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GST/HST CASE

GOOD FAITH CAN'T EXCUSE NON-COMPLIANCE WITH ITC DOCUMENTARY REQUIREMENTS

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Subsection 169(4) of the *Excise Tax Act* (the "ETA") and subparagraph 3(c)(iii) of the *Input Tax Credit Information (GST/HST) Regulations* (the "Regulations") require a registrant, before making an input tax credit ("ITC") claim, to substantiate it with sufficient evidence (*renseignements suffisants, en francais*), including its supplier's true name and registration number, its own name, the amount paid or to be paid, the terms of payment and a description of each supply sufficient to identify it.

There is an abundance of case law relating to ITC information requirements. The courts have repeatedly made it clear that such requirements are mandatory (see *Systematix*[1] as a leading example). The courts have also clarified that "physical documentation" need not exist at the time of audit, but does need to exist prior to the making of the ITC claim. In *Forestech*,[2]

1 *Systematix Technology Consultants Inc. v. R.*, 2007 CarswellNat 1613, 2007 CarswellNat 2802, 2007 CAF 226, 2007 FCA 226, [2007] G.S.T.C. 74 (F.C.A.).

2 *Forestech Industries Ltd. v. R.*, 2009 CarswellNat 3826, 2009 CarswellNat 5104, [2009] G.S.T.C. 172, 2009 CCI 591, 2009 TCC 591 (T.C.C. [Informal Procedure]).

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Justice W. Webb accepted the registrant's oral and affidavit evidence to the effect that the required information was all in place prior to the ITC claims, but no longer existed at time of audit.

In a recent Tax Court of Canada decision, the Court, once again, confirms that a registrant, who fails to *verify* the information provided by its new suppliers, bears the risk of any wrongdoings of such suppliers, even if the registrant has paid the invoices in good faith.

Review of Legislative Provisions

Subsection 169(4) of the ETA provides as follows:

> **(4) Required documentation** — A registrant may not claim an input tax credit for a reporting period unless, before filing the return in which the credit is claimed,
>
> (a) the registrant has obtained sufficient evidence in such form containing such information as will enable the amount of the input tax credit to be determined, including any such information as may be prescribed; and...

Subparagraph 3(c)(iii) of the Regulations provides as follows:

> 3. For the purposes of paragraph 169(4)(a) of the Act, the following information is prescribed information:
>
> (a) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is less than $30,
>
> (i) ...
>
> (ii) where an invoice is issued in respect of the supply or the supplies, the date of the invoice,
>
> (iii) ...
>
> (iv) the total amount paid or payable for all of the supplies;
>
> (b) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is $30 or more and less than $150
>
> (i) the name of the supplier or the intermediary in respect of the supply, or the name under which the supplier or the intermediary does business, and the registration number assigned under subsection 241(1) of the Act to the supplier or the intermediary, as the case may be,
>
> ...
>
> (c) where the total amount paid or payable shown on the supporting documentation in respect of the supply or, if the supporting documentation is in respect of more than one supply, the supplies, is $150 or more,
>
> (i) the information set out in paragraphs (a) and (b),
>
> (ii) the recipient's name, the name under which the recipient does business or the name of the recipient's duly authorized agent or representative,
>
> (iii) the terms of payment, and
>
> (iv) a description of each supply sufficient to identify it.

Les Constructions Marabella Inc. v. R.

In *Les Constructions*,[3] the appellant, which was a construction business, hired subcontractors in its construction projects. The appellant knew that its new subcontractor, Archambault, was short of funds and had problems with the tax authorities. Despite this knowledge, and the fact that Archambault's invoices were from three

3 *Les Construction Marabella Inc. v. R.*, 2012 CarswellNat 5300, 2012 TCC 397 (T.C.C. [Informal Procedure]).

different companies which the appellant had never dealt with, the appellant paid the invoices promptly without making any inquiries.

The Minister found that, although the three companies were GST registered, they did not have any employees or the equipment required to provide the services to the Appellant. The Minister further found that Archambault and these three companies were unrelated, and that the cheques received by the three companies were cashed at a cheque-cashing business on the same day at a discount. The Minister concluded that these three companies were involved in a "false invoicing scheme" and the GST collected by them was not remitted to the tax authorities.

