Docket: 2018-4823(GST)G

BETWEEN:

THE TORONTO-DOMINION BANK,

Appellant,

and

HIS MAJESTY THE KING,

Respondent,

and

THE RETAIL COUNCIL OF CANADA,

Proposed Intervener.

Motion heard on August 28, 2023 at Toronto, Ontario

Before: The Honourable Justice Don R. Sommerfeldt

Appearances:

Counsel for the Appellant:	Al Meghji Pooja Mihailovich
Counsel for the Respondent:	Craig Maw Natasha Tso Natasha Mukhtar
Counsel for the Proposed Intervener:	Richard Macklin Meaghan Coker

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ORDER

The Proposed Intervener's motion for leave to intervene in this Appeal is dismissed.

The question of costs is yet to be determined.

If the Appellant, the Respondent and the Proposed Intervener are unable to reach an agreement in respect of costs within 30 days from the date of this Order, the Appellant may, within the ensuing 30 days thereafter, file a written submission on costs, and the Respondent and the Proposed Intervener shall thereafter have a further 30 days to file their respective written responses. Any such submission or response shall be limited to fives pages in length.

Signed at Ottawa, Canada, this 31st day of October 2023.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2023TCC154
Date: 20231031
Docket: 2018-4823(GST)G

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REASONS FOR ORDER

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to the motion (the "Motion") by the Retail Council of Canada ("RCC") for leave to intervene in Appeal No. 2018-4823(GST)G (the "Appeal"), which was instituted by The Toronto-Dominion Bank ("TD") in 2018.

II. BACKGROUND

A. Background to the Appeal

[2] During the reporting periods in question, certain credit cards issued by TD to some of its customers allowed the cardholders to participate in the Aeroplan Mile Program (the "Aeroplan Program") operated by Aimia Canada Inc. ("Aimia"). Under the agreement between TD and Aimia, TD made payments that were

calculated by reference to the number of Aeroplan Miles accumulated by cardholders through credit card spending.[1]

[3] TD paid, and Aimia collected, the goods and services tax ("GST") or the harmonized sales tax ("HST"), as the case may have been, in respect of the above payments. In instituting the Appeal, TD asserted that it had paid Aimia for a supply of Aeroplan Miles, which constituted gift certificates (for the purposes of section 181.2 of the *Excise Tax Act*[2] (the "*ETA*")), such that the above GST/HST had been paid in error. TD seeks a rebate of that GST/HST.

[4] In opposing the Appeal, His Majesty the King (the "Crown") takes the position that the Aeroplan Miles were not gift certificates, with the result that TD did not pay GST/HST in error.[3]

B. **Background to the Motion**

[5] RCC is a not-for-profit association, which has approximately 2,000 members, who collectively have about 55,000 retail locations. Many of its members participate in a variety of loyalty rewards programs. Many retailers treat loyalty rewards as coupons (as partially defined in subsection 181(1) of the *ETA*), rather than as gift certificates. RCC is concerned that, if TD succeeds in the Appeal, the basis of those loyalty programs will be upended, which will have a dramatic change on the taxation rules related to retailers.[4]

[6] The Crown supports RCC's proposed intervention. In particular, the Crown submits that RCC meets the requirements for leave to intervene, that RCC's views may assist the Court in determining whether the supplies by Aimia to TD were supplies of gift certificates, and that, if the Court were to give a wide interpretation

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[1] Written Representations of The Toronto-Dominion Bank ("TD's Representations"), dated and filed August 21, 2023, p. 3, ¶7-8.
[2] *Excise Tax Act*, RSC 1985, c. E-15, Parts VIII and IX, as enacted by SC 1990, c. 45, and as subsequently amended.
[3] Amended Reply, filed October 11, 2022, p. 14-15, ¶28-31.
[4] Memorandum of Fact and Law of the Moving Party (Re: Motion to Intervene of the Retail Council of Canada) ("RCC's Memorandum"), dated and filed August 11, 2023, p. 1-2, ¶2-4; and Transcript of the Cross-Examination of Karl Littler on his Affidavit ("C/E Transcript"), held on July 20, 2023, p. 5, line 19 to p. 6, line 15. The page numbers of the C/E Transcript cited in these Reasons are the actual page numbers of that transcript, which are in the lower right-hand corner of each page, and not the page numbers in the bound Transcript Record of Retail Council of Canada (Moving Party), which are in the upper right-hand corner of each page. For brevity, I will refer to the various loyalty rewards programs simply as "loyalty programs".

or broad application to the term *gift certificate*, RCC's members could potentially be impacted.[5]

[7] In opposing RCC's proposed intervention, TD submits that:

a) the materials filed by RCC in support of the Motion do not indicate that RCC proposes to offer to the Court any insight on the character of Aeroplan Miles;

b) RCC seeks to expand the hearing of the Appeal into a wide inquiry relating to loyalty programs in general; and

c) the Appeal should be resolved on its own unique facts, such that it will not have the impact on other loyalty programs that RCC claims to be inevitable.[6]

III. **PROCEDURAL HISTORY**

A. **Procedural History of the Appeal**

[8] An abbreviated procedural history of the Appeal is as follows:

a) TD filed a Notice of Appeal on December 19, 2018.

b) The Crown filed a Reply on April 8, 2019.

c) On July 5, 2019, TD and the Crown (together, the "Parties") sent a joint letter to the Registrar of the Court, requesting that the Appeal be held in abeyance, until the appeal proceedings in respect of *Canadian Imperial Bank of Commerce v. The Queen*[7] were exhausted, given that "[t]he same substantive legal issue arises in this appeal …" and "there

[5] Respondent's Written Representations to Motion Brought by the Retail Council of Canada ("Crown's Representations"), dated and filed August 22, 2023, p. 2-4, ¶2, 8 & 10-11.
[6] TD's Representations, p. 2, ¶1-3 & 5.
[7] *Canadian Imperial Bank of Commerce v. The Queen*, 2019 TCC 79; affirmed, 2021 FCA 96.

are material facts and legal principles in issue in the current case which appear to be substantially similar to those in the CIBC … [c]ase….”

d) On October 22, 2021, the Court issued an Order setting a timetable to which the Parties had jointly agreed.

e) The Crown’s oral discovery of TD’s nominee occurred on December 14, 2021. TD satisfied its undertakings on February 14, 2022.

f) The questions for TD’s written discovery of the Crown’s nominee were provided to the Crown on December 15, 2021. The Crown’s nominee provided answers to those questions on February 14, 2022.

g) On March 7, 2022, TD sent a unilateral Memorandum Pursuant to Rule 123(3) and a letter to the Registrar of the Court, advising that the Crown would not agree to make a joint application under Rule 123(2), and applying to the Registrar to fix the time and place of hearing.

h) On March 7, 2022, the Crown sent a letter to the applicable Hearings Coordinator at the Court, advising of several reasons for which the Appeal was not ready to be set down for trial at that time.

i) The Crown filed an Amended Reply on October 11, 2022.

j) On October 27, 2022, the Parties filed a Joint Application for Time and Place of Hearing.

k) On April 11, 2023, the Court issued an Order, scheduling the commencement of the hearing of this Appeal for December 11, 2023, for an estimated duration of four days.

