

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

**DEANS KNIGHT INCOME CORPORATION**

**APPELLANT**  
(Respondent in the  
Federal Court of Appeal)

- and -

**HER MAJESTY THE QUEEN**

**RESPONDENT**  
(Appellant in the  
Federal Court of Appeal)

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**MOTION RECORD OF THE PROPOSED INTERVENER,  
TAX EXECUTIVES INSTITUTE, INC.**

(Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*, SOR/2020-156)

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(Appellant in the  
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**NOTICE OF MOTION OF THE PROPOSED INTERVENER,  
TAX EXECUTIVES INSTITUTE, INC.**  
(Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*, SOR/2020-156)

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**TAKE NOTICE** that the Tax Executives Institute, Inc. (“TEI”) hereby applies to a judge of this Court pursuant to Rule 47 and 55 of the *Rules of the Supreme Court of Canada*, SOR/2020-156 for an order:

1. Granting TEI leave to intervene in this appeal on the following terms:
  - (a) TEI shall be permitted to serve and file a factum not exceeding 10 pages by such date as directed by the Court;
  - (b) TEI shall be permitted to make oral submissions not exceeding 10 minutes at the hearing of the appeal;
  - (c) no costs will be ordered for or against TEI on this motion or the appeal; and
  - (d) any further or other order that this Court may deem appropriate.

**AND FURTHER TAKE NOTICE** that the following documents will be relied on in support of this motion:

- (a) the affidavit of Patricia Likogiannis, affirmed June 30, 2022;
- (b) the affidavit of Watson McLeish, affirmed June 30, 2022;
- (c) the memorandum of argument on motion for leave to intervene of TEI; and
- (d) such further and other material as counsel may advise and this Court may permit.

**AND FURTHER TAKE NOTICE** that the motion shall be made on the following grounds:

1. TEI is the preeminent association of in-house tax professionals worldwide, with 57 chapters across the Americas, Europe, and Asia, including four in Canada.
2. Over 15% of TEI's approximately 6,500 individual members are tax professionals who work for Canadian businesses in a cross-section of industries across the country. TEI's Canadian members have senior management responsibility for tax within their organizations.
3. TEI's advocacy work focuses primarily on issues of tax policy and administration that are of concern to a broad, cross-industry segment of TEI's membership, and on which TEI can provide responsive, practical, and consensus-based recommendations to address them.
4. TEI should be granted leave to intervene because it has a real interest in the appeal and will make useful submissions from a different perspective than the other parties.
5. TEI has a demonstrated historical and current interest in fostering a tax system that works—one in which taxpayers can comply in a reasonably cost-efficient and confident manner.
6. TEI is concerned that the Federal Court of Appeal's introduction of a novel and inchoate 'actual control' concept in determining whether a transaction has abused the loss restriction regime will penetrate beyond that regime and jeopardize other regimes in the *Income Tax Act*, RSC 1985, c 1 (5th Supp), that rely on control, which will have a detrimental impact on Canadian businesses.
7. TEI has extensive experience advocating in Canada in respect of Canadian federal income tax matters and a history of responsible advocacy as *amicus curiae* in tax disputes in the United States, including before the Supreme Court of the United States.

8. TEI is uniquely well positioned to provide the Court with vial context, from a perspective rooted in practical experience and consistent with TEI's commitment to supporting the uniform application and interpretation of tax laws.
9. If granted leave to intervene in this appeal, TEI will assist the Court by presenting an objective, balanced approach to the central issues in the appeal, namely:
  - (a) the extent to which shareholder-level voting control is repeatedly reflected as a deliberate policy choice underlying the schemes of the *Income Tax Act*;
  - (b) the need for certainty of the principles applicable to determining control for tax purposes, including for financial reporting to shareholders; and
  - (c) applying the general anti-avoidance rule in a manner that curtails abusive tax avoidance, without undermining the well-established principles on which the schemes of the *Income Tax Act* rely.
10. If granted leave to intervene, TEI will:
  - (a) not file any additional evidence or add to the appeal record;
  - (b) not seek costs associated with its intervention;
  - (c) not unduly expand the issues;
  - (d) not unreasonably delay or lengthen the hearing of this appeal;
  - (e) work with the parties and any other interveners in order to avoid duplicative submissions and ensure an efficient presentation of each intervener's position to the court; and
  - (f) comply with any terms and conditions imposed.
11. TEI's proposed intervention will not cause any injustice to the parties.
12. Rules 47, 55-59 of the *Rules of the Supreme Court of Canada*, SOR/2020-156.
13. Such further and other grounds as counsel may advise and may be permitted.

**DATED** at the City of Toronto, Province of Ontario this 30th day of June, 2022.



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**AFFIDAVIT OF PATRICIA LIKOIANNIS  
(made June 30, 2022)**

(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, SOR/2020-156)

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I, **PATRICIA LIKOIANNIS**, of the Town of Newtonville, in the Province of Ontario,  
**MAKE OATH AND SAY:**

1. I am the Tax Director and Treasurer at General Motors of Canada. I have served as Tax Director since 2013 and added Treasurer to my responsibilities in 2018. As Tax Director and Treasurer, I am responsible for directing and overseeing all aspects of General Motor's tax and treasury operations in Canada, including cash flow management, tax compliance, government audits and controversy resolution, tax and treasury planning and strategy, project management, and government advocacy.

2. I joined General Motors of Canada in 2001 and during my time with the company I have worked in several roles including as a Financial Analyst, Supervisor – Customer Care and Aftersales, Strategy Board Analyst, and Income Tax Manager. Prior to this, I held the role of Manager, Tax at Molson Canada, and Auditor and Tax Specialist at KPMG.

3. I have a Bachelor of Mathematics and Master of Accounting from the University of Waterloo. I hold a Chartered Professional Accountant designation with CPA Ontario.

4. I have been a member of the Canadian Income Tax Committee of the Tax Executives Institute, Inc. (“**TEI**” or the “**Institute**”) since 2014. I currently serve as Chair of TEI’s Canadian Income Tax Committee, a role to which I was appointed in 2021, and previously served as a Vice Chair of the Committee from 2019 to 2021.

5. In my role as Chair of TEI’s Canadian Income Tax Committee, I am responsible for leading the Committee’s activities by, *inter alia*, establishing goals, maintaining a membership that generally reflects the diversity of geography and industry represented by TEI’s Canadian members, planning and facilitating monthly business meetings, advancing the Committee’s advocacy and educational priorities, maintaining relationships and engagement with government officials, and reporting to TEI’s Board of Directors.

6. I have personal knowledge of the matters deposed, except where indicated otherwise. Where I do not have personal knowledge, I have stated the source of my information and believe it to be true.

**A. TEI**

7. TEI is the preeminent association of in-house tax professionals in Canada, which is home to four of TEI’s 57 chapters across the Americas, Europe and Asia.

8. Over 15% of TEI’s approximately 6,500 members are tax professionals who work for Canadian businesses in a cross-section of industries across the country.

9. TEI’s Canadian membership consists of corporate employees who work in an executive, administrative or managerial capacity in the tax function of their employers and meet certain minimum experience requirements. Individuals engaged in public tax practice, such as law firms, accounting firms and government, are not eligible for membership in TEI.