The Minister made the assumption that the appellant was involved in the false invoicing scheme and, therefore, assessed the appellant for the GST paid on the invoices, plus interest and a penalty. The appellant objected to the assessment on the basis that it paid for the services provided by Archambault in good faith and in accordance with Archambault's instructions.

Tax Court of Canada Decision

The issue before the Court was whether or not the appellant took sufficient precautions to comply with the ITC documentary requirements under the law.

The Court began by referring to the Federal Court of Appeal ("FCA") decision in *Systematix*, which states that the legislated ITC documentary requirements are not directive, but mandatory. After reviewing the legislative provisions and the evidence, the Court accepted the appellant's submission that it was not an accomplice in the false invoicing scheme. The Court, however, pointed out that the Tax Court decision in *Comtronic Computer*[4] confirmed that, in making an ITC claim, a registrant has the obligation to obtain a valid registration number for its supplier. The Court noted that, for the case on hand, the question was not regarding the registration number, but the very identity of the supplier. The Court commented that "[t]he supplier's name must match the registration number, and the supplier must in fact be the supplier." The Court determined that, as the three companies were not in fact the actual suppliers of the services, their GST registration numbers were invalid in respect of the appellant's ITC claims. Based on this finding, the Court determined that the appellant had failed to meet the legislative documentary requirements.

The Court noted that the appellant made the mistake in good faith. However, the Court determined that this fell short of due diligence, which only excuses the taking of reasonable precautions to comply with the law. The Court explained the difference between good faith and due diligence by referring to the FCA decision in *Corp de l'École Polytechnique*:[5]

> The good faith defence enables a person to be exonerated if he or she has made an error of fact in good faith, even if the latter was unreasonable, whereas the due diligence defence requires that the error be reasonable, namely, an error which a reasonable person would have made in the same circumstances. The due diligence defence, which requires a reasonable but erroneous belief in a situation of fact, is thus a higher standard than that of good faith, which only requires an honest, but equally erroneous, belief.

The Court determined that the appellant made an unreasonable mistake of fact by accepting Archambault's representations without verifying them and, accordingly, dismissed the appellant's appeal.

Commentary

With more incidents of identity theft, fraud, and false invoicing schemes relating to ITC claims, ITC documentation remains a top GST/HST audit issue. *Les Constructions* is a good reminder to registrants that acting in good faith cannot excuse the undertaking of reasonable precautions to comply with the legislated documentary requirements. Those who cannot demonstrate that they have exercised due diligence in verifying invoice information before payment will be on the hook for an assessment if their ITC claims are denied based on the wrongdoings of their suppliers.

GST/HST CASE

MAC'S CONVENIENCE STORES INC. : CONVENIENCE COMES WITH A COST

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It goes without saying that a great convenience in today's retail environment is the placement of an automated banking machine ("ABM") in a convenience store, though two inconvenient aspects are typically associated with this convenience. First, the ABM is typically situated in the back of the store, requiring the customer to walk by most of the goods for sale, and second, unless the brand of the ABM is that of the patron's bank, a convenience or service fee will be charged for the use of the ABM.

Mac's Convenience Stores Inc. ("Mac's"), which operates a chain of convenience stores and is a division of Alimentation Couche-Tard Inc., provides Canadian Imperial Bank of Commerce ("CIBC")–branded ABMs in some of its stores, with the machines either operated by CIBC or CIBC's wholly-owned subsidiary, Amicus Corporation. In other stores, Mac's has placed ABMs that it owns and operates. In either situation, there is typically a store "tour" to get to the ABM. While the tour poses no issues under the *Excise Tax Act* ("ETA"), issues did develop concerning the fees charged by Mac's to CIBC, as well as Mac's acquisition of ABMs operated in some of its stores.

