Date: 20070727

Docket: A-472-05

Citation: 2007 FCA 263

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

BETWEEN:

JORDAN FINANCIAL LIMITED ON BEHALF OF THE PENSION PLAN FOR PRESIDENTS OF JORDAN FINANCIAL LIMITED

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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REASONS FOR JUDGMENT

RYER J.A.

[1] Mr. Charles Ross was a police officer for many years. Upon retirement, he was entitled to a pension from the Ontario Municipal Employees Retirement System ("OMERS"). Mr. Ross chose to forego the collection of retirement benefits from the public sector and instead chose to have the commuted value of his pension, which amounted to $754,513.47, transferred from OMERS to a newly created pension plan (the "Plan") that had been set up by Jordan Financial Limited ("Jordan Financial").

[2] The Plan is called the Pension Plan for Presidents of Jordan Financial Limited. Mr. Ross is President of the Company and the sole member of the Plan by virtue of his position as President. The sole shareholder of Jordan Financial is Michael McBurney.

[3] ActuBen Consulting Inc. ("ActuBen") acting through its principal, Mr. Brian Jenkins, 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. Prior to the Plan's registration, he had been involved in detailed discussions about individual pension plans ("IPP") with the RPD.

[4] After the Plan's registration, the RPD corresponded and had discussions with both Mr. Ross and Mr. Jenkins and an audit of the Plan was conducted by the CRA to ensure that it met the requirements of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (the "ITA"). This process culminated on September 8, 2005, when the CRA gave notice (the "Notice of Intent") to the Plan that the Minister of National Revenue ("the Minister") proposes to revoke the registration of the Plan effective November 1, 2000. The matter under appeal is the decision of the Minister to give the Notice of Intent.

[5] The letter from 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.

[6] Before canvassing the facts, it should be noted that this case was heard in conjunction with *1346687 Ontario Inc. on behalf of the Pension Plan for Presidents of 1346687 Ontario Inc. v. Minister of National Revenue* (A-471-05), a case involving an IPP that was set up for the benefit of the president of 1346687 Ontario Inc. Mr. Fournie, who represented both appellants, acknowledged that the cases were similar. He spent most of his time on the 1346687 Ontario Inc. matter and then pointed out the factual differences between the two cases.

FACTUAL BACKGROUND

Jordan Financial

[7] Jordan Financial was incorporated as Joandan Financial Inc. on April 28, 2000. For income tax purposes, it has a year-end of December 31. It was originally owned by Auke Zylstra, who incorporated it to facilitate the formation of an IPP into which the commuted value of accrued pension benefits were to be transferred. That plan fell through and Mr. Zylstra sold the shares of the corporation to Mr. McBurney on July 26, 2000, for nominal consideration. The record does not disclose the nature of the relationship, if any, between Mr. McBurney and Mr. Ross or how it was that Mr. Ross came to be the president of Jordan Financial. Effective December 31, 2003, the corporate name was changed from “Joandan Financial Inc.” to “Jordan Financial Limited”.

Registration of the Plan

[8] On December 28, 2000, ActuBen applied for registration of the Plan on behalf of Jordan Financial under section 147.1 of the ITA. In the registration documents, Jordan Financial was identified as both the sponsor and the administrator of the Plan and Mr. McBurney was identified as the contact person for both Jordan Financial and the Plan.

[9] The documents submitted at the time of registration of the Plan with the CRA included actuarial valuations, with an effective date of November 1, 2000, that indicated that Jordan Financial had no history of earnings and salaries were contingent upon the receipt of future revenues. The documents also indicated that expected annual earnings of Mr. Ross, the sole member of the Plan, were $66,500. Also included in the documents were statements from Mr. Ross to the effect that he was an employee, but not a shareholder, of Jordan Financial and that the Plan had not been established for the purpose of receiving transfers of funds from other pension plans.

[10] Registration was granted by the CRA on March 28, 2001, with effect from November 1, 2000.

