



THE CANADIAN
BAR ASSOCIATION

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GST/HST Joint Venture Election

**CANADIAN BAR ASSOCIATION
COMMODITY TAX, CUSTOMS AND TRADE SECTION**

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Commodity Tax, Customs and Trade Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Commodity Tax, Customs and Trade Section.

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GST/HST Joint Venture Election

I. INTRODUCTION

We are writing on behalf of the Commodity Tax, Customs and Trade Section of the Canadian Bar Association (CBA Section) in response to the Canada Revenue Agency's (CRA) interpretation of the term "participant" for the purposes of the joint venture election described in section 273 of the *Excise Tax Act* (ETA).

The CBA Section believes that, to the extent the CRA's interpretation of the term participant under subsection 273(1) excludes a nominee corporation or bare trustee (Nominee) in a typical real property joint venture (JV), this interpretation is unduly restrictive and inconsistent with the clear language and purpose of section 273.

In our opinion, a Nominee can be a "registrant" for GST/HST purposes under Part IX of the ETA. Since a Nominee can satisfy the definitions of both participant and registrant, a Nominee can be designated as the operator under the Election.

II. TYPICAL STRUCTURE OF A REAL PROPERTY JOINT VENTURE

A. Key Terms of a Typical Real Property JV

In a typical JV, two or more parties referred to as co-venturers enter into a written agreement (JV Agreement) to pool their resources, including money, property, effort and knowledge, to develop real property for the purpose of selling or leasing residential or commercial units or parcels of the developed real property. One example of a JV would be to build homes and other improvements (such as roads, sewers, street lights) under a registered plan of subdivision, and to market and sell the homes.

Typically, the principal co-venturers with a financial interest will establish an additional co-venturer, a Nominee, to hold title to the real property and other assets of the JV as agent on behalf of the financial co-venturers and to enter into agreements with suppliers, purchasers and lessees as undisclosed agent on their behalf. As a party to the JV Agreement, the Nominee enters into this agreement with the financial co-venturers.

B. Governance of the Nominee

Typically, each financial co-venturer owns shares in the Nominee equal to its respective proportionate interest in the JV and is entitled to appoint its proportionate share of directors and officers to the Nominee's board of directors and executive. Usually, these directors and officers overlap with the directors and officers of the financial co-venturers and become members of the management committee (or a similar organization) created under the JV Agreement. The Management Committee is the means by which the financial co-venturers direct and control the business affairs, and make the major business decisions of the JV.

C. Role of the Nominee

Under many JV Agreements, the Nominee participates in three critical and related roles in the JV's operations:

First, the Nominee holds title (i.e., the legal ownership) to the JV's real property and other assets on behalf of all the financial co-venturers. Although the legal and beneficial ownership of the JV property is divided between the Nominee and the financial co-venturers, the entire value of the property accrues to the financial co-venturers' beneficial interests.

The JV Agreement, often in conjunction with a simultaneous Nominee agreement entered into by the Nominee and financial co-venturers, establishes the terms and conditions under which the Nominee can acquire, hold, dispose of, or otherwise deal with the JV's property. Under these terms and conditions, the Nominee is generally considered a bare trustee, and can only deal with the property as specifically and expressly directed in writing by the beneficial owners (the financial co-venturers). All benefits of ownership of the property, such as sales revenues, rents and profits derived from the property belong exclusively to the beneficial owners. The financial co-venturers assume responsibility and liability for all expenses, losses or liabilities connected with the JV's property.

Second, the JV Agreement authorizes the Nominee to enter into agreements with suppliers and customers on behalf of, and as agent for, the financial co-venturers. The Nominee generally exercises this authority. For example, one clause used in JV Agreements provides that the parties:

shall, to the extent possible, ensure that all contracts entered into, or liabilities incurred, by or on behalf of the [financial co-venturers] with third parties shall be entered into to the extent possible by the [Nominee].