Mac's was audited by the Canada Revenue Agency ("CRA") for a three-year period that ended April 24, 2005, and was assessed for its failure to collect tax on fees charged to the CIBC for ABMs owned or leased by the CIBC and placed in its stores. In addition, Mac's was denied input tax credits for tax paid on ABMs acquired by it for use in its stores. The resulting assessment was contested by Mac's and,

4 *Comtronic Computer Inc. v. R.*, 2010 CarswellNat 177, 2010 CarswellNat 178, [2010] G.S.T.C. 13, 2010 CCI 55, 2010 TCC 55 (T.C.C. [General Procedure]).

5 *Corp. de l'École Polytechnique c. R.*, 2004 CarswellNat 817, 2004 CarswellNat 2170, [2004] G.S.T.C. 39, [2004] G.S.T.C. 102, 2004 CAF 127, 2004 FCA 127 (F.C.A.).

ultimately, the appeal was heard by the Honourable Justice Robert J. Hogan in a recently released decision.[6]

Facts and Legislation: CIBC Provided ABMs

With respect to the CIBC ABMs, in its agreement with Mac's, CIBC agreed to pay Mac's a percentage of the $1.50 fee that it charged to non-CIBC customers when they used a CIBC ABM in a Mac's store. Mac's portion of this fee varied from 10% to 55%, depending on the overall usage of the ABM network. There appeared to be no evidence that Mac's attempted to negotiate a lower fee for its customers' use of the CIBC ABMs.

Mac's did not collect GST/HST on these fees because, as it argued, the supplies it made to CIBC amounted to arranging for a financial service, which is an exempt supply. A financial service is defined in subsection 123(1) of the ETA. Essentially, paragraphs (a) through (m) of the definition lists activities that are considered financial services, but activities that would otherwise fit the definition of a financial service are excluded by paragraphs (n) through (t). The relevant paragraphs of the definition read as follows:

> "financial service" means
>
> (a) the exchange, payment, issue, receipt or transfer of money, whether effected by the exchange of currency, by crediting or debiting accounts or otherwise,
>
> ...
>
> (l) the agreeing to provide, or the arranging for, a service that is
>
> (i) referred to in any of paragraphs (a) to (i), and
>
> (ii) not referred to in any of paragraphs (n) to (t), or
>
> ...
>
> but does not include
>
> ...
>
> (r.4) a service (other than a prescribed service) that is preparatory to the provision or the potential provision of a service referred to in any of paragraphs (a) to (i) and (l), or that is provided in conjunction with a service referred to in any of those paragraphs, and that is
>
> (i) a service of collecting, collating or providing information, or
>
> (ii) a market research, product design, document preparation, document processing, customer assistance, promotional or advertising service or a similar service,
>
> (r.5) property (other than a financial instrument or prescribed property) that is delivered or made available to a person in conjunction with the rendering by the person of a service referred to in any of paragraphs (a) to (i) and (l), ...

Mac's contended that the supplies it made to the CIBC under written agreements from 2001 and 2004 amounted to the arranging for a financial service under paragraph (l). The retailer considered itself to be the "link" that connected the CIBC with Mac's customers who desired to use an ABM in their stores. Mac's submitted evidence in support of its position that included the facts that: the revenue-sharing agreement had no provision for guaranteed income; Mac's had a right under the 2001 agreement to change the service fee rate charged to ABM customers; and a letter from the CIBC addressed to Mac's store managers emphasized that the ABMs would "benefit our partnership," "help increase store traffic," and "increase revenue opportunities for your business."

The CRA, in assessing Mac's, had a different perspective. It saw the fee paid to Mac's as a supply of property provided by way of license, rather than a supply consisting of arranging for a financial service. It considered the dominant element of the supply made to the CIBC to be real property (i.e., space in the stores) because Mac's had no role in providing a financial service to ABM customers. In the Minister's view, Mac's was not an intermediary in the ABM transactions. The Minister argued that Mac's role was similar to the role that any landlord would have in providing the space for an ABM.

