

THE CANADIAN TAXPAYER

Editor: Arthur B.C. Drache, C.M., Q.C.

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Interest Relief and Undue Delays: The Tax Court Blocks a Low Blow by the CRA

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Interest which arose primarily because of undue delays in resolving an objection or an appeal or in completing an audit may be waived or cancelled by applying to the Minister of National Revenue for interest relief under [subsection 220\(3.1\)](#) of the *Income Tax Act*. The courts have held that a delay is unreasonable if three requirements are met:

- the delay in question has been longer than the nature of the process required, *prima facie*;
- the applicant and his counsel are not responsible for the delay; and
- the authority responsible for the delay has not provided satisfactory justification.¹

The burden of satisfying the Minister that these requirements have been met is onerous when the actions of the CRA constitute a failure to exercise due diligence (including a failure by management to adequately supervise).

Requests for interest relief are made in writing. The request must give the reasons for the cancellation or waiver as well as all relevant information and documents to support the validity of the claim. The taxpayer relief officer reviewing the claim will rely primarily on the auditor's report and the T2020 memo(s) to file. The guidelines to the officer state that these "should clearly explain all contact with the taxpayer and any delays on either the CRA or the taxpayer's part. When in doubt or if you have questions about the timeline or any other information in the auditor's report or the T2020 memo to file, **you should contact the auditor to clarify.**"²

When undue delay is attributable to a failure to exercise due diligence, it is unlikely that the auditor's report, the T2020, or any written or verbal response by the auditor

¹ *Conille v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 F.C. 33, 1998 CarswellNat 2788 at para. 23.

² Emphasis added. The CRA Taxpayer Relief Reference Guide, 2013-05 Taxpayer Relief Procedures Manual, para. 7.4.3.

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will contain a *mea culpa*. When, as is often the case, the request for interest relief has been preceded by complaints to the auditor or management, the auditor's report and the T2020 will likely contain a self-serving justification (implicitly sanctioned by the auditor's team leader and section manager who signed the report).

The taxpayer relief procedures do not provide a procedure for testing the accuracy of information provided by the auditor. The most effective method of doing so is to appeal to the Tax Court on the merits or to a superior court of the province in damages

before requesting interest relief. The credibility of the information provided by the auditor can then be challenged by examining him or her on discovery. The implied undertaking rule prohibits the taxpayer from using discovery testimony for any purpose other than the litigation with respect to which it was provided without permission of the court. Given the numerous public pronouncements by the CRA with respect to the importance of administrative transparency, one would expect the CRA to have no objection to the production of a transcript of discovery testimony in a request for interest relief. Object, however, is precisely what the CRA did in a recent request to the Tax Court for such permission. The basis of the objection was that the litigation having been settled, the Tax Court no longer had jurisdiction to relieve the taxpayer from the implied undertakings. Mr. Justice Archambault gave the objection short shrift, stating that he had no doubt about the jurisdiction of the court to do so given the Tax Court's jurisdiction over its own process.³ What is shocking is that CRA management instructed the Department of Justice to attempt to prevent the Minister from seeing the sworn testimony of an auditor who he is charged with supervising and to prevent him from considering evidence which should be considered in order to reasonably exercise the discretionary power to grant interest relief.⁴

The Statement of Defence by the CRA in a damage action instituted by the same taxpayer indicates that the objection to the production of the discovery transcript reflects a systemic obstructionist approach where undue delay is alleged.⁵ The following statements are particularly egregious as they imply that a taxpayer faced with CRA misconduct has an obligation to mitigate damages by withdrawing from the administrative dispute resolution process and having the dispute resolved by the courts (where CRA misconduct is not a factor):⁶

- 3 *Henro Holdings Corp. v. The Queen* (June 26, 2015, 2012-2729 (IT) GCTCC).
- 4 In objecting to the taxpayer's request for permission to produce discovery testimony in an application for interest relief, the CRA implicitly attempted to prevent the testimony from being considered by the Federal Court in a judicial review application. "It is trite law that in a judicial review application the only matter that should be considered is the material that was before the decision maker": *Ochapowace First Nation v. Canada (Attorney General)*, 2007 FC 920 at para. 9.
- 5 The damage action was settled contemporaneously with the Tax Court appeal.
- 6 See e.g. *Canada (Attorney General) v. Webster*, 2003 FCA 388, 2003 CarswellNat 3313, leave to appeal to the Supreme Court of Canada dismissed December 19, 2003, SCC file no. 30095.

