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CEBA EXPANSION — THINK TWICE BEFORE APPLYING FOR THE ADDITIONAL $20,000

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As of December 4, 2020, Canadian banks are now offering the expanded Canada Emergency Business Account ("CEBA") Loan Program. Applicants that previously received the original $40,000 loan may now be eligible for an additional $20,000 (of which $10,000 may be forgivable). Those businesses that have not yet applied may be eligible for a $60,000 loan amount (of which $20,000 may be forgivable). To receive the additional $20,000 CEBA loan amount, applicants must enter into a CEBA Term Loan Amending Agreement (the "Amendment"). As part of the Amendment, applicants will be bound by an Attestation. This Attestation may be different than the original Attestation attached to the initial $40,000 CEBA Loan Agreement, depending on when the initial loan was received.

To refresh your memory, banks appear to have at least two different CEBA Loan Agreements. The first agreement was provided to applicants prior to the government announcing what it determined as "eligible non-deferrable expenses". The Attestation in the first CEBA Loan Agreement simply states that, "*Funds from this Loan shall only be used by you to pay your non-deferrable operating expenses including, without limitation, payroll, rent, utilities, insurance, property tax and regularly scheduled debt service, and may not be used to fund any payments or expenses such as prepayment/refinancing of existing indebtedness, payments of dividends, distributions and increases in management compensation*." Notice how "non-deferrable operating expenses" is not capitalized and not defined.

Subsequent to the government's announcement, the banks revised the Attestation in the CEBA Loan Agreements to define "Eligible Non-Deferrable Expenses" based on the same language the government had used. As a result, it may be reasonable to take the position that if you applied early, based on the wording in the first CEBA Loan Agreement, the type of expenses that the loan funds could be used for are much broader than the expenses that the loan funds could be used for under the "revised" CEBA Loan Agreements.

The new Attestation for the additional $20,000 CEBA loan in the Amendment has continued with the more restrictive "Eligible Non-Deferrable Expenses" definition. The Amendment appears to revise the original CEBA Loan Agreement. Therefore, by applying for the additional $20,000 CEBA loan amount, businesses which had applied for the initial $40,000 CEBA Loan early and received the Attestation with the broader undefined eligible non-deferrable expense term may now find that their entire $60,000 CEBA loan must be used only for the following "Eligible Non-Deferrable Expenses":

(i) wages and other employment expenses to independent (arm's length) third parties;

(ii) rent or lease payments for real estate used for business purposes;

(iii) rent or lease payments for capital equipment used for business purposes;

(iv) payments incurred for insurance related costs;

(v) payments incurred for property taxes;

(vi) payments incurred for business purposes for telephone and utilities in the form of gas, oil, electricity, water, and internet;

(vii) payments for regularly scheduled debt service;

(viii) payments incurred under agreements with independent contractors and fees required in order to maintain licenses, authorizations, or permissions necessary to conduct business;

(ix) payments incurred for materials consumed to produce a product ordinarily for sale by the business; and

(x) any other expense in a category other than the above as may be indicated by the Government of Canada at https://application-demande.ceba-cuec.ca/ from time to time.

For greater certainty, the following expenses are not "Eligible Non-Deferrable Expenses" and the funds received under the CEBA Loan Program cannot be used to pay such expenses: any other payments or expenses such as prepayment/refinancing of existing indebtedness, payments of dividends, distributions, increases in management compensation, and increases of the compensation of related parties, in each case except to the extent that such expense has been indicated by the Government of Canada as qualifying.

In addition, under the Amendment, businesses must certify that:

- the business is facing ongoing financial hardship as a result of the COVID-19 pandemic;
- the business intends to continue to operate or resume operations;
- in response to the COVID-19 pandemic the business has made all reasonable efforts to reduce its costs or adapt its business to improve its viability; and
- the business has not used any amount received previously under the CEBA Loan Program to make any payment or pay any expenses other than "Eligible Non-Deferrable Expenses."

Finally, knowingly submitting inaccurate information as part of an Attestation could result in criminal penalties of up to 14 years in prison and fines.

Based on the new Attestation, which includes a continuation of the more restrictive "Eligible Non-Deferrable Expenses" definition and the additional certification, it is clear that many businesses will not want to apply for or may not even be eligible for the additional $20,000 CEBA Loan extension.

COVID-19 UPDATE

Given the rapidly changing information related to COVID-19 we are providing continuously updated information at https://blog.intelliconnect.ca/.

Federal

CEWS Maximum Rate Officially Increased to 75% (December 18, 2020)

The government amended the *Income Tax Regulations* in order to increase the maximum subsidy rate under the CEWS to 75%, effective from December 20, 2020, to March 13, 2021.

Draft Legislation: Relief for Flow-Through Share Issuers (December 16, 2020)

The federal government initially proposed tax relief for junior mining companies on July 10, 2020. If these companies are unable to operate and cannot incur Canadian exploration expenses in a timely manner, they may incur these expenses outside the time limits required by the rules for renouncing expenses. To help flow-through share issuers ensure that the expenses they incur can be renounced to flow-through share investors, the government is proposing to extend certain timelines under the flow-through share rules. On December 16, 2020, the government published draft legislation that proposes to implement these measures. If enacted, the proposed legislation would provide the following relief:

- Extend, by 12 months, the period to incur eligible flow-through share expenses under the general rule and the look-back rule.
- Apply Part XII.6 tax as if expenditures were incurred up to one year earlier than the date they were actually incurred. If amounts are not actually expended by the end of 2021 (where the agreement was entered into in 2019) or 2022 (where the agreement was entered into in 2020), the additional 10 per cent tax under Part XII.6 would apply and the tax payable of investors would be adjusted accordingly.
- Apply the 12-month extension to agreements entered into on or after March 1, 2018, and before 2021, when using the general rule.
- Apply the 12-month extension to agreements entered into in 2019 or 2020, when using the look-back rule.
- Apply the relief in respect of Part XII.6 tax to agreements entered into in 2019 or 2020.

Temporary Relief for Taxable Benefits From Employment (December 15, 2020)

Given the circumstances of the pandemic, the CRA has adopted some temporary positions for employer-provided benefits pertaining to commuting and home office costs. These positions are effective from March 15, 2020, to December 31, 2020.

Travel between an employer's home and workplace is personal in nature, so normally any travel and parking costs relating to commuting that are reimbursed by the employer are a taxable benefit to the employee. However, acknowledging that employees may incur additional commuting costs to minimize their risk of exposure to COVID-19 or to travel to their place of employment to pick up equipment required to work from home, the CRA is providing tax relief with respect to these additional costs.

