File: 2016-4984(IT)G

BETWEEN:

CAE INC.,

caller ,

And

HER MAJESTY THE QUEEN,

respondent e .

Appeal heard on June 3 and 4, 2019 and August 24 and 25, 2020 in Montreal, Quebec.

Before: The Honorable Justice Sylvain Ouimet

Appearances :

Counsel for the Appellant :	Mr. Wilfred Lefebvre Mr. Marc -Olivier Plante
Counsel for the Respondent :	Mr. Dany Leduc Ms Antonia Paraherakis _

JUDGEMENT

The appeal of the assessments made under the Income Tax *Act for the 2012 and 2013 taxation years is dismissed, with costs, for the reasons attached.*

Signed at Ottawa, Canada, this 14th day of September 2021 .

"Sylvain Ouimet"
Judge Ouimet

Reference: 2021 CCI 57

Date: 20211108
File: 2016-4984(IT)G

BETWEEN:

CAE INC.,

caller ,

And

HER MAJESTY THE QUEEN,

respondent .

AMENDED REASONS FOR JUDGMENT

Judge Ouimet

I.INTRODUCTION

[1]CAE Inc. (“CAE”) is appealing two assessments made on December 15 and October 26, 2016 by the Minister of National Revenue (the “Minister”). These assessments relate to the 2012 and 2013 taxation years. By these assessments, the Minister concluded that the sums received by CAE under an agreement entered into with the Minister of Industry of Canada entitled “- SADI Agreement NO. 780-503924 - Strategic Aerospace and Defense Initiative - Project Falcon” (“ISAD Agreement”) constituted “government assistance” within the meaning of subsection 127(9) of the Income Tax Act, *RSC* 1985 , c.1 (5th Supp.) (“ *ITA* ”). Specifically, the Minister concluded that the amounts of $57,084,395 and $59,148,888 that CAE received or was entitled to receive under the SADI Agreement during the 2012 and 2013 taxation years respectively constituted a form of " government assistance".

[2]Having concluded that the amounts of $57,084,395 and $59,148,888 constituted a form of "government assistance" within the meaning of subsection 127(9) of the ITA , the Minister concluded that the amounts of *$* 41,003,491 and $40,652,951 received by CAE under the ISAD Agreement during the 2012 and 2013 taxation years and used for scientific research and experimental development (“SR&ED”) purposes had to be subtracted from the amount of deductible SR&ED expenditures of CAE under paragraph 37(1)(d) of the *ITA* for those taxation years.

[3] In addition, pursuant to subsection 127(18) of the *ITA* , the Minister has determined that the amounts that CAE received or was entitled to receive under the SADI Agreement during the 2012 and 2013 taxation years, $57,084,395 and $59,148,888, respectively, had to be subtracted from the amount of qualified SR&ED expenditures for the purposes of CAE's investment tax credit for those taxation years.

[4] Finally, pursuant to subparagraphs 12(1)(x)(iv) and 12(1)(x)(v) of the *ITA* , the Minister concluded that the amount of $14,806,939, being the difference between the amount received by CAE during the 2012 taxation year under the ISAD Agreement ($55,810,430) and the sum of CAE's SR&ED expenditures during that same year in relation to the agreement ($41,003 $491), was to be included in computing CAE's income for the 2012 taxation year.

[5] The following persons testified for the Respondent at the hearing:

- - Jean Lemieux, employee of the Strategic Innovation Fund within the Department of Industry Canada.
- - Neil de Gray, expert witness.

[6] The following persons testified for the appellant at the hearing:

- - Constantino Malatesta, Vice President Finance of CAE.
- - Sylvie Brossard, vice-president of CAE's tax department.

II. THE ISSUES IN DISPUTE

[7] The issues in dispute are as follows:

1. Did the Minister rightly conclude that the sums of $57,084,395 and $59,148,888 that CAE received or was entitled to receive under the SADI Agreement over the years 2012 and 2013 tax returns, respectively, constituted “government assistance” within the meaning of subsection 127(9) of the *ITA* ?

2. Did the Minister correctly conclude that the sums of $57,084,395 and $59,148,888 that CAE received or was entitled to receive under the ISAD Agreement should be deducted from the amount of its SR&ED expenditures eligible for the purposes of calculating CAE's investment tax

credit for the 2012 and 2013 taxation years respectively, pursuant to subsection 127(18) of the *ITA* ?

3. Did the Minister rightly conclude that the sums of $41,003,491 and $40,652,951 [1] received by CAE under the ISAD Agreement for the 2012 and 2013 taxation years should be subtracted from the amount of SR&ED expenditures deductible from CAE's income for the 2012 and 2013 taxation years respectively, under paragraph 37(1)(d) of the *ITA* ?

4. Did the Minister correctly conclude that the sum of $14,806,939 should be included in the calculation of CAE's income for the 2012 taxation year under subparagraph 12(1) x)(iv) of the *ITA* ?

[8] Alternatively, if the Court were to conclude that the amounts received by CAE under the ISAD Agreement did not constitute a form of " government assistance" within the meaning of subsection 127(9) of the *ITA* , the Court will have to answer the question next :

> Did amounts received by CAE under the ISAD Agreement in the 2012 and 2013 taxation years respectively constitute inducement payments, reimbursements or contributions within the meaning of paragraphs 12(1)(x)(iii) and (iv) the ITA?