Rather than each financial co-venturer having to enter into agreements with suppliers and customers, the Nominee can enter into agreements on behalf of the financial co-venturers. Often the customers and suppliers do not know that the Nominee is acting only as a nominee for the financial co-venturers.

The JV's suppliers generally issue invoices to the Nominee. Other documentation relating to acquisitions and supplies made by the Nominee on behalf of the financial co-venturers are entered into and signed by the Nominee, or indicate the Nominee as supplier or recipient (in reality, as the agent or representative of the financial co-venturers). The documentation would include conveyance and closing documentation relating to the taxable sale of new houses, residential condominium units and commercial real property.

Unlike the Nominee, each financial co-venturer is generally expressly denied authority to act as agent on behalf of any other financial co-venturer. An illustrative clause in a JV Agreement reads as follows:

Except as otherwise provided in this Agreement, no co-venturer shall have any authority to act for or on behalf of another co-venturer or to bind another co-venturer.

JV agreements are entered into by an entity managed and controlled jointly by the financial co-venturers (i.e., the Nominee). This mechanism ensures that the co-venturers only enter into agreements in a manner contemplated by the JV Agreement and in accordance with the governance structure of the JV (i.e., as directed by the JV's Management Committee through the Nominee). The Nominee, therefore, makes a crucial contribution to the JV's governance.

Third, the Nominee is typically responsible for maintaining the JV's accounting books and records and for administering and accounting for the GST/HST in the JV's activities. The Nominee is often responsible for charging and collecting appropriate GST/HST on behalf of the financial co-venturers and ensuring appropriate input tax credits (ITCs) are claimed on behalf of the financial co-venturers. The Nominee maintains bank accounts in its name for the JV's activities.

The Nominee's roles and activities simplify the administration of the GST/HST not only for the co-venturers, but for the JV's suppliers and customers. The prescribed Input Tax Credits (ITC) documentary information obtained by customers, where applicable, can indicate the Nominee and Nominee's GST/HST registration number, instead of the name and GST/HST registration number of each financial co-venturer, irrespective of whether each financial co-venturer has

entered into an Election with the Nominee.¹ The Nominee's contracts with suppliers, together with any invoices issued by suppliers, can satisfy the prescribed ITC documentary information requirements for the Nominee (with an Election) or financial co-venturers (without an Election).²

D. The Nominee's Role is Consistent with Acting as Operator under the Election

If a Nominee is validly designated as the JV's operator under the Election, the Nominee can undertake all the JV's GST/HST reporting, including claiming the ITCs of the JV, on the Nominee's GST/HST returns. This Election facilitates the Nominee fulfilling the above-noted roles in the JV's operations.

The Election eliminates the burden of each financial co-venturer filing separate GST/HST returns to report their proportional net GST/HST and allocating the GST/HST liabilities, adjustments to net tax (notably deductions for GST/HST New Housing Rebates assigned by purchasers) and ITC entitlements among the financial co-venturers. The Election also eliminates the burden of allocating the GST/HST receipts to net GST/HST remittances among the financial co-venturers.

If a Nominee is validly designated as the JV's operator under the Election and the Nominee purchases taxable real property as undisclosed agent on behalf of the financial co-venturers, the Nominee would be deemed to be the purchaser pursuant to paragraph 273(1)(a) of the ETA. To relieve the vendor from charging and collecting GST/HST, only the Nominee would need to be registered for the GST/HST under section 221(2). To substantiate this relief, the Nominee could provide its GST/HST registration number. The undisclosed agency relationship would therefore not be compromised. The Nominee would then self-assess, report and pay the applicable GST/HST, subject to any offsetting ITC claim.³

¹ As the Financial Co-Venturers' sole authorized representative and agent, the Nominee is an "intermediary" within the meaning of section 2 of the *Input Tax Credit Information (GST/HST) Regulations*. As such, the Nominee's name and GST/HST registration number can be provided to satisfy the prescribed ITC documentary requirements under subparagraph 3(b)(i) of these Regulations where no Election has been made. With the Election, the Nominee would be deemed to be the supplier under section 273 of the ETA and the supplier's name and its GST/HST registration number would also satisfy subparagraph 3(b)(i) of the Regulations.