The first temporary position applies to an employee who continues performing their employment duties at their regular place of employment. The CRA will not consider an employee to receive a taxable benefit where their employer pays for, reimburses, or provides a reasonable allowance for additional commuting costs incurred by that employee during the COVID-19 pandemic, that are over and above their normal commuting costs. This position is extended to the use of employer-provided motor vehicles for such travel, provided the employee did not normally commute to work using an employer-provided motor vehicle before the COVID-19 pandemic.

The second temporary position applies to an employee who performs their employment duties at home because their regular place of employment is closed. The CRA will not consider an employee to receive a taxable benefit where their employer pays for, reimburses, or provides a reasonable allowance for normal or additional commuting costs incurred by the employee to travel to their regular place of employment for any purpose that enables them to perform their employment duties from home (for example, to pick up equipment). This position is extended to the use of employer-provided motor vehicles for such travel. Similarly, when a regular place of employment is closed due to the COVID-19 pandemic, the CRA will not consider an employer-provided parking spot at that place of employment to be available for an employee's use. As such, the employer-provided parking will not result in a taxable benefit.

In both situations, employers should maintain appropriate records to demonstrate that any allowances provided are reasonable in relation to the commuting costs incurred by the employee. Employees must maintain appropriate records of their use of the employer-provided motor vehicles, including the total kilometres driven when commuting between home and their regular place of employment.

Also, the CRA will not consider an employee to receive a taxable benefit where their employer pays for or reimburses up to $500 of computer or home office equipment to enable the employee to perform their employment duties. The employee must submit receipts to their employer. This position is extended to accountable advances provided to an employee, but does not apply to allowances provided for this purpose. Note that the $500 reimbursement amount is in respect of each employee rather than each piece of computer or office equipment that an employee may purchase. If the employer reimburses the employee for purchases in excess of $500, the excess must be included in the employee's income as a taxable benefit.

Fall Economic Statement 2020 (November 30, 2020)

The Honourable Deputy Prime Minister and Minister of Finance Chrystia Freeland presented the Fall Economic Statement 2020 on November 30, 2020. The statement projects a record high deficit of $381.6 billion for 2020–2021, with the possibility that it could go even higher. The statement also includes various new tax measures. All of the government's proposed tax measures are listed here:

- Extending the Canada Emergency Wage Subsidy ("CEWS") and Canada Emergency Rent Subsidy ("CERS") to March 13, 2021;
- Increasing the CEWS top-up subsidy rate to 35%, effective December 20, 2020;
- Implementing measures to impose a limit on the 50% employee stock option deduction, effective for options issued after June 2021;
- Providing an additional $606 million in funding for the CRA's offshore tax compliance initiatives;
- Launching a consultation to modernize the anti-avoidance rules, including the GAAR;
- Allowing employed taxpayers to claim up to $400 for a home office expense deduction in 2020 without tracking detailed expenses or obtaining a T2200 from their employer;
- Taking steps over the coming year to implement a national, tax-based measure targeting the unproductive use of domestic housing that is owned by non-resident non-Canadians;
- Introducing a tax on corporations providing digital services, effective from January 1, 2022, and until a multilateral approach comes into effect;
- Boosting the Canada Child Benefit ("CCB") in 2021 by making four additional payments to qualifying families;
- Modifying the rules that apply when the beneficiary of a registered disability savings plan becomes ineligible for the disability tax credit;

- Extending the preferential tax treatment of patronage dividends paid in shares by an agricultural cooperative;
- Introducing a simplified GST/HST system that requires non-residents to register for, collect, and remit GST/HST from supplies of goods and services to Canadian resident consumers;
- Introducing rules that require the collection of GST/HST with respect to goods supplied through fulfillment warehouses;
- Introducing new GST/HST rules that enforce the collection of GST/HST with respect to digital platform-based short-term accommodations; and
- Providing GST/HST relief for supplies of medical face masks and face shields by temporarily zero-rating them, effective December 6, 2020.

For a full analysis of all the newly-announced tax measures, see the Wolters Kluwer Dispatch: https://resource.intelliconnect.ca/resource/scion/document/default/cchca43e99bf92bf430161995661a2d362c21?cfu=null&cpid=WKCA-TAL-IC&uAppCtx=RWI.

Technical Amendment to CERS Rules (November 19, 2020)

An entity can claim the Canada Emergency Rent Subsidy ("CERS") with respect to a qualifying rent expense, which only includes expenses that the entity actually paid for. However, stakeholders criticized this restriction because it can obstruct businesses with cash flow struggles from accessing the subsidy. Taking this feedback into consideration, the federal government proposed new amendments to rectify this potential issue. The proposed legislation was published by the Department of Finance on November 19 and is currently proposed by Bill C-14.

The proposed legislation would add new subsections 125.7(12) and (13). Subsection 125.7(12) will deem an amount to be paid on the date it first became due under an agreement and not at a later date, if the individual who has principal responsibility for the financial activities of the eligible entity attests that the eligible entity intends to pay the amount due under the agreement no later than 60 days after the day on which the Minister makes the first refund in respect of the amount deemed to have been paid. Basically, an entity can now claim unpaid due amounts for the CERS if it pays the amount within 60 days of receiving the payment of the subsidy for the period. New subsection 125.7(13) deems 125.7(12) to be of no effect if the amount was not paid within the 60-day deadline. The amendments apply retroactively to September 27, which is when the CERS came into force.

Bill C-14 Proposes To Amend the ITA (December 2, 2020)

Bill C-14, *Economic Statement Implementation Act, 2020*, has received First Reading in the House of Commons. The bill only proposes two tax amendments. First, it proposes to amend the *Income Tax Act* in order to facilitate the boost to the CCB mentioned above. Second, it proposes to implement the technical amendment to the CERS that is also discussed above.

Tax Court of Canada Cancels Sittings (November 26, 2020)

The Chief Justice has cancelled all in-person court sittings scheduled between November 30, 2020, and January 15, 2021, inclusively. Conference calls are not cancelled and will proceed as scheduled. Parties affected by the cancellations will be contacted by the registry staff. The Chief Justice continues to monitor the situation closely and will reassess the week of January 4, 2021, whether the judicial sittings schedule will have to be further altered. The court and its registry offices remain open, except the Hamilton office.

CEBA Expanded (December 4, 2020)

Effective December 4, 2020, eligible businesses facing financial hardship as a result of the COVID-19 pandemic can access a second Canada Emergency Business Account ("CEBA") loan of up to $20,000, on top of the initial $40,000 that was available to small businesses. Half of this additional financing, up to $10,000, will be forgivable if the loan is repaid by December 31, 2022.