III. RELEVANT LEGISLATIVE PROVISIONS

[9] The relevant legislative provisions are as follows:

***Income Tax Act* , RSC 1985, c. 1 (5th add.)**

12 (1) There shall be included in computing a taxpayer's income from a business or property in a taxation year such of the following amounts as apply:

(x) an amount (other than a prescribed amount) received by the taxpayer in the year while earning income from a business or property:

> (i) a person or partnership (referred to as a "debtor" in this paragraph) who pays the amount, as the case may be:
>
> > (A) for the purpose of earning income from a business or property,
> >
> > (B) in order to obtain a benefit for itself or for persons with whom it does not deal at arm's length,

(C) in circumstances where it is reasonable to conclude that it would not have paid the amount if it had not received amounts from a debtor, government, municipality or other authorities referred to in this sub-paragraph or in sub-paragraph (ii),

(ii) a government, municipality or other authority,

if it is reasonable to consider the amount as received:

(iii) either as an incentive payment, in the form of a bonus, grant, forgivable loan, tax deduction or indemnity, or in any other form,

(iv) either as reimbursement, contribution or indemnity or as assistance, in the form of a grant, grant, conditionally repayable loan, tax deduction or indemnity, or in any other form, in respect of, as the case may be:

(A) an amount included in or deducted from the cost of property,

(B) an expense incurred or made,

to the extent that the amount, as the case may be:

(v) has not already been included in computing the taxpayer's income or deducted in computing, for the purposes of this Act, any balance of expenses or other amounts not deducted, for the year or for a previous tax year,

(v.1) is not an amount received by the taxpayer in respect of a restrictive covenant, as defined in subsection 56.4(1), that has been included under subsection 56.4(2) in computing the taxpayer's income. a person related to the taxpayer,

(vi) subject to subsection 127(11.1), (11.5) or (11.6), does not reduce, for the purpose of an assessment made under this Act, or which may be made, the cost or capital cost of the property or the amount of the expense,

(vii) does not reduce, under subsection (2.2) or 13(7.4) or paragraph 53(2)(s), the cost or capital cost of the property or the amount of the expenditure,

(viii) cannot reasonably be regarded as a payment made in respect of the acquisition by the debtor or by the administration of an interest in the taxpayer, of an interest or, for the application of civil law, of a right in his business or an interest or, for the application of civil law, a real right in his property;

37 (1) A taxpayer who carries on a business in Canada in a taxation year may deduct in computing his income from that business for the year an amount not exceeding the excess, if any, of the total of the following amounts:

[…]

> (c) the total of all amounts each of which is an expenditure incurred by the taxpayer in the year or a preceding taxation year ending after 1973 by way of reimbursement of amounts referred to in paragraph (d);

[…]

on the total of the following amounts:

> (d) the total of the amounts each of which is government assistance or non-government assistance, as defined in subsection 127(9), in respect of an expenditure referred to in paragraph (a) or (b), as they apply in respect of the expenditure, that the taxpayer has received, is entitled to receive or can reasonably be expected to receive on the filing-due date applicable to him for the year;

67 . In computing income, no deduction may be made in respect of an expense in respect of which an amount is otherwise deductible under this Act, except to the extent that such expense was reasonable in the circumstances.

127(9) The following definitions apply in this section **.**

government assistance Assistance received from a government, municipality or other administration in the form of a grant, grant, conditionally repayable loan, tax deduction or investment allowance or in any other form, excluding a deduction under subsection (5) or (6). (government assistance)

non-governmental aid Amount that would be included in income under paragraph 12(1)(x) if that paragraph applied but for subparagraphs (v) to (vii) thereof. (non - government assistance)

127 (18) Where a taxpayer — an individual or a partnership — receives, is entitled to receive or can reasonably be expected to receive, on or before the filing due date applicable to him for his taxation year, an amount that represents government assistance, non-government assistance or a contractual payment that can reasonably be regarded as relating to scientific research and experimental development activities, the excess of such amount over the amounts applied for prior taxation years under this subsection or subsections (19) or (20) in respect of that amount shall be applied against eligible expenditures of the taxpayer otherwise incurred in the year in which it is reasonable to regard as relating to the activities

Interpretation Act, RSC 1985, c. I-21

Rules of interpretation

Property and civil rights

Bijural tradition and application of provincial law

8.1 The civil law and the common law are equally authoritative and are both sources of property and civil rights law in Canada and, if it is necessary to resort to rules, principles or concepts belonging to the field of property and civil rights in order to ensure the application of a text in a province, it is necessary, unless rule of law opposes it, to have recourse to the rules, principles and concepts in force in this province at the time of the application. application of the text.

Civil Code of Quebec, CQLR, c. CCQ-1991

BOOK FOUR - GOODS

TITLE TWO – PROPERTY

CHAPTER ONE – NATURE AND SCOPE OF THE RIGHT OF PROPERTY

947 . Ownership is the right to use, enjoy and dispose of property freely and completely, subject to the limits and conditions of exercise set by law **.**

It is susceptible to modalities and dismemberments.

BOOK FIFTH - OBLIGATIONS

TITLE ONE – OBLIGATIONS IN GENERAL

CHAPTER TWO – AGREEMENT

SECTION IV – INTERPRETATION OF THE CONTRACT

1425 . In the interpretation of the contract, one must seek what was the common intention of the parties rather than stopping at the literal meaning of the terms used.

1426 . In interpreting the contract, account is taken of its nature, the circumstances in which it was concluded, the interpretation that the parties have already given it or that it may have received, as well as usage.

1427 . The clauses are interpreted by each other, giving each the meaning that results from the contract as a whole.

1428 . A clause is understood in the sense that confers on it some effect rather than in that which produces none.

