Court File No. T-250-25

FEDERAL COURT

PELCO HOLDINGS INC.

Applicant

AND:

THE ATTORNEY GENERAL OF CANADA, THE CANADA REVENUE AGENCY, and **THE MINISTER OF NATIONAL REVENUE**

Respondents

APPLICATION UNDER sections 18 and 18.1 of the *Federal Courts Act*

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Vancouver, British Columbia.

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 Court Rules* and serve it on the Applicant's solicitor, or where the Applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Court Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court in 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: JAN 24 2025

Issued By: Registry Officer

SORAYA PREMJI
REGISTRY OFFICER
AGENTE DU GREFFE

Address of local office:

Registry of the Federal Courts
PO Box 10065, Pacific Centre
701 West Georgia Street
Vancouver, BC V7Y 1B6

To:

Deputy Attorney General of Canada
c/o Department of Justice Canada
British Columbia Regional Office
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

Minister of National Revenue
555 Mackenzie Avenue, 7th Floor
Ottawa ON K1A 0L5

APPLICATION

1. This is an application for judicial review in respect of the decision (the "**Decision**") of the Canada Revenue Agency (the "**CRA**"), first communicated to the Canadian public on or about January 8, 2025, to administer the *Income Tax Act* (Canada) (the "**ITA**") as though the proposed legislative changes colloquially referred to as the "capital gain inclusion rate changes" (described in further detail below) contained within the notice of Ways and Means motion tabled in Parliament on September 23, 2024 (the "**Proposals**") are legally effective.

RELIEF SOUGHT

2. The Applicant makes this application for an Order:

   a. issuing an injunction against the Minister of National Revenue and the CRA from administering the ITA in accordance with the Proposals, including but not limited to by way of issuing any prescribed form or return or assessing or reassessing any taxpayer based on the Proposals;

   b. issuing a writ of prohibition enjoining the CRA from taking any steps, including those enumerated in the previous paragraph, as if the Proposals have any legal effect;

   c. issuing writs of *certiorari* and *mandamus* quashing the Decision and directing the Minister of National Revenue and CRA to administer the ITA without regard to the Proposals, including but not limited to issuing (or amending and re-issuing, if applicable) any prescribed forms or returns based on the current provisions of the ITA and without regard to the Proposals;

   d. granting a declaration that the CRA has no basis or standing to administer the ITA in accordance with the Proposals;

   e. granting the Applicant its costs of this application; and

   f. granting such further and other relief as this Honourable Court deems appropriate and just.

3. Due to the urgent nature of this matter, the applicant also seeks a preliminary order from the Court dispensing with the normal time limits pertaining to applications under sections 18 and 18.1 of the *Federal Courts Act* and granting an urgent and expedited hearing of this matter.

GROUNDS FOR THE APPLICATION

The Applicant

4. The Applicant is a private company incorporated under the laws of British Columbia.

5. At all material times, the Applicant was a shareholder of an engineering firm which has dozens of employees and operates throughout Western Canada.

6. On October 30, 2024, the Applicant realized a capital gain from the disposition of certain capital assets. The taxable portion of that capital gain must be included in the Applicant's income for its taxation year ending October 31, 2024 (the "**2024 Taxation Year**").

7. Each year, the Applicant's annual financial statements are audited by an independent accounting firm. In conducting that audit, the accounting firm is required to calculate and verify the estimated income taxes payable by the Applicant for the relevant year. The audit of the Applicant's financial statements for the 2024 Taxation Year is currently underway.

Background

8. On April 16, 2024, the Honourable Chrystia Freeland ("**Freeland**"), then the Deputy Prime Minister of Canada and the Minister of Finance for Canada, tabled the federal government's 2024 budget bearing the title "Budget 2024: Fairness For Every Generation" ("**Budget 2024**").

9. In Chapter 8 of Budget 2024, the federal government announced its intention to increase the taxable portion, or "inclusion rate", of capital gains from one-half to two-thirds for:

a. capital gains realized by an individual over $250,000 in a year; and

b. capital gains of any amount realized by a trust or corporation.

10. Budget 2024 further outlined the government's intention to implement numerous changes to the ITA and the *Income Tax Regulations* (the "**Regulations**") linked to the desired inclusion rate changes.

11. Budget 2024 stated that the intended effective date of the inclusion rate changes would be June 25, 2024. However, no draft legislation implementing those changes was contained in, or otherwise published alongside, Budget 2024.

12. On June 10, 2024, Freeland tabled a notice of Ways and Means motion titled "A Notice of Ways and Means Motion to introduce An Act to amend the *Income Tax Act* and the *Income Tax Regulations*" in Parliament that provided, for the first time, draft legislation to implement the inclusion rate changes announced in Budget 2024.

