



Canadian
Chamber of
Commerce

Chambre de
Commerce
du Canada

Because
Business
Matters.

Parce que les
affaires sont
importantes.

Transmitted via email to: jonathan.garbutt@dominiontaxlaw.com; diane.lebouthillier@cra-arc.gc.ca; chrystia.freeland@parl.gc.ca; bob.hamilton@cra-arc.gc.ca; francois.boileau@oto-boc.gc.ca; amit@nationalrdinc.ca;

January 12, 2022

Mr. Jonathan N. Garbutt, J.D.
Dominion Tax Law
#210, 6111-36th Street SE
Calgary, AB, T2P 1C9

Dear Mr. Garbutt:

Re: Guidance from the Federal Court of Appeal to Prevent Irreparable Damage to Canadian Business Innovation and Investment Caused by the Tax Court of Canada's Denial of SR&ED Tax Credits in *National R&D Inc. v Her Majesty the Queen*.

I am writing on behalf of the Canadian Chamber of Commerce because the Tax Court of Canada's (TCC) denial of National R&D Inc.'s 2011 claim for investment tax credits under the *Income Tax Act* (the Act) for having conducted Scientific Research and Experimental Development (SR&ED) in that year creates a disincentive and adds uncertainty for Canadian businesses seeking to innovative to become more productive and globally competitive. On behalf of the Canadian Chamber, I want to offer our strong support for National R&D Inc.'s appeal of this decision to the Federal Court of Appeal (FCA).

About the Canadian Chamber of Commerce

Founded in 1925, the Canadian Chamber of Commerce is a national business association that, along with its national network of chambers of commerce and boards of trade, communicates the needs of the Canadian business to government. The Canadian Chamber is unwavering in its support of businesses of every size and sector, and the vital role they play as the engines of job creation.

Key among government policies we have long sought to advance are tax reform and the simplification and modernization of the SR&ED program to promote greater innovation and business investment. The Canadian Chamber regards National R&D Inc.'s appeal as an important and needed step towards this goal.

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The Canadian Chamber is uniquely positioned to speak to the negative consequences restrictive SR&ED program practices place generally on Canadian businesses and the economy. We are concerned that the approach taken by the Canada Revenue Agency (CRA) and Canadian courts in assessing SR&ED eligibility has become too narrow and restrictive. We believe successive court cases and interpretations by the Minister of National Revenue have narrowed the eligibility for SR&ED and transformed a program intended to incentivize innovation and investment into a compliance program that disproportionately hinders certain sectors and businesses from availing themselves of the program's benefits.

The TCC's decision further stymies and discourages innovative Canadian: research, production methods, commercialization opportunities and business investment.

Two areas of the decision against National R&D are particularly relevant to the Chamber's mandate.

First, the *Income Tax Act* clearly indicates that, to qualify for SR&ED tax credits, a taxpayer must, in context of the creation of a new or improved product or process, make a technological advancement through a process of 1) systematic investigation or 2) search. In this regard, the Act clearly sets a two-part test. However, the TCC's decision follows a judge-made five-part test that requires more than what the Act requires. National R&D Inc. is asking that the FCA re-examine the issue and follow the decision of the TCC in *Les Abeilles*. The Canadian Chamber supports National R&D Inc.'s position that a two-part test is more consistent with the Supreme Court of Canada's ruling in *Canada TrustCo*, which required a textual, contextual and purpose interpretation of the Act. A two-part test is better since it relies on the exact wording of the Act instead of a judge-made five-part test that imposes requirements and uses wording that are not in the Act. Furthermore, a two-part test is more consistent with the purpose of the SR&ED program because the five-part test has become an onerous compliance burden on taxpayers both at audit and at trial.

The Canadian Chamber concurs the approach taken by the TCC in its decision in National R&D was unduly restrictive regarding the issue of "systematic investigation". The TCC conflated the term systematic investigation with following "the scientific method". Not only is this approach inconsistent with the wording of the Act, but it is also insensitive to the circumstances in which each particular claimant's SR&ED efforts are carried out. For instance, the development of software, the advancement of manufacturing and construction methods and the creation of new commercial products tend to rely more on the engineering method. The engineering method is well established and has been applied by industry for decades, as being an equal, but more contextually appropriate method, than the scientific method. However, the engineering method is not recognized in the SR&ED case law.

Therefore, unless the CRA's SR&ED assessment criteria as well as the TCC denial of National R&D Inc.'s 2011 claim are overturned, critical parts of Canada's economy will be discouraged from exploring innovative research, production methods and commercialization opportunities.

The Canadian Chamber and its national network of chambers have long advocated in favour of simplifying and modernizing the SR&ED program to encourage, among other things, business investment in research and development in Canada. In fact, an overwhelming majority of the Canadian Chamber's national network readopted this standing policy resolution in 2020. It is deeply concerning that Canada's business expenditures on research and development (BERD) as a share of GDP remains below the OECD average and its own 2001 peak. The Canadian Chamber contends that the CRA's restrictive SR&ED assessment practices contributes to Canada's poor BERD performance and the TCC's denial of National R&D Inc.'s 2011 claim exacerbates this challenge.

The Canadian Chamber therefore supports National R&D Inc.'s appeal and calls upon the FCA to take up its arguments on these critical issues in order to stop the irreparable and ongoing damage the CRA's restrictive SR&ED assessment practices is causing to Canada's economic future.

Sincerely,



Hon. Perrin Beatty P.C., O.C.
President and Chief Executive Officer
Canadian Chamber of Commerce

cc: **Hon. Diane Lebouthillier, P.C., M.P., Minister of National Revenue**
Bob Hamilton, Commissioner, Canada Revenue Agency
Hon. Chrystia Freeland, P.C., M.P., Deputy Prime Minister, Minister of National Revenue
Amit Saini, President, National R&D Inc.
François Boileau, Taxpayers' Ombudsperson of Canada