B. **Procedural History of the Motion**

[9] A concise procedural history of the Motion is:

a) On June 28, 2023, RCC filed a Notice of Motion for Leave to Intervene (the "Notice of Motion") and the supporting Affidavit of Karl Littler (the "Affidavit").

b) On July 20, 2023, counsel for TD cross-examined Mr. Littler in respect of the Affidavit.

c) The Motion was heard on August 28, 2023.

IV. **ISSUES**

A. **Issues in the Appeal**

[10] The Notice of Appeal describes the issue in the Appeal as follows:

> The issue in this Appeal is whether the Aeroplan Payments were consideration for Aeroplan's issuance or sale of a "gift certificate" as contemplated by section 181.2 of the *Act*.[8]

[11] In its Written Representations, TD describes the issues in the Appeal as follows:

> The principal issues as between TD and the Crown are as follows:
>
> a) Did TD pay Aeroplan [i.e., Aimia] for a supply of Aeroplan Miles? and
>
> b) Are Aeroplan Miles "gift certificates" under section 181.2 of the *Act*?[9]

[12] TD takes the position that "[t]he only actual supply made by Aeroplan to TD Bank under the Agreement was the issuance or sale of Aeroplan Miles, which constitute a 'gift certificate' under the *Act*."[10]

[13] The Amended Reply states that there are two issues in the Appeal, described as follows:

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[8] Notice of Appeal, filed December 19, 2018, p. 4, ¶18.
[9] TD's Representations, p. 3, ¶9.
[10] Notice of Appeal, p. 5, ¶20.

> The issues are as follows:
>
> a) Was ACI's [i.e., Aimia's] supply to the Appellant under the Affinity Program Agreement a taxable supply of promotional and marketing services?[11]
>
> b) Was ACI's supply to the Appellant a supply of Aeroplan Miles to the Appellant under the Program Agreement, and if so, was the supply a supply of "gift certificates" within the meaning of section 181.2 of the *Act*?[12]

[14] In the Crown's Representations, the Crown describes the second of the above two issues as follows:

> One of the issues in the present appeal concerns whether Aimia Canada Inc. ("ACI") made a supply of gift certificates to the Appellant as part of ACI's Aeroplan loyalty reward program, for which the Appellant is entitled to a rebate of tax paid in error.[13]

[15] In assessing TD, the Minister of National Revenue (the "Minister") assumed that "the Program Agreement did not contain any terms regarding a supply of gift certificates by ACI and did not describe Aeroplan Miles as gift certificates…."[14] The Crown takes the position that "[t]he Aeroplan Miles were not gift certificates."[15]

[16] Thus, the issues, as framed by the Parties, focus on whether Aimia supplied promotional and marketing services or Aeroplan Miles to TD, and, if the latter, whether the Aeroplan Miles were gift certificates. In framing the issues, the Parties have said nothing about whether the Aeroplan miles were, or were not, coupons (for the purposes of section 181 of the *ETA*).

[17] In RCC's Memorandum, RCC states the following about the issues in the Appeal:

> 16. This Appeal has two main issues to be decided: (1) whether the agreement between the TD Bank and Aimia Canada Inc. ("Aeroplan") created a taxable supply

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[11] The Amended Reply does not appear to define the term "Affinity Program Agreement". It is not clear whether the Affinity Program Agreement is the same agreement as the Program Agreement that was made on August 9, 2013, that was amended on September 16, 2013, and that is defined in paragraph 12 of the Amended Reply as the "Program Agreement".
[12] Amended Reply, p. 10, ¶15.
[13] Crown's Representations, p. 2, ¶4.
[14] Amended Reply, p. 8, ¶14.s.
[15] Amended Reply, p. 14, ¶28.

> through the Aeroplan loyalty program; and (2) if the agreement's supply is determined to be the Aeroplan loyalty reward feature—Aeroplan Miles, whether the Aeroplan Miles were a supply of "gift certificates" within s. 181.2 of the *ETA*.
>
> 17. RCC's interest in this Appeal is in regard to issue (2), and whether the Aeroplan loyalty reward feature of Aeroplan Miles was a "gift certificate" under the *ETA*, and consequently not a "coupon". A "coupon", as defined in s. 181(1) of the *ETA*, cannot be a "gift certificate".[16]

[18] It appears that RCC is attempting to introduce the gift certificate/coupon dichotomy and tension into the formulation of the issues in the Appeal.

B. **Issues in the Motion**

[19] The broad issue in respect of the Motion is whether RCC satisfies the criteria set out in section 28 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules").[17] More specifically, that issue may be broken down into the following five questions:

a) Does RCC or any of its members have an interest in the subject matter of the Appeal?

b) May RCC or any of its members be adversely affected by a judgment in the Appeal?

c) Will RCC's proposed intervention unduly delay the determination of the rights of the Parties?

d) Will RCC's proposed intervention prejudice the determination of the rights of the Parties?

e) Will RCC's proposed intervention render assistance to the Court?

V. **LEGAL PRINCIPLES**

[16] RCC's Memorandum, p. 5, ¶16-17.
[17] SOR/90-688, as amended. In these Reasons, I will sometimes refer to section 28 of the Rules as "Rule 28".

A. ***Excise Tax Act***

[20] Subsection 181(1) of the *ETA* partially defines a *coupon* as follows:

> "coupon" includes a voucher, receipt, ticket or other device but does not include a gift certificate or a barter unit (within the meaning of section 181.3).

Section 181.2 of the *ETA* states the following in respect of a gift certificate:

> For the purposes of this Part, the issuance or sale of a gift certificate for consideration shall be deemed not to be a supply and, when given as consideration for a supply of property or a service, the gift certificate shall be deemed to be money.

B. **Rule 28**

[21] Section 28 of the Rules states:

> 28(1) Where it is claimed by a person who is not a party to a proceeding
>
> (a) that such person has an interest in the subject matter of the proceeding,
>
> (b) that such person may be adversely affected by a judgment in the proceeding, or
>
> (c) that there exists between such person and any one or more parties to the proceeding a question of law or fact or mixed law and fact in common with one or more of the questions in issue in the proceeding,
>
> such person may move for leave to intervene.
>
> (2) On the motion, the Court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding, and the Court may,
>
> (a) allow the person to intervene as a friend of the Court and without being a party to the proceeding, for the purpose of rendering assistance to the Court by way of evidence or argument, and
>
> (b) give such direction for pleadings, discovery or costs as is just.

C. **Jurisprudence**

[22] RCC has invoked Rule 28 in support of its Motion to intervene. As the wording of Rule 28 may vary in some cases from the wording of the applicable intervention rule in other jurisdictions, I will first review some of the cases that have considered intervention motions brought in the Tax Court of Canada (the "TCC").[18] I will then turn to a few cases decided in other jurisdictions.

(1) Cases considering Rule 28

(a) Moss v. The Queen[19]

[23] In *Moss*, the wife of the appellant was allowed to intervene in her husband's income tax appeal, on the basis that she could be adversely affected by the judgment in that appeal. The evidence suggested that her husband had transferred several properties to her (apparently to keep them safe), he had constructed a house on a lot purchased in her name, she had assisted in the claiming of the principal-residence exemption in questionable circumstances, and she had participated in a subterfuge or sham transaction.[20]

[24] Mrs. Moss was obviously related to Mr. Moss, and she had participated in some of the transactions that were the subject of his appeal. Clearly, there was the potential for her to be adversely affected by the judgment in that appeal. On the other hand, neither RCC nor any of its members are related to TD, nor did they participate in the transactions between TD and Aimia that are the subject of the Appeal.