Analysis of CIBC Provided ABMs

Justice Hogan reasoned that two previous cases considered by the courts could assist in the decision as to whether Mac's was "arranging for" the supply of a financial service. In considering the *President's Choice Bank*[7] decision, Justice Hogan noted that there were several differences between the supplies made by Mac's and President's Choice Bank ("PCBank") and the judge discounted the pertinence of the PCBank decision because those differences clearly indicated a more involved PCBank, in comparison to Mac's dealings with CIBC. The differences included:

- fees paid by CIBC to PCBank were calculated with reference to new accounts opened and to average funds and assets under management;
- PCBank used its marketing leverage with CIBC to ensure that their brand was more attractive to consumers;
- a steering committee with equal representation from both CIBC and PCBank was organized to ensure that CIBC would meet PCBank's requirements;
- PCBank had about a dozen employees working with CIBC to determine the terms to be offered to consumers on various banking products; and
- PCBank had full banking authority under the *Bank Act.*

The judge also considered the *Global Cash Access*[8] decision, in which Justice Woods contemplated if a fee paid by a provider of cash access services to Canadian casinos was consideration for arranging a financial service. In that case, Justice Woods took into consideration

6 *Mac's Convenience Stores Inc. v. R.*, 2012 CarswellNat 4470, 2012 TCC 393 (T.C.C. [General Procedure]).

7 *President's Choice Bank v. R.*, 2009 CarswellNat 801, 2009 CarswellNat 6388, [2009] G.S.T.C. 60, 2009 CCI 170, 2009 TCC 170 (T.C.C. [General Procedure]).

8 *Global Cash Access (Canada) Inc. v. R.*, 2012 CarswellNat 2574, 2012 CarswellNat 3817, [2012] G.S.T.C. 42, 2012 CCI 173, 2012 TCC 173 (T.C.C. [General Procedure]).

three distinct supplies by the casinos: (1) kiosks being permitted on the premises; (2) the provision of support services at cashier cages, such as initiating transactions on behalf of customers of the casino; and (3) the cashing of Global Cash Access's cheques. While two of those supplies were found to be arranging for the issuance of cheques (a financial service) in that decision, Justice Hogan observed that, in Mac's case, there was only a casual decision by the customer choosing to use a CIBC ABM. As a result, the Court concluded that Mac's was not operating as an intermediary with respect to the ABM usage. Mac's only made preparations for the ABM's usage in the most general of ways — providing space for it. Mac's did not stock the cash in the ABM, nor did it make any preparations with respect to any individual transaction. In fact, if a customer needed assistance, the customer was directed by a Mac's employee to contact the CIBC.

Justice Hogan concluded that Mac's did not supply a financial service to the CIBC. Having reached this conclusion, the Court did not need to consider the parties' submissions on the scope of the exclusions provided for in new paragraphs (r.4) and (r.5).

The Court found that the transactions were more akin to a supply of the rental of real property and, accordingly, Mac's should have collected tax on these transactions.

Facts and Legislation: ABMs Acquired by Mac's

In some of their retail locations, Mac's had placed ABMs that it owned and, consequently, both Mac's and the Minister agreed that, in those locations, Mac's was providing a financial service. Where the two parties disagreed, however, was whether Mac's was entitled to input tax credits for tax paid on the acquisition of the ABMs. Typically, input tax credits are not available where the supplies will be used to provide a financial service.

The Court reviewed section 185 of the ETA, which provides an exception to allow input tax credits to be claimed for tax paid on property or services used to make a supply of a financial service by a registrant that relates to the commercial activities of the registrant. It reads:

> 185. (1) If tax in respect of property or a service acquired, imported or brought into a participating province by a registrant becomes payable by the registrant at a time when the registrant is neither a listed financial institution nor a person that is a financial institution because of paragraph 149(1)(b), for the purpose of determining an input tax credit of the registrant in respect of the property or service and for the purposes of Subdivision d, to the extent (determined in accordance with subsections 141.01(2) and 141.02(6)) that the property or service was acquired, imported or brought into the province, as the case may be, for consumption, use or supply in the course of making supplies of financial services that relate to commercial activities of the registrant,
>
> (a) if the registrant is a financial institution because of paragraph 149(1)(c), the property or service is deemed, despite subsections 141.01(2) and 141.02(6), to have been so acquired, imported or brought into the province for consumption, use or supply in the course of those commercial activities except to the extent that the property or service was so acquired, imported or brought into the province for consumption, use or supply in the course of activities of the registrant that relate to
>
> (i) credit cards or charge cards issued by the registrant, or
>
> (ii) the making of any advance, the lending of money or the granting of any credit; and
>
> (b) in any other case, the property or service is deemed, despite subsections 141.01(2) and 141.02(6), to have been so acquired, imported or brought into the province for consumption, use or supply in the course of those commercial activities.