Also, as announced in the *Fall Economic Statement 2020*, the application deadline for CEBA has been extended to March 31, 2021.

CEWS Regulations for Furloughed Employees (November 25, 2020)

Section 8901.2 of the *Income Tax Regulations* was amended (SOR/2020-243) in order to provide a separate calculation for furloughed employees under the Canada Emergency Wage Subsidy ("CEWS"). The prescribed amount in respect of furloughed employees for periods nine and ten equals the greater of two amounts:

(i) $500, and

(ii) the lesser of

(A) 55% of baseline remuneration in respect of the eligible employee determined for that week, and

(B) $573.

Provincial

Alberta

Second Payment of Relaunch Grant (November 23, 2020)

In light of additional temporary health measures announced November 12, the government of Alberta is ensuring affected small and medium-sized businesses receive additional support through the opportunity to apply for a second payment from the Small and Medium Enterprise Relaunch Grant.

This second payment will be available to businesses operating in areas on the provincial watch list where new health restrictions — like the temporary closure of indoor group fitness classes and team sports — have been implemented.

Additionally, entities that have experienced a 40 per cent revenue loss due to the COVID-19 pandemic will qualify for the grant, lowering the threshold from the existing 50 per cent revenue loss requirement. This 40 per cent threshold will be available to impacted businesses retroactive to March.

Entities that meet the program's eligibility criteria can apply for 15 per cent of their pre-COVID-19 monthly revenue, up to a maximum of $5,000 in funding, which can offset the costs they are facing as they relaunch their businesses. This includes the costs of implementing measures to prevent the spread of COVID-19, such as physical barriers, PPE, and cleaning supplies, as well as rent, employee wages, replacing inventory, and more.

Applications will be open until March 31, 2021, unless otherwise communicated.

Manitoba

Bridge Grant Program Expanded (December 8, 2020)

The government is expanding its Manitoba Bridge Grant program and extending the deadline to protect more small businesses in the province impacted by current public health restrictions. First announced November 10, the first stream of the Manitoba Bridge Grant provides $5,000 up-front to businesses, not-for-profits, and charities ordered to temporarily cease operations or close locations by Manitoba COVID-19 public health orders in effect on November 12. The initial intake included businesses with physical storefronts, such as restaurants, bars, recreation and sport facilities, museums, theatres, and organizations such as charities, not-for-profits, and faith-based organizations.

As not all businesses operate a storefront, the second stream of the Manitoba Bridge Grant program, which opened its intake on December 9, will provide up to $5,000 in support to home-based businesses ineligible for the first round. This may include, but not be limited to, event planners, photographers, artists, and tradespeople who do not operate a retail location.

Eligible full-time businesses that were impacted by Manitoba COVID-19 public health orders in effect as of November 12, 2020 or any revisions to those orders will receive a grant in the amount equal to 10 per cent of their most recent calendar year revenues, to a maximum contribution of $5,000.

The deadline for applications for both streams of the Manitoba Bridge Grant is December 31. To access the application forms, visit www.gov.mb.ca/covid19/programs/bridge-grant.html.

Caregiver Wage Support Program (November 27, 2020)

The government will recognize thousands of front-line workers who provide direct care and help protect vulnerable Manitobans at personal care homes and in other critical settings with the new $35 million Caregiver Wage Support Program.

The Caregiver Wage Support Program will be available to more than 20,000 Manitoba residents currently working full-time or part-time on the front lines of the pandemic response. These include health-care aides, housekeeping staff, direct service workers, and recreation workers. They provide direct care to vulnerable Manitobans at personal care homes or in disability services, child welfare services, homeless and family violence prevention shelters, or long-term care facilities.

Eligible employees will receive an hourly $5 top-up to their wages, based on the number of hours worked between November 1, 2020, and January 10, 2021. Two intake periods will close on December 14, 2020, and January 18, 2021. The program benefit will be paid directly to workers by the province in the week after each intake period closes. To qualify, workers must earn a regular wage of $25 per hour or less.

Additional information on the Caregiver Wage Support Program, including information on how workers can register, is online at https://manitoba.ca/covid19/programs/caregiver-wage-support.html.

Nova Scotia

Grant for Post-Secondary Students (December 7, 2020)

The government is providing a one-time COVID-19 Response Grant of $750 to all recipients of Nova Scotia Student Assistance in 2020 – 21. Students do not have to apply. The COVID-19 Response Grant acknowledges the extra costs students may have incurred during the pandemic such as moving to new learning platforms, as well as the challenges they have had obtaining summer employment and part-time jobs.

Grant for Businesses Subject to Closure Order (November 26, 2020)

A one-time grant of up to $5,000 is being made available to support businesses in Halifax Regional Municipality and Hants County that have been ordered by Public Health to temporarily close in response to rising cases of COVID-19 in their communities.

Eligible businesses will receive a one-time grant of 15 per cent of their average monthly gross revenues for April 2019, or from February 2020 if it is a new business, up to a maximum of $5,000.

Businesses must experience a revenue decrease of 30 per cent or more in November as a result of the ongoing impacts of the public health order or expect at least a 30 per cent decrease in revenues in December 2020 resulting from the new measures put in place this week.

This program is a targeted continuation of the Small Business Impact Grant. It is funded through the Nova Scotia COVID-19 Response Council with the program funds of $50 million announced in March.

The application process will open in the coming weeks.

Prince Edward Island

Support for Workers (December 7, 2020)

The Emergency Payment for Workers program provides financial support to residents of Prince Edward Island who have been financially impacted by public health orders related to COVID-19 during the two-week period December 7 – 21, 2020.

This emergency income program is a one-time lump sum payment of $500 from the Government of Prince Edward Island. This emergency benefit is taxable income. The reduction of income must have occurred as a result of the public health order effective December 7, 2020. All applicants must be residents of Prince Edward Island to apply.

For further details see https://www.princeedwardisland.ca/en/service/emergency-payment-workers.

Funding for Businesses To Advertise to Holiday Shoppers (December 3, 2020)

New funding is available for Island businesses to advertise locally over the holiday season.

The COVID-19 Local Advertising Fund provides a maximum contribution of up to $2,500 to PEI businesses to offset the cost of advertising their consumer goods or services to the local PEI market during the peak holiday shopping season.

The fund will support costs incurred from November 15, 2020, through December 31, 2020, for:

- 50 per cent of advertising in traditional media outlets (print, radio, television) in PEI; and
- 25 per cent of online (including social media) advertising directed at the PEI market.

Applications to apply for funding will be available in January 2021.