10. In their tax leadership roles within the Canadian companies by which they are employed, TEI members oversee and advise their employers on the tax consequences of commercial

transactions and the movement of funds within the corporate group, tax compliance obligations, and financial information provided to public shareholders. In particular, TEI members:

- (a) serve as a principal source of tax expertise and leadership for their organizations and oversee a variety of income tax matters;
- (b) lead teams of in-house tax professionals in all aspects of global tax strategy, planning, reporting, accounting, audits, disputes and compliance;
- (c) provide guidance to their executive and/or senior management teams on the tax implications of ongoing and prospective business activities, as well as day-to-day tax planning, by researching, analyzing and interpreting applicable tax law;
- (d) provide due diligence and structural advice on a variety of transactions, including mergers, acquisitions and dispositions;
- (e) implement strong frameworks for tax governance, tax risk management and tax responsibility and reputation, including ensuring senior management, boards of directors and other key stakeholders understand their organizations' tax affairs; and
- (f) articulate (internally and externally) the ways in which their tax departments embody the values of the organizations they serve and contribute positively to society, while also adding value to their business.

## **B. TEI's Canadian Income Tax Committee**

11. TEI's Canadian Income Tax Committee is an Institute-level standing committee—*i.e.*, it is among the standing committees established by TEI's Board of Directors—tasked with keeping TEI members informed on Canadian federal income tax matters and spearheading TEI's advocacy and educational activities in respect of Canadian federal income tax, consistent with TEI's mission and principles.

12. Canadian Income Tax Committee membership is limited to active TEI members serving in tax leadership roles for their organizations. Currently, the Canadian Income Tax Committee comprises approximately 30 senior in-house tax professionals employed by Canadian business representing a diverse range of industries and headquartered in one of the greater Montréal,

Toronto, Calgary or Vancouver metropolitan areas (which make up the four Canadian chapters of TEI).

**C. TEI's Canadian income tax advocacy**

13. TEI's Canadian Income Tax Committee meets monthly to discuss Canadian federal income tax issues of widespread concern and related advocacy project proposals, which proposals are initiated by any TEI member who identifies an issue that may be of interest to the broader community of TEI's Canadian members. Once the Committee decides to launch an advocacy project, separate meetings are established to see the project through to completion.

14. Consistent with TEI's mission and principles, TEI's advocacy work through the Canadian Income Tax Committee focuses primarily on issues of tax policy and administration that are of concern to a broad, cross-industry segment of TEI's membership, and on which TEI can provide responsive, practical, and consensus-based recommendations to address them.

15. TEI's Canadian Income Tax Committee pursues TEI's advocacy priorities through a variety of means, including:

- (a) annual liaison (roundtable) meetings with senior tax policy and administration officials at the Department of Finance and Canada Revenue Agency in Ottawa;
- (b) written advocacy submissions (*e.g.*, comment letters, policy statements, hearing testimony) concerning significant tax legislative, regulatory or administrative proposals; and
- (c) informal interchanges with government representatives (*e.g.*, conference calls, meetings) to facilitate the development of solutions to difficult issues of widespread concern to TEI members.

16. The effectiveness of TEI's Canadian Income Tax Committee's advocacy is driven by the diverse, real-world experiences of its members—in-house tax professionals who are responsible for administering the tax affairs of their employers and bring a balanced, practical perspective to the issues.

17. Under TEI's By-Laws, ultimate control of TEI is vested in TEI's Board of Directors, which consists of: (i) the officers of TEI (i.e., TEI's International President, Senior Vice President, Regional Vice Presidents, Treasurer, and Secretary), (ii) one representative from each of TEI's 57 chapters, and (iii) qualifying past International Presidents. TEI's Board of Directors appoints and oversees an Executive Committee, which is responsible for handling the day-to-day business of TEI. In appointing the members of the Executive Committee, the Board strives to achieve a measure of diversity of representation across TEI's 11 geographical regions, the first of which (Region 1) is Canada. TEI's Board of Directors is also responsible for establishing various Institute-level standing committees, including TEI's Canadian Income Tax Committee.

18. Watson M. McLeish, one of three full-time Tax Counsels employed by TEI in Washington, D.C., is TEI's designated staff liaison and technical assistant to the Canadian Income Tax Committee. In this role, which he has held since July 2017, Mr. McLeish (i) monitors pending and proposed tax legislation, regulations, and other tax administrative and judicial pronouncements; (ii) oversees the preparation of written advocacy submissions/position papers, liaison meeting agendas, and testimony; (iii) prepares communications for TEI publications (both print and electronic); and (iv) maintains liaison with government representatives.

**D. TEI's unique perspective and interest in this appeal**

19. TEI's Canadian members have senior management responsibility for tax within each of their organizations and typically work closely with the chief financial officer and general counsel. TEI's Canadian members are primarily responsible for:

- (a) ensuring corporate compliance with tax obligations;
- (b) implementing commercial transactions in a fiscally-prudent manner;
- (c) reporting to shareholders on the precise tax implications of those transactions; and
- (d) certifying the tax reporting required under the *Income Tax Act*.

20. TEI's Canadian members are also charged with advising their corporate employers on what tax attributes remain available or may be shared within the corporate group, as well as the effective movement of funds within the corporate group, including for the satisfaction of corporate obligations and for the payment of dividends.

21. Specifically, TEI's Canadian members are required to manage and assess tax risk and compliance for:

- (a) transformational transactions, such as mergers and acquisitions, significant divestitures (such as spin-offs), internal reorganizations in Canada and in foreign affiliates, and public securities offerings; and
- (b) ordinary course business decisions, such as recognizing tax attributes, managing the treasury function (including the payment of intercorporate dividends), and determining eligibility for certain incentive programs.

22. In so doing, TEI's Canadian members must rigorously examine and assess each of the various control relationships that Parliament has prescribed in the *Income Tax Act*—legislation that is premised on careful and deliberate distinctions between legal control, statutorily deemed legal control, and factual control.

23. TEI is concerned that the Federal Court of Appeal's introduction of a novel and inchoate 'actual control' concept in determining whether a transaction has abused the loss restriction regime will penetrate beyond the loss restriction regime and jeopardize other regimes in the *Income Tax Act* that rely on control. These regimes includes the statutory schemes for whether:

- (a) inherent losses in capital property, depreciable property, and doubtful debts will be triggered and recognized for tax purposes;
- (b) resource tax expenses, scientific research expenses, and investment tax credits are streamed or expire;
- (c) payment of accrued expenses must be accelerated within a corporate group;
- (d) there has been a deemed tax year-end within a corporate group, triggering substantial tax compliance and reporting obligations;
- (e) companies are related and therefore share tax attributes with each other, or are deemed not to deal at arm's length with each other for various purposes;
- (f) a foreign subsidiary is a "controlled foreign affiliate" for the purposes of the foreign affiliate regime; and
- (g) inter-corporate dividends may be paid tax free between Canadian corporations.