² *Input Tax Credit Information (GST/HST) Regulations*, subparagraph 3(c)(ii). With an Election, the Nominee is the recipient. Without an Election, the Nominee is each "recipient's duly authorized agent or representative". The recipients would be the Financial Co-Venturers.

³ ETA, subsections 228(4) and (6).

While maintaining the confidentiality of the undisclosed agency relationship and the financial co-venturers' interests in the real property, this Election simplifies the GST/HST reporting on the taxable purchase of real property. In the absence of the Election, the GST/HST payment and ITC entitlement would be allocated and fragmented between or among each financial co-venturer (registered for GST/HST instead of the Nominee).

III. CAN THE NOMINEE BE A “REGISTRANT”?

To be designated as *operator* under the Election, a Nominee must not only be a *participant*, but must also be a *registrant*. A *registrant* is either a person registered, or required to be registered, for the GST/HST under Part IX, section 123(1) of the *ETA*.

If not otherwise required to register for the GST/HST, a person “engaged in a commercial activity in Canada” may voluntarily register in certain circumstances under subparagraph 240(3)(a) of the *ETA*. Under subsection 123(1)(a), a Nominee who acts as an agent for the financial co-venturers of a JV is engaged in a commercial activity by virtue of carrying on a business of making taxable supplies of agency services to the financial co-venturers. This would be the case regardless of whether a separate fee is charged for these services.

The Nominee is entitled to be registered for the GST/HST and become a *registrant*. Once the Election is made, the Nominee is deemed under subsection 273(1) of the *ETA*, in its capacity as the JV's operator, to be engaged in the commercial activities of the financial co-venturers and to make the JV's taxable supplies in the course of a business carried on, or an adventure or concern in the nature of trade engaged in by the Nominee.⁴ As a consequence, the Nominee remains a *registrant* during the period that the Election is in effect.

A Nominee, therefore, can be a *registrant* for the purposes of Part IX of the *ETA*.

IV. CRA'S ADMINISTRATIVE POSITION ON THE MEANING OF “PARTICIPANT” AS IT RELATES TO NOMINEES

In CRA's GST/HST Policy Statement P-106 – *Administrative definition of a “participant” in a joint venture*, released on November 7, 1993 (P-106), the CRA takes the position that for the purposes of section 273, a participant of a JV means:

⁴ *ETA*, subsection 123(1), paragraphs (a) and (b) of the definition of “commercial activity”.

- (i) a person who, under a JV Agreement evidenced in writing, makes an investment by contributing resources and takes a proportionate share of any revenue or incurs a proportionate share of the losses from the joint venture activities; or
- (ii) a person, without a financial interest, who is designated as the operator of the joint venture under an agreement in writing and is responsible for the managerial or operational control of the JV Agreement. (CRA Participant Definition)

Since a Nominee typically does not have a financial interest in the JV, a Nominee would need to have “managerial or operational control” to be a participant of the JV under the CRA’s interpretation.

CRA published *GST/HST Notice No. 284 – Bare Trusts, Nominee Corporations and Joint Ventures* (Notice 284) to clarify the application of the Election to a Nominee. In Notice 284, the CRA states that, absent any managerial or operational control by a Nominee (referred to in that document as a “bare trust”), a Nominee cannot be an operator:

For the purposes of the section 273 joint venture election, a “bare trust” which is a bare trust at law cannot be considered the operator of a joint venture.

Neither P-106 nor Notice 284 provides any statutory or judicial basis for narrowly construing *participant* in a JV to exclude a Nominee. In other circumstances, the CRA has advocated that a Nominee can be a *participant* and an *operator* (see discussion of the *Lau* decision below). The CRA’s position that a Nominee could be a *participant* in a JV was ultimately accepted by the court in the *Lau* decision.