1429. Terms capable of two meanings must be taken in the sense that best suits the subject matter of the contract.

1430 . The clause intended to remove any doubt as to the application of the contract to a particular case does not restrict the scope of the contract otherwise framed in general terms.

1431 . The terms of a contract, even if stated in general terms, include only what the parties appear to have intended to contract on.

1432 . When in doubt, the contract is interpreted in favor of the person who contracted the obligation and against the person who stipulated it. In all cases, it is interpreted in favor of the member or the consumer.

TITLE TWO – NAMED CONTRACTS

CHAPTER TWELVE – LOAN

SECTION I – CASH OF LOANS AND THEIR NATURE

2312 . There are two kinds of loan: the loan for use and the simple loan.

2314 . The simple loan is the contract by which the lender gives a certain quantity of money or other goods which are consumed by use to the borrower, who undertakes to return the same to him, of the same kind and quality, after a while

2315 . The simple loan is presumed made free of charge, unless otherwise stipulated or it is a loan of money, in which case it is presumed made against payment

SECTION III – SIMPLE LOAN

2327. By simple lending, the borrower becomes the owner of the property lent and assumes the risk of loss upon delivery.

IV. FACTS

A. Context

[10] CAE is a Canadian company founded in 1947 and its head office is located in Ville Saint-Laurent in the province of Quebec [2]. CAE is a public company listed on the Toronto Stock Exchange [3]. CAE operates primarily in the field of manufacturing, selling and servicing flight simulators. The company also offers training sessions using flight simulators for the civil and military aviation industries. The company operates in more than 30 countries and employs approximately 9,000 employees worldwide [4].

[11] In 2007, as part of a strategic initiative aimed at the aerospace and defense industries, Canada's Minister of Industry created the Aerospace and Defense Strategic Initiative Program "ISAD Program" [5].

[12] The objectives of the ISAD Program were:

1. Encourage strategic research and development leading to innovation and excellence in products, services and processes;
2. Increase the competitiveness of Canadian businesses;
3. Foster collaboration between research institutes, universities, colleges and the private sector [6].

[13] Under the ISAD Program, a financial contribution to a research and development project could be granted to a company operating in the aerospace, space or defense sectors [7]. The Industrial Technologies Office of the Department of Industry Canada was responsible for administering this program [8].

B. The ISAD Agreement

[14] On March 30, 2009, within the framework of the ISAD Program, an agreement was concluded between the Minister of Industry of Canada and CAE [9]. This agreement, the ISAD Agreement, was entered into with respect to CAE's SR&ED project known as “Project Falcon”. This project required SR&ED expenditures of $700,000,000 over a five-year period, from 2009 to 2014 [10]. It focused on the development of technologies related to flight simulators as well as certain products in the health sector [11]. Under this agreement, Canada's Minister of Industry contributed financially to the project by making “contributions” to CAE between 2009 and 2014 inclusive. These contributions are defined in the agreement as " financial assistance" intended to fund CAE's SR&ED activities in relation to Project Falcon [12]. These contributions constituted 35% of the total “eligible expenses” [13] incurred by CAE in relation to Project Falcon and could not exceed $250,000,000 [14]. More specifically, the annual contributions that could be paid to CAE could not exceed the following amounts [15]:

Years tax governmental	Maximum contributions that can be made
2009/2010	**$31,750,000**
2010/2011	$53,250,000
2011/2012	$57,100,000
2012/2013	$63,000,000
2013/2014	$44,900,000

Years tax governmental	Maximum contributions that can be made
TOTAL	$250,000,000

[15] CAE has received the maximum amount that can be paid to it under the ISAD Agreement, namely $250,000,000.

[16] During the 2012 and 2013 taxation years, the amounts that CAE received or was entitled to receive under the ISAD Agreement were $57,084,395 and $59,148,888 respectively [16 [1]. Only a portion of these amounts was used by CAE to pay SR&ED expenses incurred in relation to Project Falcon, namely $41,003,491 in 2012 and $40,652,951 in 2013 [17 [1].

[17] Under the ISAD Agreement, repayment of contributions must be made in fifteen annual instalments. The total reimbursements correspond to the sum equivalent to the total contributions paid to CAE multiplied by a factor of 1.35. CAE having received contributions totaling $250,000,000, the total amount to be reimbursed is $337,500,000 ($250,000,000 X 1.35) [18].

[18] According to the ISAD Agreement, the reimbursement of contributions is unconditional and without any security [19]. The contributions must be reimbursed according to the schedule and according to the conditions provided for in the agreement. Annual repayments must be made no later than July 31 of each year from 2015, approximately six years after receipt of the first contributions. The last of the fifteen repayments must be made on July 31, 2029 [20]. Under the repayment conditions provided for in the agreement, the contributions paid to CAE implicitly provide the Canadian Minister of Industry with a rate of return of approximately 2.50% on an annual basis [21].

[19] The amounts to be reimbursed annually by CAE under the ISAD Agreement are as follows [22]:

Refunds	Payment	Year
1	$11,250,000	2015
2	$11,250,000	2016
3	$11,250,000	2017
4	$11,250,000	2018
5	$22,500,000	2019
6	$22,500,000	2020

Refunds	Payment	Year
7	$22,500,000	2021
8	$22,500,000	2022
9	$22,500,000	2023
10	$22,500,000	2024
11	$33,750,000	2025
12	$33,750,000	2026
13	$33,750,000	2027
14	$33,750,000	2028
15	$33,750,000	2029
TOTAL	$337,500,000	

[20] Under the terms of the ISAD Agreement, certain restrictions are imposed on CAE. For example, CAE is committed to manufacturing exclusively in Canada all products that may result from Project Falcon and certain other restrictions apply to CAE's ability to transfer title or intellectual property rights relating to the project [24]. CAE is also required to notify the Minister of Industry Canada of any other government financial assistance requested or received in connection with the project. If such assistance were to be received, the contributions to be received could be revised downwards [24]. In addition, to be eligible to receive funds under the ISAD Program, CAE had to establish a plan to work with accredited post-secondary institutions in Canada and allocate to these institutions at least 1.0% of total eligible SR&ED of the project [25].