However, this section provides no relief for a listed financial institution or a *de minimis* financial institution under paragraph 149(1)(b) of the ETA. In addition, the goods or services must be consumed in the course of making supplies of financial services that "relate to" the commercial activities of the registrant.

Analysis of Mac's Acquired ABMs

Justice Hogan observed that Mac's was neither a listed financial institution nor a financial institution by virtue of paragraph 149(1)(b), and focused on the clause "in the course of making supplies of financial services that relate to commercial activities of the registrant."

The Minister argued that the financial service provided did not relate to Mac's core business of retailing, since the financial service was not incidental or ancillary to those activities. The reasoning was that, since Mac's accepts credit and debit cards for purchases, the placement of ABMs in its stores was not needed to facilitate sales. As a result, the Minister saw the provision of the financial services as a separate and distinct profit centre for Mac's.

The Court disagreed with the Minister's view. Justice Hogan commented that the test proposed by the Minister does not conform to the ordinary meaning of the words "relate to" and does not adequately consider the context and purpose of subsection 185(1). In essence, the Court found that the Minister's position was based on an overly narrow interpretation of the term "relate to."

Justice Hogan considered *Nowegijick,*[9] in which the Supreme Court of Canada held that the phrase "in respect of" has the widest possible scope, and concluded that a registrant needs only to establish that there is some connection between the registrant's commercial activities and the financial service in respect of which input tax credits have been claimed. As to the potential creation of an unfair playing field for ABM providers, most of which cannot claim input tax credits for tax paid on their inputs, the Court noted that Parliament was likely aware of this result when it enacted the provision.

The Court concluded that Mac's was providing convenience, from its sales of goods to the ability of customers to access their bank accounts in its stores, and that these supplies were sufficiently interconnected for section 185 to apply. This conclusion was supported by evidence that impulse buying increased with the presence of an ABM, and the fact that the long walk through the store to the ABM was designed to increase sales. Accordingly, the Court granted the portion of the appeal relating to the purchase of the ABMs.

9 *Nowegijick v. R.*, 1983 CarswellNat 520, 1983 CarswellNat 123, [1983] C.T.C. 20, 83 D.T.C. 5041, [1983] 1 S.C.R. 29 (S.C.C.).

Commentary

This decision is one of the first decisions of the courts involving section 185, and provides direction on the application of this section. It is also evident that the narrow interpretations of "in respect of" or "related to" favoured by the Minister are increasingly unacceptable to the courts. This continues a trend of courts interpreting non-defined terms in a wider scope, often to the benefit of the taxpayer.

And as to that store tour to access the ABM, perhaps there is a good tax strategy in it, after all.

PST LEGISLATION AND ADMINISTRATIVE POLICY

PRINCE EDWARD ISLAND TRANSITION TO HST: ARE WE THERE YET?

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Prince Edward Island ("PEI") is taking the big step forward into the world of sales tax harmonization on April 1, 2013. And, while this transition may be taking a bit of a back seat to the other much debated and discussed transition by British Columbia ("BC") back to a GST and PST regime on that same date, it is important that all GST/HST registered organizations are ready to start charging, collecting and, of course, recovering the 14% PEI HST.

For many, the PEI harmonization is a welcome change, especially since, over the years, there has been some confusion as to whether or not PEI was part of the original HST implementation. Not to mention the additional cost associated with the separate administration and collection of PST in Canada's smallest province. However, while many may have expected PEI to adopt the original version of the HST introduced in 1997 when Nova Scotia, New Brunswick, and Newfoundland and Labrador started the harmonization trend, PEI may have surprised them by adopting the somewhat less user-friendly version of the HST introduced by Ontario ("ON") and BC.