(b) Silicate Holdings Ltd. v. The Queen[21]

[25] The *Silicate Holdings* case addressed a situation in which the Crown's list of documents inadvertently and mistakenly described three documents that pertained to other taxpayers, one of which was a predecessor corporation of Ford Motor Company of Canada, Limited ("Ford"). During the examination for discovery, counsel for Silicate Holdings Ltd. ("Silicate") asked questions about those documents. The officer of the Crown, while being examined, refused, on the

[18] In this discussion of the jurisprudence, which considers cases decided by several courts, to avoid confusion, I will refer to the Tax Court of Canada as the "TCC".
[19] *Moss v. The Queen*, 99 DTC 1229 (TCC).
[20] *Ibid*, ¶4, 7, 9, 26, 45 & 46.
[21] *Silicate Holdings Ltd. v. The Queen*, [2001] 2 CTC 2222, 2001 DTC 299.

instruction of counsel, to answer those questions. Silicate then brought a motion for an order requiring the Crown to produce a witness who would answer the questions.

[26] Ford moved to intervene, under Rule 28, in Silicate's motion, on the ground that Silicate's motion sought to obtain documents pertaining to the predecessor corporation. Justice Beaubier noted that the basis of Ford's motion was that Ford had a jurisprudential interest in the matter. He also noted that Ford's position in respect of section 241 of the *Income Tax Act* (the "*ITA*") was identical to the Crown's position. Therefore, he dismissed the motion to intervene.[22]

(c) Tanner v. The Queen[23]

[27] In the *Tanner* case, Colin Lesser was granted leave by Deputy Judge Rowe, pursuant to Rule 28, to intervene in the appeals of Bernard Tanner. Rowe DJ refrained from providing a complete summary of the reasons for which he had granted leave to intervene, as those reasons were not relevant to the determination of the issues in Tanner's appeals, and it would have undermined the purpose of granting leave if certain "unproven allegations" had been recited in the reasons given in deciding Tanner's appeals.[24] However, Rowe DJ did note that Lesser had been a business associate of Tanner, Lesser was mentioned several times in the notices of appeal filed by Tanner, and Tanner had served Lesser with a subpoena to attend the trial of Tanner's appeals.[25] There was also a suggestion by Crown counsel that Tanner was attempting to deflect responsibility to Lesser for certain missed remittances.[26] As Rowe DJ allowed Lesser to intervene for the purposes of paragraph 28(2)(a) of the Rules,[27] it seems that Rowe DJ had concluded that Lesser had satisfied one or more of the criteria in subsection 28(1) of the Rules.

(d) La Banque Canadienne Impériale de Commerce v. The Queen[28]

[28] In the appeal that was the subject of the motion to intervene in *La Banque Canadienne Impériale de Commerce* ("*BCIC*"), the issue was whether the services

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[22] *Ibid*, ¶4. In dismissing the intervention motion, Justice Beaubier made reference to *Tioxide Canada Inc. v. The Queen*, [1995] 1 CTC 285, 94 DTC 6655 (FCA), which is discussed below.
[23] *Tanner v. The Queen*, 2005 TCC 119.
[24] *Ibid*, ¶6.
[25] *Ibid*, ¶3 & 9-12.
[26] *Ibid*, ¶15.
[27] *Ibid*, ¶6.
[28] *La Banque Canadienne Impériale de Commerce v. The Queen*, 2005 TCC 716.

provided to the bank by various collection agencies each constituted a financial service (as defined in subsection 123(1) of the *ETA*), such that the supply of each service was an exempt supply, and thus was not subject to GST. The proposed intervener was the Ontario Society of Collection Agencies ("OSCA"), which is an industry association whose members were engaged in the business of collecting outstanding debts owed by borrowers to lenders. Thus, some of the members of OSCA may have been some of the collection agencies that provided some of the services that were the subject of the bank's appeal. In the present Motion, there is nothing to suggest that any of the members of RCC have such a connection to the subject matter of TD's Appeal.

[29] In *BCIC*, Justice Angers made the following comments about the application of the tests in subparagraphs 28(1)(a) and (b) of the Rules to a proposed intervention in a tax appeal:

> 8. In order for a person to make a motion to the Court for leave to intervene, that person must have an interest in the subject matter of the proceeding and show that the person may be adversely affected by the judgment.
>
> 9. In income tax appeals, this threshold test may sometimes be difficult to meet because an assessment usually only pertains to an individual taxpayer. In addition, the confidential character of taxpayer information that may need to be disclosed in order for an intervener to intervene effectively must be considered in weighing the conditions to be met. Intervener status was denied where the only interest shown to exist was jurisprudential in nature (see *Tioxide Canada Inc. v. The Queen*, 94 DTC 6655) and where the position of the intervener was similar to that of the respondent under s. 241 of the *Income Tax Act* (see *Silicate Holdings Limited. v. The Queen*, 2001 DTC 299).
>
> 10. On the other hand, in *Moss v. The Queen*, 99 DTC 1229, the Court granted the wife of an appellant leave to intervene in her husband's appeal because she might be adversely affected by the outcome of the case, as it related to the disposition of property and to unreported income. Although I agree with counsel for the appellant that income tax appeals may demand a more rigorous standard in applying the threshold test for intervention than do cases involving public law issues, I believe that the situation in GST appeals may be slightly different in that the assessment of the recipient of a supply directly affects how the Minister will assess the recipient's

> suppliers. Thus, in the present case, the judgment may adversely affect, at the very least, the specific collection agencies with which the appellant is doing business.[29]

[30] Given that various collection agencies were the suppliers of the services of which the bank was the recipient, Justice Angers found that OSCA had a sufficient interest in the bank's appeal and that OSCA's members could be adversely affected by the decision in that appeal.[30] Therefore, he granted leave to OSCA to intervene as a friend of the Court, such that OSCA was not allowed to adduce evidence or examine witnesses.[31]

[31] In the context of the supplies that are the subject of TD's Appeal, Aimia was the supplier and TD was the recipient. Neither RCC nor any of its members was a supplier to TD of any good or service that is relevant to the Appeal.

(e) Tall v. The Queen[32]

[32] In this case, Mr. Tall had appealed from an assessment that had denied him a medical expense tax credit in respect of amounts expended on his and his wife's behalf for vitamins, supplements, homeopathic remedies, organic foods and healthcare products. The Chinese Canadian National Council ("CCNC") sought leave to intervene in Mr. Tall's appeal. CCNC acknowledged that it had no financial or tax interest in Mr. Tall's appeal; however, it sought to lobby to get recognition for traditional Chinese medicine.[33]

[33] Although Justice Rip (as he then was) recognized that CCNC was genuinely interested in the issue raised by Mr. Tall and had experience in promoting traditional Chinese medicine to various levels of government in Canada, he concluded that, if CCNC's intervention were permitted, the trial would be unduly delayed and the intervention could prejudice the determination of the rights of the parties.[34] Accordingly, he did not grant leave to intervene.

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[29] *Ibid*, ¶8-10.
[30] *Ibid*, ¶13.
[31] *Ibid*, ¶16.
[32] *Tall v. The Queen*, 2005 TCC 765.
[33] *Ibid*, ¶2 & 12.
[34] *Ibid*, ¶14 & 16.