Québec

QST Relief for Face Masks and Shields (December 1, 2020)

The Québec government announced that the Québec sales tax ("QST") will be temporarily eliminated on purchases of masks and face shields. This change will harmonize the application of the QST with the federal proposal to provide GST/HST relief for masks and shields, effective December 6, 2020.

Saskatchewan

Legislation Proposes To Reduce Small Business Tax Rate (December 7, 2020)

The government introduced legislation that will reduce the tax rate for Saskatchewan small businesses over the next three years. As a result, Saskatchewan's small business corporate income tax rate drops from two per cent to zero effective October 1, 2020. Beginning July 1, 2022, the small business tax rate will increase to one per cent. And on July 1, 2023, the small business tax rate will return to two per cent. The amount which small businesses can earn at the small business tax rate will remain at $600,000.

Strong Recovery Adaptation Rebate (December 7, 2020)

The government announced the new Strong Recovery Adaptation Rebate ("SRAR"), which will assist businesses as they adapt their business models to address the challenges caused by the global COVID-19 pandemic.

The rebate will assist businesses who have adapted to different business models, such as changing the use of square footage, installing physical infrastructure to comply with COVID-19 mitigation guidelines, and upgrading technology, such as websites, to enhance their business.

The program is for Saskatchewan businesses that employ less than 100 people, have or will incur expenses to adapt their business model between April 1, 2020, and February 28, 2021, plan to continue operating, and have experienced at least a 30 per cent revenue decline compared to 2019.

Eligible applicants will receive a rebate of 50 per cent up to a maximum of $5,000 for a $10,000 expenditure, with amounts being determined based on business expenditures for changing business models to adapt to the current environment brought about due to COVID-19.

The SRAR program will be launched and applications will be available in the coming weeks. For more information, including COVID-19 support for businesses and workers in Saskatchewan, please visit www.saskatchewan.ca/covid19-businesses.

Saskatchewan Small Businesses Emergency Payment Program Renewed (December 3, 2020)

The government announced the Saskatchewan Small Business Emergency Payment ("SSBEP") program is being renewed for the period of December 1 to December 31. Through this program, small businesses closed or significantly curtailed due to a public health order will be eligible for provincial support.

The SSBEP program initially launched April 13, 2020, to provide support to small businesses that had to temporarily close or substantially curtail their operations as a result of COVID-19. The program was extended for May 2020 and provided 6,485 businesses more than $32 million in support.

The eligibility period for this phase of the SSBEP will be from December 1, 2020, to December 31, 2020, and is estimated to cost $8 million. Applications for the SSBEP will open on December 7, 2020, and the application deadline for this eligibility period is January 31, 2021.

Eligible applicants will receive a payment of 15 per cent of their monthly sales revenue, to a maximum of $5,000, based on the greater of November 2019, December 2019, or February 2020 sales revenue. For seasonal businesses, the funding support will be 15 per cent of the average monthly sales revenue for full months that the business operated in 2019.

Eligible applicants must attest that they:

- are a small or medium business (0-499 employees);
- maintain a permanent establishment in Saskatchewan and allocate a portion of their income to Saskatchewan;
- were operating October 31, 2020, or eligible to operate, in the case of seasonal business;
- are subject to a public health order that requires them to temporarily suspend or substantially curtail their operations during the eligibility period December 1 to December 31, 2020;
- have experienced a loss of sales revenue; and
- plan to reopen when the public health restrictions are lifted.

Further details and applications will be available at noon on December 7.

FOCUS ON CURRENT CASES

This is a regular monthly feature examining recent cases of special interest, coordinated by *Tony Schweitzer* of Dentons Canada LLP. The contributors to this feature are from Dentons Canada LLP, Montreal, Toronto, Calgary, and Vancouver.

Canada v. BCS Group Business Services Inc., 2020 DTC 5089 (Federal Court of Appeal)

Background

BCS Group Business Services Inc. (the "Taxpayer") brought a motion pursuant to subsection 30(2) of the *Tax Court of Canada Rules (General Procedure)* (the "Rules") to have its sole shareholder, director, and principal officer, Mr. Gagnon, act on behalf of the Taxpayer in a proceeding before the Tax Court of Canada (the "TCC").

Section 17.1 of the *Tax Court of Canada Act* (the "Act") provides that a party to a proceeding before the TCC may appear in person or be represented by counsel. Where a party wishes to be represented by counsel, only a lawyer may represent the party. However, subsection 30(2) of the Rules ("Rule 30(2)") provides that where a party to a proceeding is not an individual (such as a corporation), that party shall be represented by a lawyer except with leave of the TCC and on any conditions that it may determine. Hence, there is a contradiction in the Act and the Rules: on one hand, section 17.1 of the Act says that a party who wishes to be represented by counsel must be represented by a lawyer; on the other hand, Rule 30(2) says that a corporation must be represented by a lawyer unless it has been granted leave by the TCC.

In 2017, the question of who may represent a corporation in proceedings before the TCC under Rule 30(2) was considered by the TCC in *Masa Sushi Japanese Restaurant Inc. v. The Queen,* 2017 DTC 1147. In that decision, Justice Graham found that the Rules may neither prohibit things that are allowed by the Act, nor allow things that are prohibited by the Act. A corporation, being a legal fiction, cannot appear "in person", so its only option is to be represented by a lawyer under section 17.1 of the Act. Since Rule 30(2) allows a corporation to be represented by a non-lawyer with leave of the court, it is allowing something that is prohibited by the Act. Therefore, Justice Graham held that Rule 30(2) is *ultra vires* and a corporation has no choice but to be represented by a lawyer. *Masa Sushi* has been endorsed by other TCC decisions, such as *Suchocki Accounting Ltd. v. The Queen*, 2018 DTC 1073, and *1532099 Ontario Ltd. v. The Queen*, 2020 GTC 6.

Tax Court of Canada Decision

Justice Campbell Miller disagreed with Justice Graham's decision in *Masa Sushi* that section 17.1 of the Act and Rule 30(2) are at odds. Instead, he pointed out that the TCC has always proceeded on the basis that the Act and the Rules allow directors and officers of a corporation to be the "in person" embodiment of the corporation. On this basis, he interpreted section 17.1 of the Act as allowing any party to a proceeding, including a corporation, to appear in person. If a corporation wishes to appear in person, then it must bring a motion under Rule 30(2) to seek leave of a judge of the TCC, which is precisely what the Taxpayer did. Justice Campbell Miller also suggested that the TCC's unique role as a specialized court that exclusively adjudicates tax disputes between taxpayers and the government means that the TCC should facilitate, rather than create barriers to, comprehensible and cost effective procedures through which taxpayers can argue their position.