The following article reviews some of the key issues and concerns for organizations as they make final preparations for the implementation of the HST in PEI. As with the implementation of any new tax, planning, testing, and review are the basis of a successful transition. Many organizations will be able to draw from their experience in 2010 in implementing the ON and BC HST to facilitate the current transition, but as people and systems change, often it feels like one is starting the process all over again.

PEI announced its intent to implement the HST at a rate of 14% in its 2012 budget, reducing the combined effective sales tax rate on "PST-able" supplies from an effective rate of 15.5%. Despite the expected public comments in the media about how consumers will be unduly taxed by this change, overall and from a business perspective, the change has been widely accepted.

Wind Down of PEI PST

Organizations need to ensure that all invoicing and purchasing systems are updated to reflect the elimination of PST. Often, updating the general ledger with new accounts and processes is fairly straight forward, it is generally any legacy systems that tie into these systems that can prove to be the challenge, as they may have been implemented before HST was contemplated and may not have the flexibility to accommodate the change easily. Thus, updating these systems requires more planning and testing to ensure a smooth transition both from a purchasing and sales perspective.

Suppliers are to stop collecting PST on taxable sales made after March 31, 2013, subject to the transitional provisions. The final PST return is due by April 20, 2013. However, any additional PST collectible or payable after that date is to be remitted by way of a supplemental PST return. All supplemental returns must be filed by August 20, 2013.

Under the PEI transitional provisions (see PEI Revenue Tax Guide 185, "Implementation of the Harmonized Sales Tax in Prince Edward Island"), any PST that is not paid or that has not become payable becomes due and payable on July 31, 2013, and should be remitted with a supplemental return.

Refunds or adjustments of tax by a supplier will no longer be available after July 31, 2013. Up until that date, subject to the transitional provisions, a supplier is generally permitted to refund PST to a customer where tax had been paid on goods returned or credited that were acquired prior to April 1, 2013. Suppliers are to include the adjustments in a supplemental return. After that date, there is no PST adjustment permitted by the supplier, but the customer is permitted to file a rebate claim directly with the provincial government.

At this point, PEI has indicated that the normal PST rebate and refund periods will remain in place. However, ON had noted the same during its transition and then subsequently announced a reduction in the refund period to December 31, 2012.

Transitional dates	
November 8, 2012	Date from which most organizations not eligible for full input tax credits must begin to self-assess tax where the supplies relate to periods on or after April 1, 2013, similar to the announcement date under the ON and BC transition
February 1, 2013	Date on which suppliers were required to start collecting PEI HST on taxable supplies provided on or after April 1, 2013
April 1, 2013	Harmonization date
April 20, 2013	Filing date for final PEI PST return
July 31, 2013	Date on which any outstanding PEI PST becomes payable under the transitional provisions
August 20, 2013	Final filing date for any supplemental PST returns

Transition to HST

For most businesses, the transition to PEI HST is viewed as a long-overdue, positive change, as the cost of doing business should

decrease with the general recoverability of the HST versus the unrecoverable PST on many business costs.

For many, once the transition has occurred, the ongoing collection and recovery of tax becomes somewhat routine. It is the transition period and the supplies straddling the months before and after the transition date where many issues and concerns often arise. A transition plan that incorporates a thorough review of such transactions will often avoid any unpleasant surprises during a subsequent audit.

The transitional provisions generally require all GST/HST registered suppliers to charge HST on taxable supplies of goods or services that are to be delivered or performed on or after April 1, 2013, where PEI is the place of supply. See the table below for a general overview of the transitional provisions. Note that special rules apply to specific types of supplies (for example, freight services, continuous supplies, etc.). Please consult PEI Revenue Tax Guide 185 or contact your tax advisor to ensure that any special provisions that may apply have been taken into consideration.

Organizations will be required to start collecting the HST as of February 1, 2013, in certain cases, where the supplies are to be delivered or conveyed after March 31, 2013. And for organizations that are not fully engaged in commercial activities (i.e., eligible to claim full input tax credits for HST paid or payable), an obligation to self-assess tax may exist for certain supplies acquired between November 8, 2012 and March 31, 2013, where the supplies relate to post–March 31 periods.