(f) Weyerhaeuser Company Limited v. The Queen[35]

[34] At the relevant time, the *ITA* included, in computing a taxpayer's income, the taxpayer's income from logging operations, and provided a tax credit calculated by reference to a formula, in which one of the factors was ⅔ of any logging tax paid by the taxpayer to a province. The British Columbia ("BC") *Logging Tax Act* imposed a tax calculated by reference to a formula in which one of the factors was 10% of a taxpayer's income derived from logging operations in BC, and another factor was 150% of the tax credit that would have been allowed under the *ITA*. The BC *Income Tax Act* provided a tax credit equal to ⅓ of the logging tax paid to the BC government. Thus, the income-inclusion and tax-credit mechanisms of the applicable federal and BC legislation were intertwined.[36]

[35] The BC government brought a motion for leave to intervene in an appeal by Weyerhaeuser Company Limited ("Weyerhaeuser"), concerning the calculation of the federal logging tax credit. Deputy Judge Beaubier found that the BC government had an interest in Weyerhaeuser's appeal, and that the decision in that appeal could affect Weyerhaeuser's operations and income in BC, which could adversely affect the BC tax base and logging industry. In addition, the question in issue in the federal appeal, both as to fact and law, was common to the BC government and Weyerhaeuser.[37] Therefore, Beaubier DJ allowed the intervention.

(g) Armstrong v. The Queen[38]

[36] Mr. Armstrong had been the president and chief executive officer of Cango Inc. ("Cango"). After receiving a whistleblower report from a former employee and after conducting an investigation, Cango accused Mr. Armstrong of misappropriating funds and dismissed him. Cango also sued Mr. Armstrong in an effort to recover the allegedly misappropriated funds. Mr. Armstrong sued Cango for wrongful dismissal. Those civil claims were eventually settled.[39]

[37] Concerned that the allegedly misappropriated funds may have represented part of Cango's income and that it may have thus underreported its income, Cango

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[35] *Weyerhauser Company Limited v. The Queen*, 2008 TCC 36.
[36] *Ibid*, ¶2.
[37] *Ibid*, ¶6.
[38] *Armstrong v. The Queen*, 2013 TCC 59.
[39] *Ibid*, ¶2-5.

made a voluntary disclosure to the Canada Revenue Agency (the "CRA"). As part of the disclosure process, Cango provided to the CRA copies of financial documents relating to Mr. Armstrong.[40]

[38] The CRA conducted a net worth analysis in respect of Mr. Armstrong, and subsequently reassessed him, whereupon he objected and appealed. During the course of the examination for discovery of the Crown's nominee in the tax appeal, Mr. Armstrong obtained copies of seven binders of documents that Cango had previously provided to the CRA. Mr. Armstrong and the Crown ultimately settled the tax appeal, on the basis that the appeal was allowed in full.[41]

[39] Mr. Armstrong then sued Cango, alleging that it had provided false, incomplete or misleading documents to the CRA. As well, Mr. Armstrong, desiring to use the above seven binders of documents in his action against Cango, brought a motion in the TCC for an order relieving him of his implied undertaking in respect of those documents. Mr. Armstrong served a copy of his notice of motion on Cango, as well as on the Crown. Cango then brought a motion for leave to intervene in the hearing of Mr. Armstrong's motion concerning the implied undertaking.[42]

[40] Justice Angers found that Cango had a genuine and direct interest in Mr. Armstrong's motion, as the documents obtained by the CRA from Cango and subsequently provided by the CRA to Mr. Armstrong were the subject matter of that motion. By reason of Mr. Armstrong having served Cango with a copy of his notice of motion, and given that Mr. Armstrong was seeking to use Cango's financial records in his litigation against Cango, Justice Angers concluded that Cango would be adversely affected if Mr. Armstrong were to be relieved of his implied undertaking. Justice Angers also noted that Cango had already provided the Court with its written submissions concerning the sought-after waiver of the implied undertaking; therefore, Cango's intervention in the hearing of Mr. Armstrong's motion would not unduly delay the hearing of the motion. Accordingly, Justice Angers allowed Cango to intervene.[43]

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[40] *Ibid*, ¶6.
[41] *Ibid*, ¶7-9.
[42] *Ibid*, ¶1, 11-12, 16 & 23.
[43] *Ibid*, ¶22-25.

[41] The connection between Cango's circumstances and Mr. Armstrong's motion was substantially closer and more direct than the connection between RCC's circumstances (including those of its members) and TD's Appeal.

(h) *Kérouac v. The Queen*[44]

[42] Mr. Kérouac claimed to have made a donation of $2,000,000 to the Municipality of Larouche (the "Municipality"); however, the CRA assessed him on the basis that the amount of the donation was only $1,000,000, whereupon he appealed to the TCC. Mr. Kérouac also sued the Municipality in the Quebec Superior Court, seeking the revocation or cancellation of the donation, the reimbursement of $2,000,000, and damages. In that litigation, Mr. Kérouac alleged that the Municipality intentionally, or in circumstances constituting gross negligence amounting to wilful blindness, had taken part in the implementation of a tax plan that proved to be highly prejudicial to him, as the donor.

[43] The Municipality brought a motion, seeking leave to intervene in Mr. Kérouac's tax appeal. In dismissing that motion, Justice Jorré made the following observations:

a) The Municipality was not subject to a tax assessment related to the assessment at issue in Mr. Kérouac's appeal.

b) The eventual judgment in Mr. Kérouac's appeal could not have a financial impact on the Municipality.

c) The Municipality's role was not at the heart of Mr. Kérouac's appeal.[45]

(i) Summary of TCC Cases

[44] I have reviewed the above cases in order to illustrate the circumstances in which the TCC has, pursuant to Rule 28, granted leave to intervene in a tax appeal. The circumstances involving RCC and its members are not comparable to the circumstances in which the TCC has permitted an intervention.

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[44] *Kérouac v. The Queen*, 2013 TCC 255.
[45] *Ibid*, ¶7 & 17.

[45] Nevertheless, as RCC's motion should be decided by reference to the criteria set out in Rule 28, and not by a comparison to other cases in which intervention has, or has not, been permitted, I will first review a few guiding principles enunciated by other courts, and then turn to an analysis of the Rule 28 criteria.

(2) Other Cases

[46] The Federal Court of Appeal (the "FCA") has issued a number of decisions in response to motions for leave to intervene. While those cases provide useful guidance, it should be remembered that motions to intervene in a case before the FCA are governed by section 109 of the *Federal Courts Rules*,[46] which is markedly different from the TCC's Rule 28.

[47] Apart from some of the TCC cases discussed above, counsel for RCC referred me to the *Abbott* case,[47] counsel for TD referred me to the *Tioxide* case and the *Alliance for Equality* case,[48] and counsel for the Crown referred me to the *Benoit* case.[49] I will discuss those four cases below (albeit in a different order).

