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Court File No.

FEDERAL COURT

B E T W E E N:

(Court Seal)

FATANA MURSAL KHAIRY

Applicant

- and -

CANADA REVENUE AGENCY

Respondent

APPLICATION UNDER section 18.1 of the *Federal Courts Act*, RSC 1985, c. F-7

**NOTICE OF APPLICATION
(JUDICIAL REVIEW)**

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 Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

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

Date November 5, 2024 Issued by _____
(Registry Officer)

Address of
local office: 180 Queen Street West, Suite 200
Toronto ON M5V 3L6

TO: THE ADMINISTRATOR
Federal Court

AND TO: THE ATTORNEY GENERAL OF CANADA
Ontario Regional Office
Department of Justice Canada
120 Adelaide Street West
Suite #400
Toronto, Ontario M5H 1T1

APPLICATION

This is an application for judicial review in respect of Canada Revenue Agency's ("CRA") decision denying the Applicant's eligibility for the Canada Emergency Recovery Benefit ("CERB"). On behalf of the Minister of Employment and Social Development (the "**Minister**"), and by letter dated October 7, 2024 bearing reference number C0071904480-001-45 (the "**Second Review Letter**"), the CRA informed the Applicant that she was not eligible for the CERB because she "did not earn at least \$5,000 (before taxes) of employment and/or self-employment income in 2019 or in the 12 months before the date of your first application".

THE APPLICANT MAKES APPLICATION FOR:

1. An Order setting aside the CRA's decision dated October 7, 2024, as contained in the Second Review Letter, that the Applicant is ineligible for the CERB;
2. An Order declaring that the Applicant is eligible for the CERB payments she received as well as any benefits she would have otherwise received if not for the Minister's improper denial, because the Applicant did earn at least \$5,000 (before taxes) of employment and/or self-employment income in 2019 or in the 12 months before the date of her first application for the CERB and is therefore eligible for that benefit;
3. In the alternative, an Order referring the matter back to a different agent of the Minister for reconsideration of the Applicant's eligibility for the CERB, with such directions as this Honourable Court considers just and appropriate;
4. Further or other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

5. The Applicant, Fatana Khairy (“**Ms. Khairy**”), is a 27-year-old woman residing in Toronto, Ontario. Ms. Khairy lives with her husband and 19-month-old daughter. She is currently pregnant with her second child, expected in November 2024;

6. In 2019 and in early 2020, Ms. Khairy was primarily self-employed. She generated income by providing commercial and residential cleaning services to businesses and individuals in her Afghan community. She supplemented this income by providing childcare services for a client to whom she also provided residential cleaning services;

7. Ms. Khairy provided regular commercial cleaning services to Basir Azizi Bakery, an Afghan bakery and pastry shop, at its Scarborough and Pickering locations. She provided these services on an on-call basis from March 2019 to January 2020. Ms. Khairy also provided commercial cleaning services to the Afghan Supermarket in Scarborough, and residential cleaning services to various acquaintances in her Afghan community;

8. Ms. Khairy issued invoices to her clients for her cleaning and childcare services. She was paid in cash. Ms. Khairy rarely deposited this cash as she and her partner required this income immediately to meet their basic needs. However, on some occasions, her partner deposited this cash on Ms. Khairy’s behalf and sent her e-transfers for the amount deposited and sometimes more;

9. Ms. Khairy incurred some expenses in the provision of her cleaning services, as she purchased her own cleaning supplies. Ms. Khairy did not maintain records of her expenses. However, Ms. Khairy estimates that her cleaning expenses were around \$500-700, and no more than \$1,000, between March 2019 and January 2020;

10. On January 15, 2020, Ms. Khairy contacted Altis Recruitment (“**Altis**”), a recruitment and temporary help agency. Altis connected Ms. Khairy with an employment opportunity as a Records Specialist in early 2020, for which she was paid by Altis. On March 14, 2020, Altis connected Ms. Khairy with a month-long assignment with full time hours at St. Michael’s Hospital as a Customer Service/Surveyor, which began on March 16, 2020. The assignment was scheduled from Monday, March 16th to Friday, April 17th, with working hours from 7:30 AM to 3:30 PM. Ms. Khairy’s responsibilities included greeting hospital visitors, assisting them with application forms, screening, and guiding them to the appropriate departments. The start of Ms. Khairy’s new role at St. Michael’s Hospital coincided with the outbreak of the COVID-19 pandemic;

11. Unfortunately, on the first day of her assignment, March 16, 2020, Ms. Khairy developed COVID symptoms. She experienced an itchy throat and a severe headache. After completing her work, she promptly informed Kathryn O’Connor, the Manager and Temporary Staffing Specialist at Altis, about her situation. Ms. O’Connor advised Ms. Khairy to stay home and self-quarantine. Within three days, Ms. Khairy recovered;