Type of supply	Application of PEI HST
Goods	Where ownership and possession transfer on or after April 1, 2013
Services	For services performed on or after April 1, 2013, proration generally required for services straddling the implementation date (unless the services where performed all or substantially all before April 1, 2013)
Prepayments for goods and services	Supplier to charge and collect as of February 1, 2013 (recipient to self-assess from November 8, 2012 if not acquired for use exclusively in commercial activities)
Leases and licences	Lease intervals, or parts of lease intervals, that begin on or after April 1, 2013 (except where the lease interval starts before April 1 and ends prior to May 1, 2013)
Intangibles	Generally, where consideration becomes due, or is paid without having become due, on or after April 1, 2013 (with special rules for admissions, memberships and passenger transportation passes)
Real property	Where ownership and possession transfer on or after April 1, 2013 (with special grandfathering provisions for new residential property)

Point-of-Sale Rebates

Like the other harmonized provinces, PEI has adopted a number of point-of-sale ("POS") rebates to ease the transition to HST on certain types of purchases generally acquired by consumers. POS rebates for the provincial component of the PEI HST are to be provided on the following types of supplies in PEI:

- heating oil;
- infant and children's clothing and footwear; and
- books.

Recaptured Input Tax Credits (RITCs)

Despite the province noting that one of the key benefits of switching to HST was that it would save businesses time and money by not having to deal with two sets of tax rules, and that the primary reason to adopt the HST was to strengthen PEI's primary industries, PEI has nonetheless chosen to adopt the RITCs provision initially introduced to GST/HST registrants during the BC and ON harmonization. These provisions would appear go against these statements, as they increase the administrative burden and costs to large businesses both in and outside of PEI.

PEI has chosen to implement the recapture of input tax credits ("RITCs") provisions in respect of the provincial component of the PEI HST on specified supplies acquired by "large businesses" and certain financial institutions. And, while for many organizations the relative dollars may not be significant, the administrative burden from a reporting compliance perspective is potentially taxing to most (pun intended). The recapture provisions will be in place for five years and then will be phased out over a three-year period. While the recapture period and phase-out is of the same duration as that in ON, the province could have possibly given consideration to having recapture begin on July 1 (to coincide with ON), rather than April 1, 2013, which might have at least reduced some of the administrative burden felt by businesses administering these provisions.

Specified supplies – RITCs	ON	BC*	PEI
Licensed road vehicles (<3,000kgs)	X	X	**X**
Fuel for licensed road vehicles			
(other than diesel fuel)	X	N/A	**X**
Energy: Electricity, gas, etc. other than for manufacturing of TPP for sale or use in farming	X	X	**X**
Telecommunication services			
(other than internet and toll-free numbers)	X	X	**X**
Meals and entertainment			
(subject to 50% ITA restrictions)	X	X	**X**

** Effective April 1, 2013, British Columbia will eliminate the HST and revert to GST and PST. As a result, there will be no need for the recapture of the provincial component of the HST.*

April 1, 2013 is almost here. Understanding the transitional provisions and any specific PEI HST provisions is only half of the battle to ensure a smooth and compliant transition from PST to HST. A successful implantation will involve planning, testing, and reviewing of all systems impacted by the change, but a really successful implementation will also consider the training and knowledge transfer required to ensure that customers, staff and other persons impacted by the transition

thoroughly understand the changes. Otherwise, without adequate training for all parties impacted by the change, often unexpected issues and problems will occur that can derail even the best of plans.

CUSTOMS

CANADA INTRODUCES LEGISLATION TO ESTABLISH EFFECTIVE ANTI-COUNTERFEITING BORDER ENFORCEMENT MEASURES

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On March 1, 2013, the Government of Canada introduced Bill C-56, "Combating Counterfeit Products Act," in the House of Commons. Bill C-56 provides copyright and trademark owners with a Canadian legal process to stop the import and export of counterfeit goods and permanently remove those goods from the commercial stream. Trademark and copyright owners have been asking for effective anti-counterfeiting border enforcement measures in Canada and their wishes are in the process of being granted.