V. WHAT IS A “PARTICIPANT” FOR THE PURPOSES OF THE ELECTION?

A. Principles of Statutory Interpretation

In interpreting *participant* as used in subsection 273(1), we look to the modern rule of statutory interpretation, set out by the Supreme Court of Canada in *Queen v. Canada Trustco Mortgage Company*, 2005 SCC 54:

It has been long established as a matter of statutory interpretation that ‘the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament’. See *63502 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process.

On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words play a lesser role. [emphasis added]

The Supreme Court elaborated that:

There is no doubt today that all statutes, including the *Income Tax Act*, must be interpreted in a textual, contextual and purposive way.

In our view, the CRA's narrow interpretation of the term *participant* as used in subsection 273(1) is inconsistent with a "textual, contextual and purposive" interpretation of that subsection.

B. Textual Approach – What is the Ordinary Meaning of a “Participant”

In view of the specificity and technical nature of tax legislation, emphasis should be placed on the textual interpretation. As the Supreme Court of Canada said in *Canada Trustco*:

...[T]he particularity and detail of many tax provisions often [lead] to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.

A textual approach requires considering the ordinary meaning of *participant* in subsection 273(1) of the ETA. Given that a JV is fundamentally a contractual relationship, a plain language interpretation of the term *participant* should include any person that participates in the JV activities as a party under the JV Agreement, including the Nominee.

One constituent element of the legal definition of a JV is “a contribution by the parties of money, property, **effort**, knowledge, skill **or** other assets to a common undertaking” (emphasis added).⁵ In a typical real property JV, the Nominee clearly contributes effort to the common undertaking of the JV by:

- holding title and legal ownership to the real property and other assets of the JV,
- entering into agreements with suppliers and customers as agent on behalf of the financial co-venturers,
- maintaining the JV's accounting books and records and bank accounts; and

⁵ *Central Mortgage & Housing Corp. v. Graham*, (1973) 43 DLR (3d) 686 (Nova Scotia, Supreme Court, Trial Division).

- acting as the “operator” to collect, account for and remit the appropriate GST/HST for the JV’s activities.

We believe that a Nominee is a *participant* in a JV, in the ordinary meaning of that word, for the purposes of subsection 273(1) of the *ETA*.

Since *participant* has an ordinary meaning that is both broad and unambiguous, there is no textual basis for assigning the narrow definition favoured by the CRA in P-106 and Notice 284. Had Parliament intended *participant* to have a meaning so different from its ordinary meaning, it could and should have made that intent clear by expressly defining the term for the purposes of section 273, rather than relying on the ordinary meaning.

C. Contextual Interpretation – Meaning of “Participant” in Section 273

To the extent that there is any ambiguity about the ordinary meaning of *participant*, a contextual interpretation as used in section 273 resolves the ambiguity and supports the view that a Nominee can be a *participant* of a JV (and therefore an operator) for the purposes of the Election.

Subsection 273(1) clearly sets out the sole conditions imposed on a person in order for the person to act as an operator for the purposes of the Election, namely that the operator:

- be a registrant under the Part IX of the *ETA*; and
- act as agent in making and acquiring supplies on behalf of the other co-venturers.

Paragraph 273(1)(a) of the *ETA* contemplates that an operator would act as agent in making supplies and acquisitions on behalf of the other co-venturers “in the course of the activities for which the [JV Agreement] was entered into”. Consistent with this intent, paragraph 273(1)(b) expressly provides that section 177 does not apply to the operator. When paragraph 273(1)(b) and the original version of section 177 became law on December 18, 1990, section 177 specifically dealt with taxable supplies made by agents on behalf of principals. Paragraph 273(1)(b) makes clear that paragraph 273(1)(a) is intended to override section 177 in respect of taxable supplies made through an agent. In drafting section 273, Parliament contemplated that an operator would be an agent on behalf of other co-venturers. In its Technical Information Bulletin B-068 – Bare Trusts, the CRA acknowledges that a bare trust should not be treated as a true trust, but rather establishes an agency relationship between the Nominee and the beneficial owners (i.e., the financial co-venturers).