Justice Campbell Miller allowed the Taxpayer's motion to be represented by Mr. Gagnon (with certain conditions), but also stated that if the Federal Court of Appeal (the "FCA") rules that an individual cannot so act for a corporation, his order would be revoked.

Federal Court of Appeal Decision

The FCA allowed the Crown's appeal. The only issue considered was the meaning of the words "in person" in section 17.1 of the Act. Based on a review of the grammatical structure of the provision, a corporation should be allowed to appear in person since it is a party to a proceeding. However, the FCA held that the grammatical structure must be complemented by its logical interpretation, and one must consider the description of the right provided for in the provision to determine to whom that right applies. Since "in person" means "physically present", it is logical to conclude that only an individual has the option to appear in person or be represented by a lawyer. A corporation has no choice but to be represented by a lawyer. The FCA also considered the use of the phrase "in person" in section 18.14 of the Act, which provides that all parties to an appeal under the TCC's "informal procedure" may appear in person or may be represented by counsel or an agent. The FCA concluded that the phrase "in person" is not synonymous with the phrase "represented by an agent".

The FCA cited section 11 of the *Canadian Charter of Rights and Freedoms* (Part 1 of the *Constitution Act, 1982*) as another example of a legislative provision where the description of the right has an impact on the meaning of the general expression used to describe the right holder. For example, paragraph 11(*b*) provides that any person charged with an offence has the right to be tried within a reasonable time. This clearly applies to corporations. However, paragraph 11(*c*), which provides that any person charged with an offence has the right not to be compelled to be a witness in proceedings against itself, does not apply to corporations since a corporation, being a legal fiction, cannot be held to be a witness.

Finally, in determining the object and purpose behind section 17.1 of the Act, the FCA reviewed the legislative history of the Act and, more specifically, the objective of the rules governing the general and informal procedures for matters before the TCC.

Before the bifurcation of these two procedures, all parties to a tax dispute had the option of appearing in person, or being represented by a lawyer or an agent. The informal procedures were introduced as a way of continuing to provide easy and less costly access to justice for all taxpayers where the amount in question is below a certain threshold. Generally, evidentiary rules and courtroom procedure are more relaxed and parties could still be represented by a non-lawyer who does not necessarily need to be well-versed in the rules of evidence and courtroom procedure. However, matters under the general procedure, which generally involve more complex tax issues, are subject to the same rules of evidence and procedure applicable before other superior courts of law (with some exceptions). To promote efficiency in the administration of justice, section 17.1 of the Act was introduced under the general procedure rules and removed a party's option to be represented by a non-lawyer. The suggestion that section 17.1 also allows a corporation to appear in person without representation by a lawyer would have been a major change to the Act that was not intended by the legislator.

Conclusion

In some circumstances, this decision may lead to the unfortunate result that a corporation facing a potentially large tax assessment and a worsening financial condition has no option but to spend more money on legal fees if it wants to appeal the assessment. However, in paragraph 3 of the FCA decision, Justice Gauthier recognizes that it is not the FCA's role to change the authentic meaning of legislation, properly interpreted, and that individual justices are not to envisage the best policy or examine their personal preferences in deciding how a corporation may participate in proceedings before the TCC. Rather, its role is to interpret legislation and "call it as it is". Accordingly, even if the requirement that a corporation must hire a lawyer to appeal a tax assessment is considered bad policy, the only way to effect a change is to amend the Act itself.

— *Paige Donnelly*

Keybrand Foods Inc. v. The Queen, 2020 DTC 5087 (Federal Court of Appeal)

Background

The Taxpayer's Relationship With Vidabode

B. W. Strassburger Ltd. ("BWS") was the sole shareholder of Keybrand Foods Inc. (the "taxpayer"). The shareholders and directors of BWS were Mr. Bernhardt Strassburger ("Mr. Strassburger") and his three siblings. In 2006, the Strassburger family, through its companies, began investing in Vidabode Group Inc. ("Vidabode"), which held patents in a new and promising concrete product called Vidacrete. In 2008, the taxpayer and other related family companies became guarantors of certain loans made by GE Capital to Vidabode. The taxpayer did not receive a fee for providing its guarantees. By 2009, BWS owned 41% of the common shares in Vidabode and was the largest shareholder of Vidabode. Additionally, amendments to a shareholders' agreement between all the shareholders of Vidabode provided: (i) that BWS could nominate two of the four directors of Vidabode; (ii) that BWS had the right to nominate one of its directors as Chairman of the Board; and (iii) the Chairman nominated by BWS had a casting vote. In August 2010, Mr. Strassburger became the president and secretary treasurer of Vidabode.

Vidabode's Financial Distress and the Transactions at Issue

In September 2010, Vidabode defaulted on a $3 million balloon payment owed to GE Capital, which prompted GE Capital to call all the loans it had made to Vidabode. The total outstanding on these loans was over $15 million. In October 2010, the taxpayer made a $500,000 payment to GE Capital on behalf of Vidabode. In return, Vidabode issued to the taxpayer a $500,000 promissory note bearing interest at 10% per year, calculated monthly. Since the taxpayer and other Strassburger companies were guarantors on the GE Capital loans to Vidabode, Mr. Strassburger worked with TD Bank to obtain $14.5 million to pay off GE Capital. The taxpayer subscribed for 19,343,493 common shares in Vidabode at $1 per share (the "Vidabode Shares"). The conversion of a loan of almost $5 million and $14.5 million borrowed from TD Bank were used to pay for the shares near the end of December 2010. There was no negotiation of the purchase price of the Vidabode Shares between Vidabode and the taxpayer before entering into this transaction. Vidabode, in turn, used the funds from the share purchase to repay GE Capital. This resolved the amount outstanding to GE Capital. However, Vidabode still owed approximately $2 million to other creditors. In January 2011, Mr. Strassburger signed a letter on behalf of BWS to BDO Canada Limited ("BDO") appointing BDO as receiver to Vidabode. In April 2011, BDO became the receiver of Vidabode. In May 2011, Vidabode filed for bankruptcy.

Issues

There were three issues in the appeal to the Tax Court of Canada (the "Tax Court"). The first and second issues were also addressed on a further appeal to the Federal Court of Appeal (the "FCA").