(a) Tioxide Canada Inc. v. The Queen[50]

[48] In *Tioxide*, two corporations sought leave to intervene in the hearing of an appeal by Tioxide Canada Inc. to the FCA from an unfavorable decision of the TCC. In dismissing the application to intervene, Justice Hugessen stated the following:

> The sole "interest" argued by the applicants is that they are also involved in challenges to income tax assessments which raise a question that is similar or identical to the question raised by the appellant in this case. In other words, the applicants have no direct pecuniary or proprietary interest in the outcome of this appeal. Their sole interest is, so to speak, "jurisprudential": the decision of this Court in this appeal might be binding at the time when the applicants in turn will have to argue their own cases before the courts. To all appearances, this is an interest that literally thousands of taxpayers have in literally thousands of income tax appeals. This kind of interest alone will never justify an application to intervene.

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[46] *Federal Court Rules*, SOR/98-106.
[47] *Abbot et al. v. The Queen*, [2000] 3 FC 482.
[48] *Alliance for Equality of Blind Canadians v. Attorney General of Canada*, 2022 FCA 131.
[49] *Canadian Taxpayers Federation v. Benoit et al.*, 2001 FCA 71.
[50] *Tioxide*, *supra* note 22.

> Chief Justice Jackett clearly expressed the rule as follows, in *The Queen* v. *Bolton*, [1976] 1 F.C. 252, 12 N.R. 352, at page 253 (N.R. 353):
>
> > In our view, no matter how widely one interprets the Court's power to permit persons to be heard, it does not extend to permitting a person to be heard merely because he has an interest in another controversy where the same question of law will or may arise as that which will or may arise in the controversy that is before the Court.[51]

[49] In *Tioxide*, the would-be interveners had already been assessed and had challenged those assessments. In the case of RCC and its members, there is no indication that any member of RCC has been assessed on the basis that a purported coupon is actually a gift certificate. However, RCC hopes to "caution this Court against deeming [TD's] loyalty reward feature (Aeroplan Miles) as a gift certificate."[52]

(b) Abbott et al. v. The Queen[53]

[50] This case was a class action involving leases in Riding Mountain National Park. The issue in that action was whether those leases contained or should contain a perpetual renewal clause. Canadian Pacific Hotels Corporation ("CP") sought to intervene in that action. At that time, CP owned the Banff Springs Hotel and Chateau Lake Louise, which were built on land leased from the federal government, pursuant to leases containing perpetual renewal clauses.[54]

[51] In defending the claim brought by the class-action plaintiffs, the Crown took the position that it lacked the legal authority to enter into any lease containing a perpetual renewal clause, which led to the conclusion that such a clause was null and

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[51] *Ibid*, p. 286. See also *Canadian Airlines International Ltd. and Air Canada v. Canadian Human Rights Commission, Canadian Union of Public Employees (Airline Division) and Public Service Alliance of Canada*, [2000] F.C.J. No. 220, Court File A-346-99 (FCA), ¶11, where the FCA stated that the interest of the proposed intervener (i.e., PSAC) was, "at its highest … 'jurisprudential' in nature; [PSAC] is concerned that the decision of the [Canadian Human Rights] Tribunal, if allowed to stand, may have repercussions on litigation involving pay equity issues in the future." Martin A. Sorensen, in "Getting a Seat on the Bus — Intervention in Income Tax Appeals" (2003) *Tax Litigation Journal* (published by Federated Press), vol. XI, no. 4, p. 5, at p. 7, indicates that a jurisprudential interest is sometimes referred to as a generalized interest.

[52] Affidavit, p. 2, ¶4. The page numbers of the Affidavit (as well as the Notice of Motion) cited in these Reasons are the actual page numbers of that Affidavit (or Notice of Motion), which are in the upper center of each page; and not the page numbers in the bound Motion Record of Retail Council of Canada (Moving Party), which are in the upper right-hand corner of each page.

[53] *Abbott*, *supra* note 47.

[54] *Ibid*, ¶1-2 & 4.

void. As the Crown's position and its logical conclusion were of great concern to CP, it sought leave to intervene in the class action.[55]

[52] One of the arguments made by the Crown in opposing the motion to intervene was that CP had only a jurisprudential interest in the class action. Prothonotary Hargrave acknowledged that *Tioxide* stood for the proposition that a mere jurisprudential interest is not sufficient to give a prospective intervener an interest in the outcome of a particular legal proceeding. However, the prothonotary held that CP, as a custodian of western Canadian heritage, had more than a jurisprudential interest in the class action.[56] This factor does not apply to RCC or its members.

[53] In discussing Rule 109 of the *Federal Court Rules*, Prothonotary Hargrave noted that the rule requires prospective interveners to show how their participation will assist the court, and then added these comments:

> This assistance must not merely be a reiteration of the position taken by a party, but rather must be a different perspective…. What is required is a relevant and useful point of view which the initial parties cannot or will not present, a point of view without which the Court's eventual decision might well be the poorer.[57]

(c) Canadian Taxpayers Federation v. Benoit et al.[58]

[54] In this case, three Indigenous individuals had commenced legal proceedings in the Federal Court (the "FC"), claiming that, by reason of Treaty #8, the Crown could not impose any tax of any kind upon them. In defending the claim, the Crown argued that there was no treaty exemption from taxation, or, if there had been such an exemption, it had been extinguished.[59]

[55] The Canadian Taxpayers Federation (the "CTF"), which then had 40,000 paying supporters, as well as offices in each province from British Columbia to Ontario, sought to intervene in the FC proceeding. The fundamental objective of the CTF, in its public activities and in its proposed intervention, was to uphold the principle that all Canadian taxpayers should be treated equally in taxation matters,

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[55] *Ibid*, ¶3-4.
[56] *Ibid*, ¶6, 9-10 & 13.
[57] *Ibid*, ¶14.
[58] *CTF v. Benoit*, *supra* note 49.
[59] *Ibid*, ¶1. In the discussion of the *Benoit* case, the term "the Crown" refers to Her Majesty the Queen in right of Canada.

without regard to (among other things) race or ethnic origin. The CTF was concerned that, if the FC were to uphold the claim that Treaty #8 exempts Indigenous Peoples from taxation, this would be an exemption based on racial grounds, and the taxes not paid by Indigenous Peoples would be borne by the remaining classes of people.[60]

[56] The reason that the CTF sought to intervene in the FC proceeding was that the Crown, in defending the Treaty-based claim, had not raised the above argument. Furthermore, the CTF argued that the Crown was constrained, by reason of constitutional, statutory, legal and fiduciary obligations, from raising the argument. Therefore, if the CTF were not allowed to intervene, the argument would not be put before the FC.[61]

[57] The FC motions judge found no evidence to support the assertion that the Crown was constrained in its defence. Therefore, he concluded that the CTF's participation in the FC proceeding would not assist in the determination of a factual or legal issue.[62] Consequently, he dismissed the application to intervene, whereupon the CTF appealed to the FCA, which allowed the appeal and granted leave to intervene.

[58] In reaching the decision to allow the CTF to intervene, Justice Sexton reiterated the factors to be considered on a motion to intervene, as set out first in the *Rothmans* case,[63] and subsequently in the *Canadian Airlines* case,[64] as follows:

> (1) Is the proposed intervenor directly affected by the outcome?
>
> (2) Does there exist a justiciable issue and a veritable public interest?
>
> (3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

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[60] *Ibid*, ¶2-4.
[61] *Ibid*, ¶5-7.
[62] *Ibid*, ¶14. Section 109 of the *Federal Courts Rules*, *supra* note 46, applies to interventions in both the FCA and FC. The criterion considered by the FC motions judge is found in paragraph 109(2)(b), which requires a proposed intervener to "describe … how that participation will assist the determination of a factual or legal issue related to the proceeding."
[63] *Rothmans, Benson & Hedges Inc. v. Attorney General of Canada*, [1990] 1 FC 74 (FC); affirmed [1990] 1 FC 90 (FCA).
[64] *Canadian Airlines*, *supra* note 51.