We do not believe there is contextual basis for reading into the definition of a *participant* (and by implication an operator) a requirement that a party to the JV Agreement have either a financial interest in, or managerial or operational control of the JV. All that is required for one person to act as agent for a principal is for the agent to have legal authority to enter into acquisition and supply contracts on behalf of the principal to affect the principal's legal position.⁶ As a party to the JV Agreement, the Nominee is required to participate in the JV's activities (i.e., contribute effort to the JV's common undertaking) and authorized to act as an agent on behalf of the financial co-venturers in making and acquiring supplies. Under a contextual interpretation, the Nominee meets all the requirements to be a *participant* in the meaning of subsection 273(1) of the ETA.

A partnership is specifically excluded from the application of subsection 273(1) because, unlike a JV, a partnership is defined as a "person" for the purposes of Part IX of the ETA. In the context of Part IX, and considering the purpose of section 273 outlined in Finance Canada's Explanatory Notes to Bill C-62⁷, section 273 is intended to put a JV on the same footing as a partnership.

In the absence of a partnership being considered a person, each partner would be required to report and account for its proportionate share of net tax relating to its own commercial activity within the JV. Similarly, section 273 of the ETA is designed to reduce and streamline the GST/HST reporting, filing and remittance obligations through a single participant who is an agent on behalf of the financial co-venturers. There is no competing purpose or object under Part IX of the ETA that would suggest a restrictive interpretation of *participant*. The financial co-venturers seek no illicit or unfair advantage by designating the Nominee as operator under subsection 273(1) of the ETA. Any concerns about tax leakage, which would arise from unenforceability of tax claims against a Nominee without substantial assets, are adequately addressed by the joint and several liability provisions in subsection 273(5). Under this provision, CRA can seek recourse against the financial co-venturers (i.e., the beneficial owners of the JV assets). Moreover, derivative GST/HST liability claims may be pursued against the Nominee's directors as per section 323. If a financial co-venturer is a partnership, then CRA may assess members of the partnership directly.

The legislative history of section 273 is instructive. When subsection 273(1) was enacted, the only activities prescribed for the purpose of the Election under the *Joint Venture (GST/HST) Regulations* were the construction of real property (including certain related ancillary work) and

⁶ *Glengarry Bingo Association v. Canada*, [1995] G.S.T.C. 41 (TCC); rev'd [1999] G.S.T.C. 15 (FCA); leave to appeal denied [2000] G.S.T.C. 9 (SCC). Refer also to CRA's GST/HST Policy Statement P-182R, Agency (Revised July 2003).

⁷ ETA, Revised Statutes of Canada, 1985, Chapter E-15, Parts VIII and IX enacted by S.C. 1990, c. 45 [Bill C-62].

the ownership of real property (including construction or development) for the purpose of deriving revenue from the property by way of sale, lease, license or similar arrangement.

In a typical real property JV, the Nominee is established specifically for the purpose of holding the JV real property and other assets as bare trustee or agent on behalf of the financial co-venturers, and to enter into agreements to make and acquire supplies on behalf of the financial co-venturers, as contemplated by the JV Agreement. This typical real property JV structure pre-dates subsection 273(1) and the *Joint Venture (GST/HST) Regulations*. It is reasonable to conclude that Parliament intended subsection 273(1) to apply to the JV structure commonly used by real property developers.

The alternative interpretation, favoured by the CRA, would limit availability of the Election rendering it largely inaccessible. Parliament would have explicitly limited the availability of the Election to participants in the JV having a financial interest in, or operational control and management of, a JV, if it intended to do so.