CRA Warnings

[11] On March 28, 2001, the same day that the Plan was registered, the RPD wrote to Mr. Ross as President of Jordan Financial, to make him aware of the CRA's concerns about the circumstances surrounding the establishment of the Plan and the potential consequences that could arise if the Plan did not meet the requirements of the ITA. The concerns outlined were similar to those that had been

previously expressed by the RPD to the Ontario Public Service Employee's Union Pension Trust and the Financial Services of Commission of Ontario with respect to the validity of similar IPPs.

[12] The correspondence from RPD, a copy of which was sent to ActuBen and Michael McBurney, clearly stated the concerns of the CRA with respect to the creation of IPPs and the required compliance with paragraph 8502(*a*) of the *Income Tax Regulations*, C.R.C., c. 945 (the "ITR"). 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.

[13] The RPD made several attempts to communicate this information to Mr. Ross. The original letter that was mailed to Mr. Ross was returned to RPD. As a result, an official of the RPD attempted to contact Mr. Ross at the telephone number provided in the registration documents. The notes of this official that formed a part of the record indicate that the telephone number provided appeared to be a personal number unrelated to Mr. Ross. These notes also indicated that a search of

the telephone directory and the CRA's database failed to locate a corporate telephone listing for Jordan Financial. When RPD attempted to reach the shareholder of Jordan Financial at the second telephone number that was provided in the Plan's documents, the person on the telephone answered on behalf of a different corporate entity.

The Audit

[14] On February 4, 2003, the CRA commenced an audit of the Plan. A little less than one year later, the audit was completed. In the course of the audit, the CRA spoke and corresponded with Mr. Ross, Mr. Jenkins, and Mr. McBurney on several occasions.

[15] On May 14, 2003, RPD wrote to Mr. McBurney, requesting submissions on various issues including:

(a) the names of all participants in the Plan;

(b) the amount and date of any transfer of funds into the Plan;

(c) all employer contributions that had been made to the Plan;

(d) the details of the accrued pension entitlement as of December 31, 2002 and all pension adjustments;

(e) the details of any distributions from the Plan; and

(f) the business number for Jordan Financial.

[16] On September 26, 2002, ActuBen filed the Plan's Annual Information Return for the 2001 year which disclosed that $80,000 had been paid to Mr. Ross out of surplus funds in the Plan, and not as employment income.

[17] An Actuarial Valuation for the Plan, dated January 1, 2003, which was certified by Mr. Ross, indicated that he was "actively employed and earning benefits" from Jordan Financial and that his "Estimated Annualized 2003 Earnings" were $66,500.

[18] Between June and December of 2003, the CRA communicated with Mr. McBurney, in writing and by telephone. During the course of these communications, the CRA asked Mr. McBurney to explain why Mr. Ross had "no months worked" and no paid employment with Jordan Financial. The CRA also asked Mr. McBurney to explain how Mr. Ross could have had $66,500 in final average earnings for 2002 if he has "no months worked" and no paid employment income with Jordan Financial. An explanation of the primary purpose of the Plan was also requested.

[19] With respect to the question of why Mr. Ross had "no months worked" with Jordan Financial, Mr. McBurney replied:

> The letter from the CCRA requires that when the member receives a salary from the Company that it is in the amounts equal to the total compensation received from his previous employer despite any changes made to the member's compensation structure. The President, had to take an unpaid leave of absence from Jordan Financial Limited for personal reasons. The owner kindly agreed to wait for his return. The member should be returning to active employment with the Company in 2003. The member will be collecting a salary at the level required by CCRA, and will finish meeting the requirement of the letter before retirement benefits become payable.

Mr. McBurney also indicated that the final average earnings of $66,500 was the amount that Mr. Ross expected to earn upon his return to work.

[20] With respect to the explanation as to how Jordan Financial met the "primary purpose" requirement in paragraph 8502(*a*) of the ITR, Mr. McBurney replied:

> The primary purpose of the pension plan remains that which is required under the Regulations to the *Income Tax Act* 8502(a). This primary purpose as defined in the legislation was the primary reason the Pension Plan for Presidents of Jordan Financial Limited was established, and this continues to be the primary purpose of the plan. We believe we comply with the legislation. In addition, we do believe we also have and continue to comply with your much different "primary purpose" although our focus has been in complying with requirements of the *Income Tax Act.*

[21] The audit also revealed that in the period from 2000 to 2003, Mr. Ross reported gross farming income, employment income from the Corporation of the City of Sault Ste. Marie, the Government of Canada, Algoma Co-Operative Livestock Sales, the Ontario Cattlemen's Association and "self employment" income from W. H. Stuart Mutuals Ltd.