> (4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?
>
> (5) Are the interests of justice better served by the intervention of the proposed [intervenor]?
>
> (6) Can the Court hear and decide the cause on its merits without the proposed intervenor?[65]

[59] Justice Sexton also referenced the decision of the Supreme Court of Canada in *Finta*, and then added a comment, as follows:

> 17. The Supreme Court of Canada in *R. v. Finta* [1993] 150 N.R. 370 said one criteria for allowing intervention is *if the intervener has submissions which will be* useful and *different from those of the other parties.* That would seem to be the case here.
>
> 18. We are of the view that if in a case where important public interest issues are raised, an intervenor wishes to raise a related public interest question which naturally arises out of the existing lis between the parties, and *which none of the other parties has raised*, it is appropriate to permit the intervention.[66] [*Emphasis added*.]

(d) Alliance for Equality of Blind Canadians v. Attorney General of Canada[67]

[60] In *Alliance for Equality*, after referring to the various factors identified in *Rothmans*, Justice Rennie observed that, at times, those factors may need to be supplemented; at other times, they may not be relevant, and other factors might come to the forefront. He also noted that none of the *Rothmans* factors, in and of itself, is determinative. In addition, he affirmed the principle stated in *Sport Maska* that the intervention criteria must remain flexible.[68]

[61] Justice Rennie noted that, while the decision to grant leave to intervene is discretionary, judicial discretion is to be exercised according to legally relevant

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[65] *Rothmans* (FC), *supra* note 63, at p. 79-80. See also *Canadian Airlines*, *ibid*, ¶8; and *CTF v. Benoit*, *supra* note 49, ¶15.
[66] *Benoit*, *supra* note 49, ¶17-18.
[67] *Alliance for Equality*, *supra* note 48.
[68] *Ibid*, ¶9-10. The reference to flexibility is taken from *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, ¶42.

criteria. A key criterion is that the proposed intervention must be useful.[69] He further noted that "an intervention must take the issues as framed by the parties, and not shape the case in a way that they [i.e., the intervener] prefer it to have been argued."[70] In addition, he stated that an intervention should not comprise overt policy arguments,[71] nor should it "simply duplicate the argument or support the result desired by one of the parties."[72]

VI. **ANALYSIS**

A. **Subsection 28(1) Criteria**

[62] Notwithstanding the comment made in paragraph 8 of *BCIC*,[73] the three criteria enunciated in subsection 28(1) of the Rules are disjunctive, not conjunctive. The RCC submits that it has satisfied the first two criteria. I disagree, for the reasons expressed below.

(1) Paragraph 28(1)(a)

[63] The first criterion, as set out in paragraph 28(1)(a) of the Rules, is that a proposed intervener must have an interest in the subject matter of the proceeding.

[64] Based on the evidence presented at the hearing of the Motion, it is my understanding that neither RCC nor any of its members has a direct financial or proprietary interest in the outcome of the Appeal, nor has RCC or any of its members been assessed in a manner similar to the assessment that is the subject of the Appeal.[74] Rather, as Mr. Littler stated in paragraph 8 of the Affidavit, "RCC is concerned that if this appeal is allowed, the potential outcome is that other loyalty reward programs will be thought to be treated as gift certificates, instead of their current treatment as coupons (taxable supplies)."[75]

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[69] *Alliance for Equality*, *supra* note 48, ¶11-12.
[70] *Ibid*, ¶13. See also *The Minister of Citizenship and Immigration et al. v. The Canadian Council for Refugees et al.*, 2021 FCA 13, ¶26; and *Macciacchera et al. v. Bell Media Inc. et al.*, 2023 FCA 180, ¶19-20.
[71] *Ibid*, ¶19.
[72] *Ibid*, ¶21.
[73] As quoted in paragraph 29 above.
[74] See *Kérouac*, *supra* note 44, ¶7.
[75] Affidavit, p. 3, ¶8.

[65] In other words, it seems that RCC is concerned that, if the Appeal is allowed, there is a risk that the CRA might change its assessing practice and might assess some of RCC's members on the basis that the coupons that are the subject of their particular loyalty programs are actually gift certificates. In this regard, no evidence was presented to show that any member of RCC has been so assessed or is potentially facing such an assessment.[76]

[66] During the cross-examination on the Affidavit, Mr. Littler was asked, with reference to paragraph 8 of the Affidavit, whether it was his understanding that, if TD succeeds in the Appeal, "it will, with certainty, affect the outcome of the other loyalty programs."[77] Mr. Littler's response included the following statement:

> No, I'm saying that in some cases, if this becomes the broad interpretation of how loyalty programs should be characterized, in particular as gift certificates, rather than as coupons, if that becomes the standard interpretation, then a significant number of existing programs may be implicated by that.[78]

[67] When Mr. Littler was then asked to confirm that TD's success in the Appeal *may*, rather than *will*, have significant consequences for other loyalty programs, he replied:

> It would depend upon the interpretation. If the interpretation takes a particular and very strict form, then I guess it could gravitate from "may" to "will", but, yes, "may" is probably the appropriate interpretation as to what I've said.[79]

[68] Based on my reading of the Affidavit and the C/E Transcript, including the above statements by Mr. Littler, my understanding is that RCC's interest in the subject matter of the Appeal is merely jurisprudential. It is well established that a mere jurisprudential interest in a proceeding's outcome is insufficient to support an intervention.[80]

(2) Paragraph 28(1)(b)

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[76] Even if a member of RCC had been so assessed or was facing such an assessment, according to *Tioxide*, this, in and of itself, would not be a sufficient interest in the subject matter of TD's Appeal. See paragraph 48 above.
[77] C/E Transcript, p. 25, lines 14-15.
[78] *Ibid*, p. 25, lines 16-22.
[79] *Ibid*, p. 26, lines 15-20.
[80] *Tioxide*, *supra* note 22, p. 286; and *Abbott*, *supra* note 47, ¶6 & 9-10.

[69] Paragraph 28(1)(b) of the Rules will be satisfied if it is shown that a proposed intervener may be adversely affected by a judgment in the particular proceeding. This wording suggests that the adverse effect must flow from the judgment itself, and not from any precedential value that the decision in the particular appeal might have. However, no evidence was presented during the hearing of the Motion to suggest that the judgment in the Appeal will have any direct fiscal impact on RCC or any of its members.[81] Rather, as noted below, the effect anticipated by RCC on its members seems to be indirect.

[70] The Affidavit of Mr. Littler states that there are many more loyalty programs than the Aeroplan Program, and identifies three of the leading programs, namely, the Triangle Rewards program (which is owned by Canadian Tire, and whose partner retailers include Sport Chek and Mark's), the Air Miles program (which is owned by Bank of Montreal, and whose partner retailers include Shell and some Metro grocers), and the Scene+ Rewards program (which is owned by Cineplex, Sobeys and Scotiabank).[82] RCC seems to be concerned about the impact of the Appeal's outcome on the non-Aeroplan programs.