12. On March 20, 2020, Ms. Khairy emailed Ms. O'Connor inquiring about returning to work at the hospital. However, Ms. O'Connor informed her that they no longer required her services;

13. In the months following the pandemic outbreak and until September 2020, Ms. Khairy received no requests for her cleaning services and, other than a two-day work opportunity in August 2020, Ms. Khairy also received no assignments from Altis. She searched persistently for other work opportunities, and applied for several jobs, but was unsuccessful;

14. Given her financial obligations (rent, bills, groceries, etc.), Ms. Khairy decided to apply for CERB in April 2020, shortly after the federal government introduced the program. Eventually, in September 2020, Ms. Khairy received a call back from Altis, was assigned to a new job, and subsequently stopped receiving CERB. Ms. Khairy later worked at Amazon briefly in November or December 2020, after she ceased receiving CERB;

15. Between April 2020 and September 2020, Ms. Khairy received \$14,000 in CERB (the "**CERB Payments**"). The CERB Payments provided significant financial relief to Ms. Khairy;

16. On February 9, 2021, the Government of Canada announced that CERB recipients who based their eligibility on gross instead of net self-employment income could keep the CERB benefits they had received, provided they met the other CERB eligibility criteria and filed both their 2019 and 2020 income tax returns by December 31, 2022;

17. On February 17, 2023, Ms. Khairy received a letter from the CRA, which stated that her account had been selected for a review to assess her entitlement to the CERB Payments she received (the “**February 2023 Letter**”). The CRA asked Ms. Khairy to provide documentation supporting that she earned at least \$5,000 in 2019 or in 2020, 2021, or in the 12 months prior to the date she applied for CERB, to support her eligibility for the CERB Payments;

18. The letter specified that Ms. Khairy could provide the following types of evidence:

In order to support you earned at least \$5,000 in 2019, 2020, 2021 or in the 12 months before the date you applied, we require further documentation. Documents can include, but are not limited to:

If you are or were an employee:

- pay slips*
- employment verification letter, including salary, if accessible online*
- record of Employment*
- Bank statement showing name, address, and payroll deposit*

If you are or were self-employed

- invoice(s) for service rendered that includes the service date, who the service was for, and the name of the individual or company*
- receipt of payment for the service or services provided (a statement of account or bill of sale showing a payment and the remaining balance owed)*
- documents showing income earned from a "trade or business" as a sole proprietor, and independent contractor or partnership*
- any other document (s) that will confirm you earned \$5,000 in employment or self employment income*

Ms. Khairy Earned over \$5,000 in Self-Employment and Employment Income in the 12 Months Prior to her CERB Application

19. On April 13, 2023, Ms. Khairy submitted her cleaning and childcare invoices and a cleaning service confirmation letter from Basir Azizi Bakery for the cleaning services she provided to the CRA. She also submitted Altis's payroll information. Ms. Khairy's invoices demonstrate that she earned \$5,700.00 in gross self-employment income from the cleaning and childcare services she provided in the 12 months prior to applying for CERB. Altis's payroll information demonstrates that Ms. Khairy earned \$1,330.94 in employment income before taxes in the 12 months prior to applying for CERB, totaling \$7,030.94;

20. However, despite providing these invoices and a confirmation letter from Basir Azizi Bakery for the cleaning services, the CRA deemed Ms. Khairy ineligible for CERB;

Ms. Khairy was deemed ineligible for CERB despite meeting the eligibility requirements

21. On May 15, 2023, Ms. Khairy received a letter stating that, after considering all the information available to them, the CRA determined that she was not eligible for CERB (the "**May 2023 Letter**"). The May 2023 Letter stated that the CRA determined that Ms. Khairy was not eligible because she "did not earn at least \$5,000 (before taxes) of employment or self-employment income in 2019 or in the 12 months before the date of [her] first application";

22. On June 8, 2023, Ms. Khairy received a “Notice of redetermination for COVID-19 benefits” from the CRA stating that she was required to repay \$14,000 in respect of the CERB Payments she was issued (the “**Notice of Redetermination**”);

23. On June 8, 2023, Ms. Khairy wrote to the CRA and applied for a second review and provided additional evidence to the CRA that she was unable to return to her position at St. Michael’s Hospital.