24. TEI is also concerned that the Federal Court of Appeal's decision to disregard the foundational judicial and statutory test for control will have a detrimental impact on Canadian businesses, including:

- (a) introducing incremental business risk, which could hinder the ability of Canadian corporations to raise capital and attract investment in a competitive global market;
- (b) increasing the complexity of, and the documentation requirements for, mergers and acquisitions and treasury operations among members of a corporate group;
- (c) creating administrative complexity that will consume scarce business investment resources that could be better deployed elsewhere; and
- (d) reducing the effectiveness of targeted incentive regimes, such as those for the conduct of scientific research and experimental development.

25. Prior to the Federal Court of Appeal's decision in this case, an acquisition of control of a corporation was understood to involve an acquisition of voting control at the shareholder level by a single person, or by a "group persons" with a "common connection" or "acting in concert" to effect control of the corporation. This test for control, often referred to as "*de jure*" control, has been accepted as the governing standard by Canadian courts for over 50 years, and has allowed for certainty of application both within corporate groups and in commercial transactions with unrelated corporations.

26. Many commercial transactions involve an examination of control, and the potential for an acquisition of it, from several different perspectives within a corporation. This would typically involve examinations of control by the corporation's legal team under applicable corporate statutes and by the corporation's accounting team under the applicable accounting standards for purposes of consolidation and other financial reporting to shareholders.

27. As in-house tax professionals, TEI members are responsible for providing advice on control under the *Income Tax Act* in the context of commercial transactions. A particular focus will be on the continuity of, and possible restrictions on, corporate tax attributes, but also of any associated tax compliance and reporting obligations. Much of this analysis is critical to the accuracy of the financial information provided to public shareholders. In this context, it is critical

to have a test that TEI members and other corporate taxpayers can apply with certainty and predictability.

28. As an organization that collects the input of senior tax professionals from across the diverse regions and business sectors of the Canadian economy, TEI believes that its is uniquely situated to provide the Court with vital context, including the extent to which established standards of control permeate legislative schemes throughout the *Income Tax Act* and the potential impact of the decision in this appeal on commercial transactions, tax reporting complexity, treasury management efficiency, and financial disclosure precision.

**E. TEI's submissions to be advanced in this appeal**

29. If granted leave to intervene, if granted leave to intervene, TEI will assist the Court by presenting an objective, balanced approach to the central issues in this appeal, namely:

- (a) the extent to which shareholder-level voting control is repeatedly reflected as a deliberate policy choice underlying the schemes of the *Income Tax Act*;
- (b) the need for certainty of the principles applicable to determining control for tax purposes, including for financial reporting to shareholders; and
- (c) applying the general anti-avoidance rule in a manner than curtails abusive tax avoidance, without undermining the well-established principles on which the schemes of the *Income Tax Act* rely.

30. TEI's memorandum of argument provides particulars on TEI's proposed submissions if it is granted leave to intervene.

**F. TEI's intervention will not cause any injustice or prejudice**

31. I believe that TEI's proposed intervention will not cause any injustice to the parties or otherwise prejudice their interests because TEI will:

- (a) not file any additional evidence or add to the appeal record;
- (b) not seek costs associated with its intervention;
- (c) not unduly expand the issues or attempt to raise new issues;
- (d) not unreasonably delay or lengthen the hearing of this appeal;




- (e) work with the parties and any other interveners in order to avoid duplicative submissions and ensure an efficient presentation of each intervenor's position to the court; and
- (f) comply with any terms and conditions imposed.

32. If granted leave, TEI provide the Court with a balanced perspective rooted in practical experience, without taking a position on the facts or outcome of the appeal.

**G. General**

33. At the time of making this affidavit, I am presently located in Newtonville, Ontario.

AFFIRMED BEFORE ME over  
videoconference in accordance with the  
*Administering Oath or Declaration Remotely  
Regulation*, O. Reg. 431/20, on June 30, 2022  
while I was located in the City of Toronto, in  
the Province of Ontario, and the affiant was  
located in the Town of Newtonville, in the  
Province of Ontario.



---

MARK SHEELEY  
Commissioner for Taking Affidavits



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PATRICIA LIKOIANNIS

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---

**AFFIDAVIT OF WATSON M. McLEISH  
(made June 30, 2022)**

(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, SOR/2020-156)

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I, **WATSON M. McLEISH**, of the City of Washington, in the District of Columbia, in the United States of America, **MAKE OATH AND SAY:**

1. I am currently employed as Tax Counsel for Tax Executives Institute, Inc. (“**TEI**” or the “**Institute**”), a role in which I have served since July 2017. In this role, I support the advocacy and educational activities of TEI’s Canadian Income Tax Committee, Federal Tax Committee, and Tax Reform Task Force.

2. Among other things, I am responsible for coordinating and executing TEI’s income tax-related advocacy initiatives at the federal level in the United States and Canada. This work includes the preparation of written advocacy submissions (e.g., comment letters, position papers) in support of TEI’s income tax-related legislative and administrative policy priorities. It also includes the planning and facilitation of liaison meetings between TEI members and senior U.S. and Canadian federal government officials.

3. In addition to my role with TEI, I am an adjunct professor of law at Georgetown University Law Center in Washington, D.C., where I teach a graduate-level seminar, *Tax Research and Writing* (LAW 809 v02).

4. Prior to joining TEI, I worked for approximately six years as a tax attorney at Ernst & Young LLP in Washington, D.C., advising clients on a wide range of U.S. federal income tax law and policy issues related to international business transactions.

5. I hold a Bachelor of Arts in political science and French from Trinity College in Hartford, Connecticut, a J.D. from The Catholic University of America, Columbus Law School in Washington, D.C., and a LL.M. in Taxation from Georgetown University Law Center in Washington, D.C. I am admitted to practice in Maryland (Bar of Maryland, 2012) and before the United States Tax Court (Tax Court Bar, 2014).

6. I have personal knowledge of the matters deposed, except where indicated otherwise. Where I do not have personal knowledge, I have stated the source of my information and believe it to be true.

**A. TEI**

7. TEI was organized in 1944 under the laws of the State of New York as a non-profit corporation to serve the professional needs of in-house tax professionals. TEI's members are business executives responsible for the tax affairs of their employers in an executive, administrative, or managerial capacity. TEI serves its members and advances the profession through education, networking, and advocacy throughout the world.

8. Today, TEI is the preeminent association of in-house tax professionals worldwide, with 57 chapters across North and South America, Europe and Asia, including four chapters in Canada: Montréal, Toronto, Calgary and Vancouver.

9. TEI's approximately 6,500 members represent nearly 2,800 of the world's leading companies, many of which either are resident or do business in Canada. Over 15% of TEI's members are tax professionals who work for Canadian businesses in a cross-section of industries across the country.

10. TEI is dedicated to the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimization of administration and compliance costs to the mutual benefit of governments and taxpayers. TEI is committed to fostering a tax system that works—one that is administrable and with which taxpayers can comply in a reasonably cost-efficient manner.

**B. TEI’s organizational structure**

11. Under TEI’s By-Laws, ultimate control of the Institute is vested in TEI’s Board of Directors, which consists of: (i) the officers of the Institute (*i.e.*, TEI’s International President, Senior Vice President, Regional Vice Presidents, Treasurer, and Secretary), (ii) one representative from each of TEI’s 57 chapters, and (iii) qualifying past International Presidents.

