Federal Court  Cour fédérale

**Date: 20250812**

**Docket: T-269-25**



**Ottawa, Ontario, August 12, 2025**

**PRESENT: Associate Judge Catharine Moore**

**BETWEEN:**

**DEBBIE RENE VORSTEVELD**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

## ORDER AND REASONS

[1] The Respondent Attorney General of Canada [AGC] brings this motion seeking to dismiss the application for judicial review on the basis that i) it does not challenge a reviewable decision and is premature, ii) this Court's jurisdiction is ousted by section 18.05 of the *Federal Courts Act* (RSC, 1985, c F-7) [*Federal Courts Act*], and iii) the application is moot. I have already advised the parties that the mootness issue will be deferred to the Judge hearing the application.

[2] The underlying application relates to the proposed increase in the individual inclusion rate for capital gains pursuant to section 38 of the *Income Tax Act* (RSC, 1985, c 1 (5th Supp.))

[*Income Tax Act*] from one-half to two-thirds after the first $250,000. Essentially, the Applicant, Ms. Vorsteveld, takes issue with the Canada Revenue Agency's [CRA] decision to administer the proposed increase prior to it being authorized by duly enacted legislation. Ms. Vorsteveld seeks to quash the decision, to prohibit CRA from administering the increased inclusion rate as well as declaratory relief that the decision is *ultra vires* the CRA and unreasonable. Ms. Vorsteveld points, in particular, to an announcement on the CRA website:

> Although these proposed changes are subject to parliamentary approval, consistent with standard practice, the CRA is administering the changes to the capital gains inclusion rate effective June 25, 2024, based on the proposals included in the NWMM tabled September 23, 2024.

[3] The September 2024 Notice of Ways and Means Motion which would have implemented the increase was not adopted by the House of Commons and prorogation in March 2025 terminated all unfinished business including the passage of the enabling legislation. Ms. Vorsteveld and her husband jointly owned a property purchased in 2009 which they sold in July 2024 resulting in a taxable capital gain which the CRA website indicated would be included at a rate of two-thirds instead of one-half despite the lack of legislative underpinning for the increased inclusion rate. Ms. Vorsteveld asserts that this is contrary to the rule of law as CRA has no legal authority to compulsorily implement the new inclusion rate without legislative authority.

[4] At this time, the application is nearing perfection as only cross-examinations and records are outstanding. Had this motion not been brought, the matter would likely be ready for hearing.

[5] The AGC tendered an affidavit that exhibited printed copies of the official website of the government of Canada. One is an "Update on the Canada Revenue Agency's administration of the proposed capital gains taxation changes" dated January 31, 2025, which indicates that the CRA has reverted to administering the currently enacted capital gains inclusion rate of one-half for individuals. Interestingly, the document also indicates that CRA intends to maintain the existing coming into force date of the proposed increase in the Lifetime Capital Gains Exemption limit to $1.25 million even though it was included in the same September 2024 Notice of Ways and Means Motion which did not result in legislation.

[6] The AGC argues that its affidavit should be accepted to support its mootness argument. Since that issue is deferred to the application judge, I did not consider it in reaching my decision.

[7] The AGC further asserts that the application is bereft of any possibility of success because it does not challenge any decision amenable to judicial review as the CRA statement did not affect Ms. Vorsteveld's legal rights or obligations or cause her prejudice. In addition, the application is premature as the assessment process has yet to run its course. The AGC characterizes the communications from CRA as "at most interim steps."

[8] Also, the AGC contends that section 18.5 of the *Federal Courts Act* prohibits the Federal Court from dealing with the application as the proper appeal from an assessment is to the Tax Court of Canada and the application, essentially, is a premature attack on an assessment which has yet to be made. Additionally, the AGC argues that the objection and appeal process under the *Income Tax Act* is an adequate, alternative remedy.

[9] For her part, Ms. Vorsteveld filed three affidavits – her own and that of Mr. Ryan Thorpe, an investigative journalist at the Canadian Taxpayers Federation and Mr. Adrian Quiring, a technician at the Department of Justice. Ms. Vorsteveld deposes to the facts set out in the application but also describes the impact of the decision. Mr. Thorpe exhibits various materials including commentary on the uncertainty caused by the CRA announcements. Mr. Quiring exhibits three government websites. Ms. Vorsteveld asserts that the affidavits relate to mootness but also jurisdiction and are, therefore, properly before me.



[10] Ms. Vorsteveld argues that she is not seeking a premature appeal of a prospective tax assessment but seeks to review the practice of the CRA to administer the collection of proposed taxes prior to their enactment or "Provisional Tax Implementation". She says that the decision is reviewable as it created legal uncertainty as well as practical consequences in connection with filings, inaccurate forms and other prejudice. In addition, she says that the objection and appeal process in the *Income Tax Act* are not sufficient to address her concerns.

[11] The Respondent objects to the affidavit evidence filed by the Applicant and points out various inconsistencies. Motions to strike are typically decided on the basis of the pleadings with limited exceptions (*JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250). In coming to my conclusion, I have relied on the Notice of Application itself and not the affidavit evidence of either party.