24. On April 12, 2024, Ms. Khairy submitted her bank statements to the CRA showing a relevant deposit and e-transfers from her cleaning service income;

25. On April 15, 2024, Ms. Khairy received a letter from the CRA stating that the CRA had completed its review and determined that she was not eligible for the CERB because she “did not earn at least \$5,000 (before taxes) of employment and/or self-employment income in 2019 or in the 12 months before the date of [her] first application” (the “**April Second Review Letter**”). Ms. Khairy received no further information as to why her eligibility was denied;

26. On or about May 1, 2024, Ms. Khairy commenced an application for judicial review of the April Second Review Letter, which was subsequently discontinued;

27. On or about August 27, 2024, Ms. Khairy spoke to a CRA agent regarding her CERB Application. The CRA agent asked Ms. Khairy to provide proof of her cleaning supply expenses, such as receipts or transactions in her bank account, and to highlight any transactions listed in her bank statements that may contain purchases of cleaning supplies;

28. The CRA agent also asked Ms. Khairy to submit pay stubs from Altis and from Amazon. Ms. Khairy did not have the Amazon pay slips, but her 2020 T4 slips reflected earnings of \$421.28 from Amazon;

29. Ms. Khairy submitted the highlighted bank statements, her 2020 T4, and Altis pay stubs on or around September 11, 2024;

30. On September 27, 2024, Ms. Khairy spoke to the CRA agent again, who confirmed that she had received Ms. Khairy's documentation, that she would review her documentation, and that she would contact her with any further questions. Ms. Khairy did not hear from the CRA agent again;

31. On October 7, 2024, Ms. Khairy received a letter from the CRA stating that the CRA had completed its review and determined that she was not eligible for the CERB because she "did not earn at least \$5,000 (before taxes) of employment and/or self-employment income in 2019 or in the 12 months before the date of [her] first application" (the "**Second Review Letter**"). Ms. Khairy received no further information as to why her eligibility was denied;

32. Mr. Khairy and her husband are of limited means. She is on maternity leave and is expecting her second child imminently. She is not able to continue working at this time in order to care for her newborn. She is unable to pay back \$14,000 in respect of the CERB Payments;

33. The Second Review Letter is the CRA decision that is the subject of this application for judicial review;

The Decision in the Second Review Letter is Unreasonable and Procedurally Unfair

34. The decision as set out in the Second Review Letter is unreasonable and lacked procedural fairness for the following reasons:

- (a) It comes to the identical conclusion stated in the May 2023 Letter, without addressing the explanations and concerns raised by Ms. Khairy in her communications with the CRA and the supporting documentation submitted, which demonstrates that her earnings were over \$5,000 during the twelve months preceding her CERB application;
- (b) It comes to the identical conclusion stated in the May 2023 Letter, in spite of the bank statements submitted by Ms. Khairy to the CRA as requested, showing relevant deposit and e-transfers from her cleaning service income, and her total cleaning expenses;
- (c) The CRA failed to acknowledge and apply the Government of Canada's policy that gross self-employment income is the basis to assess CERB eligibility;
- (d) The CRA failed to provide Ms. Khairy with an explanation or reasons as to how and why she did not meet the \$5,000 income eligibility requirement for CERB;
- (e) The CRA fettered its discretion by mechanically applying its delegated authority without adequate consideration of the circumstances before it;

- (f) The CRA's reasons were inadequate and unintelligible. The CRA has a heightened responsibility to justify decisions with significant consequences on vulnerable people, including Ms. Khairy. The CRA was aware that Ms. Khairy is a low-income individual and would have to repay \$14,000 to the CRA if she was ineligible for the CERB Payments. The reasons the CRA provided in the Second Review Letter fail to meet the standard of justification in Ms. Khairy's case, and in fact provide no justification at all;

35. The *Federal Courts Act*, RSC 1985, c F-7, including section 18.1, and the *Federal Court Rules*, SOR/98-106;

36. The *Canada Recovery Benefits Act*, SC 2020, c 12, s 2; and

37. Such further and other grounds as counsel may advise and this Honourable Court may permit.

This Application will be supported by the following material:

1. Affidavit of Fatana Khairy, to be sworn;
2. The February 2023 Letter, the May 2023 Letter, the Notice of Redetermination dated June 8, 2023, and the Second Review Letter dated October 7, 2024; and
3. Such further and other material as counsel may advise and this Honourable Court may permit.

THE APPLICANT REQUESTS that, pursuant to Rule 317 of the *Federal Court Rules*, the Minister send a certified copy of the following material that is not in the

possession of the Applicant but is in the possession of the Minister to the Applicant and to the Registry:

- (a) Any and all records pertaining to the Applicant's receipt of the CERB Payments and determinations about the Applicant's eligibility for it; and
- (b) Any and all records considered by the decision-maker(s).

November 5, 2024

BLAKE, CASSELS & GRAYDON LLP
Barristers & Solicitors
199 Bay Street
Suite 4000, Commerce Court West
Toronto ON M5L 1A9

Daniel Szirmak LSO #701630
Tel: 416-863-2548
daniel.szirmak@blakes.com

Lidia Hencic LSO #86947D
Tel: 416-863-2231
lidia.hencic@blakes.com

Solicitors for the Applicant:

Fatana Mursal Khairy
1110-20 Antrim Crescent
Scarborough, ON M1P 4N3
647-782-9681
Fatana.Khairy@gmail.com