

Alberta Investor Tax Credit program - even more bad news

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On January 17, 2017, I published a blog about the [new Alberta Investor Tax Credit program](#). For those of you who read my original blog, you'll know that I was and remain very critical of the new program. Subsequent to the publishing of my article, some astute readers in the Alberta business and technology industry brought two potential deal killers for the Alberta Investor Tax Credit (AITC) to my attention. A third item, discovered on another read-through of the regulations enacted to implement the many prescribed rules related to the AITC, concerns overreaching Ministerial discretion which, in my view, too easily lends itself to politically motivated denial of the credit. Accordingly, the purpose of this follow-up article is to bring the two deal killer issues to your attention and raise the concern of the overreach that I have subsequently identified.

A. The Two Deal Killers:

1. Necessary Amendment to the Articles of Incorporation

Section 5(1) of the Alberta Investor Tax Credits Regulation (the Regulations) states:

The articles of a corporation applying for registration under the Act must provide that fees or remuneration of any kind to any shareholder, director or officer of the corporation, or to any affiliate or associate of those persons, are prohibited except as permitted by an annual ordinary resolution. [my emphasis]

In most small technology companies, almost all employees are shareholders. Employees, directors, and officers are, of course, remunerated with some combination of salary, bonus, stock-based compensation such as stock options or restricted stock and director's fees. All of these items would most certainly constitute "remuneration of any kind." It would be highly unusual for a corporation to have a provision in its articles that would require an annual shareholders resolution to approve the compensation of every single employee. Therefore, under *the Act*, most corporations would be disqualified because their articles wouldn't contain the necessary prohibition. To date, appeals to Alberta Economic Development and Trade (who administer the program) appear to have fallen on deaf ears.

For a public company that would otherwise qualify for the AITC, the process of amending its articles is a cumbersome one. Assuming the Annual General Meeting is not imminent, a Special Meeting of the Shareholders could be called. This would take a minimum of 60 days, at great cost, to complete the process that involves the board of directors, the transfer agent, securities lawyers, several third parties, and shareholders. Hopefully, all of this can be accomplished before the annual tax credit allotment provided for all companies set by the Government is not fully consumed by applications from other companies.

One additional point: for purposes of the annual ordinary resolution discussed above, subsection 1(3) of the Regulations provides:

A shareholder who is receiving, or is proposed to receive, any fees or remuneration from the corporation or whose associate or affiliate is receiving, or is proposed to receive, any fees or remuneration from the corporation is deemed to be not entitled to vote in person or by proxy at an annual general meeting in respect of an ordinary resolution to approve or ratify the payment of any fees or remuneration by the corporation. [my emphasis]

So, how will this work? Let's say, for example, six entrepreneurs have formed a company to develop a technology platform for employee engagement. It's a start-up and all of the entrepreneurs are shareholders. If the six entrepreneurs are the *only* shareholders of the company, and all participate in the business and are remunerated for their efforts, who would be left to vote for the necessary annual ordinary resolution?

2. Anti-Stacking Regulation

The second deal killer may be even more devastating to the technology industry than the first. The issue surrounds so-called "anti-stacking" rules in subsection 5(4) of the Regulations that disqualify investee companies from participating in the AITC program if they have received any funding, directly or indirectly, from Alberta Enterprise Corporation after the coming-into-force of the Regulations.

In Alberta, there is a Crown Corporation called Alberta Enterprise Corporation (AEC) that invests in virtually every venture capital fund (VC) in Alberta that is targeted to the technology industry. Commonly, the VC will raise money from investors and AEC and then the funds are pooled to invest in Alberta technology companies that the VC believes in. To the extent that a VC has been partially funded by AEC, the VC and *all* of its investee companies who have received AEC funds through the VC are disqualified from participating in the AITC.

How would this work? If the VC raises \$5 million, \$1 million of which is from AEC, and invests \$1 million in five different tech companies, all of the technology companies would be disqualified to participate in the AITC program on the basis that they each received \$200,000 from AEC. However, could it be viewed that the VC allocated the full \$1 million to one of the companies that may not otherwise be eligible for the AITC, thus entitling the remaining four companies to be eligible? Not sure. If the former view is the better view, then the only way these anti-stacking rules are even possibly workable is if the latter approach can be taken and clear guidance is issued by the Alberta government. It may be likely that virtually every investment worthy technology company in Alberta will be disqualified from participating.

B. Overreach?

1. Ministerial Discretion Based on "Public Policy"

As mentioned, I recently took another complete re-read of the Regulations. The broad discretionary powers granted to the Minister under subparagraph 12(1)(c)(ii) dealing with business activities that qualify for funding under the AITC program are striking:

The following are business activities for the purposes of sections 11(c), 12(1)(c) and 37(3) of the Act:

...

(c) the development within Alberta for commercial use of interactive digital media or video game product that...

(ii) is not, based on inquiries the Minister considers adequate and appropriate, a product for which public financial support would be contrary to public policy. [my emphasis]

What does that mean? For example, if an Alberta technology company creates an interactive educational module that demonstrates that manmade global warming is hokum would that be “*contrary to public policy*” in the NDP world? I bet it would be.

There’s a similar carve-out for post-production services in (d). Obviously, I’m concerned. At face value, it would appear that any technology company that might not share the same views on public policy as the reigning government could be disqualified from eligibility for the AITC program.

The AITC is a very short term program and is off to a very bad start. Disappointing.