[22] On October 30, 2002, all of the property and assets in the Plan were transferred from the Plan to Mr. Ross's RRSP.

Post-Audit Correspondence

[23] 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 December 28, 2000 with a request to register the Plan effective November 1, 2000.

- In your letter of December 22, 2000, submitted along with the application for registration, you stated,

> 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 do not directly or indirectly own any shares of the company.
>
> I expect to receive compensation from the company at a level comparable to the earnings I received by my previous employer.

- The Plan received deemed registration on January 23, 2001.

- The Plan was registered on March 28, 2001 with effect from November 1, 2000.

- On March 28, 2001, we sent you a letter in relation to your December 22, 2000 letter. In our letter, we stated in part the following:

  > We received your letter of December 22, 2000 in which you make various statements.
  >
  > In light of the statements made in your letter, 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…

- During the course of our audit of the Plan, we requested, on September 8, 2003, from Michael McBurney, owner of Jordan Financial Limited, Articles of Incorporation for Jordan Financial Limited and that company's Business Number (BN). Subsequent to our request, we were advised of a company called Joandan Financial Inc.

- On October 17, 2003, Brenda Tubic of ActuBen Consulting Inc. faxed documents to us including Articles of Incorporation for "Joandan Financial Inc.", and other documentation related to the change in ownership of that company. On the coversheet to the fax, we are advised that,

  > Our client has requested us to fax you these incorporation documents. Mr. McBurney will be sending you the audit letter response shortly.

- All documents related to the registration of the Plan were in the name of Jordan Financial Limited and not Joandan Financial Inc. In Michael McBurney's letter of October 15, 2003, we are advised,

> Please find attached a copy of the Articles of Incorporation for Jordan Financial Limited. We do realize there is a difference between the pension plan name and the name of the corporation. We are in the process of having this brought into line.

- On January 14, 2004, we received a letter from Brenda Tubic of ActuBen Consulting Inc., attaching Articles of Amendment. The letter advises us that,

  > In point B, of the October 15th letter, a difference between the pension plan name and the name of the corporation was reported. This has been corrected, the name of the company Joandan Financial Inc. has been changed to Jordan Financial Limited.

- We note that from Michael McBurney's letter of July 3, 2003 that $754,513.47 was transferred into the Plan on September 5, 2001 from the "OMERS" plan. Also, we note from the letter that you received an $80,000 payment of "Surplus Amount" on September 19, 2001. This payment was made within days of the September 5, 2001 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 Michael McBurney's letter of July 3, 2003, that you had "0.00" years of service with the company from the effective date of the Plan (November 1, 2000) onward. Also we note from the letter that "29.04" years of pre-effective date service with the former employer was being recognized.

- In Michael McBurney's letter of October 15, 2003, we are advised in part that,

  > …The President, had to take an unpaid leave of absence from Jordan Financial Limited for personal reasons. The owner kindly agreed to wait for his return. The member should be returning to active employment with the Company in 2003…
  >
  > …The member was not actively at work during the period, and was on unpaid leaves of absence…

- In our letter of September 8, 2003 to Michael McBurney, we stated in part that,

  > We note from your letter that the member began his participation in the pension plan on November 1, 2000 (the pension plan's effective date) and that the employer has not made any contributions whatsoever. Please explain why the employer has not made any current service contributions to the pension plan.

- The letter we are referring to above is Michael McBurney's letter of July 3, 2003.

- In reply, we are advised in Michael McBurney's letter of October 15, 2003 that,

  > The member was not actively at work during the 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.

- 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 Michael McBurney's letter of July 3, 2003, we are advised that you had no "Months Worked", no "Paid Employment Income" from the company and no "Pension Adjustment". We are also advised that "Mr. Ross is receiving employment income in 2003. No T4s have been issued, so no pension adjustment have been computed yet."

  Also, indicated in Michael McBurney's letter of October 15, 2003, "…The member should be returning to active employment with the Company in 2003."