12. TEI’s Board of Directors appoints and oversees an Executive Committee, which is responsible for handling the day-to-day business of TEI. In appointing the members of the Executive Committee, the Board strives to achieve a measure of diversity of representation across TEI’s 11 geographical regions, the first of which (Region 1) is Canada.

13. TEI’s Board of Directors is also responsible for establishing various Institute-level standing committees, including TEI’s Canadian Income Tax Committee. The Chair of TEI’s Canadian Income Tax Committee is appointed by TEI’s International President, in consultation with his or her Vice President for Region 1 (Canada). The incumbent Chair of TEI’s Canadian Income Tax Committee is Patricia Likogiannis.

**C. TEI’s experience in tax litigation**

14. TEI has a history of responsible advocacy as *amicus curiae* in tax disputes before various federal and state courts of appeal in the United States, including the Supreme Court of the United States. Recent examples of such advocacy include:

- (a) ***South Dakota v Wayfair, Inc.*, 585 U.S. \_\_\_\_ (2018), 138 S. Ct. 2080**, in which TEI filed a brief before the Supreme Court of the United States regarding the injustice and subsequent litigation that would ensue if the ruling requested by the petitioner were to be applied retroactively. The case concerned a state’s ability to compel out-of-state retailers to collect and remit sales or use taxes in connection with mail order or internet sales made to residents of the state.

- (b) *Normand v. Wal-Mart.com USA, LLC*, No. 2019-C-00263 (La. Jan. 29, 2020), in which TEI filed an amicus brief before the Supreme Court of Louisiana arguing that the statute was not intended to apply to online marketplace facilitators and that neither adequate notice nor guidance regarding how it would administer the sales and use tax if marketplace facilitators were to undertake such responsibilities was provided. TEI maintained that if Louisiana and its parishes seek to impose tax collection and remittance responsibilities on marketplace facilitators fairly and legitimately, they must enact the appropriate laws and regulations.
- (c) *Sirius XM Radio, Inc. v. Hegar*, No. 20-0462 (Tex. Mar. 25, 2022), in which TEI filed an amicus brief seeking review by the Texas Supreme Court concerning the apportionment of a service provider's gross receipts for state franchise tax purposes. TEI's brief argued that review by the Texas Supreme Court was necessary to resolve a conflict between decisions of an intermediate appellate court that used fundamentally different standards to determine how taxpayers providing similar services must apportion their Texas franchise tax bases. The conflict created uncertainty and the potential for inconsistent taxation of similarly situated taxpayers.

15. TEI's proposed intervention in this appeal is made on the unanimous recommendation of its Canadian Income Tax Committee members, who identified numerous concerns with the decision under appeal. Those concerns are set out in TEI's letter of support for leave to appeal dated October 1, 2021, which I attach hereto as Exhibit "A".

**D. TEI's intervention will not cause any injustice or prejudice**

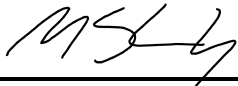
16. Consistent with the manner in which TEI approaches its role as *amicus curiae* before federal and state courts in the United States, TEI's proposed intervention here will not cause any injustice to the parties or otherwise prejudice their interests.

17. TEI will take no position on the merits of the appeal. Rather, the purpose of the proposed intervention is to assist the Supreme Court of Canada in its analysis of the relevant legal principles in a manner consistent with TEI's commitment to supporting the uniform application and interpretation of tax laws.

**E. General**

18. At the time of making this affidavit, I am presently located in Washington, D.C.

AFFIRMED BEFORE ME over  
videoconference in accordance with the  
*Administering Oath or Declaration Remotely  
Regulation*, O. Reg. 431/20, on June 30, 2022  
while I was located in the City of Toronto, in  
the Province of Ontario, and the affiant was  
located in the City of Washington, in the  
District of Columbia in the United States of  
America.



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MARK SHEELEY  
Commissioner for Taking Affidavits



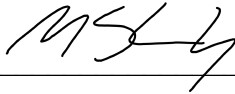
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WATSON M. McLEISH

THIS IS **EXHIBIT “A”** REFERRED TO IN THE  
AFFIDAVIT OF WATSON M. McLEISH

AFFIRMED BEFORE ME over videoconference in accordance  
with the *Administering Oath or Declaration Remotely Regulation*,  
O. Reg. 431/20, on June 30, 2022, while I was located in the City  
of Toronto, in the Province of Ontario, and the affiant was located  
in the City of Washington, in the District of Columbia in the  
United States of America

THIS 30<sup>th</sup> DAY OF JUNE, 2022.

A handwritten signature in black ink, appearing to read 'MSL', is positioned above a horizontal line.

MARK SHEELEY  
Commissioner for Taking Affidavits



1200 G Street, N.W., Suite 300  
Washington, D.C. 20005-3814  
202.638.5601  
tei.org

October 1, 2021

**2021-2022 OFFICERS**

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**Re: Guidance from the Supreme Court of Canada is Required to Avoid Adverse  
Uncertainty for Canadian Businesses Caused by the New “Actual Control”  
Standard Created, But Not Defined, by the Federal Court of Appeal in  
*Deans Knight Income Corporation v. Her Majesty the Queen***

Dear Ms. DiGregorio:

The decision rendered by the Federal Court of Appeal in *Deans Knight Income Corporation v. Her Majesty the Queen*, 2021 FCA 160 (the “FCA Decision”), creates significant uncertainty that will negatively impact many businesses across Canada. On behalf of Tax Executives Institute (“TEI”), therefore, I write in strong support of the application for leave to appeal by Deans Knight Income Corporation (“Deans Knight”) to the Supreme Court of Canada.

**About TEI**

TEI was founded in 1944 to serve the professional needs of in-house tax professionals. Today, the organization has 57 chapters across North and South America, Europe, and Asia, including four chapters in Canada. Our approximately 7,000 members represent 2,800 of the world’s leading companies, many of which either are resident or do business in Canada. Over 15 percent of TEI’s membership comprises tax professionals working for Canadian businesses in a variety of industries across the country. TEI members are responsible for the tax affairs of their employers and must contend daily with provisions of the tax law relating to the operation of business enterprises. The following recommendations reflect the views of TEI as a whole but, more particularly, those of our Canadian constituency.



As the preeminent association of in-house tax professionals worldwide, TEI is dedicated to the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimization of administration and compliance costs to the mutual benefit of government and taxpayers. TEI is committed to fostering a tax system that works—one that is administrable and with which taxpayers can comply in a cost-efficient manner. The diversity, professional training, and global viewpoints of our members enable TEI to bring a balanced and practical perspective to the issues discussed herein.