Throughout the audit, the Plaintiff tried to convince the Defendant not to issue the proposed reassessment and essentially turned the process into the hearing of the appeal for the proposed reassessment. Notwithstanding that the Plaintiff had the right to file a notice of objection to the Tax Court of Canada much sooner since the Appeals Division had not rendered a decision within 90 days of filing of the notices of objection, the Plaintiff only filed a notice of appeal in the Tax Court of Canada

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Liberals Cost Their Promises

Three weeks before election day the Liberals came out with a (sort of) detailed document about the costing of their promises and their economic game plan.¹ We say “sort of” because like the NDP the prior week, the document gives us a lot of detail but far from a comprehensive picture. But as we said about the NDP document, we don’t expect the equivalent of a 400-page budget document in the midst of a campaign.

We all knew from the start that the Liberals promise to run three years of deficits. Here is the overall synopsis:

Our plan includes measures that, according to Department of Finance multiplier projections, will have positive impacts on economic growth, particularly infrastructure investment and measures for lower-income Canadians. This new economic growth would in turn improve the fiscal position of the federal government. With our plan’s level of investment, this would translate

into additional billions per year for the fiscal bottom line. While these improvements to the bottom line would be material, consistent with Department of Finance practices, we have not included them in our planning framework.

The Liberal accounting includes two key differences from the practice used in the Conservative government’s April budget.

The Liberals argue that the April budget’s revenue forecasts are now out of date in light of lower-than-expected economic growth. The Liberal numbers are instead based on July numbers from the Bank of Canada and the Parliamentary Budget Officer. This decision shaves \$4.9 billion over four years compared to the assumptions in the budget.

However, the Liberals are also suspending the practice of including a contingency fund in the budget forecasts for the next three years. It will bring back a contingency of \$1 billion in the final year, which the party is also booking as a surplus. Without including the contingency, the Liberal platform projects a budget that balances exactly that year, with neither a surplus nor a deficit. In contrast, the April budget included contingencies of \$1 billion a year for the next two years, followed by a \$2-billion contingency in 2018-19 and \$3 billion in 2019-20.

However the party faced criticism over its plan to save billions through an internal spending review. The plan books \$6.5 billion over four years from this initiative, ramping up gradually to \$3 billion in ongoing savings by the fourth year. The plan is not precise as to where these savings will be found. It lists potential examples such as ending various tax credits, “significantly reducing” spending on government advertising and setting a cap on how much can be claimed through

¹ <https://www.liberal.ca/files/2015/09/The-Liberal-fiscal-plan-and-costing.pdf>.

Planning Framework	2016/17	2017/18	2018/19	2019/20
April Finance forecast (including contingency)	2,700	3,600	4,600	7,800
Estimated impact of reduction in economic growth	- 2,100	- 1,400	- 1,200	- 200
Revised forecast (PBO 2016/17–2017/18) + projection	600	2,200	3,400	7,600
New revenue	23,939	26,611	28,258	29,756
New investment announced	33,262	35,952	34,819	35,001
Measures not yet announced	1,170	2,375	2,557	1,355
Planning framework with Liberal plan for growth	- 9,893	- 9,516	- 5,718	1,000
Federal debt-to-GDP	30%	29%	28%	27%

stock option tax deductions. The party says it is not planning cuts to the public service.

Here are some specifics:

Our projection is based on a Library of Parliament analysis which determined that a new tax bracket of 33 percent on individual incomes in excess of \$200,000 would have increased revenue in 2014 by \$3.24 billion. With inflation, that estimate increases to approximately \$3.4 billion by 2016/17. ... We will increase enforcement resources for the CRA to ensure tax liabilities are collected. However, we have also included a prudence factor of \$600 million in our estimates. We project revenue of \$2.8 billion in 2016/17, rising to \$3.0 billion in 2019/20.

[O]ur priorities reflect the changes that are needed after ten years of Harper's Conservative government. These include:

- Significantly reducing the advertising budget of the government of Canada, and ending the use of government advertising for partisan activities.
- Conducting an overdue and wide-ranging review of the over \$100 billion in increasingly complex tax expenditures that now exist, with the core objective being to look for opportunities to reduce tax benefits that unfairly help those with individual incomes in excess of \$200,000 per year.
- [Setting] a cap on how much can be claimed through the stock option deduction. The Department of Finance estimates that 8,000 very high-income Canadians deduct an average of \$400,000 from their taxable incomes via stock options. ... Stock options are a useful compensation tool for start-up companies, and we would ensure that employees with up to \$100,000 in annual stock option gains will be unaffected by any new cap.
- As we reduce the small business tax rate to 9 percent from 11 percent, we will ensure that Canadian-Controlled Private Corporation (CCPC) status is not used to reduce personal income tax obligations for high-income earners rather than supporting small businesses.

