.1(11)(a) of the ITA. Accordingly, the appeal should be dismissed with costs.

“C. Michael Ryer”

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J.A.

“I agree  
J. Edgar Sexton J.A.”

“I agree  
B. Malone J.A.”

## APPENDIX "A"

|   |   |
|---|---|
| 147.1 (11) Where, at any time after a pension plan has been registered by the Minister,   | 147.1 (11) Lorsque l'une des situations suivantes se produit après que le ministre a agréé un régime de pension:  |
| (a) the plan does not comply with the prescribed conditions for registration ...  | a) le régime n'est pas conforme aux conditions d'agrément réglementaires [...]  |
| the Minister may give notice (in this subsection and subsection 147.1(12) referred to as a "notice of intent") by registered mail to the plan administrator that the Minister proposes to revoke the registration of the plan as of a date specified in the notice of intent, | le ministre peut informer l'administrateur du régime par avis -- appelé "avis d'intention" au présent paragraphe et au paragraphe (12) --, envoyé en recommandé, qu'il entend retirer l'agrément du régime à la date précisée dans l'avis d'intention, qui ne peut être antérieure aux dates suivantes: |
| 172(3) Where the Minister   | 172(3) Lorsque le ministre:   |
| ...   | [...]   |
| (f) refuses to register for the purposes of this Act any pension plan or gives notice under subsection 147.1(11) to the administrator of a registered pension plan that the Minister proposes to revoke its registration,   | f) refuse d'agréer un régime de pension, pour l'application de la présente loi, ou envoie à l'administrateur d'un régime de pension agréé l'avis d'intention prévu au paragraphe 147.1(11), selon lequel il entend retirer l'agrément du régime;  |
| ...   | [...]   |
| the administrator of the plan or an employer who participates in the plan, in a case described in paragraph 172(3)(f) ..., may appeal from the Minister's decision, or from the giving of the notice by the Minister, to the Federal Court of Appeal.                         | l'administrateur du régime ou l'employeur qui participe au régime, dans une situation visée aux alinéas f) [...] peuvent interjeter appel à la Cour d'appel fédérale de cette décision ou de la signification de cet avis.  |

180. (1) An appeal to the Federal Court of Appeal pursuant to subsection 172(3) may be instituted by filing a notice of appeal in the Court within 30 days from

...

(c) the mailing of notice to the administrator of the registered pension plan under subsection 147.1(11),

...

as the case may be, or within such further time as the Court of Appeal or a judge thereof may, either before or after the expiration of those 30 days, fix or allow.

(2) Neither the Tax Court of Canada nor the Federal Court has jurisdiction to entertain any proceeding in respect of a decision of the Minister from which an appeal may be instituted under this section.

(3) An appeal to the Federal Court of Appeal instituted under this section shall be heard and determined in a summary way.

8502. For the purposes of section 8501, the following conditions are applicable in respect of a pension plan:

(a) the primary purpose of the plan is to provide periodic payments to individuals after retirement and until death in respect of their service as employees;

180. (1) Un appel à la Cour d'appel fédérale prévu au paragraphe 172(3) est introduit en déposant un avis d'appel à la cour dans les 30 jours suivant, selon le cas:

[...]

c) la date de mise à la poste de l'avis à l'administrateur du régime de pension agréé, en application du paragraphe 147.1(11);

[...]

ou dans un autre délai que peut fixer ou accorder la Cour d'appel ou l'un de ses juges, avant ou après l'expiration de ce délai de 30 jours.

2) La Cour canadienne de l'impôt et la Cour fédérale n'ont, ni l'une ni l'autre, compétence pour connaître de toute affaire relative à une décision du ministre contre laquelle il peut être interjeté appel en vertu du présent article.

(3) Un appel dont est saisie la Cour d'appel fédérale, en vertu du présent article, doit être entendu et jugé selon une procédure sommaire.

8502. Pour l'application de l'article 8501, les conditions suivantes s'appliquent aux régimes de pension :

a) le principal objet du régime consiste à prévoir le versement périodique de montants à des particuliers, après leur retraite et jusqu'à leur décès, pour les services qu'ils ont accomplis à titre d'employés;



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

(Appeal from the Notice of Intention to Revoke the registration of the Pension Plan for Presidents of 1346687 Ontario Inc. issued by Annelisa Gillespie on behalf of the Minister, in an undated letter that was received on September 12, 2005.)

**DOCKET:** A-471-05

**STYLE OF CAUSE:** 1346687 ONTARIO INC. ON BEHALF OF THE  
PENSION PLAN FOR PRESIDENTS OF 1346687  
ONTARIO INC.  
and  
MINISTER OF NATIONAL REVENUE

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** April 25, 2007

**REASONS FOR JUDGMENT BY:** Ryer J.A.

**CONCURRED IN BY:** Sexton J.A.  
Malone J.A.

**DATED:** July 27, 2007

**APPEARANCES:**

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