### **The FCA Decision’s new “actual control” standard creates significant uncertainty for Canadian businesses**

For over 50 years, since the Exchequer Court of Canada’s decision in *Buckerfield’s Ltd. v. Minister of National Revenue*, 64 D.T.C. 5301 (Ex. Ct.), the term “control” in the Income Tax Act<sup>1</sup> has been understood to mean *de jure* control. Indeed, the *de jure* control concept articulated in *Buckerfield’s Ltd.* has been repeatedly cited—with approval—by the Supreme Court of Canada.<sup>2</sup>

In *Buckerfield’s Ltd.*, the court held that while many approaches might conceivably be adopted in applying the word “control” in the Act to a corporation, including control by management or *de facto* control by one or more shareholders, “control” for purposes of the Act contemplates *de jure* control—the legal right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the board of directors.<sup>3</sup>

In addition to the *de jure* control test, Parliament has statutorily incorporated the *de facto* control test as a second control standard that applies only to certain specified provisions in the Act.<sup>4</sup>

Despite acknowledging that the term “acquisition of control” in subsection 111(5) had been judicially determined to mean *de jure* control, the FCA Decision concluded that the object, spirit and purpose of the provision is for it to apply where there has been an acquisition of “actual control.” In so concluding, the FCA Decision established a new, third standard of control (“New Actual Control Standard”):

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<sup>1</sup> Unless otherwise indicated, all references to “section” or “subsection” herein are to sections or subsections of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), as amended (the “Act”).

<sup>2</sup> E.g., *Duha Printers (Western) Ltd. v. R.*, [1998] 1 S.C.R. 795, para. 35 (“It has been well recognized that, under the Income Tax Act, “control” of a corporation normally refers to *de jure* control and not *de facto* control.”); see also *Minister of National Revenue v. Dworkin Furs (Pembroke) Ltd.*, [1967] S.C.R. 223; *Vina-Rug (Can.) Ltd. v. Minister of National Revenue*, [1968] S.C.R. 193; *The Queen v. Imperial General Properties Ltd.*, [1985] 2 S.C.R. 288; *Atco Ltd. v. Calgary Power Ltd.* [1982] 2 S.C.R. 557; *Minister of National Revenue v. Consolidated Holding Co.*, [1974] S.C.R. 419.

<sup>3</sup> *Buckerfield’s Ltd.* at para. 10.

<sup>4</sup> Subsection 256(5.1), which applies for taxation years commencing after 1988. The standard applies only where the expression “controlled, directly or indirectly in any manner whatever” is used.

For these reasons, I conclude that the object, spirit and purpose of subsection 111(5) is, at least in part, to restrict the use of specified losses, including non-capital losses, if a person or group of persons has acquired actual control over the corporation's actions, whether by way of *de jure* control or otherwise.<sup>5</sup>

By substituting the New Actual Control Standard for the well-understood *de jure* control standard, the FCA Decision encroached on a fundamental aspect of the concept of control—its clarity in application. Unlike the *de jure* control test, which has been subject to decades of jurisprudence, and the *de facto* control test, which has been codified in the Act for over 30 years, this New Actual Control Standard was introduced with essentially no definition or description. The FCA Decision provided no guidance other than to acknowledge that the New Actual Control Standard includes forms of *de jure* and *de facto* control.<sup>6</sup> This is inadequate guidance for taxpayers seeking to interpret and apply this novel standard.

TEI is concerned about the uncertainty created by the FCA Decision, which introduced the New Actual Control Standard without defining its parameters. If the New Actual Control Standard defines the object, spirit, and purpose of subsection 111(5), even though the text of the provision is limited to *de jure* control, then it's possible to envision similar applications of the New Actual Control Standard to other provisions in the Act with *de jure* control standards.

Examples of the far-reaching technical uncertainty caused by the FCA Decision and its New Actual Control Standard include the following.

- Businesses will not know how to assess those regimes in the Act that apply rights and restrictions on the basis of whether an entity is controlled by another entity. It is unclear how the New Actual Control Standard could impact or alter this assessment. The scope of application of rules in the Act applicable to large multinational corporations (e.g., the controlled foreign affiliate regime) and to small Canadian businesses (e.g., the Canadian-controlled private corporation regime and entitlement to the small business deduction) is now less clear.
- Foundational rules respecting the computation of business taxes require the ability to determine when control of a corporation has been acquired. It is unclear how to assess these rules in the wake of the FCA Decision and its New Actual Control Standard. Examples of where the New Actual Control Standard would create uncertainty include:

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<sup>5</sup> FCA Decision at para. 93.

<sup>6</sup> See FCA Decision at para. 83.

- when non-capital losses,<sup>7</sup> scientific research expenses<sup>8</sup> and investment tax credit pools,<sup>9</sup> undeducted Part I tax credits, and unused surtax credits<sup>10</sup> are streamed to income from the same business or a similar business;
  - when depreciable property with inherent losses will be written down to fair market value (“FMV”) and doubtful debts will be written down;<sup>11</sup>
  - when properties with inherent capital losses will be written down to FMV and inherent capital losses triggered;<sup>12</sup>
  - whether foreign currency losses on debts payable are triggered;<sup>13</sup>
  - whether resource pools are streamed to income or proceeds of disposition from the resource properties owned;<sup>14</sup> and
  - whether there has been a deemed taxation year end.<sup>15</sup>
- Businesses will not have clarity on whether they are subject to certain regimes in the Act whose application is dependant on whether entities are related, as the concept of “related” is currently based on the *de jure* control standard.<sup>16</sup> This uncertainty would extend to the qualification for and computation of certain subsidies, like CEWS,<sup>17</sup> and incentives, like the small business deduction and investment tax credits.<sup>18</sup>

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<sup>7</sup> Subsection 111(5).

<sup>8</sup> Subsections 37(1)(h) and 37(6.1).

<sup>9</sup> Paragraphs (j) and (k) of the definition of “investment tax credit” in subsections 127(9), (9.1), and (9.2).

<sup>10</sup> Subsections 181.1(7) and 190.1(6).

<sup>11</sup> Subsections 111(5.1) and 111(5.3). The amount written down is generally deductible in the year of the acquisition of control with any resulting loss treated in the same manner as other non-capital losses following the acquisition of control.

<sup>12</sup> Subsection 111(4).

<sup>13</sup> Subsection 111(12).

<sup>14</sup> Subsection 66.7(10).

<sup>15</sup> Subsection 249(4)(a).

<sup>16</sup> Subsection 251(2).

<sup>17</sup> Certain rules in the Canada Emergency Wage Subsidy apply based on whether entities are part of an affiliated group, which includes corporations that are controlled (both *de jure* and *de facto*) by the same person.

<sup>18</sup> Entitlement to the small business deduction (subsection 125(2)–(4)) and certain enhanced investment tax credits (subsection 127(10.2)–(10.4)) is shared by associated corporations. Whether two entities are associated is based on an expanded *de facto* control standard set out in subsection 256(1).

- Businesses will have less certainty that rules understood to apply only between non-arm's length persons do not apply to commercial transactions undertaken by them.<sup>19</sup> That is, related persons are deemed not to deal at arm's length, and the concept of related is based on the *de jure* control standard.
- The permissibility of the deduction under subsection 112(1) for deemed inter-corporate dividends between related corporations is now less clear. That is, the exception to subsection 55(2) in paragraph 55(3)(a) does not apply where, *inter alia*, there are certain dispositions to unrelated persons.
- Businesses do not know if and how the New Actual Control Standard might apply to joint ventures and partnerships.

These technical uncertainties resulting from the FCA Decision give rise to adverse business risk and could render incentive regimes less effective, as described below.