As we often say, readers who want to get the full flavour of the document can read it for themselves. If, as and when the Liberals form or are a part of government, it will be required reading.

NDP Backs Down Somewhat on Stock Option Pledge

In a letter to a couple of high tech executives, NDP leader Thomas Mulcair has softened his high-profile promise to repeal what he referred to as a “loophole” with regard to the preferential tax treatment of stock options.¹

In an article in the *Globe and Mail* about the letter, Mulcair seems to suggest that the proposal was being modified to some extent.

In the letter dated September 25 to Ryan Holmes, CEO of Vancouver-based social media management firm Hootsuite Media Inc. and Tobi Lutke, CEO of Ottawa-based retail software firm Shopify Inc., Mulcair clarified that his party's plans to fully tax gains by senior corporate executives from exercising stock options “excludes options granted by early stage companies”. Mr. Mulcair added: “We will work with technology industry leaders to establish fair guidelines that protect these companies and their employees and support entrepreneurship and innovation.”

Mr. Holmes and Mr. Lutke, leaders of two of Canada's most successful emerging tech companies, had told the *Globe and Mail* that the NDP's plans would harm the country's startup ecosystem. They said options are vital for young tech companies that need to attract employees and are challenged by a lack of money and a much greater risk of failure than established firms. Employees accept lower pay and greater risk in the hopes that the stock options they receive could translate into valuable equity down the line. The CEOs said by fully taxing options gains, it would be harder to recruit employees, and that neither of their companies could have achieved their current success, including the ability to hire hundreds of employees each, if such a regime had been in place.

In his letter, Mr. Mulcair thanked the two for the points they raised in the *Globe* story, and promised the party would “work with leaders in the tech and innovation

¹ In our original story about the proposal, we made the point that this provision was not a “loophole” which means an unintended result of legislation. See page 145 of this volume of *The Canadian Taxpayer*.

sector to ensure the success of the next generation of Canadian start-ups". In the Liberal costing document² the party also referenced stock options but had a much more nuanced approach than the original NDP position.

Lutke said in an interview that he was "very impressed with the swiftness of the response and by how [the NDP] engaged on this issue. I think this is a very good sign the formation of start-ups is an issue that has made it into campaign offices."

Canada's venture capital sector has been an economic success story, attracting high levels of financing even as the economy faces volatility and stock markets have slumped. In the first half of 2015, completed venture capital deals totalled \$939 million, up 23 percent over the same period last year, according to the Canadian Venture Capital & Private Equity Association.

Meanwhile, another election promise by the NDP is still sending negative ripples through the startup community: a promise to restore tax credits for labour-sponsored venture funds, a policy tool of past governments that policy experts say resulted in a squandering of government funds with no meaningful creation of jobs or investment returns. But when the Liberals came out with their costing plans, they seemed to indicate that they too would support the return of the tax credit.

² See page 155 in this issue.

Tax Lock Promise Another Sop to the Ignorant

Prime Minister Harper seems to have a penchant for announcing legislative changes which have absolutely no value except to appeal to the credulous.

We had fixed election date legislation which we discovered was only used when it suited the Prime Minister. We have legislation prohibiting deficits which recent Canadian experience shows (at the various provincial levels) means less than nothing.

And now we have something he called "tax lock" legislation.

Harper announced on September 25 that a re-elected Conservative government will pass legislation imposing a "tax lock" that prohibits increases to federal income taxes and sales taxes, and new, discretionary payroll taxes, over the next four years. The Prime Minister said:

Our Conservative government believes in lowering taxes because we know that tax money belongs to Canadians, not the government. We have a proven record of reducing taxes on hardworking Canadians and job-creating businesses, and a plan to lower them further. This pledge backs our low-tax commitment with the force of the law.

Harper noted that his tax lock legislation would prohibit any increase to personal or business income tax rates, the GST, and new, discretionary payroll tax increases like those being promised by the Liberals and NDP for the next four years. He also reiterated his plan to continue cutting taxes further for Canadians, including reducing payroll taxes by 20 percent, introducing a new, permanent Home Renovation Tax Credit, and providing significant tax relief to single and widowed seniors.