13. On August 12, 2024, the Department of Finance released, *inter alia*, revised legislative proposals relating to the inclusion rate changes.

14. On September 23, 2024, Freeland tabled a notice of Ways and Means motion titled "Notice of Ways and Means Motion to introduce a bill entitled An Act to amend the *Income Tax Act* and the *Income Tax Regulations*" in Parliament (the "**September NWMM**"). The September NWMM contained only the Proposals and no other tax measures.

15. The September NWMM is 85 pages long and contains dozens of proposed changes to the ITA which would implement, or are consequential upon, the inclusion rate changes. In general, the proposals as contained within the September NWMM would, if enacted:

a. increase the taxable portion of all capital gains realized (and the allowable portion of all capital losses sustained) on or after June 25, 2024 from one-half to two-thirds;

b. provide for an offsetting reduction to the net capital gain included in the income of an individual (other than a trust) in respect of the first $250,000 of capital gains realized in a taxation year;

c. reduce the addition to a corporation's "capital dividend account" (as defined in subsection 89(1) of the ITA) from one-half of any capital gain realized to one-third; and

d. implement a myriad of further technical amendments, transitional rules, and new concepts (for example, the "legacy hybrid surplus" account concept).

16. It is widely accepted that, if enacted, the Proposals would impact, directly or indirectly, a large percentage of Canadians. The Proposals would also have direct effect on non-residents investing into Canada, advisors and other professionals (including accountants and tax preparers), and all manner of businesses both large and small. The Proposals would directly impact the Applicant.

17. In December 2024, the House of Commons' Standing Committee on Finance published a report titled "Pre-Budget Consultations in Advance of the 2025 Budget". Appended to that report was a "dissenting report" by the Conservative Party of Canada (the "**CPC**") in which it described the Proposals as "job killing" and "vilifying".

18. The September NWMM was never tabled in Parliament for adoption.

19. Similarly, neither the September NWMM nor any measures contained therein have been included within a bill tabled in Parliament.

20. On December 20, 2024, The New Democratic Party (the "**NDP**"), a federal political party, announced that it would be bringing forward a motion of non-confidence regarding the federal government in the next sitting of the House of Commons.

21. On the same day, the CPC affirmed it would vote in favour of a non-confidence motion (further to the previous non-confidence motions it brought during the prevailing Parliamentary session). Similarly, the Bloc Québécois, the federal political party with the fourth-largest number of Members of Parliament in its ranks, issued a statement calling for an election to be held in early 2025 so that a new government could be formed.

22. On January 6, 2025, based on advice from the current Prime Minister of Canada, the Right Honourable Justin Trudeau (the "**Prime Minister**"), the current Governor General of Canada, Her Excellency the Right Honourable Mary Simon (the "**Governor General**"), exercised her prerogative power to prorogue the first session of the 44th Parliament of Canada until March 24, 2025.

23. On January 8, 2025, despite the manifest uncertainty over whether the Proposals would ever be enacted (or even contained within a bill tabled in Parliament), the CRA issued the Decision. The Decision was delivered by the CRA publishing the following statement on its website confirming that it intends to administer the ITA as though the Proposals as included within the September NWMM are legally effective:

> ***The CRA is administering proposed capital gains inclusion rate legislation***
>
> *On September 23, 2024, the Deputy Prime Minister and Minister of Finance tabled a Notice of Ways and Means Motion (NWMM) to introduce a bill entitled An Act to amend the Income Tax Act and the Income Tax Regulations. This NWMM modified the motion tabled on June 10, 2024. For more information about the capital gains tax changes, please visit this NWMM.*
>
> *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.*
>
> *For all taxpayers, the new inclusion rate will apply to capital gains realized on or after June 25, 2024. Impacted forms for individuals, trusts, and corporations are expected to be on Canada.ca as of January 31, 2025. Arrears interest and penalty relief, if applicable, will be provided for those corporations and trusts impacted by these changes that have a filing due date on or before March 3, 2025. The interest relief will expire on March 3, 2025. More information will be made available in the coming weeks.*

24. On January 10, 2025, the CRA published a further statement on its website confirming that it intends to administer the ITA based on the Proposals:

> ***January 10, 2025 - Update on the status of Capital Gains Tax Changes***
>
> *On September 23, 2024, the government tabled a Notice of Ways and Means Motion to introduce a bill entitled An Act to amend the Income Tax Act and the Income Tax Regulations. This Notice of Ways and Means Motion modified the motion tabled on June 10, 2024. For more information about the capital gains tax changes, please visit the Notice of Ways and Means Motion.*
>
> *Although these proposed changes are subject to parliamentary approval, consistent with standard practice, the Canada Revenue Agency (CRA) is administering the changes to the capital gains inclusion rate effective June 25, 2024, based on the proposals included in the Notice of Ways and Means Motion tabled September 23, 2024. Parliamentary convention dictates that taxation proposals are effective as soon as the government tables a Notice of Ways and Means Motion; this approach provides consistency and fairness in the treatment of all taxpayers.*

The CRA will issue the forms to allow taxpayers to file in accordance with the new capital gains rules by ***January 31, 2025****. Arrears interest and penalty relief, if applicable, will be provided for those corporations and trusts impacted by these changes that have a filing due date on or before* ***March 3, 2025****.*

When Parliament is prorogued, or dissolved, the CRA will generally continue to administer proposed legislation consistent with its established guidelines.

Upon resumption of Parliament, if no bill is passed in the House of Commons, and the government signals its intent to not proceed with the proposed measures, the CRA would cease to administer them. If this scenario described were to materialize, the CRA will be ready to support taxpayers in ensuring any corrective reassessments of implicated returns are processed.

25. The CRA has also published the following notice on several of its online guides and webpages:

The CRA is administering proposed capital gains inclusion rate legislation

On September 23, 2024, the government tabled a Notice of Ways and Means Motion to introduce a bill entitled An Act to amend the Income Tax Act and the Income Tax Regulations. This Notice of Ways and Means Motion modified the motion tabled on June 10, 2024. For more information about the capital gains tax changes, please visit the Notice of Ways and Means Motion.

Notwithstanding that Parliament is prorogued, the Canada Revenue Agency (CRA) will continue to administer the proposed capital gains legislation.

The CRA will issue the forms to allow taxpayers to file in accordance with the new capital gains rules by January 31, 2025. Arrears interest and penalty relief, if applicable, will be provided for those corporations and trusts impacted by these changes that have a filing due date on or before March 3, 2025.

26. On or about January 7, 2025, the Department of Finance issued the following written statement confirming that the CRA will be administering the ITA based on the Proposals and NWMM:

Although these proposed changes are subject to parliamentary approval, consistent with standard practice, the Canada Revenue Agency (CRA) is administering the changes to the capital gains inclusion rate effective June 25, 2024, based on the proposals included in the notice of ways and means motion tabled Sept. 23, 2024.

Parliamentary convention dictates that taxation proposals are effective as soon as the government tables a notice of ways and means motion; this approach provides consistency and fairness in the treatment of all taxpayers.

In the event that Parliament is prorogued, or dissolved, the CRA will generally continue to administer proposed legislation consistent with its established guidelines.

Upon resumption of Parliament, if no bill is passed in the House of Commons, and the government signals its intent to not proceed with the proposed measures, the CRA would cease to administer them.

27. On January 14, 2025, the CPC sent a letter to the Minister of National Revenue criticizing the "lawless capital gains tax increase" and "job-killing tax hike," and asserted that the Proposals will never become law.

28. On January 23, 2025, reports emerged that Freeland, a leading candidate for becoming the new leader of the Liberal Party of Canada (the federal political party that tabled the NWMM), no longer supports the Proposals.

29. As of today, the CRA has already issued at least three prescribed forms based on the Proposals: the T3 "Statement of Trust Income Allocations and Designations", the T4 "Statement of Remuneration Paid", and the T1170 "Capital Gains on Gifts of Certain Capital Property" (collectively, the "**Prescribed Forms**"). In the T3 slip, for example, as part of the accompanying "instructions" the issuer is directed to report gains from dispositions before June 25, 2024 in one box with gains from dispositions after June 24, 2024 to be reported in a different box. The T4 slip also expressly requires differing reporting for security option benefits and deductions realized before June 25, 2024 versus on or after that date. Millions of Canadians receive a T3 or T4 slip every year.

The Decision Violates the Rule of Law

30. Canadians are bound by the rule of law. They are required to comply with the provisions of the ITA as written, unless – and only after – Parliament amends those provisions through a bill which receives royal assent.

31. The CRA is also bound by the rule of law. Section 5 of the *Canada Revenue Agency Act*, S.C. 1999, c. 17 states: "The Agency is responsible for supporting the administration and enforcement of the program legislation". "Program legislation" is defined in section 1 to include the ITA.

32. As confirmed by the preamble to the *Constitution Act, 1867* (the "**Constitution**"), the rule of law is a fundamental principle of the Canadian Constitution. Breaching the rule of law thus amounts to violating the Constitution.