[12] There is no dispute between the parties that the bar to strike an application for judicial review is very high. The application must be "bereft of any possibility of success" (*David Bull*

*Laboratories (Canada) Inc. v Pharmacia Inc (C.A.)* [1995] 1 FC 588). The motion must contain a "show stopper" or a "knock out punch" (*Rahman v Canada* 2013 FCA 117). Equally, I must determine the "true essence" of the application (*Iris Technologies Inc. v Canada*, 2024 SCC 24).



[13] I asked AGC counsel during the hearing whether all the arguments advanced by the AGC rested on characterizing the application as a disguised challenge to an assessment that has not yet been made. I was advised that they do. I do not accept this characterization. The facts which Ms. Vorsteveld asserts about her purchase and sale of property give context to the application, but its true essence is a challenge to the CRA's implementation of an unlegislated taxation change. Indeed, the Notice of Application states as follows:

1. This is an application for judicial review in respect of a decision made by the Canada Revenue Agency….to administer a proposed increase in the inclusion rate for capital gains… before said proposal had been authorized by the Parliament of Canada by way of duly enacted legislation…
2. The Decision is Not Authorized by Law
3. The CRA accordingly possesses no legal authority to unilaterally adopt, implement, or impose a tax absent Parliamentary authorization by way of duly enacted legislation originating in the House of Commons.
4. The CRA has decided to compulsorily implement the New Inclusion Rate for returns of income for taxation years ending on or after 25 June 2024 pursuant to the proposed legislative amendments of the Second Ways and Means Motion.
5. As such, the Decision seeks to unconstitutionally implement the New Inclusion Rate absent parliamentary authorization by way of duly enacted legislation originating in the House of Commons.
6. Under no correct (or reasonable) interpretation of its own authority is the CRA thus permitted to arrogate powers (namely, that of Parliament's sovereign legislative function) that it does not possess.

[14] Having characterized the submission as I do, I do not accept the jurisdictional or prematurity arguments raised by the AGC. Further, I do not accept that challenging the ultimate

assessment in accordance with the process set out in the *Income Tax Act* is an adequate alternative remedy for Ms. Vorsteveld.



[15] With respect to the AGC's argument that there was no "decision" capable of being challenged, the Applicant characterized the "decision" as a policy decision that was capable of challenge. Although the Respondent's argument gives me pause, I am not prepared to characterize the Applicant's argument as completely without merit.

[16] The Respondent did not identify any jurisprudence where a similar website announcement by the CRA was determined not to be reviewable. The Respondent pointed me to *Air Passengers Rights v Canada (Transportation Agency)* 2024 FCA 128 [*Air Passengers Rights*] but the communications at issue there are very different than those in this application. As described in the decision of the Federal Court of Appeal in *Air Passenger Rights :*

> [7] The Statement opens by referring to the COVID-19 pandemic and the widespread disruption of domestic and international air travel that began in Canada in March 2020. The Statement next refers to the combined effect of the *Transportation Act*, Regulations and airline tariffs that establish the obligations of airlines in the event of flight disruptions outside of their control. The CTA notes that those legislative provisions and tariffs were developed to address localized and short-term flight disruptions; they did not contemplate the spectre of worldwide flight cancellations caused by the pandemic.
>
> [8] The Statement attempts to balance the interests of passengers and airlines, stating that passengers who had no prospect of completing their planned itineraries should not be out of pocket for the cost of cancelled flights, but that airlines were facing huge drops in passenger volumes and revenues and "should not be expected to take steps that could threaten their economic viability". The Statement continues:
>
> > While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally

> speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).



[17] The Federal Court of Appeal characterized the statement as containing "only general guidance" which is very different from a statement from the taxing authority that it will be enforcing tax legislation that is not yet in existence. That Court distinguished the Ontario authorities in *EA Manning Ltd. v Ontario Securities Commission* [1995] OJ No.1305 (Ont. CA) [*EA Manning*] and *Ainsley Financial Corp. v Ontario Securities Commission* [1994] OJ No. 2966 (Ont. CA) which concluded that the Commission had acted outside its statutory mandate in adopting a policy that imposed a "de facto legislative regime complete with detailed substantive requirements."

[18] The Respondent further argues that the website statement fails to affect legal rights, impose legal obligations or cause real prejudicial effects; however, in *Air Passengers Rights*, the Federal Court of Appeal noted that "the prejudicial effects … were both obvious and at the centre of the dispute before the Ontario courts." The Applicant describes the actions of the CRA as "fundamentally unlawful" and, indeed, the Notice of Application makes reference to the rule of law as a foundational principle of Canada's constitutional order requiring that all action undertaken by the state be authorized by law. It seems to me that this case may be closer to the situation in *EA Manning* than to the careful statements in *Air Passengers Rights*.

[19] In conclusion, although the Respondent raises arguments that may well succeed at the hearing of the judicial review application, I am not convinced that the application, read generously for its essential character, is entirely bereft of success.

[20] In terms of costs, the parties agreed that the amount of $2,880.00 would be awarded to the successful party. I accept that agreement and make that award against the Respondent.

**THIS COURT ORDERS that:**

1. The motion is dismissed without prejudice to the Respondent arguing that the application is moot before the judge hearing the application;
2. The Applicant shall have her costs in the amount of $2,880.00.

"Catharine Moore"
Associate Judge