It was hard for even media announcers to keep a straight face when this announcement was made. Somebody asked us if this was a sign of desperation. Our response was "No. It is a sign of Harper's contempt for the ability of the 'average Canadian' to recognize BS when it is presented to him or her."¹

¹ We resisted the temptation to use the term "Boobus Canadiensis". H.L. Mencken used the term Boobus Americanus to describe a "complacent, lazy & stupid US citizen who votes for politicians based upon information proffered by government shills in the mainstream media, or for other vacuous reasons. This dolt not only doesn't understand the concept of 'limited government', but has never read The Constitution nor The Bill of Rights. He also believes his vote counts and that politicians are honest" (from www.urbandictionary.com).

Looming Senate Conundrum

In the event, which seems a distinct possibility, that the election produces a government which is either NDP, Liberal or more likely some combination of the two,¹ the issue of the Senate will loom as a real problem.

¹ We don't preclude the possibility that the Conservatives end up with the most seats on October 20...but find themselves unable to form a stable government.

By this we don't mean the perpetual question of reform or abolition (the latter being clearly the NDP's preferred option while the former is the preference of the Liberals) but the issue of how the governing party will handle getting legislation through a conceptually oppositional Senate.

Of course this has often been an issue in the past, most notably the infamous "kazoo Senate" which tried to block Brian Mulroney's GST legislation until he used an obscure provision to "pack" the Senate with newly minted Tories.

But the party taking power has always had a base in the Senate though often not a majority. To a great extent (aside from the example given) the Senate recognized the primacy of the House and tended not to try to thwart most legislative initiatives. And one might assume that given the hugely negative feelings in the country to this particular group of Senators, they would be politically savvy enough to keep their collective heads down when dealing with legislation.

Right now the status is that there are 105 seats in the Senate of which 22 are vacant.²

There are 47 Conservatives, 29 Liberals (who are not part of the Liberal Parliamentary caucus) and seven independents including Duffy, Wallin and Brazeau, all of who were *de facto* reinstated once Parliament was dissolved for the election.

There is no NDP Senator and of course Mr. Mulcair has taken the position that he would never appoint a Senator to a body which the party says is politically illegitimate.

But the fact remains that there is widespread understanding that any attempt to get rid of the Senate would be a hard fight and one likely to be lost. Attempts at reform (whatever that might be) could be possible but it would take time (likely years) to arrive at a consensus which would rest on provincial cooperation.

An NDP Prime Minister would be faced with the conundrum of getting legislation through the upper house with nary a spokesperson on board. It is true

that some deal might be struck where Liberal Senators could act in stead of the absent NDPers.

This leads to speculation about a coalition or more likely, in Trudeau's words, "an arrangement" between the parties³ which would include dealing with the issue of the Senate.

We would point out the obvious that if the NDP got over its antipathy (and power is a great help in such cases) to making Senate appointments and appointed 22 Senators, these along with the sitting Liberals would outnumber the Conservatives...meaning that a lot of power would rest with the independents who presumably would be "open minded" in the new situation.

As we write, the election finale is still weeks away but one can assume that as we get closer to October 19, some backroom people of both opposition parties will give consideration to any outcome other than an outright Conservative majority. And how to deal with the Senate will be on the list of priorities very quickly indeed.

³ We think of the arrangement between Bob Rae's NDP and David Peterson's Liberals in Ontario in the late '80s.

Employment Insurance Rates for 2016

The employment insurance rates for 2016 were released in mid-September, an event which would not merit much comment except for the fact that the Conservatives and the Liberals are squabbling as to whether the Liberal promise to cut the EI rate is actually a rate increase.

But as the official data contained in the government press release shows, the promise to keep the rate at \$1.88 per \$100 (the Conservative pledge) actually means lighter paycheques because the amount of earnings covered jumps.

The following is the unedited data provided by the Canada Employment Insurance Commission (CEIC).¹

² In part this is because the Prime Minister is loath to name any more given the overall public sentiment.

¹ See <http://www.esdc.gc.ca/en/reports/ei/premium/rates2016.page>.

Maximum insurable earnings:

- Section 4 of the *Employment Insurance Act* provides for the annual calculation of the MIE, which is the maximum annual amount of employment income on which EI premiums are paid by workers and their employers and for which benefits may be paid. **The MIE for 2016 is \$50,800**, up from \$49,500 in 2015.
- The MIE is indexed to the annual percentage increase in the average weekly earnings of the industrial aggregate in Canada, as published by Statistics Canada, to ensure that the level of income insured maintains its relative value.
- As a result of the MIE and premium rates for the year, the maximum amounts of premiums paid by workers and employers (per employee) for 2016 are shown in the table below.