- The uncertainty around the application of various technical rules in the Act gives rise to incremental business risk, which could derail economically beneficial investment in Canada. For example, the uncertainty around if and how the New Actual Control Standard might apply to joint ventures and partnerships could unnecessarily hinder—and may ultimately derail—otherwise economically beneficial joint projects of significant scale in Canada.
- The uncertainty could also hinder the ability of Canadian businesses to raise capital, find investment, and transact with parties that may request some level of commercial or corporate influence over their business as a condition of investment, even in cases where such levels of influence fall short of the existing control tests.
- The uncertain application of the New Actual Control Standard creates administrative complexity that will consume scarce business investment resources that could be better deployed elsewhere.
- The uncertain application of the New Actual Control Standard will consume scarce judicial resources as taxpayers and the Canada Revenue Agency grapple with how to apply this ill-defined new standard.

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<sup>19</sup> For example, subsection 69(1) deems FMV proceeds to arise on transfers of property between persons not dealing at arm's length. The benefit conferral provisions in subsections 56(4) and 246(1) also potentially apply to parties not dealing at arm's length.

- The scope of potentially relevant documentation required for due diligence in ascertaining whether the New Actual Control Standard might apply in mergers and acquisitions could derail economically beneficial transactions.
- The movement of cash between Canadian corporations within a Canadian corporate group, which is desirable for business efficacy, could be further constrained as the availability of the deduction under subsection 112(1) for inter-company deemed dividends is now subject to further uncertainty.
- With the qualification and computation of incentive regimes less certain, the effectiveness of these regimes in inciting small businesses to conduct scientific research and experimental development could decrease.

**Guidance from the Supreme Court of Canada regarding the New Actual Control Standard is required to avoid adverse uncertainty for Canadian businesses caused by the FCA decision**

In the wake of the FCA Decision, additional guidance is needed from the Supreme Court of Canada regarding the meaning, formulation, and applicability of the New Actual Control Standard as a new control standard in the Act. TEI is deeply concerned about the adverse business risks created by the FCA Decision, which could hinder economically beneficial investments and transactions in Canada. TEI is similarly concerned about the potential for increased, unproductive use of scarce taxpayer and judicial resources to address the uncertainties caused by the ill-defined New Actual Control Standard.

For all these reasons, TEI strongly supports Deans Knight's application for leave to appeal the FCA Decision to the Supreme Court of Canada.

\* \* \*

These comments were prepared under the aegis of TEI's Canadian Income Tax Committee, whose Chair is Patricia Likogiannis. Watson M. McLeish, Tax Counsel for TEI, coordinated their preparation. If you have questions about TEI's comments, please contact Ms. Likogiannis at (905) 431-4565 or [patricia.likogiannis@gm.com](mailto:patricia.likogiannis@gm.com), or Mr. McLeish at (202) 470-3600 or [wmcleish@tei.org](mailto:wmcleish@tei.org).

Respectfully,



Mitchell S. Trager  
International President

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

**DEANS KNIGHT INCOME CORPORATION**

**APPELLANT**  
(Respondent in the  
Federal Court of Appeal)

- and -

**HER MAJESTY THE QUEEN**

**RESPONDENT**  
(Appellant in the  
Federal Court of Appeal)

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**MEMORANDUM OF ARGUMENT OF THE PROPOSED INTERVENER,  
TAX EXECUTIVES INSTITUTE, INC.**

(Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*, SOR/2020-156)

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## PART I - STATEMENT OF FACTS

### A. Overview

1. This appeal is about whether the Federal Court of Appeal erred by introducing a novel ‘actual control’ standard in determining whether there has been an acquisition of corporate control for the purposes of the loss restriction rules in the *Income Tax Act*.<sup>1</sup> As the leading association of in-house tax professionals globally, Tax Executives Institute, Inc. (“TEI”) has a genuine interest in this appeal, which will have significant implications to the business community as a whole and on the practical administration of the *Income Tax Act*.

2. TEI represents tax executive and management professionals from across the Canadian economy and, as such, is uniquely situated to provide the Court with vital context about the deleterious impact of the Federal Court of Appeal’s approach on the conduct of the tax function within businesses across Canada.

3. TEI’s Canadian members are responsible for advising their employer companies regarding the availability and treatment of corporate tax attributes, including those that qualify for sharing within their corporate groups. TEI’s Canadian members are also charged with advising on the effective movement of funds within the corporate group, including funds for paying corporate obligations and dividends to shareholders. These decisions not only have serious commercial implications but may also involve material penalties under the *Income Tax Act*, including for officers and directors of public companies who have obligations to provide precise financial disclosure to the market.

4. “Control” is foundational to the definition of various forms of inter-corporate relationships tested in the *Income Tax Act*. Corporations under common control typically share tax attributes. Conversely, the acquisition of corporate control by a new person or group of persons typically results in the deferral, denial, or streaming of pre-existing corporate tax attributes. Control is key to most of the legislative schemes in the *Income Tax Act*.

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<sup>1</sup> RSC 1985, c 1 (5th Supp), as amended.

5. The Federal Court of Appeal chose not to undertake the control analysis within the framework of the well-established principles for an acquisition of voting control at the shareholder level (commonly referred to as *de jure* or legal control).

6. The Federal Court of Appeal's approach is of serious concern to TEI's Canadian members in carrying out their duties of interpreting, applying, and complying with the obligations imposed on them and their employers by the *Income Tax Act*. TEI seeks leave to intervene so as to fully sensitize this Court to the considerable difficulties caused for TEI's Canadian members—and the companies they serve—by the Federal Court of Appeal abandoning a standard that has stood at the foundation of the *Income Tax Act* for decades.

## **B. Proposed Intervener**

7. TEI is the preeminent association of in-house tax professionals worldwide, with 57 chapters across North and South America, Europe and Asia, including four chapters in Canada: Montréal, Toronto, Calgary, and Vancouver.<sup>2</sup> TEI is dedicated to the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimization of administration and compliance costs to the mutual benefit of governments and taxpayers.<sup>3</sup>

8. TEI's approximately 6,500 individual members represent nearly 2,800 of the world's leading companies. Over 15% of TEI's members are tax professionals who work for Canadian businesses in a cross-section of industries across the country.<sup>4</sup>

9. TEI's Canadian Income Tax Committee comprises approximately 30 senior in-house tax professionals employed by Canadian business representing a diverse range of industries, and is responsible for spearheading TEI's advocacy and educational activities in respect of Canadian federal income tax matters.<sup>5</sup>

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<sup>2</sup> Affidavit of Patricia Likogiannis, made June 30, 2022 (the "**Likogiannis Affidavit**") at para 7; Affidavit of Watson McLeish, made June 30, 2022 (the "**McLeish Affidavit**") at para 8.

<sup>3</sup> McLeish Affidavit at para 10.

<sup>4</sup> Likogiannis Affidavit at para 8-10; McLeish Affidavit at para 9.

<sup>5</sup> Likogiannis Affidavit at para 11-12.