[21] The ISAD Agreement stipulates that meetings can be organized between the parties in order to examine the results of the SR&ED work undertaken within the framework of the Falcon Project as well as to verify whether the performance objectives of the ISAD Program have been achieved [26]. In addition, CAE must periodically submit reports to the Minister of Industry of Canada on the following subjects [27]:

1. The progress of SR&ED work on the Falcon project [28];
2. Achievements resulting from the achievement of results [29];
3. Yields of the ISAD Program [30].

[22] The ISAD Agreement may be terminated by CAE in the event of early repayment of all contributions received and the payment of an amount representing

a return on investment of 2.75% on an annual basis with respect to the amounts repaid in advance [31].

C. Testimony of Constantino Malatesta

[23] Mr. Malatesta has been with CAE since 2006. He was appointed Vice President Finance and Controller in 2016. During the negotiations leading to the conclusion of the ISAD Agreement, Mr. Malatesta was responsible for the " Complex Accounting Group" of CAE [32]. He first pointed out that since CAE is a public company listed on the Toronto Stock Exchange and the New York Stock Exchange, its financial statements are audited by independent auditors on a quarterly basis and an audit report is produced annually [33].

[24] According to Mr. Malatesta, the ISAD Program was a way for CAE to finance its SR&ED projects. Mr. Malatesta's role was to give opinions on the financing and the accounting aspect of such projects, including when concluding an agreement such as the ISAD Agreement [35].

[25] Mr. Malatesta testified about the circumstances surrounding the signing of the ISAD Agreement. He did not participate directly in the negotiations , but he took part in the discussions of the CAE negotiation team . The people in charge of the negotiations were Nathalie Bourque for CAE and Mr. Lemieux for the Minister of Industry of Canada [37]. Negotiations leading to the signing of the agreement lasted several months.

[26] In October 2008, CAE was considering a reimbursement option whereby it could reimburse contributions made by the government based on a percentage of earned income based on sales growth ("conditional reimbursement") [38]. This option was ultimately not retained. CAE chose a financing option with repayment independent of sales growth, i.e., a program of payments made in the form of fixed installments ("unconditional repayment"), because it concluded that it thus had more liquidity and that the effective interest rate incurred would be lower [39]. This aspect of the agreement was the subject of negotiations between the parties.

[27] The refunds were made by CAE and, according to Mr. Malatesta , it always had the ability to make them . According to CAE's consolidated financial statements for the years 2010 and 2012, revenues and assets were in the billions of dollars and were expected to grow year over year . Although CAE did not provide security to secure the repayment of contributions received, it is a public company and therefore its ability to repay could be assessed using its financial statements and other public records [43].

[28] As for the accounting treatment of the contributions received from the Minister of Industry of Canada, they were qualified as a whole as a long-term obligation in CAE's consolidated financial statements [44]. In order to comply with generally accepted accounting principles (“GAAP”) [45], certain accounting adjustments had to be made. According to Mr. Malatesta, given the repayment conditions, the contributions received did not really reflect CAE's financial obligation to them [46]. Accordingly, the amounts received have been adjusted to reflect their actual values [47]. The amount of contributions received was reduced according to the prevailing market interest rate for such financing [48]. These reductions take into account the duration of the agreement, including the repayment period.

[29] CAE concluded that the effective interest rate of the ISAD Agreement was approximately 2.7% [49]. CAE adjusted this rate according to the interest rate that would have been paid in the context of a comparable transaction carried out at the prevailing market interest rate, ie at its fair market value [50]. The monetary value of the difference between the effective interest rate and that which would have been determined in a transaction carried out at fair market value is added in the calculation of income for accounting purposes under GAAP [51]. This incremental component, together with the effective rate, constitutes the cost of financing the agreement for CAE [52].

[30] Ultimately , the total interest that would have been payable on a loan made at its fair market value of $210,475,399 was deducted as a financing expense in the financial statements [53]. The amount of $122,975,399 constituting the accretionary component was presented as revenue, constituting a reduction in operating costs or a reduction in capitalized expenditures [54]. The financing cost of $210,475,399 was effectively reduced by the accretionary component, reducing the interest expense in the financial statements to $87,500,000, being the amount of interest actually paid by CAE under the agreement [55].

[31] In order to determine the fair market value of the interest rate of an agreement comparable to the ISAD Agreement , CAE examined the interest rate agreed between private companies for such transactions [56]. She looked at the interest rate paid on bonds [57] as well as rates for other transactions where the party that was to receive funds had a credit rating similar to CAE's [58]. It retained the highest rates on the market since its agreement involved greater risk, considering that it did not provide the same guarantees and protections to the government as in similar transactions and considering that the sums to be received would be used to SR&ED activities [59].

[32] According to Mr. Malatesta, the difference between the total amount of interest payable on the contributions received under the ISAD Agreement and the total amount of interest that should have been paid by CAE if it had had to pay interest on these contributions to the market interest rate, i.e. 122 $975,399 ($210,475,399 - $87,500,000) was characterized as " government benefit ” to CAE’s financial statements [60].