Firstly, the taxpayer claimed an allowable business investment loss ("ABIL") of nearly $10 million in respect of the Vidabode Shares. The Minister denied the claim on the basis that, at the time of the acquisition of the Vidabode Shares, their fair market value was nil and the parties were not dealing at arm's length. The Minister contended that paragraph 69(1)(*a*) of the *Income Tax Act* (the "Act") applied and that the taxpayer was deemed to have acquired the Vidabode Shares at their fair market value which was nil. The issue was therefore whether, with respect to the ABIL, the taxpayer was acting at arm's length with Vidabode when it acquired the Vidabode Shares.

Secondly, the taxpayer deducted interest on the funds it borrowed from TD Bank to pay for the Vidabode Shares. The Minister disallowed these deductions on the basis that the funds were not used for the purpose of earning income as required by paragraph 20(1)(*c*) of the Act. The issue was therefore whether the taxpayer borrowed the funds to acquire the Vidabode Shares for the purpose of earning income.

Thirdly, the taxpayer loaned $500,000 to Vidabode and received a promissory note bearing interest at a rate of 10%

per annum. The taxpayer claimed a capital loss in relation to the loan. The Minister denied the loss on the basis that it was not made for the purpose of earning income. The issue was therefore whether the taxpayer made this loan to Vidabode for the purpose of earning income.

Tax Court of Canada Decision

Issue 1: Arm's Length Status and ABIL

In determining whether the taxpayer acted at arm's length with Vidabode in relation to the acquisition of the Vidabode Shares, the Tax Court stated that three common indicators are relevant:

(1) whether there was a common mind which directed the bargaining for both parties to a transaction;

(2) whether the parties were acting in concert without separate interests; and

(3) whether there was *de facto* control.

The Tax Court focused on the third indicator of *de facto* control. It applied the test of *de facto* control as very narrowly articulated in *Silicon Graphics Ltd. v. The Queen*, 2002 DTC 7112 (FCA), and affirmed in *McGillivray Restaurant Ltd. v. The Queen*, 2016 DTC 5048 (FCA). This test states that *de facto* control is found only in situations in which a person or group of persons has the clear right and ability to effect a significant change in the board of directors or the powers of the board of directors, or to directly influence the shareholders who would otherwise have the ability to elect the board of directors. BWS elected two of the four members of the Board of Directors of Vidabode, one of whom was the Chairman of the Board with a casting vote. Therefore, BWS was in a position to control the decisions of the Board of Directors and fulfilled the *de facto* control test as articulated in *Silicon Graphics*. On this basis, the Tax Court concluded that BWS was not acting at arm's length with Vidabode. Since BWS and the taxpayer also did not deal at arm's length, it followed that the taxpayer and Vidabode did not deal at arm's length. The taxpayer was therefore deemed to have acquired the Vidabode Shares at no cost and could not claim an ABIL.

Issue 2: Purpose of Borrowing From TD Bank To Acquire the Vidabode Shares

The court found that the taxpayer would not have borrowed from TD Bank if not for its obligation to honour the guarantees to GE Capital. As outlined in *Ludco Enterprises Ltd. v. Canada*, 2001 DTC 5505 (SCC), the test for determining interest deductibility is ". . . whether, considering all the circumstances, the taxpayer had a reasonable expectation of income at the time the investment is made." Although the taxpayer may have wanted to earn income from the Vidabode Shares, at the time the investment was made in December 2010, the reasonable expectation was that Vidabode would quickly collapse. Therefore, the taxpayer was not entitled to deduct the interest on the money borrowed to acquire the Vidabode Shares because there was no reasonable expectation of income.

Issue 3: Purpose of $500,000 Loan to Vidabode

The taxpayer loaned $500,000 to Vidabode in October 2010, when the survival of Vidabode was still a possibility. The promissory note bore a rate of 10% interest per annum calculated monthly. Given the timing of the loan and the interest rate on it, there was a reasonable expectation of income at the time it was made. The capital loss on the $500,000 loan was allowed.

Federal Court of Appeal Decision

The taxpayer appealed the Tax Court's decision on the first and second issues. The third issue was not appealed.

Issue 1: Arm's Length Status and ABIL

On the issue of whether the taxpayer dealt at arm's length with Vidabode, the FCA held that while the Tax Court came to the correct conclusion on arm's length status, it erred in relying on *McGillivray Restaurant* in doing so.

McGillivray Restaurant dealt specifically with the issue of *de facto* control within the meaning of subsection 256(5.1) of the Act, which is a distinct analysis from the determination of arm's length status. While there is significant overlap between these analyses, the purpose and application of each is not the same. Furthermore, the question of *de facto* control is not linked to a particular transaction, whereas the determination of whether parties are acting at arm's length for the purposes of section 69 is made in reference to a particular transaction.

The FCA referred to the three indicators of arm's length status, which are: (1) whether there was a common mind which directs the bargaining for both parties to a transaction; (2) whether the parties were acting in concert without separate interests; and (3) whether there was *de facto* control. It held that there was no real distinction between factors (1) common mind and (3) *de facto* control. Where a person is the directing mind for a particular transaction, that person would also have *de facto* control over the transaction and vice versa.

The FCA concluded that, based on the financial dependence of Vidabode on BWS and the taxpayer and the absence of any negotiation with respect to the taxpayer's acquisition of the Vidabode Shares, it was more likely than not that the taxpayer controlled both sides of the transaction. Because of Vidabode's financial dependence on the taxpayer, it was completely captive to its interests. In light of the reasoning in *Robson Leather Co. v. Minister of National Revenue*, 77 DTC 5106 (FCA), and *Swiss Bank Corp. v. Minister of National Revenue*, 72 DTC 6470 (FCA), the degree of financial dependence of Vidabode on the taxpayer and BWS in December 2010 was a significant factor contributing to the holding that the taxpayer and Vidabode were not dealing with each other at arm's length. The Tax Court did not err in concluding that the taxpayer and Vidabode were not dealing at arm's length and therefore disallowing the claim for ABIL.

Issue 2: Purpose of Borrowing From TD Bank To Acquire the Vidabode Shares

The FCA held that, although the taxpayer may have intended that the borrowed money would eventually produce income, two actions taken by the taxpayer and BWS after acquiring the Vidabode Shares contradicted this intention. First, BWS appointed a receiver and manager of Vidabode very shortly after the Vidabode Shares were acquired. Second, since there was no actual disposition of the Vidabode Shares on which the taxpayer could claim ABIL, the taxpayer had to rely on the deemed disposition rules in subsection 50(1) of the *Act*. Pursuant to subparagraph 50(1)(*b*)(iii), a deemed disposition would occur only if the following conditions were satisfied: (1) the corporation did not carry on business; and (2) it was reasonable to expect that the corporation would be dissolved or wound up and would not commence to carry on business. By claiming the ABIL in its tax return for the year ending April 24, 2011, the taxpayer was effectively stating that, less than four months after acquiring the Vidabode Shares, Vidabode satisfied the conditions in subparagraph 50(1)(*b*)(iii). This was inconsistent with an intention to earn income on the Vidabode Shares. Accordingly, there was no basis to interfere with the Tax Court's finding that the taxpayer did not have a reasonable expectation of income when it acquired the Vidabode Shares and the deduction of interest on the borrowed funds was disallowed.