10. Consistent with TEI's mission and principles, TEI's advocacy work focuses primarily on issues of tax policy and administration that are of concern to a broad, cross-industry segment of TEI's membership, and on which TEI can provide responsive, practical, and consensus-based recommendations to address them.<sup>6</sup>

## **PART II - QUESTION IN ISSUE**

11. The issue on this motion is whether TEI should be granted leave to intervene.

## **PART III - ARGUMENT**

### **A. The criteria for granting leave**

12. Leave to intervene is granted where a prospective intervener has a real interest in the appeal and will make useful submissions from a different perspective than the other parties.<sup>7</sup>

13. The standard for an "interest" is flexible. Any interest in an appeal is sufficient, subject always to the Court's discretion.<sup>8</sup> Intervener status should be granted to a proposed intervener who can "present argument from a different perspective with respect to some of the issues" raised in an appeal.<sup>9</sup> An intervention "is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue."<sup>10</sup>

14. TEI meets these criteria.

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<sup>6</sup> Likogiannis Affidavit at para 13-14.

<sup>7</sup> *Reference re Workers' Compensation Act, 1983 (Nfld)*, [\[1989\] 2 SCR 335](#) at 339, per Sopinka J [*Reference re Workers' Compensation Act*].

<sup>8</sup> *Norcan Limited v Lebrock*, [\[1969\] SCR 665](#) at 666, per Pigeon J; *Reference re Workers' Compensation Act*, *supra* note 7 at 339; *R v Finta*, [\[1993\] 1 SCR 1138](#) at 1142, per McLachlin J (as she then was).

<sup>9</sup> *Norberg v Wynrib* (1991), [\[1992\] 2 SCR 224](#) at 225, per Sopinka J.

<sup>10</sup> *Reference re Workers' Compensation Act*, *supra* note 7 at 340.

**B. TEI's real interest in the appeal**

15. TEI has a genuine interest in this appeal, the disposition of which will have a significant impact on the administration of the *Income Tax Act*. TEI has a demonstrated historical and current interest in fostering a tax system that works—one in which taxpayers can comply in a reasonably cost-efficient and confident manner.<sup>11</sup>

16. The appeal concerns the Federal Court of Appeal's introduction of a novel 'actual control' concept in determining whether a transaction has abused the loss restriction regime.<sup>12</sup> This 'actual control' concept is not contemplated in the *Income Tax Act* and is undefined in the jurisprudence.

17. TEI is concerned that this introduction of a novel and inchoate concept will penetrate beyond the loss restriction regime and jeopardize other regimes in the *Income Tax Act* that rely on control. These regimes include the statutory schemes for whether:

- (a) inherent losses in capital property, depreciable property, and doubtful debts will be triggered and recognized for tax purposes;
- (b) resource tax expenses, scientific research expenses, and investment tax credits are streamed or expire;
- (c) payment of accrued expenses must be accelerated within a corporate group;
- (d) there has been a deemed tax year-end within a corporate group, triggering substantial tax compliance and reporting obligations;
- (e) companies are related and therefore share tax attributes with each other, or are deemed not to deal at arm's length with each other for various purposes;
- (f) a foreign subsidiary is a "controlled foreign affiliate" for the purposes of the foreign affiliate regime;<sup>13</sup> and
- (g) inter-corporate dividends may be paid tax free between Canadian corporations.<sup>14</sup>

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<sup>11</sup> McLeish Affidavit at para 10; Likogiannis Affidavit at para 19-22, 27.

<sup>12</sup> *Canada v Deans Knight Income Corporation*, [2021 FCA 160](#) at para 72-93.

<sup>13</sup> See e.g., *Canada v Loblaw Financial Holdings Inc*, [2021 SCC 51](#) at para 29-30.

<sup>14</sup> Likogiannis Affidavit at para 23; TEI Letter (Oct. 1, 2021), McLeish Affidavit, Ex. A.

18. TEI is also concerned that the Federal Court of Appeal's decision to disregard the foundational judicial and statutory test for control will have a detrimental impact on Canadian businesses, including:

- (a) introducing incremental business risk, which could hinder the ability of Canadian corporations to raise capital and attract investment in a competitive global market;
- (b) increasing the complexity of, and the documentation requirements for, mergers and acquisitions and treasury operations among members of a corporate group;
- (c) creating administrative complexity that will consume scarce business investment resources that could be better deployed elsewhere; and
- (d) reducing the effectiveness of targeted incentive regimes, such as those for the conduct of scientific research and experimental development.<sup>15</sup>

**C. TEI brings a different and useful perspective**

19. TEI has the expertise and track record necessary to make a “useful submission” and assist the Court in this appeal. The “useful submission” criterion is “easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter.”<sup>16</sup>

20. TEI meets this criterion, as it has extensive experience advocating in Canada in respect of Canadian federal income tax matters, including through organizing annual roundtable meeting with senior tax policy and administration officials at the Department of Finance and Canada Revenue Agency and delivering written advocacy submissions concerning significant tax legislative, regulatory or administrative proposals.<sup>17</sup>

21. In the United States, TEI has a history of responsible advocacy as *amicus curiae* in tax disputes before various courts of appeal, including the Supreme Court of the United States.<sup>18</sup>

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<sup>15</sup> Likogiannis Affidavit at para 24; TEI Letter (Oct. 1, 2021), McLeish Affidavit, Ex. A.

<sup>16</sup> [Reference re Workers' Compensation Act](#), *supra* note 7 at 340.

<sup>17</sup> Likogiannis Affidavit at para 11, 13-18.

<sup>18</sup> McLeish Affidavit at para 14.

22. In Canada, as in the United States, TEI is recognized as the foremost association of in-house tax professionals, representing a diverse cross-section of business sectors from across the country. TEI is uniquely well positioned to provide the Court with vital context, including the extent to which established standards of control permeate legislative schemes throughout the *Income Tax Act* and the potential impact of the Federal Court of Appeal's decision on commercial transactions, tax reporting complexity, treasury management efficiency, and financial disclosure precision.<sup>19</sup>

23. TEI's track record as a responsible public interest advocate in tax matters is well established. TEI will provide the Court with a balanced perspective rooted in practical experience, without taking a position on the facts or outcome of the appeal; TEI will assist the Court in its analysis of the relevant legal principles in a manner consistent with TEI's commitment to supporting the uniform application and interpretation of tax laws.<sup>20</sup>

#### **D. Overview of TEI's proposed submissions**

24. TEI's Canadian members have senior management responsibility for tax within each of their organizations and typically work closely with the chief financial officer and general counsel. TEI's Canadian members are primarily responsible for:

- (a) ensuring corporate compliance with tax obligations;
- (b) implementing commercial transactions in a fiscally-prudent manner;
- (c) reporting to shareholders on the precise tax implications of those transactions; and
- (d) certifying the tax reporting required under the *Income Tax Act*.

25. TEI's Canadian members are also charged with advising their corporate employers on what tax attributes remain available or may be shared within the corporate group, as well as the effective movement of funds within the corporate group, including for the satisfaction of corporate obligations and for the payment of dividends.

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<sup>19</sup> Likogiannis Affidavit at para 7-10, 19-22, 28.

<sup>20</sup> Likogiannis Affidavit at para 16, 32; McLeish Affidavit at para 17.

26. Specifically, TEI's Canadian members are required to manage and assess tax risk and compliance for:

- (a) transformational transactions, such as mergers and acquisitions, significant divestitures (such as spin-offs), internal reorganizations in Canada and in foreign affiliates, and public securities offerings; and
- (b) ordinary course business decisions, such as recognizing tax attributes, managing the treasury function (including the payment of intercorporate dividends), and determining eligibility for certain incentive programs.