D. Testimony of Sylvie Brossard

[33] Ms. Brossard has been with CAE since 2007. At the time of the trial, she held the position of vice-president of CAE's tax department. Most of Ms. Brossard's testimony focused on the accounting treatment of contributions received by CAE under the ISAD Agreement.

[34] According to Ms. Brossard's testimony, CAE did not include in its revenues the sums received as contributions under the ISAD Agreement, because CAE considered that these were sums received under a loan and not received as " government assistance ". For the same reason, these sums were not used by CAE to reduce its eligible SR&ED expenditures [62].

[35] CAE has included in its 2012 income statements a fictitious profit generated by this loan obtained at a preferential rate. CAE also included in these same statements a fictitious interest expense corresponding to the difference between the sums paid as interest under the ISAD Agreement and the sums that should have been paid in this respect if the loan had been granted at the market interest rate. This sum was “compensated” by the addition of a non-deductible expense, thus canceling out the fictitious profit generated by the preferential interest rate in CAE's financial statements [63].

E. Testimony of Jean Lemieux

[36] Mr. Lemieux has been with the Department of Industry Canada's Strategic Innovation Fund since 2006. He was the senior investment manager and analyst and, in this capacity, he was the person who prepared the documents necessary for the conclusion of the ISAD Agreement.

[37] According to Mr. Lemieux, the ISAD Program was set up in 2007 by the Industrial Technologies Office to encourage research and development projects as well as collaboration with universities, colleges, post-secondary institutions and research institutes. in such projects. The program was also intended to encourage the

economic development of the aerospace, defence, space and security industry by contributing financially to research and development projects of companies working in these sectors. Still according to Mr. Lemieux, these sectors of activity are important for Canada and, traditionally, they have always been heavily subsidized [64].

[38] The objective of the ISAD Program was not to generate a return on the contributions made and the program does not have a target rate of return. However, an agreement entered into under the program could not be limited to providing for the reimbursement of contributions paid to a business. The agreement had to provide for a reasonable rate of return on "investment" in order to respect the rules of the World Trade Organization .

[39] According to Mr. Lemieux, the sums received from businesses under the ISAD program are transferred to the government's consolidated fund for the most part. Only part of these sums is kept and included in the program budget.

[40] The ISAD Program is a so-called “contributions” program and it is for this reason, according to Mr. Lemieux, that the ISAD Agreement does not qualify it as a loan. Further, the relevant government documents do not provide that a loan can be obtained under the program.

[41] The most important criterion that must be met by a company in order to benefit from the ISAD Program is to be able to demonstrate that Canada will benefit from the project [67]. According to Mr. Lemieux, CAE was able to benefit from the program because it demonstrated that it was a well-established company in the flight simulator industry and that the funds obtained under the program would allow Canada and the company to maintain its leadership in this industry. In addition, the Canadian workforce would benefit from the training provided to them as a result of CAE's participation in the program and the Canadian public as well, since the use of flight simulators for training purposes is beneficial to the environment. . Finally, Canadian companies collaborating with CAE would indirectly benefit from its participation in the program.

[42] Mr. Lemieux explained that under the terms of the ISAD Program, a maximum contribution corresponding to 30% of the total SR&ED expenditures incurred for a project could be made. During the negotiation of the ISAD Agreement, the Minister of Industry Canada offered CAE two options for reimbursement of the contributions to be paid to it, namely a conditional reimbursement and an unconditional reimbursement. The option that was initially offered was a conditional repayment

deal based on business sales. In order to establish the conditions for a conditional refund, a mathematical formula was used to determine a royalty rate which was then applied to the company's sales. The result of this calculation was increased by an adjustment factor which varied according to the company's income. When the company's sales increase, the adjustment factor was increased; therefore, in years when a company's sales were growing, the sums reimbursed were correspondingly greater. A company could also opt for an unconditional refund. Under this option, a fixed amount determined in advance was to be repaid annually. However, it was possible to choose a repayment plan according to which the amounts reimbursed gradually increased over the years.

[43] Mr. Lemieux explained that the process leading to the conclusion of the ISAD Agreement began after a request from CAE. Following this request, discussions to conclude a contribution agreement were initiated. In accordance with the *ISAD Application Preparation Guide* , CAE submitted an initial proposal and sent it to Industry Canada in October 2008. As part of this proposal, CAE requested a contribution constituting 35% of the Falcon Project's SR&ED expenditures. The proposed repayment plan provided for a conditional repayment and a royalty rate of 0.28%. Mr. Lemieux carried out an audit to determine whether the information produced by CAE in its proposal complied with the standards in force and he began a due diligence process including a risk analysis. As a result of this process, he offered two options to CAE, one option involving a conditional repayment and an option involving an unconditional repayment.

[44] However, the contribution reimbursement conditions presented by CAE as well as the cost-sharing ratio defined in its initial proposal did not comply with the standards established by the Department of Industry Canada. In January 2009, a second proposal was submitted by CAE, which complied with current standards. In this proposal, CAE requested a total contribution equivalent to 30% of the SR&ED expenses incurred. The total contribution was not to exceed $250,000,000. Repayment of contributions was to be made over a period of fifteen years and the amount reimbursed by CAE was to correspond to the total amount of contributions received multiplied by a minimum adjustment factor of 1.5. The adjustment factor to be used could increase according to the company's sales or according to the growth of its sales

[45] Negotiations focused on the total amount of contributions to be paid as well as the period over which repayments would be staggered. The reimbursement ratio was set at 1.35 and the total amount of contributions to be paid was increased to an amount equivalent to 35% of the research and development expenses incurred In

return, the Department of Industry Canada has given up some of the research activities deemed more risky. As for refunds, the ministry offered two options. In both cases, a grace period of five years was provided. The first repayment option offered was conditional and based on CAE's sales growth. Repayment of contributions was to be made over a period of eight years. As for the second option, the reimbursement of contributions was unconditional and provided for fixed sums to be reimbursed over a period of fifteen years. CAE chose the second option [74]. According to Mr. Lemieux, no guarantee or surety was required from CAE because it is not usually required by the ISAD Program.