- Based on our audit findings, we note that you did not have any employment earnings from either Jordan Financial Limited or Joandan Financial Inc. during the period 2000 (the Plan's effective date is November 1, 2000) through 2003.

[24] At the conclusion of the correspondence, Mr. Ross was advised that if he had any additional information relevant to this matter, or if he wished to make any further representations to RPD, that it was open for him to do so prior to January 7, 2005.

[25] By correspondence dated November 18, and November 28, 2004, Mr. Jenkins responded to RPD on behalf of Jordan Financial. These letters contained several general questions about RPD's

interpretation of the ITA and ITR and included requests for RPD to 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 to just having to demonstrate that its members were employees.

[26] On November 20, 2004, Mr. Jenkins submitted a third letter indicating that a salary had been paid to Mr. Ross in 2002 and 2003, but had not been reported properly. No documentation was provided in support of this assertion.

[27] 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 RPD's concerns outlined in their 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 November 2, 2004 letter.

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

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

[30] Mr. Jenkins replied to these letters with a final letter on January 5, 2005. In it he complained of the unfair timelines imposed by RPD, indicated that he did not agree with several of their positions and sought further clarification on some of their responses. Mr. Jenkins also included a letter from W.H. Stuart Mutuals Ltd., in which that corporation stated that it had, in fact, been paying fees to Jordan Financial, rather than to Mr. Ross, for services that had been rendered to it in 2002 and 2003. No documentation confirming that these payments were, in fact, made to Jordan Financial, and not to Mr. Ross, was provided. Moreover, this statement contradicts the statements of Jordan Financial, in its October 15, 2002 correspondence to the RPD, to the effect that Mr. Ross had not, at the date of that correspondence, actively worked for Jordan Financial, was on an unpaid leave of absence and was expected to undertake active employment with Jordan Financial in 2003.

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

> The Minister intends to revoke the Plan's registration effective November 1, 2000 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 above and in our letter of November 2, 2004.

Consequences of Revocation

[32] 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 created for the benefit of a number of employees, unlike the Plan, which was an individual pension plan that was created solely for the benefit of Mr. Ross. 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

[33] 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

[34] 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.).)

[35] 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

[36] 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 Jordan Financial and Mr. Jenkins in at least two letters (March 28, 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, the November 2, 2004 correspondence invited Jordan Financial and Mr. Jenkins to make further submissions. Clearly, Jordan Financial had a number of opportunities to provide additional information to the CRA.

[37] Counsel for the appellant argued that the CRA should have asked about Mr. Ross's job description at Jordan Financial, what the Jordan Financial's business plan entailed and why Jordan Financial failed to achieve anything at all by way of business development.

[38] 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 five year period since the Plan was registered.

[39] 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 March 28, 2001. 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

[40] 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.

[41] 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.

[42] 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 Mr. Ross with respect to his service as an employee – had not been met. First, the Minister contended that there was no *bona fide* employment relationship between Mr. Ross and Jordan Financial. To the Minister, this was apparent for several reasons: Mr. Ross received no remuneration from, and provided no services to, Jordan Financial from the inception of the Plan until at least the end of 2003; he was employed by, and received remuneration from third parties, during that period; and a number of inconsistent statements were made with respect to his employment with, and earnings from, Jordan Financial.

[43] 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 OMERS rather than for the provision of lifetime retirement benefits to Mr. Ross in respect of his service as an employee of Jordan Financial. According to the Minister, this purpose is evident from the fact that within days of the transfer of funds from OMERS, Mr. Ross caused a portion of the transferred funds to be paid to himself as a payment out of a "surplus" in the Plan that was apparently created by virtue of his relatively low or non-existent earnings from Jordan Financial. According to the Minister, this ability to withdraw surplus was only available to Mr. Ross 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 OMERS 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. Moreover, according to the Minister, the transfer of all of the funds in the Plan to Mr. Ross's RRSP, in 2003, provided additional support for this conclusion.

[44] 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

[45] 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"
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 no 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 Jordan Financial Limited. issued by Annelisa Gillespie on behalf of the Minister, in an undated letter that was received on September 12, 2005.)

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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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