33. There is no dispute that the Proposals have not been enacted, and that the ITA has not been formally amended to implement the Proposals. The Proposals have not even been included within a Parliamentary bill. Nevertheless, the CRA has announced its intention to force taxpayers to act as if the Proposals are legally effective.

34. The Decision and the CRA's intended actions to implement the Decision violate the rule of law and the Constitution. Put simply, the CRA by the Decision has unequivocally indicated that it intends to instruct taxpayers to **not** comply with the law. Instead, the CRA and, by extension, the Minister of National Revenue – a member of the executive branch of government – have announced their intention to compel taxpayers to comply with an unsupported capital gains inclusion rate, without sanction of Parliament.

35. In doing so, the Minister of National Revenue and the CRA have effectively usurped Parliament's prerogative and exclusive authority to create tax laws. That violates Canada's system of parliamentary democracy and the principles underlying the clear separation of the executive, legislative, and judicial branches of government.

36. In that regard, section 53 of the Constitution provides:

> Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or impost, shall originate in the House of Commons.

37. Section 53 traces its roots back to the English Bill of Rights in 1689. It is direct and straightforward. It provides that Parliament alone has the power to impose a tax, and reflects the fundamental democratic principle of "no taxation without representation".

38. Section 53 recognizes the fundamental importance of the legislative process in taxation matters, and safeguards the rule of law. Mandating that Parliament alone may impose taxes ensures that transparency and the procedural protections inherent in the legislative process are respected.

39. The Decision and the CRA's proposed course of action based on the Decision violate section 53. The CRA, a body comprised of unelected officials, effectively seeks to create a tax levy that was not originated by Parliament.

40. The CRA seemingly relies on parliamentary convention to justify the Decision. Although not expressed, the Applicant understands that to be the parliamentary convention colloquially known as the "provisional implementation of taxation" (the "**Convention**").

41. The Convention has no application vis-à-vis the Proposals or the NWMM. Among other things, the Convention assumes the ongoing operation of Parliament in circumstances where the government enjoys the confidence of a majority of the members of Parliament, which is clearly no longer the case. Further, the Convention as it purportedly applied to the September NWMM ceased to have any force or effect once Parliament was prorogued (since, *inter alia*, a new notice of Ways and Means motion that includes the Proposals would need to be tabled in Parliament once it resumes). Finally, any purported application of the Convention resolutely ceased once Freeland, the Member of Parliament who tabled the relevant notice of Ways and Means motion, resiled from that motion.

42. The Proposals are clearly unlike virtually all other tax measures which are presented before Parliament. The Proposals, specifically, have garnered significant pushback – both political and apolitical – casting direct doubt on whether they will ever be enacted. This is unlike most other tax measures which, rightly or wrongly, do not attract much scrutiny or widespread attention.

The Decision Places Taxpayers in an Untenable and Unlawful Position

43. The Decision places taxpayers in an untenable position: comply with the law as enacted (namely, the ITA) or comply with the CRA. Failing to do either could lead to extreme monetary consequences, including additional tax, penalties, and arrears interest of huge magnitude.

44. By the Decision, the CRA is asking taxpayers to file tax returns, calculate, report, and pay their tax liabilities, and undertake various ancillary tasks (e.g., issue tax slips) on the incorrect basis that the Proposals are law. In doing so, a large number of taxpayers would in fact be acting contrary to the law.

45. The Applicant's circumstances highlight this dilemma. By the Decision, the CRA is instructing the Applicant to complete its impending tax return, and calculate, report, and pay its tax payable for the 2024 Taxation Year on a basis that violates the rule of law.

46. The Applicant's independent auditors are also faced with an intractable problem. They are tasked with auditing and verifying the Applicant's tax liability for the 2024 Taxation Year – and ultimately issuing an independent auditor's report in connection therewith – in accordance with strict accounting policies and procedures. The Decision frustrates their ability to do so in a timely manner.

47. In addition to the above, taxpayers who are assessed on the basis of the Proposals are at significant risk of not recovering any amounts of "tax" paid to the CRA over the legislated inclusion rate. If they calculate and pay their assumed tax liability based on the Proposals, but the Proposals are not enacted into law as currently drafted (including with the same proposed effective date) – which is a serious possibility given the various statements by political parties and politicians referenced above – then those taxpayers would have overpaid the CRA.

48. At minimum, failing to object in a timely manner and follow various procedural requirements set forth in the ITA could result in those taxpayers being unable to ever recover the additional amounts paid.