[46] Mr. Lemieux testified that clause 8.17 of the agreement under which CAE can terminate the agreement prematurely by refunding the contributions received in addition to an "annual return on investment" of 2.75% added at CAE's request. The Minister of Industry of Canada did not oppose it even if the addition of this clause could reduce its performance in the event that CAE decides to take advantage of it [75]. As for clause 6, under which CAE was required to declare the receipt of any government assistance, it was included in the agreement because, pursuant to a Treasury Board directive, the total percentage of he government assistance that a company can receive as contributions under the ISAD Program is 75% [76]. Loans made at a low interest rate must be taken into account in this accumulation [77]. Moreover, according to this directive, the contributions must be repayable to a for-profit enterprise [78]. The clause prohibiting the payment of dividends is one of the clauses usually found in all agreements entered into under the ISAD Program. However, these are clauses that only apply in the event that, after verification, a company declares that it is unable to make the reimbursements provided for in the agreement or if the deadlines provided for in the agreement are not respected [79].

[47] SR&ED projects are monitored on an annual or quarterly basis depending on the level of risk associated with the project. An audit is performed as soon as a claim for reimbursement of SR&ED expenditures is filed since a report must be attached.

[48] According to Mr. Lemieux, in the event that CAE had financial difficulties, a new risk analysis would have been carried out and the conditions of the ISAD Agreement would have been renegotiated. It was only as a last resort that CAE would have been put in default by the Minister of Industry of Canada [81]. In some cases, the debt can be written off. If renegotiations had taken place, they would have aimed to ensure that Canada still benefits from the agreement. During his cross - examination, Mr. Lemieux said that the government was doing this in order to protect his rights .

F. Testimony of Neil de Gray

1. Mr. de Gray's tenure

[49] Mr. de Gray is Director of Disputes and Investigations at Duff & Phelps. Since 2010, his firm has specialized in business and title valuation, quantification of damages and corporate finance advisory services ~~.~~ The Respondent retained his services as an expert in corporate finance and in the valuation of debt instruments and securities. The services of Mr. de Gray have been retained to assist the Court; Mr. de Gray was asked to indicate whether, in his view, the ISAD Agreement has the attributes of a “trade” and constitutes an “ordinary commercial agreement”. Specifically, the Respondent asked him whether, in his view, payments made pursuant to the ISAD Agreement were made " in exactly the same manner and for exactly the same reasons as payments made by private companies, that is, in order to promote the interests of the payer” [86]. Mr. de Gray was aware that the parties were in disagreement as to whether the agreement constituted a loan agreement or some other type of agreement. He was not asked his opinion on this [87].

2. M. de Gray's analysis

[50] In assessing the "nature" of the ISAD Agreement and seeking to determine whether it possesses the attributes of a "commercial enterprise" and constitutes an "ordinary commercial agreement", Mr. de Gray considered the main terms of the agreement which, according to him, are as follows:

- a) reimbursement ;
- b) ISAD Agreement internal rate of return;
- (c) clauses and restrictions;
- d) other conditions [88].

[51] Analysis of the terms of the ISAD Agreement led Mr. de Gray to conclude that, in general, these terms implied a higher risk profile and therefore a return at the higher end of the range of returns offered. by comparable "instruments" on the market [89]. The Court has summarized Mr. de Gray's findings on each of these conditions below.

To) Refund

[52] Appendix 3 of the ISAD Agreement establishes the conditions for reimbursement of contributions. They require full unconditional repayment of all contributions received by CAE. Repayments are to be made over a fifteen-year period beginning in 2015. Overdue amounts accrue interest at the “bank rate” plus

3%, compounded monthly. Mr. de Gray concluded that the obligation to repay all contributions received under the agreement and accrued interest on overdue amounts is generally consistent with the terms of a “commercial agreement ” .

[53] Regarding the deferral of interest and principal payments during the first five years of the ISAD Agreement and the fifteen-year repayment period, Mr. de Gray believes that these two factors increase the lender's risk relating to the 'agreement. According to Mr. de Gray, it is unusual for a commercial loan agreement to provide for a five-year payment deferral of interest and principal. Mr. de Gray stated that a commercial loan agreement usually requires repayment in some form over the term of the agreement, and deferral periods are usually less than five years .

b) ISAD Agreement Implied Internal Rate of Return

[54] Mr. de Gray noted that the ISAD Agreement provides Canada's Minister of Industry with a rate of return on funds advanced to CAE. Pursuant to the agreement, CAE must reimburse the full face value of the total amount of contributions received, plus an amount equal to this amount multiplied by a maximum factor of 0.35 over a period of fifteen years.

[55] To determine whether the ISAD Agreement possesses the attributes of a "commercial enterprise" and constitutes an "ordinary commercial agreement", Mr. de Gray considered whether the "implied" rate of return of the agreement corresponded to a fair rate of market return given the risk profile of the "investment". This is an “implied” rate of return because there is no reference in the agreement to any rate of return.