Key Takeaways

The FCA decision clarifies the distinction between the *de facto* control and arm's length analyses. While there are overlapping features of each analysis, they serve different purposes and are not to be conflated.

With respect to the three common indicators to consider when making a determination on arm's length status, the jurisprudence has long recognized that these are not exclusive factors to consider and that they overlap significantly. However, the FCA decision may change how these indicators are applied. According to the FCA, the common mind and *de facto* control indicators are one and the same. Therefore, the arm's length status analysis requires courts to consider two common indicators rather than three: (1) whether there is a common mind which directs the bargaining for both parties to a transaction (i.e., whether one party has *de facto* control over the transaction); and (2) whether the parties are acting in concert without separate interests.

— *Alexandra Terrell*

Northbridge Commercial Insurance Corporation v. The Queen, 2020 GTC 22 (Tax Court of Canada)

The taxpayer was an insurer that issued fleet insurance policies to trucking companies. Those companies operated their vehicles in both Canada and the United States. The taxpayer attempted to claim input tax credits ("ITCs") in respect of its business, on the basis that portions of its supplies were zero-rated. The Minister denied the ITCs on the basis that all of the taxpayer's supplies were exempt supplies, which would prohibit the taxpayer from claiming ITCs.

The Tax Court Appeal

The issue before the Court was whether section 2 of Schedule VI, Part IX of the *Excise Tax Act*, which lists various supplies that are considered to be zero-rated, applied to the taxpayer's activities such that all or a portion of the taxpayer's supplies would be zero-rated, entitling the taxpayer to ITCs. The provision reads as follows:

> 2. A supply made by a financial institution of a financial service that relates to an insurance policy issued by the institution (other than a service that relates to investments made by the institution), to the extent that
>
> …
>
> (*d*) where the policy is a policy of any other kind, *it relates to risks that are ordinarily situated outside Canada.*
>
> [emphasis added]

In particular, the appeal turned on whether the policies issued by the taxpayer related to "risks that are ordinarily situated in Canada". Generally, insurance has two components: the object of the insurance (for instance, the owner, driver, passengers, and motor vehicle in the case of automobile insurance) and the perils which that object is insured against (for instance, accidental loss, damage, theft, vandalism, etc.).

In the present case, the issue was the proper meaning of the word "risks" for purposes of section 2 of Schedule VI, Part IX — did this mean the risks related to the object of the insurance, the perils insured against, or the chance that the perils would occur in respect of the object of the insurance?

The Court conducted a textual, contextual, and purposive analysis. It concluded that the text of paragraph 2(*d*) was ambiguous and that the word "risks" could mean either the objects of the insurance or the chance of a peril occurring in respect of the objects of the insurance. It did not mean, however, the perils insured against.

On a contextual analysis, the Court examined the provisions of paragraphs 2(*a*) to (*c*) in Schedule VI, Part IX, and found that these paragraphs also supported the conclusion that "risks" meant the objects of the insurance, not the perils insured against.

Lastly, the Court did not find that a purposive analysis revealed any ambiguity or inconsistency in the text of paragraph 2(*d*). As such, the Court held that on a textual, contextual, and purposive analysis, "risks" meant the objects of an insurance policy. Therefore, paragraph 2(*d*) treats the supply of an insurance policy as zero-rated to the extent that those *objects* are ordinarily situated outside Canada. If a policy insures more than one object, any apportionment of the supply of that policy into exempt and zero-rated parts should occur on an object-by-object basis.

Turning to the taxpayer's facts, the Court found that the taxpayer had determined that 33.3% of its insurance payouts were in respect of perils in the United States, and on this basis, claimed that 33.3% of its supplies were zero-rated. The Court disagreed with this approach. It held that the determination of whether section 2 applied must be made on an object-by-object basis. In other words, each insurance policy would need to be examined on a vehicle-by-vehicle basis for the vehicles covered by that policy.

Since all of the evidence before the Court was global evidence rather than evidence pertaining to specific policies, the Court was unable to determine whether the supply of any particular policy was partly zero-rated. The Court dismissed the appeals on this basis.

Commentary

Typically, GST/HST decisions have all-or-nothing outcomes: for instance, either a taxpayer's supplies are exempt supplies, or they are not. However, as noted by the Court, this case was unusual as the provision at issue could allow a taxpayer to be partially or wholly successful in its appeal, to the extent that the taxpayer's supplies were considered zero-rated. So it is somewhat unfortunate that even with this unique provision, the taxpayer was still wholly unsuccessful because it was unable to produce the relevant evidence to enable the Court to determine whether the supplies fell within the provision at issue.

This decision will have a significant impact on insurers who may be relying on paragraph 2(*d*) of Schedule VI, Part IX of the *Excise Tax Act* in support of their claim for ITCs. The Court's approach to require an examination on an object-by-object basis to determine whether paragraph 2(*d*) is applicable may greatly increase the costs of compliance for insurers.

— *Jacob Yau*

CURRENT ITEMS OF INTEREST

Draft Legislation: Accelerated CCA for Zero-Emission Vehicles

The federal government introduced a 100% capital cost allowance ("CCA") deduction for zero-emission vehicles in Budget 2019. However, the accelerated CCA was only available for purchases of new motor vehicles, so used vehicles and vehicles that are not designed for road use were ineligible. Effective March 2, 2020, the accelerated CCA is expanded to include used on-road motor vehicles and new or used off-road vehicles. The government published proposed legislation to implement this measure on December 15, 2020.

"Zero-emission vehicle" is defined under subsection 248(1) of the *Income Tax Act* and clarified by subsection 1102(26) of the *Income Tax Regulations*. The definition of a zero-emission vehicle will be amended to include used motor vehicles acquired on or after March 2, 2020. Consequently, used motor vehicles acquired as of that date are eligible for 100% CCA and are included in Class 54 or 55. If CCA was claimed by the previous owner with respect to the used vehicle, the vehicle qualifies as a zero-emission vehicle if the following conditions are met:

- it was not acquired on a tax-deferred "rollover" basis; and
- it had not been owned, prior to its acquisition by the taxpayer, by a business or by a person or partnership not dealing at arm's length with the taxpayer.