27. In so doing, TEI's Canadian members must rigorously examine and assess each of the various control relationships that Parliament has prescribed in the *Income Tax Act*—legislation that is premised on careful and deliberate distinctions between legal control, statutorily deemed legal control, and factual control.

28. Prior to the Federal Court of Appeal's decision, it was settled law that control of a corporation is acquired when a person, or group persons with a common connection, gains voting control at the shareholder level.<sup>21</sup> This test for control, often referred to as “*de jure*” or legal control, mirrors the test found in various corporate statutes,<sup>22</sup> has been accepted as the governing standard by Canadian courts for decades,<sup>23</sup> and has benefited from certainty of application both within corporate groups and in commercial transactions between unrelated corporations.

29. “Control” is foundational to the definition of various forms of inter-corporate relationships for the purposes of numerous legislative schemes in the *Income Tax Act*, including determining when corporations are “related”, “associated”, “affiliated”, or “connected”.<sup>24</sup>

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<sup>21</sup> *Vina-Rug (Canada) Limited v Minister of National Revenue*, [1968] SCR 193; *Silicon Graphics Ltd v Canada*, 2002 FCA 260, [2003] 1 FC 447 at para 21-22.

<sup>22</sup> See e.g., *Canada Business Corporations Act*, RSC 1985 c C-44, s 2(3).

<sup>23</sup> *Buckerfield's Ltd v Minister of National Revenue* (1964), [1965] 1 Ex CR 299 at 302-03, adopting *British-American Tobacco Co, Ltd v Commissioners of Inland Revenue* (1942), 29 TC 49 at 68, [1943] 1 All ER 13 at 15 (UKHL), a conclusion reconsidered and affirmed in *Duha Printers (Western) Ltd v Canada*, [1998] 1 SCR 795 at para 35.

<sup>24</sup> As defined in subsections 251(2), 256(1), 251.1 and 186(4) of the *Income Tax Act*, respectively.

30. Corporations under common control may share tax attributes; conversely, the acquisition of corporate control by a new person or group of persons typically results in the deferral, denial, or streaming of pre-existing corporate tax attributes.<sup>25</sup> As such, control is a key component of many restrictive rules in the *Income Tax Act*.

31. TEI proposes to provide the Court with essential context about the various legislative schemes in the *Income Tax Act* that are premised upon careful and deliberate distinctions between legal control, statutorily deemed legal control, and factual control.<sup>26</sup> TEI's perspective is that these distinctions in the legislative schemes strike a delicate balance without eliminating the distinction between legal and factual control, whereas the Federal Court of Appeal has eviscerated those distinctions with the introduction of the 'actual control' standard.

32. TEI is very concerned that under the Crown's approach legal control does not have a single, unified meaning for purposes of the *Income Tax Act*, but rather the meaning changes depending on the context of the transaction.<sup>27</sup> If adopted, the Crown's approach would result in control being applied to transactions on a discretionary and circumstantial basis, dramatically impairing confidence in tax outcomes and precision in the associated financial reporting. For obvious reasons, this would not be sustainable for TEI members, their employers, or the wider Canadian business community.

33. If granted leave to intervene, TEI will endeavour to dispassionately inform this Court about the practical difficulties the Federal Court of Appeal's decision, and the Crown's interpretation thereof, will cause for Canadian corporations. TEI will provide important context about how the introduction of a novel and inchoate concept, without history in the jurisprudence or legislation, has serious commercial implications and exposes companies and their directors and officers to the potential imposition of material penalties under the *Income Tax Act*.

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<sup>25</sup> See e.g., Canada Revenue Agency, *Income Tax Technical News, No 30* (21-May-2004) at ["Corporate Loss Utilization Transactions"](#); *Income Tax Act*, s 66.7, 111(4)-(5).

<sup>26</sup> See e.g., the detailed legislative code in subsection 256(7) of the *Income Tax Act* for the statutorily deemed acquisition of legal control in circumstances involving widely held corporations where an acquisition of voting control would not otherwise apply.

<sup>27</sup> Crown's memorandum of argument on application for leave at para 28, 65.

34. TEI acknowledges that the proper administration of the *Income Tax Act* includes curtailing abusive tax avoidance, and that taxpayers should not be permitted to abuse the concept of control to undermine the loss restriction regime. However, TEI is concerned that the Federal Court of Appeal's approach to control under the general anti-avoidance rule (the "GAAR") fundamentally departs from the standard contemplated in the *Income Tax Act*, risking an inconsistent application of tax legislation across taxpayers.

35. TEI's position is that the GAAR analysis must be undertaken in harmony with the legislative framework of the *Income Tax Act* and the established body of common law interpreting that framework. The GAAR requires that *abusive transactions be recharacterized* to determine the appropriate tax consequences under the legislative test, but is not designed or intended to *rewrite the legislative test* selected by Parliament.

36. TEI will suggest an approach to the interpretation of the GAAR that can provide Canadian corporate taxpayers the confidence required to undertake commercial transactions, while respecting Parliament's objective of preventing abusive tax avoidance. The proposition that control be applied in a manner that is discretionary and circumstantial is untenable. Canadian businesses and their officers, directors, and shareholders must be in a position to trust that the interpretation of such a fundamental aspect of Canadian law is not at the discretion of a Canada Revenue Agency auditor.

37. In summary, if granted leave to intervene, TEI will assist the Court by presenting an objective, balanced approach to the central issues in this appeal, namely:

- (a) the extent to which shareholder-level voting control is repeatedly reflected as a deliberate policy choice underlying the schemes of the *Income Tax Act*;
- (b) the need for certainty of the principles applicable to determining control for tax purposes, including for financial reporting to shareholders; and
- (c) applying the GAAR in a manner that curtails abusive tax avoidance, without undermining the well-established principles on which the schemes of the *Income Tax Act* rely.<sup>28</sup>

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<sup>28</sup> Likogiannis Affidavit at para 29-30.

#### **PART IV - SUBMISSIONS ON COSTS**

38. TEI does not seek costs of this motion and asks that it not be liable to pay the costs of any party or intervener. If granted leave to intervene in this appeal, TEI will not seek costs in respect of the intervention and asks that it not be liable to pay the costs of any party or intervener.

#### **PART V - ORDER SOUGHT**

39. TEI respectfully requests that it be granted leave to intervene in this appeal on the following terms:

- (a) TEI shall be permitted to serve and file a factum not exceeding 10 pages by such date as directed by the Court;
- (b) TEI shall be permitted to make oral submissions not exceeding 10 minutes at the hearing of the appeal;
- (c) no costs will be ordered for or against TEI on this motion or the appeal; and
- (d) any further or other order that this Court may deem appropriate.

**DATED** at the City of Toronto, Province of Ontario this 30th day of June, 2022.



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Al Meghji, Edward Rowe,  
Joanne Vandale & Mark Sheeley

**Osler, Hoskin & Harcourt LLP**  
Lawyers for the Proposed Intervener,  
Tax Executives Institute, Inc.



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