[56] Based on the total contributions received by CAE ($250,000,000) and the total repayments to be made ($337,500,000), Mr. de Gray concluded that the ISAD Agreement offered a return of $87,500,000 ($337,500 $000-$250,000,000) [94]. Mr. de Gray established what this dollar return meant from an annual rate of return perspective. He calculated the implied rate of return based on the cash flow projections in the agreement and subsequent amendments to the agreement. He concluded that the internal rate of return implied by the agreement is approximately 2.5% [95].

[57] To determine whether this rate was a fair market rate for such an “investment,” Mr. de Gray considered the following:

1. The terms of the agreement and their impact on a fair market rate of return;
2. The risk-free benchmark rates of return prevailing in the market on the date the parties entered into the agreement;
3. The yield of corporate bonds in Canada and the United States for bonds of the so-called " investment grade" category during the period in question;
4. The implied rates of return associated with the issuance of corporate bonds in the aerospace and defense industries during the relevant period;
5. Implied rates of return associated with CAE's existing trade receivables from arm's length third parties;
6. The market rate of return implied by the ISAD Agreement as determined by CAE and found in its financial reports [96].

Conditions of the ISAD Agreement

[58] Mr. de Gray reviewed the terms that he believes impact the risk profile of the ISAD Agreement. These conditions are as follows:

(a) average term to maturity;
(b) security;
(c) clauses and restrictions;
(d) classification;
(e) repayment terms;
(f) prepayment;
(g) fixed rate of return and interest rate.

(To) Average time to maturity

[59] Mr. de Gray considered that the ISAD Agreement was for a period of twenty years, ie a contribution period of five years followed by the repayment period of fifteen years. He stated that the longer the term, the greater the risk inherent in an agreement and, therefore, the higher the rate of return .

(b) Collateral

[60] “Contributions” under the SADI Agreement are unsecured. Since unsecured instruments present a higher inherent risk to the contribution provider, the rate of return applicable to these instruments is higher.

(vs) Terms and Restrictions

[61] The covenants are intended to provide protections to the lender; the risk for the lender is therefore increased if an agreement contains minimum clauses. After reviewing the ISAD Agreement, Mr. de Gray concluded that the protections provided were minimal. Consequently, the required return and the risk profile of the agreement are higher.

(d) Ranking

[62] According to Mr. de Gray, the ISAD Agreement does not expressly address the classification of the “instrument” relative to CAE's other issued and outstanding debt “instruments”. Mr. de Gray stated that the ranking of a debt "instrument" corresponds to the order of eligibility of the "instrument" or its priority on the assets of the borrowing company compared to other lenders of the Company. A highly ranked debt “instrument” has a lower risk profile since the lender is more likely to receive the funds due, compared to a lender holding a lower ranked debt instrument. Mr. de Gray concluded that since the agreement is silent on the question of classification, this increases the exposure to risk for the Minister of Industry of Canada.

(e) Refund

[63] Mr. de Gray stated that the Minister of Industry Canada's exposure to risk is increased because the ISAD Agreement does not provide for any reimbursement during the first five years of payment of the contributions and the reimbursement increases gradually over the course of fifteen years following this period. He stated that usually lenders require at least the payment of interest. Thus, the rate of return on the agreement should be higher.

(g) Prepayment

[64] The ISAD Agreement allows CAE to prematurely terminate the agreement and prepay all amounts due, in addition to a premium of 2.75%. According to Mr. de Gray, this option is generally advantageous for the beneficiary of the capital. Furthermore, the option is disadvantageous for the funder because it reduces its

ability to predict the level of its future liquidity. Therefore, financial instruments with prepayment options show higher rates of return [101].

(g) Fixed rate of return and interest rate

[65] The rate of return provided for in the SADI Agreement is fixed. It remains the same for the duration of the agreement, regardless of the market interest rate. Therefore, fixed rates are superior to variable or floating rates since the lender, under a fixed agreement, is exposed to fluctuations in market rates during the term of the agreement .

Risk-free benchmark rate of return prevailing in the market on the date the parties entered into the agreement

[66] According to Mr. de Gray, the risk-free rate is the theoretical rate of return an investor would expect from a risk-free investment over a given period. The risk-free rate corresponds to a base rate or a guaranteed floor rate. Therefore, the rate of return of a given instrument must be accompanied by a premium in order to compensate for the increase in the risk profile. In practice, the yield on Canadian government and US government bonds is considered by many to be an indication of a risk-free rate in Canada and the United States, respectively .

[67] Since the approximate duration of the ISAD Agreement is 20 years, Mr. de Gray examined the risk-free rate of return on 20-year bonds measured by the Canadian government and the US Treasury [104]. Mr. de Gray compared the rate of return implied by the ISAD Agreement to the risk-free rates of return for the period from March 31, 2007 to March 31, 2014; he concluded that the rate of return implied by the agreement (2.50%) was approximately 1.15% lower than the risk-free rate of return (3.65%) in Canada as of March 30, 2009. D 'after this observation, he concluded that, given the higher risk profile of the ISAD Arrangement compared to risk-free government bonds, the ISAD Arrangement should have resulted in a higher rate of return than the risk-free rate. risk [105].

Yield of corporate bonds accessible in Canada and the United States for investment grade bonds

[68] Mr. de Gray examined the rate of return of BBB-rated Canadian corporate bonds with terms to maturity similar to those of the ISAD Agreement, over the period from 2008 to 2014. According to Mr. de Gray , corporate bonds rated BBB or higher are generally considered to be investment grade, ie very good quality.