[71] There is no mention in the Affidavit or the C/E Transcript of any members of RCC who participate in the Aeroplan Program, nor is there any evidence to suggest that, if TD is successful in the Appeal, any member of RCC will be directly affected by the judgment in the Appeal. RCC's argument is that, if TD is successful, the CRA might alter its assessing policy and treat RCC's members as participating in loyalty programs whose rewards constitute gift certificates.[83] According to paragraph 9 of the Notice of Motion, this would have a "far-reaching impact … on Canadian retailers, the economy, and employment."[84]

[72] During the cross-examination of Mr. Littler, when it was suggested to him that there is "no way to say with any confidence that there will be [such] a far-reaching impact",[85] he replied:

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[81] This is consistent with the above view that the interest of RCC and its members in the subject matter of the Appeal is merely jurisprudential. In fact, there is some overlap between the analyses of paragraphs 28(1)(a) and (b). See also *Kérouac*, *supra* note 44, ¶7.
[82] Affidavit, ¶6.
[83] Notice of Motion, ¶8.
[84] *Ibid*, ¶9.
[85] C/E Transcript, p. 41, lines 18-20.

> … I guess what I would say to that is, in the event that loyalty programs at large are characterized … as gift certificates, rather than as coupons, it is reasonable to expect that there will be a significant impact on the retail industry.[86]

After giving the above response, Mr. Littler acknowledged that RCC had not conducted any studies or economic analysis to demonstrate that proposition.[87]

[73] It is possible that some members of RCC do participate in the Aeroplan Program, in which case there might be an argument that the precedential value (as distinct from the judgment) in the Appeal might have some impact on them. However, in my view, that would be a precedential impact only. Furthermore, no evidence was put before the Court[88] to show that any member of RCC participates in the Aeroplan Program. The evidence that was presented at the hearing of the Motion does not persuade me that RCC or any of its members may be adversely affected by the judgment in the Appeal.

B. **Subsection 28(2) Criteria**

[74] I turn now to a consideration of the direction given to the Court in the opening lines of subsection 28(2) of the Rules, and the purpose of an intervention, as set out in paragraph 28(2)(a) of the Rules.

(1) Subsection 28(2)

[75] The opening portion of subsection 28(2) of the Rules provides that the Court is to "consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding…."

(a) Undue Delay

[76] The trial of the Appeal is scheduled to be heard on December 11-14, 2023. It is my understanding that, if RCC were to be granted leave to intervene, it would not undertake any steps that would result in the trial being postponed. Although RCC initially sought "to reserve its right to call a half day of evidence if necessary,"[89] at

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[86] *Ibid*, p. 41, line 21 to p. 42, line 1.
[87] *Ibid*, p. 42, lines 4-7.
[88] During the balance of these Reasons, I will revert to my initial practice of referring to the TCC as the "Court".
[89] RCC's Memorandum, ¶40.

the hearing of the Motion, counsel for RCC stated that RCC is no longer seeking an opportunity to call evidence or to question witnesses.[90] Accordingly, I am of the view that, if the Motion for leave to intervene were to be allowed, the intervention would not unduly delay the determination of the rights of the Parties.

(b) Prejudice

[77] As noted in the procedural history summarized above, TD initiated the Appeal on December 19, 2018, i.e., almost five years ago. The Parties filed a Joint Application for Time and Place of Hearing on October 27, 2022. On April 11, 2023, the Court issued an Order, scheduling the trial for December 11-14, 2023. Slightly more than two months later, on June 28, 2023, RCC filed the Notice of Motion, seeking leave to intervene. While I do not consider the Notice of Motion to have been filed "[o]n the eve of the hearing of this appeal,"[91] I am nevertheless concerned by RCC's tardiness in bringing the Motion, less than six months before the trial, even though the Appeal had then been underway for more than four years. RCC did not offer any explanation for the timing of the filing of the Notice of Motion.

[78] As emphasized in *Council for Refugees*, "intervention motions should be brought early," because "[l]ate interventions can disrupt the orderly progress of a matter," and "[t]hey can also cause prejudice…."[92]

[79] In this regard, at the hearing of the Motion, counsel for TD advised the Court that, since the inception of the Appeal, they have worked for years to draft their pleadings, to review the Crown's pleadings, to conduct examinations for discovery, and otherwise to ascertain the case they have to meet. If RCC is permitted to intervene, TD's preparation for the pending trial will be disrupted, and a revised approach will be required. In other words, TD will need to meet, not only the Crown's case, but a potentially different argument from RCC as to how the *ETA* works.[93]

[80] Counsel for TD also expressed a concern that, if RCC is permitted to intervene, during oral submissions at the trial, in explaining (to the trial judge) why

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[90] Transcript of the Hearing of the Motion on August 28, 2023 ("Motion Transcript"), p. 11, lines 14-24; p. 24, lines 24-27; and p. 25, lines 5-8.
[91] As was done in *Council for Refugees*, *supra* note 70, ¶1.
[92] *Ibid*, ¶21.
[93] Motion Transcript, p. 81, line 25 to p. 83, line 13.

RCC has intervened, counsel for RCC will make factual statements about RCC, its members and their loyalty programs, which will divert the course of the trial and contaminate the trial process.[94]

[81] I share TD's concerns. Hence, I am of the view that, if leave to intervene were to be granted, the intervention would prejudice the determination of the rights of the Parties.

(2) Paragraph 28(2)(a)

(a) Assistance

[82] Paragraph 28(2)(a) of the Rules indicates that the purpose of an intervention is to render assistance to the Court. As explained in *Abbott*, this implies that the intervention should be relevant and useful to the Court in determining the issues in the tax appeal that is before the Court.[95]

[83] To ascertain what might assist the Court in deciding a GST appeal, it is helpful to review the nature of such an appeal. Section 306 of the *ETA* indicates that an appeal must be preceded by an objection to an assessment, and that the objective of an appeal is to have the assessment vacated or to have a reassessment made.

[84] Section 309 of the *ETA* provides that the Court may dispose of an appeal by:

a) dismissing the appeal; or

b) allowing the appeal, and vacating the assessment or referring the assessment back to the Minister for reconsideration and reassessment.

[85] By reason of the above statutory provisions, the focus of a GST appeal is on the assessment that is the subject of the appeal. The Court is a statutory court, with a very limited (rather than plenary) jurisdiction, which is focused on the assessment. The only manner in which the Court may dispose of an appeal is to dismiss it (meaning, in essence, that the assessment is upheld), or to allow the appeal and either vacate the assessment or refer the assessment back to the Minister for

[94] *Ibid*, p. 85, line 20 to p. 87, line 8.
[95] See paragraph 53 and footnote 57 above.

reconsideration and reassessment. In other words, the Court's jurisdiction is limited to the assessment that is the subject of the appeal. The Court may not issue an order or judgment that would affect an assessment that is not before the Court.

