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## Publisher's Note

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# Tax Aspects of Litigation

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This release adds new commentary to the content in Chapter 3 (Issues in Real Estate Litigation), Chapter 4 (Disputes Between Corporations and Their Shareholders); Chapter 6 (The Tax Consequences of Bankruptcy and Insolvency); Chapter 7 (Issues in Separation and Divorce); Chapter 8 (Trust and Estate Litigation); Chapter 9 (The Deductibility of Litigation Expenses); Chapter 10 (Goods and Services Tax/Harmonized Sales Tax (GST/HST)); and 11 (Directors' Liability — The Cases and the Rules of Thumb).

## Highlights

This release includes the following case law:

- **Chapter 3 — Issues in Real Estate Litigation — Involuntary Transfer — Potential Capital Gains** — Where the applicant sister was successful in being declared the owner of two properties jointly owned by her parents, along with her sister, based on proprietary estoppel, any capital gains triggered by transferring the properties

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to the applicant was to be shared between the parents and the applicant: *Layton v. Layton* 2021 CarswellNS 539, 2021 NSSC 201, 59 R.F.L. (8th) 327 (N.S. S.C.).

- **Chapter 4 — Disputes Between Corporations and Shareholders — CCAA Proceedings — Priority Issues — Super-Priority Charges — Directors’ Charge Protecting Directors and Officers Against Liabilities — Prevailing Over Deemed Trust for Unremitted Source Deductions** — Where related corporations initiated restructuring proceedings under the CCAA, and an initial order granted priority to priming charges in favour of the interim lender, the monitor and the directors over all other security interests, and where the corporations’ debt included unremitted source deductions, the priming charges prevailed over the deemed trust created by s. 227(4.1) of the *Income Tax Act* (“ITA”) for unremitted source deductions: *Canada v. Canada North Group Inc.* 2021 CarswellAlta 1780, 2021 CarswellAlta 1781, 2021 SCC 30, 2021 CSC 30, [2021] 10 W.W.R. 1, [2021] 5 C.T.C. 111, 19 B.L.R. (6th) 1, 2021 D.T.C. 5080, 2021 D.T.C. 5081, 28 Alta. L.R. (7th) 1, 460 D.L.R. (4th) 309, 91 C.B.R. (6th) 1 (S.C.C.).
- **Chapter 6 — Tax Consequences of Bankruptcy and Insolvency — Bankrupt Corporations — Priority Interests — Super-Priority Charges — Financing Charges of Interim Lender — Prevailing Over Deemed Trust for Unremitted Source Deductions** — Where related corporations initiated restructuring proceedings under the CCAA, and an initial order granted priority to priming charges in favour of the interim lender, the monitor and the directors over all other security interests, and where the corporations’ debt included unremitted source deductions, the priming charges prevailed over the deemed trust created by s. 227(4.1) of the *Income Tax Act* (“ITA”) for unremitted source deductions: *Canada v. Canada North Group Inc.* 2021 CarswellAlta 1780, 2021 CarswellAlta 1781, 2021 SCC 30, 2021 CSC 30, [2021] 10 W.W.R. 1, [2021] 5 C.T.C. 111, 19 B.L.R. (6th) 1, 2021 D.T.C. 5080, 2021 D.T.C. 5081, 28 Alta. L.R. (7th) 1, 460 D.L.R. (4th) 309, 91 C.B.R. (6th) 1 (S.C.C.).
- **Chapter 7 — Issues in Separation and Divorce — Calculating Annual Income — Child Tax Benefit — Refugee Claimants — Whether “Temporary Residents” — Charter-Based Arguments — Social Science Evidence Admissible** — Where the refugee claimants appealed from the Minister’s determination that each failed to qualify for the Child Tax Benefit as they were not

“temporary residents” within the meaning and for the purposes of section 122.6 of the *Income Tax Act*, as the Minister was incorrect legally and factually, social science evidence was materially important in *Charter*-based cases but an expert witness’ legal opinion would not usually be necessary and should be excluded. In *Yao v. The Queen* 2022 CarswellNat 446, 2022 TCC 23 (T.C.C. [Informal Procedure]).

