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Transfer Pricing: Tax Court of Canada

The Canada Revenue Agency filed an appeal of the recent Tax Court of Canada decision in [GE Capital v. The Queen](#), 2009 TCC 563 on January 4, 2010, so for the time being the law on transfer pricing practice in Canada is still uncertain. The Tax Court found in the taxpayer's favour, allowing GE Capital to deduct a fee for guaranteeing its debts owed to third-party creditors on the basis that the arm's length price for the service was at least 100 basis points rather than zero as argued by the Minister. The lengthy decision considers a number of important issues, including the use of expert witnesses and the business judgment rule, and it sets out a complicated framework for determining arm's length pricing starting at para. 231. The court cautions, however, that "it would be dangerous for taxpayers to draw general inferences from this particular case, as differences in facts or circumstances or in the economically relevant characteristics of a transaction can lead to a very different result. In the final analysis, transfer pricing is largely a question of facts and circumstances coupled with a high dose of common sense." (para. 273) This warning is particularly apt in light of the CRA's appeal. The following articles discuss the implications of the case in more detail:

- [Transfer Pricing for Inter-Company Transactions Clarified in GE Capital](#) by Sona Dhawan, posted January 18, 2010 on The Court
- [GE Capital - Court Accepts Guarantee Fees in Landmark Transfer Pricing Case](#), a KPMG tax bulletin published December 9, 2009
- [General Electric Capital Canada Inc.: watershed transfer pricing case](#), an Ernst & Young tax alert

Corporate Directors Beware

The recent Ontario Superior Court of Justice decision in [Allen v. Aspen Group Resources Corporation](#), [2009] O.J. No. 5213 is causing some lawyers to question the age old practice of sitting on the boards of corporate clients according to recent articles from the [Globe and Mail](#) and [Lawyers Weekly](#). The court certified a shareholder-launched securities class action, implicating a Toronto lawyer sitting on the board of Aspen Group Resources and his firm. The

judge commented as follows on whether the lawyer's statutory liability as a director could engage the liability of the firm:

It seems to me that it is arguable that a lawyer who, through his or her law firm, acts as external corporate counsel to a corporation and who also sits on the corporation's board, may well be acting in the ordinary course of the law firm's business when he or she takes a seat at the boardroom table. Indeed, such a relationship with the corporation may be encouraged by the law firm to strengthen the relationship with the client, to raise the profile of the lawyer and the law firm and to increase business. To the extent there are risks for the lawyer and the law firm, they undoubtedly can be offset by appropriate liability insurance. (para.71)

Names Not So Similar as to Cause Confusion

In [*Brian Neil Friesen Dental Corp. and Zdan Roman \(de Leliva\) Shulakewych Dental Corp. v. Director of Companies Office \(Manitoba\)*](#), 2009 MBQB 330 the applicants sought an order under s.14 of *The Business Names Registration Act* cancelling the registration or changing the name of two businesses which operated under names similar to the applicants' business. The court dismissed the application, deferring to the specialized knowledge and expertise of the Director of the Companies Office in dealing with similar names and the likelihood of confusion.

Standard of Care in Negotiating Financing Agreements

In [*Sports Pool Distributors Inc. v. Dangerfield*](#), 2009 BCCA 483 the court reversed a lower court ruling awarding damages against a B.C. lawyer and his firm for negligence in negotiating a financing agreement. The court distinguished between being retained to structure an agreement and being retained to negotiate the terms of an agreement, as was the case here, and had this to say on the duty owed in such circumstances:

I consider the burden of the duty owed by a solicitor who undertakes the negotiation of an agreement lies in his ensuring the client understands the implications of the terms to be agreed to the extent necessary to enable the client to make an informed decision as to whether to proceed with the transaction. Of utmost importance is the client's appreciation of the contractual risks and consequent financial exposure arising on the terms of the agreement, and of less risky alternatives that might be available. At least as a general proposition, a client who properly understands an exposure, and who proceeds with a transaction, cannot later be heard to complain his solicitor failed him in respect of the terms obtained in the negotiations the solicitor conducted. (para. 34)

Business Law Publications

These recent publications may be of interest to business lawyers:

Volume 2, Issue 1 of [*Tax Update: A report on cross-border developments in Canadian tax law*](#), a McCarthy Tétrault publication which contains articles on *Improving Access to Tax Treaties* and *Canadian Foreign Affiliates - New Draft Rules*.

[*"Top Ten" Accommodation Agreement Negotiation Issues*](#) by Billy S. Garton, a Practice Points publication which highlights the ten most common business and legal issues in negotiating accommodation agreements with respect to lands subject to claims for aboriginal rights or title.

Upcoming Law Society CPD Programs

Don't forget to register soon for [When the Going Gets Tough - New Insolvency Regime to Help the Tough Get Going](#) which will be held February 10, 2010 at the Law Society classroom. Moderator David Jackson and several insolvency practitioners will walk you through the long awaited amendments to the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* in this half day program starting at 1:00 p.m.

Learn about the legal limits secured creditors and receivers face when selling assets in the upcoming lunch hour program [Purchasing Assets from Receivers](#), which will be held April 20, 2010 at the Law Society classroom.

Contact the Education and Competence Department of the Law Society for further details or to register.

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