[86] I am concerned that RCC will endeavor to move this Appeal away from the issues that TD and the Crown have put before the Court, in particular, the interpretation of section 181.2 of the *ETA* and the question of whether the issuance of Aeroplan Miles was a supply of gift certificates. This concern derives, in part, from the following statement made by counsel for RCC at the hearing of the Motion:

> Once you're interpreting a gift certificate, you have to consider the coupon that is part and parcel of the analysis. Once you're a gift certificate, you're not a coupon….
>
> … we are there to articulate this second half of the interpretive principle, which is that if you are a gift certificate, you are not a coupon. And reading the legislation as a whole and then analyzing how the coupon system works within the taxation system.[96]

[87] Later, counsel for RCC stated:

> … we're allowed to utilize tax rulings, CRA statements and the jurisprudence to cobble together the argument about the importance of the coupon versus the gift certificate and the input tax credits that are sitting there on the face of the legislation.[97]

[88] During his oral submissions in support of the Motion, counsel for RCC stated that, if granted leave to intervene, RCC would "be talking about [sub]sections 181(1), (3), and (5)" of the *ETA*.[98] However, neither TD's Notice of Appeal nor the Crown's Amended Reply, in the respective paragraphs setting out the statutory provisions on which the particular party relies, makes any mention of section 181 of the *ETA*, let alone subsections 181(1), (3) and (5).[99]

[89] Given the statutory framework of subsection 181(1) and section 181.2 of the *ETA*, the meaning and scope of the term *coupon* cannot be determined without first knowing the meaning and scope of the term *gift certificate*. However, it is not necessary to know the meaning and scope of the term *coupon* in order to determine

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[96] Motion Transcript, p. 31, lines 19-22; and p. 31, line 27 to p. 32, line 3.
[97] *Ibid*, p. 41, line 26 to p. 42, line 2.
[98] *Ibid*, p. 42, lines 25-26. See also p. 46, lines 6-8.
[99] Notice of Appeal, ¶19; and Amended Reply, ¶16.

the meaning and scope of the term *gift certificate*. Based on the above statements by counsel for RCC, I am concerned that, if permitted to intervene, RCC would endeavour to divert the trial to an analysis of the coupon system.

[90] RCC is of the view that "[t]he law governing the excise tax treatment of consumer loyalty programs is outdated",[100] and that "the wording of the law has not evolved along with the sophistication of the programs or the development of these loyalty rewards."[101] RCC has stated that, if leave to intervene is granted, "RCC will argue the broader implications of characterizing a loyalty reward as a gift certificate under the [*ETA*], including explaining the higher costs placed on retailers and consumers."[102] I am concerned that, if leave were to be granted, RCC's intervention would become a policy-based argument focusing on loyalty programs in general, rather than assisting the Court in its interpretation of the provisions of the *ETA* that are relevant to this specific Appeal, and in its determination of whether the issuance of Aeroplan Miles was the supply of gift certificates. In other words, I fear that, rather than "[taking] the issues as framed by the parties,"[103] RCC may endeavor "to make the case into something that it is not."[104]

[91] The importance of not allowing policy considerations to overpower the established principles of statutory interpretation was described by the Supreme Court of Canada in this manner:

> [Policy considerations] cannot be permitted to distort the actual words of the statute, read harmoniously with the scheme of the statute, its object, and the intention of the legislature, so as to make the provision say something it does not. While policy analysis has a legitimate role in the interpretative process …, the responsibility for setting policy in a parliamentary democracy rests with the legislature, not with the courts. The primary role of the courts, in my view, is to interpret and apply those laws according to their terms, provided they are lawfully enacted. It is not the role of this Court to rewrite the legislation.[105]

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[100] Affidavit, p. 2, ¶5.
[101] C/E Transcript, p. 12, lines 1-4.
[102] Affidavit, p. 3-4, ¶9.
[103] *Alliance for Equality*, *supra* note 48, ¶13.
[104] *Ibid*, ¶23.
[105] *TELUS Communications Inc. v. Wellman*, [2019] 2 SCR 144, 2019 SCC 19, ¶79. See also *65302 British Columbia Limited v. The Queen*, [1999] 3 SCR 804, ¶51, where the Supreme Court of Canada recognized that "courts should be reluctant to embrace unexpressed notions of policy or principle in the guise of statutory interpretation."

[92] The duty of this Court is to ascertain the facts that are part of the context in which a particular assessment was issued, to interpret the law that is relevant to the assessment, and then to apply that law to determine whether the assessment was validly issued and whether the assessment is correct and binding. In deciding an appeal, if the Court has a concern about the potential impact of its decision on some other taxpayer whose assessment is not before the Court, it would not be appropriate for the Court to decline — because of that concern — to apply the law, as so interpreted, to the assessment and the facts that are the subject of the appeal. In *RCI Environnement*, Justice Noël (as he then was) expressed a similar concept as follows:

> … no logic can justify that the tax treatment of a taxpayer should be determined according to the circumstances relating to another taxpayer.[106]

(b) Duplication

[93] It does not assist the Court when an intervener bases its intervention on an issue that has already been raised, and will be argued at trial, by one of the parties.[107] RCC takes the position that "Aeroplan Miles should not be treated as gift certificates."[108] That is the same position that the Crown takes. Therefore, I am concerned that the proposed intervention will lead to duplication.[109]

[94] In my view, the Crown is well represented by experienced, skilled and competent counsel. I am confident that they will present their client's position clearly, articulately and thoroughly. I have not been persuaded that there is a need for an intervention to bolster the argument that the issuance of Aeroplan Miles was not a supply of gift certificates.[110]

(c) Summary

[95] To summarize the above discussion under the subheadings "Assistance" and "Duplication", to the extent that RCC proposes to advance the position that the

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[106] *RCI Environnement Inc. v. The Queen*, 2008 FCA 419, ¶51.
[107] *Camp Mini-Yo-We Inc. v. The Queen*, 2006 FCA 102, ¶5-6.
[108] Notice of Motion, p. 3, ¶7.
[109] See *Alliance for Equality*, *supra* note 48, ¶9 & 21.
[110] See *Camp Mini-Yo-We*, *supra* note 107, ¶6, where Justice Noël (as he then was) said, "the appellants have already raised the issue on which the proposed intervention is based …, and despite the applicants' argument to the contrary, there is nothing to suggest that the appellant's counsel is not in a position to present this issue as fully, capably and thoroughly as they could." See also *Council for Refugees*, *supra* note 70, ¶33.

Aeroplan Miles should not be treated as gift certificates, the proposed intervention would be a duplication of the Crown's position and submissions. To the extent that RCC proposes to go beyond the *not-gift-certificates* argument, RCC would likely be endeavoring to support the *coupon-based* argument of its members, or otherwise raising new issues, rather than taking the issues as framed by the Parties.

VII. **CONCLUSION**

[96] The Motion is dismissed, with the question of costs to be determined.

[97] If TD, the Crown and RCC are unable to reach an agreement in respect of costs within 30 days from the date of the Order pertaining to the Motion, TD may, within the ensuing 30 days thereafter, file a written submission on costs, and the Crown and RCC shall thereafter have a further 30 days to file their respective written responses. Any such submission or response shall be limited to five pages in length.

Signed at Ottawa, Canada, this 31st day of October 2023.

"Don R. Sommerfeldt"

Sommerfeldt J.

CITATION:	2023TCC154
COURT FILE NO.:	2018-4823(GST)G
STYLE OF CAUSE:	THE TORONTO-DOMINION BANK v. HIS MAJESTY THE KING
PROPOSED INTERVENER:	THE RETAIL COUNCIL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	August 28, 2023
REASONS FOR ORDER BY:	The Honourable Justice Don R. Sommerfeldt
DATE OF ORDER:	October 31, 2023

APPEARANCES:

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