- **Chapter 8 — Trust and Estate Litigation — The Tax Treatment of Trusts — Basic Rules — Trust Property — Personal Tax Debt of Trustee — CRA’s Interim Charge Discharged** — Trust property was not available to the trustee’s creditors, including the Minister of National Revenue, in relation to a tax debt, where the debt in question was the trustee’s personal debt: *Canada (National Revenue) v. Shaker*, 2022 FC 407 (F.C.).
- **Chapter 9 — The Deductibility of Litigation Expenses — Commercial Litigation Expenses — Court Costs — Unsuccessful Action to Obtain Road Access — Costs Not Deductible as Business Not Yet Started** — Where the taxpayer was unsuccessful in his court action to obtain road access to his property for an intended seasonal business of selling fresh produce, and was ordered to pay court costs, these costs were not deductible as a business expense as the business had not yet commenced: *Vesuna v. Canada*, 2022 FCA 58, 2022 CarswellNat 812 (F.C.A.).
- **Chapter 10 — Goods and Services Tax — Basics of GST — Input Tax Credits — Employees Reimbursed For Naturopathy Services — Denial of ITCs — Connection Lacking Between Services and Employer’s Activities** — Where the registrant reimbursed its employees and their families for acupuncture, massage therapy, naturopathy and homeopathy services, the registrant was unable to claim ITCs as the registrant did not “acquire” these services under s. 169(1) of the *Excise Tax Act* nor was the registrant the “recipient” of those services under s. 123(1) of the Act: *Westcoast Energy Inc. v. Canada*, 2022 FCA 57, 2022 CarswellNat 813 (F.C.A.), affirming *Westcoast Energy Inc. v. The Queen* (2020), 58 C.C.P.B. (2nd) 89, 2020 TCC 116, [2020] G.S.T.C. 442020 CarswellNat 4497 (T.C.C. [Informal Procedure]).
- **Goods and Services Tax — Basics of GST — Zero-rated Supply — In Vitro Diagnostic Testing Kit — CRA Taking Four Years to Affirm Exemption — Two Year Limitation Period For Rebate Expiring — Remission Request Based in “Incorrect Action” Denied** — Where the registrant sought a ruling from the CRA on

whether its *in vitro* diagnostic testing kit was zero-rated, and the CRA took four years to affirm the test kits were exempt from GST/HST following a complete policy review, but the two-year limitation period barred the applicant from receiving a rebate, the registrant's request for remission of GST/HST based on the CRA's "incorrect action" was denied: *Ontario Addiction Treatment Centres v. Canada (Attorney General)*, 2022 CarswellNat 675, 2022 FC 393, 2022 D.T.C. 5031 (F.C.).

- **Basics of GST— Rebates — Subcontractors Paid HST — Unregistered Subcontractors — ITCs Denied as Lack of Documentation — Registrant's Entitlement to Rebate Subject to Limitation Period** — Where the registrant contracted with subcontractors to perform professional cleaning services, and the bi-weekly payments included HST, the registrant was entitled to ITCs for payments to subcontractors with GST/HST registration, but for unregistered subcontractors, the lack of documentation disentitled ITCs for these admittedly small suppliers. At the same time, subject to the limitation period in s. 261(3) of the ITA, the registrant was entitled to a rebate of the HST paid in error, and there was no limitation based on the registrant's negligence or carelessness: *Mediclean Incorporated v. The Queen*, 2022 TCC 37, 2022 CarswellNat 632 (T.C.C.).
- **Basics of GST — Rebate — New Housing Rebate — Short Duration — Stated Subjective Intent Not Supported by Objective Facts** — Where the taxpayer and her husband occupied the purchased townhouse for a short duration, and the objective facts did not support the taxpayer's stated subjective intent to use the property as their primary place of residence, the taxpayer was not entitled to the New Housing Rebate: *Fard v. The Queen*, 2022 TCC 42, 2022 CarswellNat 947 (T.C.C. [Informal Procedure]).
- **Chapter 11 — Director's Liability — Director Order to Pay — Employment Standards Act — Director Allegedly Resigning Prior to Claim — Undated Notice of Resignation Insufficient — Jurisprudence in Tax Case Applied** — In the context of a Director Order to Pay under the Ontario *Employment Standards Act, 2000*, the decision in *Chriss v. R.* 2016 FCA 236 (F.C.A.), was applied in finding that an undated Notice of Resignation was insufficient to prove that the director had resigned prior to the claim period: *Ng v. Lin* 2021 CarswellOnt 19750 (O.L.R.B. [ESA Appeals]).