In our view, the administrative restrictions in P-106 and Notice 284 as to who can be a *participant* for the purposes of the Election are not supported by the language in the ETA or the case law, and they undermine the utility and scope of section 273.

D. Purposive Interpretation

A purposive interpretation further supports the CBA Section's view that *participant* should be interpreted liberally to include a Nominee. Sullivan on *Construction of Statutes* (Fifth Edition) states at page 255:

In so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.

Parliament enacted section 273 as a relieving provision to simplify GST/HST compliance with Part IX of the ETA.⁸

This Election simplifies the administration and reduces the burden of GST/HST compliance under Part IX for JVs, and for the CRA in administering and auditing JVs. The absence of the Election, would create a significant administrative burden for co-venturers, would unduly complicate the

⁸ The legislative purpose of section 273 of the ETA was affirmed by the Finance Minister in Parliament on February 11, 2014 when tabling the Budget Plan in the House of Commons announcing the federal government's intent to expand the activities eligible for the Election.

administration of GST/HST compliance for JVs, and would unduly complicate the CRA's enforcement of Part IX of the ETA for JVs.

By limiting the availability of the Election, the CRA's restrictive interpretation of a *participant* increases the CRA's work in auditing JVs as the CRA would need to audit each separate participant for its respective portion of ITCs and for GST/HST collected. For these reasons, an expansive interpretation of *participant*, in accordance with its ordinary meaning, should be applied.⁹ Where a restrictive interpretation of a statute would render it useless, or of little practical value, an expansive interpretation should be taken.¹⁰

E. Judicial Interpretation of a “Participant”

To our knowledge, *Lau v. The Queen* 2007 TCC 718 is the only reported decision to consider whether a Nominee is a *participant* under subsection 273(1). Accepting the arguments made by CRA in that case, the Tax Court of Canada interpreted a participant broadly to include a Nominee, rejecting the position adopted in P-106 and Notice 284. At issue in *Lau* was whether the financial co-venturers to a real property development JV had designated their Nominee (agent) as the operator for the purposes of the Election. Although McArthur J. ultimately determined that section 273 did not apply to the Nominee, owing to the failure of the parties to actually make the Election, he concluded that a *participant* includes a Nominee.

In *Lau*, the CRA argued that the Nominee was a participant under subsection 273(1), notwithstanding that it did not have a financial interest in the JV or have operational or managerial control of the JV. McArthur J. set out the position of the CRA as follows:

The Minister submits that by virtue of its registration for GST and its inclusion in the joint venture agreement, GL Trust was an operator and participant in the joint venture and as such, was required to remit tax for all members of the joint venture pursuant to subsection 273(1) of the Act.¹¹

⁹ In *Québec (Services de santé) v. Québec (Communauté urbaine)* [1992] 1 S.C.R. 426, the Supreme Court of Canada interpreted Quebec's *Code of Civil Procedure* so as not to require “the appearance and incidental appeal ... to be filed *at the same time* ... in two different places which, depending on the judicial district, may be a considerable distance apart.” The Supreme Court found “it would be incongruous, to say the least”. In the Court's view, “an interpretation that leads to such a result is untenable.”

¹⁰ In *Campbell (G.T.) & Associates Ltd. v. Hugh Carson Co.* [1979] O.J. No. 4248, 99 D.L.R. (3d) 529 (Ont. C.A.), the majority of the Ontario Court of Appeal rejected a narrow interpretation of the term “creditor” to avoid “an unjust and unreasonable result” that would render the right to bring a claim under the relevant provision “largely inoperative” as a practical matter.

¹¹ *Ibid.*, at para. 4.