49. Even worse, if the amounts paid are not viewed as "taxes" since they are not paid pursuant to legally-enforceable tax legislation, taxpayers risk losing all recourse to recover their overpayments if the CRA is not legally able to refund the excess.

50. Conversely, by preparing and filing returns without regard to the Proposals (i.e., in accordance with the law as it stands on the return filing date), taxpayers risk flying in the face of clear CRA instructions. In the extreme, the CRA may seek to treat any such returns as not having been filed, thereby exposing taxpayers to significant penalties or other consequences. The CRA might also refrain from or delay assessing such taxpayers, denying refunds or arbitrarily failing to provide needed certainty to many.

51. In either case, taxpayers are faced with certifying the accuracy of returns which they know to be inaccurate. For example:

a. the current T2 Corporation Income Tax Return (for corporate taxpayers) requires that the authorized signing officer of the corporation certify that the return is "to the best of [their] knowledge, correct and complete"; and

b. the 2023 T1 Income Tax and Benefit Return (for individual taxpayers) requires that the taxpayer certify that information in the return and any attached documents are "correct, complete and fully discloses all of [the taxpayer's] income"

52. Certifying that a return is correct and complete when, in fact, the signor knows that to be untrue could lead to serious consequences. Section 238 of the ITA provides that, *inter alia*, every person making a false statement in a return is guilty of an offence. Complying with the Decision and completing a return based on CRA instructions that conflict with the law as written could thus expose taxpayers to charges of gross negligence or, worse, criminal prosecution.

53. Finally, the CRA's own Income Tax Audit Manual confirms that proposed amendments contained with a notice of Ways and Means motion have no legal effect:

> ***12.3.4 -- Effect of amendments on audit adjustments***
>
> *Auditors must consider proposed amendments covered in a Notice of Ways and Means Motion when presenting assessment details to a taxpayer. Proposed amendments have no legal effect until they receive royal assent and, as a result, cannot be imposed on the taxpayer. ...*
>
> *For example, an amendment is effective on the date it is announced, March 31, 2015, but it does not receive royal assent until February 29, 2016. Without the taxpayer's consent, the auditor cannot assess the taxpayer on an amendment-related issue until at least February 29, 2016...*
>
> ***12.3.5 -- Guidelines to deal with proposed legislative amendments***
>
> *When a taxpayer files a return based on proposed legislation, do not reassess the taxpayer to deny a benefit only because the proposed legislation has not been enacted. On the other hand, if the proposed legislation is not beneficial to a taxpayer, the CRA cannot require them to file on the basis of proposed legislation. [underlining added]*

54. Thus, the Decision would force taxpayers to do something which the CRA itself recognizes is not legally compellable.

55. All else aside, in cases where there is genuine cause to believe that certain legislative proposals will never be enacted – which is the case with the Proposals – taxpayers should be afforded the benefit of that uncertainty.

The Decision is Incorrect and Unreasonable, and the CRA should be Directed to Comply with the ITA

56. The Decision should be set aside and the relief sought in paragraph 2 above should be granted because, *inter alia*:

a. the CRA has no basis or standing to administer the ITA, assess taxpayers, or compel people to file returns or any other document based on the Proposals;

b. the CRA's intended actions, as communicated by it multiple times over the past few weeks, amounts to instructing taxpayers to act contrary to the law and thus breaches the rule of law;

c. the Minister of National Revenue and CRA should be instructed to take all steps, including issuing (or amending and re-issuing, if applicable) any prescribed returns and forms (including the Prescribed Forms) and assessing or reassessing any taxpayers, on the basis that the Proposals are not law and have no legal effect; and

d. both the rationale for the Decision and the effects it will produce are unreasonable having regard to the facts and the law, including the clear non-application of the Convention in these circumstances.

57. The Applicant will rely on all such further grounds as counsel may advise and as this Court may permit.

STATUTORY PROVISIONS OR RULES RELIED ON

58. The Applicant relies on the following statutory provisions or rules:

a. the rule of law;

b. the *Constitution Act, 1867*, 30 & 31 Vict, c. 3, including the preamble thereto and section 53 thereof;

c. the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), including the preamble thereto;

d. *Income Tax Act,* R.S.C. 1985, c 1 (5th Supp);

e. *Canada Revenue Agency Act*, R.S.C. 1999, c. 17, s. 5;

f. *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 18 and 18.1; and

g. *Federal Courts Rules*, SOR/8-106.

SUPPORTING MATERIALS

59. This application is intended to be supported by the following materials:

a. an affidavit or affidavits to be sworn or affirmed; and

b. such further and other evidence as counsel may advise and this Court may permit.

DATED at the City of Vancouver, in the Province of British Columbia, on January 24, 2025.

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