	Premium rate (per \$100 of insurable earnings)	Maximum employee Premium	Difference in maximum employee premium from 2015
Workers	\$1.88	\$955.04	+\$24.44
Employers	$\$1.88 \times 1.4 = \2.632	\$1,337.06	+\$34.22
Workers in Quebec	\$1.52	\$772.16	+\$9.86
Quebec employers	$\$1.52 \times 1.4 = \2.128	\$1,081.02	+\$13.80

The self-employed:

- Self-employed individuals that have opted into the EI program in order to access EI special benefits pay the same premium rate as salaried employees and pay premiums up to the MIE.
- Eligibility for benefits is a key feature of the EI program and ensures that those who receive benefits have a minimum level of attachment to the workforce. Pursuant to section 152.07 of the *Employment Insurance Act*, a self-employed person who opted into the EI program may qualify for EI special benefits providing they meet prescribed requirements, which includes a minimum amount of self-employed earnings. **For 2016, the prescribed amount of self-employed earnings is \$6,820.**

- The level of earnings required by self-employed persons to be eligible for special benefits is indexed annually to the growth in the MIE to ensure that the level of self-employed earnings required to be eligible for special benefits maintains its relative value over time.

Premium Reduction Program:

- The *Employment Insurance Act and Regulations* also provide for premium reductions for employers who provide their employees with qualified wage-loss plans that meet certain requirements and reduce EI special benefits payable. There are four categories of qualified plans, and for each category a rate of reduction is calculated annually. The corresponding rates of reduction reflect the average rate of savings for EI generated by plans in each category. This is administered through the PRP.

In 2016, it is estimated that the reductions will provide registered employers and their employees with \$915 million in premium relief. The premium reductions are shown in the table below. Employers registered in the PRP will be notified individually, as individual premium reductions may vary.

- There are approximately 31,800 employers registered in the PRP, covering \$287 billion in insurable earnings.

	Category 1	Category 2	Category 3	Category 4
Premium reduction (per \$100 of insurable earnings)	\$0.20	\$0.35	\$0.34	\$0.37

OAS Quarterly Increase

While the quantum cannot compare to the monthly windfall given to families with youngish children, Canadian seniors can rejoice in the announcement that the quarterly benefit amounts for Old Age Security paid to people 65 years of age and older will increase by \$5.08 from \$564.87 to \$569.95 per month from October 1 to December 31, 2015. Payments under the Guaranteed Income Supplement (GIS), the Allowance and the Allowance for the Survivor will also increase by the same 0.9 percent for this quarter.

OAS benefit amounts are reviewed quarterly (in January, April, July and October) and revised as required to reflect increases in the cost of living, as measured by the Consumer Price Index set by Statistics Canada. The *Old Age Security Act* guarantees that OAS benefits can never be reduced, even when there is a decrease in the CPI. If the average CPI surpasses the previous level in the future, OAS benefits will go up again.

The basic OAS pension is paid to all persons aged 65 or over who meet the legal status and residence requirements. (No recent immigrants or refugees will get a penny.)

The benefits under the OAS program include the basic OAS pension, the GIS and the Allowances. The GIS provides additional benefits to low-income pensioners who have little or no income aside from the basic pension, and the Allowances provide benefits to low-income Canadians aged 60 to 64 who are the spouses or common-law partners of GIS recipients or who are widowed.

Type of Old Age Security benefit	Maximum monthly benefit rates October – December 2015	Previous quarter July – September 2015
Basic Old Age Security pension	\$569.95	\$564.87
Guaranteed Income Supplement*		
Single	\$772.83	\$765.93
Spouse/Common-law partner of		
• a non-pensioner	\$772.83	\$765.93
• a pensioner	\$512.44	\$507.87
• an Allowance recipient	\$512.44	\$507.87
The Allowances*		
• regular	\$1,082.93	\$1,072.74
• survivor	\$1,211.79	\$1,200.98

* These amounts include the GIS and the Allowances top-ups.

A Note on Timing

As so often happens with major breaking stories, the federal election this year falls on the same day that we would normally be sending copy for *The Canadian Taxpayer*.

We have arranged to delay production of the next issue of the *Taxpayer* so that at least a basic story on the outcome of the election will be carried.

Fuller and more detailed analysis will be in issue #22.