We agree with the position advanced by the CRA and accepted by the Tax Court in *Lau*. This position is supported by a textual, contextual and purposive interpretation. McArthur J. accepted the CRA's reasoning, concluding that:

For section 273 to apply, it must be established that [the Nominee] was a "participant" in the joint venture. While I agree that "participant" is not defined in the Act, I do not accept the Appellant's submission that the decision in *Westcan Malting Ltd. v. R.* defines "participant". Referring to the definition as provided by the Appellant, and as defined by *Shorter Oxford English Dictionary*, I conclude that GL Trust was a participant of the joint venture, as the trust partook and shared in the responsibilities of the joint venture through its management of the lands. The *Canadian Oxford English Dictionary, 5th Edition* defines "participant" as follows:

A person who participates in something; a participator.¹²

Crucially, while McArthur J. concluded that the participant "shared in the responsibilities of the joint venture through its management of the lands", it did so solely in its capacity of bare trustee or agent (since it had no other authority *vis-a-vis* the real property to act without the direction from the financial co-venturers and beneficial owners of the real property). Apart from being inconsistent with the CRA's own pleadings and arguments in *Lau*, P-106 and Notice 284 are inconsistent with the Tax Court's decision.

F. Audit Risk to the CRA

The designation of the Nominee as operator under the Election does not impair CRA's ability to enforce GST/HST compliance. Denial of the Election could put CRA at risk of suffering revenue losses from the overpayment or wrongful tax refunds to the Nominee.

Currently, there are numerous circumstances where parties, including a Nominee, enter into a JV to deal with the construction and sale of real property, and the Nominee is designated as the JV's operator under an Election made by the parties, as contemplated by the JV Agreement. During the development phase, the Nominee's ITC claims would generally result in substantial refunds claimed by the Nominee on its GST/HST returns. The Nominee would generally not have any assets of its own, other than its claims for the GST/HST refunds, which it would generally pay out to the various financial co-venturers.

Under the CRA's policy on the meaning of *participant*, the CRA would deny the validity of the Election and would assess the Nominee to disallow the ITCs claimed. Once the Election is denied, the financial co-venturers would be entitled to claim their respective share of the ITCs previously claimed by the Nominee.

¹² *Ibid.*, at para. 21.

However, it is unclear what would happen if the Nominee did not pay the amount assessed by the CRA. The Nominee would generally not have assets to pay the assessment, unless the financial co-venturers provided the Nominee with funds, which they would not be required to do.

In these circumstances, the CRA would likely have to resort to assessing the Nominee's directors under section 323 of the ETA. However, directors could apply a due diligence defence, particularly as the Nominee would have signed an Election that it believed to be valid.

The CRA could be required to pay tax refunds to the financial co-venturers (which, based on the CRA's position, are entitled to claim the ITCs), without being able to collect against the Nominee. While a valid Election creates joint and several liability under subsection 273(5) (so CRA could claim against the financial co-venturers), the CRA would not have recourse against the financial co-venturers under this provision due to taking the position that the Election is invalid.

VI. CONCLUSION

The CBA Section believes that a reasonable interpretation of *participant* should include a Nominee under subsection 273(1), given that:

- (i) a Nominee is a participant in its ordinary meaning and nothing suggests that Parliament intended any other meaning;
- (ii) this interpretation is supported by contextual and purposive analyses;
- (iii) this interpretation is consistent with the operation and scheme of section 273 and does not impair the proper administration or enforcement of GST/HST compliance;
- (iv) this interpretation gives full effect to the purpose section 273, which is to simplify and streamline the administration and compliance with GST/HST for JVs; and
- (v) the CRA's position is contrary to its previous position, accepted by the Tax Court of Canada in *Lau*, that a Nominee can be a "participant" for the purposes of subsection 273(1).

We see no basis for the narrow interpretation of *participant* as reflected in P-106 and Notice 284. On the contrary, a textual, contextual and purposive interpretation of section 273, supported by the case law interpreting this section, supports a liberal interpretation of a participant to include a Nominee, who is a party to a JV Agreement, and holds property and acts as agent on behalf of the financial co-venturers within the scope of paragraph 273(1)(a) of the ETA.

We thank you for the opportunity to comment and look forward to clarification on this issue.