Requests for Assistance

Bill C-56 amends the *Trade-marks Act* and the *Copyright Act* to empower Canada Border Services Agency ("CBSA") officials to proactively target, detain, and examine counterfeit goods at the Canadian border (whether imported into Canada or exported from Canada). Once Bill C-56 is passed into law, the trademark rights and/or copyright rights holder(s) may seek the assistance of the CBSA by filing a "request for assistance" in the form and manner to be specified by the Minister of Public Safety and Emergency Preparedness (the Minister to whom the CBSA reports).

The substance of the request for assistance is a request to detain goods that are believed to be counterfeit. The request must include the trademark and/or copyright owner's name and address in Canada and any other information required by the Minister, including information about the work or other subject matter in question. Undoubtedly, the owner will be required to provide information to demonstrate his or her concerns, proof of ownership, and sufficient information to permit the CBSA officers to detain the alleged counterfeit goods. For example, the trademark and/or copyright owner might be required to provide samples of the goods that they manufacture.

The CBSA will review the request for assistance and has the discretion whether or not to accept it. The Minister of Public Safety and Emergency Preparedness, technically, would be the person accepting the request for assistance under the proposed rules. The Minister may also impose conditions for the acceptance of a request, such as requiring the trademark and/or copyright owner to post security in an amount to be determined by the Minister.

A request for assistance would be valid for a period of two years beginning on the day it is accepted by the Minister (and may be extended every two years). If, after a request is granted, the ownership or substance of a trademark or copyright changes, then the trademark and/or copyright owner must inform the Minister in writing.

After the request for assistance is accepted, the CBSA may detain any goods that are the subject matter of the accepted request. The CBSA has the discretion to provide a sample of the suspected counterfeit/infringing goods to the trademark and/or copyright owner and any information about the copies that the CBSA officer reasonably believes does not directly or indirectly identify any person. The CBSA may also permit the trademark and/or copyright owner to inspect the detained goods. The trademark and/or copyright owner will be given up to ten days (five days for perishable goods) to commence court proceedings to obtain a remedy under the Act. The trademark and/or copyright owner must provide the Minister with a copy of the document filed with the court to commence proceedings (the intake mechanism for the provision of the proof of court proceedings is yet to be determined). If the trademark and/or copyright owner does not commence proceedings, then the detained goods will be released.

Where infringing works or counterfeit goods are detained pursuant to an accepted request for assistance, the owner of the trade-mark and/or copyright is liable for the storage, handling, and destruction costs. That being said, the owner of the infringing works or counterfeit goods and the importer or exporter are jointly and severally liable for all such charges if the goods are ultimately forfeited.

Power of the Courts

Bill C-56 also sets out the powers of the court in respect of the alleged infringing works or counterfeit goods. While the process for such court proceedings will develop over time, Bill C-56 does establish some of the procedural rules. If the court finds in favour of the applicant, the court may make any order that it considers appropriate in the circumstances, including an order that the detained goods be destroyed. The court also has the power to order the Minister or CBSA to detain goods to be imported or goods that have not been released.

If the detained goods are determined to not be infringing works or counterfeit goods, or if the court proceedings are dismissed or discontinued, Bill C-56 grants the court the power to award damages against the trademark and/or copyright owner in respect of the losses, costs, or prejudice suffered as a result of the detention.

Bill C-56 also creates a new civil remedy for trademark and/or copyright owners to pursue infringers for monetary damages. In addition, Bill C-56 sets out new criminal offenses and permits the court to impose a fine up to $1,000,000 and/or a term of imprisonment up to five years. New criminal offenses include a prohibition against the possession of, or exportation of, infringing copies or counterfeit trade-marked goods, packaging, or labels.

Bill C-56 will be closely watched. Trademark and/or copyright owners may start to prepare their requests for assistance so that action may be taken when Bill C-56 becomes law. Naturally, Bill C-56 must proceed through the Canadian legislative process. However, with a majority government, it may not take long to become law.[10]

10 This article originally appeared at www.canada-usblog.com and has been modified slightly.