To expand the accelerated CCA for zero-emission vehicles to include off-road vehicles such as trolley buses, equipment designed or adapted for use on rails, aircraft, and watercraft, the legislation proposes to add new Class 56 to Schedule II of the *Income Tax Regulations*. The class includes automotive equipment (other than a motor vehicle) that is fully electric or powered by hydrogen. Class 56 also includes additions and alterations made to automotive equipment (other than a motor vehicle) to the extent it causes the equipment to become fully electric or hydrogen powered. Class 56 applies to eligible zero-emission automotive equipment and vehicles that are acquired and become available for use after March 1, 2020, and before 2028, subject to a phase-out for equipment that becomes available for use after 2023 (as shown in the table below). If the asset is used and the prior owner claimed CCA for it, the taxpayer can still deduct CCA if the same conditions above regarding rollovers and non-arm's length transfers are met.

Date Vehicle Becomes Available for Use	First-Year Enhanced Allowance
March 2, 2020 – 2023	100%
2024 – 2025	75%
2026 – 2027	55%
2028 onward	—

CCA is deductible on any remaining balances in Class 56 on a declining-balance basis at a rate of 30%. Taxpayers can elect under Regulation 1103(2j) to forgo Class 56 treatment and instead include property in the class in which it would otherwise be eligible.

Climate Action Incentive Payment Amounts for 2021

The federal government announced the Climate Action Incentive payment amounts for 2021. These payments are applicable to residents of Ontario, Manitoba, Saskatchewan, and Alberta. Residents of these provinces can claim these payments through their 2020 personal income tax returns.

Family Status	Ontario	Manitoba	Saskatchewan	Alberta
Single adult, or first adult in a couple	$300	$360	$500	$490
Second adult in a couple, or first child of single parent	$150	$180	$250	$245
Each child under 18 (starting with second child for single parents)	$75	$90	$125	$123

People who live outside a census metropolitan area, as defined by Statistics Canada, are eligible for an additional 10% supplementary amount.

The government also intends to change the frequency of payments from annually to quarterly through the CRA's benefit system. The shift is expected to occur as early as 2022. Details will follow at a later date.

Indexation for 2021

The indexation adjustment that applies to personal income tax credits, benefit amounts, and other figures will be 1.0% for 2021.

What's New for Representatives

The CRA announced some recent changes that are of interest to representatives of taxpayers. First, as of October 19, 2020, the online Represent a Client ("RAC") service allows you to submit legal documents, such as a will or a power of attorney, to identify you as a legal representative. Second, as of January 2021, if you are a representative associated with a firm, a business, or a group, you must have your own RepID and provide it to the CRA before you can represent your client. This will significantly enhance the security of confidential taxpayer information by allowing CRA agents to verify that you are authorized on the taxpayer's account. The taxpayer does not have to sign and submit a new authorization request for this change. The administrator within RAC for the business number ("BN") or GroupID with administrative rights on the BN or the GroupID can associate your new RepID to the BN or GroupID. You can register for your RepID in advance at canada.ca/taxes-representatives.

Legislation Amending Employee Life and Health Trust Rules

On November 27, the Department of Finance published proposed legislation relating to health and welfare trusts, and employee life and health trusts. As the result of a prior consultation, the amendments would facilitate the conversion of health and welfare trusts into employee life and health trusts, improve the operation of the existing employee life and health trust rules, and relax restrictions that currently apply to key employees.

New Form T1134

The CRA distributed a notice to tax professionals and a preview of the newest version of Form T1134, *Information Return Relating to Controlled and Non-Controlled Foreign Affiliates*. The preview of the form is being offered to help with preparations for the new filing changes. The revised form will be published on the CRA's website in January 2021. The 2021 version of Form T1134 takes into account the latest legislative amendments enacted and is designed to address both the CRA's critical business needs and the tax community's concerns on compliance burden. This is accomplished by requiring a more comprehensive disclosure of transactions and events within the foreign affiliates while providing administrative convenience where appropriate. The new version of the T1134 form will be effective for taxation years that begin after 2020.

MP, DB, RRSP, DPSP, and TFSA Limits (November 25, 2020)

The CRA published the MP, DB, RRSP, DPSP, and TFSA Limits for 2021. They are as follows:

- MP limit: $29,210
- DB limit: $3,245.56
- RRSP limit: $27,830 (also $29,210 for 2022)
- DPSP limit: $14,605
- TFSA limit: $6,000

RECENT CASES

Taxpayer's disallowed relief application under *Financial Administration Act* referred back for reconsideration

Following reassessments for the taxpayer's 2005 and 2006 taxation years, the taxpayer, who was self-represented, applied under subsection 23(2) of the *Financial Administration Act* for the remission of taxes, interest, and penalties owing. The taxpayer subsequently applied to the Federal Court for judicial review of the Minister's refusal to grant his relief application. His position, in part, was that the Minister breached the requirements of natural justice and procedural fairness.

The taxpayer's application was granted. The Minister's decision lacked the hallmarks of reasonableness — namely justification, transparency, and intelligibility — because it failed to engage meaningfully with the main basis of the taxpayer's remission request. The matter was therefore referred back for reconsideration by a different decision maker.

Mockrycke v. Canada (AG)

2020 DTC 5082

Corporate plaintiff's claim to certain tax credits constituted registered "security interests", taking priority over other claims against corporate defendant's assets

The corporate defendant, Arc, a film animation studio that created animated children's films, was in receivership. At issue was how to distribute approximately $1,150,000 that the receiver had collected on account of federal and provincial tax credits owing to Arc (the "Tax Credits"). The producers paid Arc in advance for the work it was about to do, and Arc was later entitled to receive the Tax Credits. Arc had agreed to pay the Tax Credits to the film producers on receipt under three contracts that contained language that either assigned the amount of the Tax Credits to the producers and/or provided that Arc would hold those funds in trust for the producers. Grosvenor (a third party) provided Arc with financing and registered a general security agreement over all of Arc's assets under the Ontario *Personal Property Securities Act* ("PPSA"). In proceedings in the Ontario Superior Court of Justice, Grosvenor moved for an order claiming its priority over the Tax Credits by virtue of its registered security agreement.

Grosvenor's motion was allowed. The producers' claims did not take priority over Grosvenor's registered PPSA claim. The contractual provisions relating to the producers' interests in the Tax Credits were transactions that created "security interests", which should have been registered under the PPSA in order to take priority over Grosvenor's claim.

Grosvenor Park v. Arc Productions

2020 DTC 5079

TAX NOTES

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