[69] On March 30, 2009, he concluded that the rate of return on Canadian corporate bonds with a level of risk comparable to that of CAE and with a maturity of 20 years was approximately 8.54%. Given CAE's risk profile, this led Mr. de Gray to conclude that he expected the rate of return on the ISAD Agreement to exceed 8.54% [106].

Implied rates of return associated with the issuance of corporate bonds in the aerospace and defense industries during the relevant period

[70] Mr. de Gray noted that from 2007 to 2014, several companies within the aerospace and defense industries had issued corporate unsecured bonds with maturities ranging from ten to thirty years. The yield on bonds rated A to BB+ during the period ranged from 2.5% to 7.75%, with an average yield of 5.13%.

[71] In particular, reviewing CAE's internal credit benchmarking analysis, Mr. de Gray concluded that the rate of return on the ISAD Agreement is lower than the market rate of return on bonds in the aerospace and defense industries. He concluded that the agreement's rate of return is significantly lower than the market rate of return .

Implied rates of return associated with CAE's existing arm's length third party trade receivable

[72] Mr. de Gray stated that the interest rate implied by CAE's existing commercial debt agreements with arm's length third parties is a market rate of return indicator for the ISAD Agreement. Mr. de Gray noted in the notes to CAE's annual reports that CAE was party to several loan agreements during the period from 2008 to 2014. Mr. de Gray found particularly interesting the sum of $120,000,000 US dollars raised by CAE in 2010 through a private placement. It was an unsecured investment with an average term to maturity of 8.5 years and a combined interest rate of 7.15% with interest payable semi-annually. Considering the proximity of the date of issue of the private placement and that of the conclusion of the ISAD Agreement, the amount of the loan and the fact that it was not accompanied by any guarantee, Mr. de Gray concluded that this private placement was a reasonable indicator of a fair market rate of return for the arrangement.

[73] According to Mr. de Gray, the rate of return on the ISAD Agreement should have been higher than the rate of return of 7.15% on the private placement, given the following factors:

1. The agreement had a longer term than the private placement, ie fifteen to twenty years instead of eight years;

2. The private placement benefited from a preferential ranking (priority claim);

3. The agreement was accompanied by minimal clauses compared to the private placement;

4. The agreement included deferred repayment conditions.

Implied market rate of return associated with CAE's financial reports regarding the ISAD Agreement

[74] According to Mr. de Gray, CAE's audited annual consolidated financial statements, together with the accompanying information, provide insight into CAE management's assessment of a fair market rate of return for the ISAD Agreement.

[75] For financial statement purposes, CAE has adjusted the face value of contributions received under the SADI Agreement to their fair market value. CAE has retained, for the obligations of the ISAD agreement, a fair market rate of return ranging from 6% for contributions received in 2014 to 13% for contributions received in 2010. The implied weighted cumulative market rate of return calculated by Mr. de Gray was 10.1% at the end of the 2014 financial year [108]. According to CAE's documents, the obligations of the agreement (contributions to be repaid) were aligned with the upper range of market benchmarks .

[76] For example, contributions received by CAE, totaling $33,805,358 for fiscal year 2010, have been discounted to represent an obligation of $9,125,957 on CAE's financial statements. CAE then assumed a fair market rate of return of 13% for contributions made in fiscal year 2010. Throughout the period in which contributions were made, CAE discounted the total amount of its obligation, thereby increasing it from $250,000,000 to $139,095,006.

vs) Terms and Restrictions

[77] Mr. de Gray stated that commercial agreements are generally subject to several protective clauses and restrictions that protect the interests of the financial backer [110]. These include financial covenants which are specific operating performance measures or ratios used to monitor the borrower's business and assess its ability to repay . They are also positive covenants requiring the business to perform certain

activities or continue to abide by certain regulations and certain covenants that limit the activities of the borrower and establish limits for the business [112].

[78] Mr. de Gray concluded that the ISAD Agreement contains certain protective clauses and restrictions, but fewer in number compared to a normal commercial agreement. Moreover, it does not contain precise financial clauses. Consequently, he considers that the Minister of Industry of Canada assumes, with the agreement, a higher risk than a usual commercial lender [113].

d) Other terms

[79] According to Mr. de Gray, the ISAD Agreement contains a number of restrictions limiting CAE's ability to dispose of any intellectual property or equipment developed with funds obtained under the agreement. The agreement also limits the amount of work and costs that can be incurred outside of Canada. According to Mr. de Gray, these restrictions reflect the political and national objectives of the Government of Canada and are unusual in a ordinary business arrangement [114]. Mr. de Gray added that there are also political reasons for the responsibilities for communicating with the public which are set out in Annex 4 of the agreement and which cover the publication of information and marketing materials. These liabilities are not common in ordinary business arrangements. Finally, Mr. de Gray stated that it was also unusual in ordinary business arrangements for the recipient (in this case, CAE) to be required to enter into partnerships with certain arm's length parties and not-for-profit organizations. for-profit in order to qualify for funding under an agreement.

3. Conclusion of M. de Gray

[80] Mr. de Gray concludes that the ISAD Agreement does not possess the attributes of a “commercial enterprise” and does not constitute an “ordinary commercial agreement”. Accordingly, he also concludes that the payments made to CAE pursuant to the agreement were not made in exactly the same manner and for exactly the same reasons as the payments made by the private companies, i.e. say in order to promote the interests of the payer [117].

[81] Mr. de Gray came to this conclusion after establishing that a "financial instrument" such as the ISAD Agreement, given its risk profile, offered a rate of return that was too low compared to what a "normal investor would expect to get from this type of " investment" . More specifically, he drew the following three conclusions:

1. The rate of return of approximately 2.5% assumed by the agreement is significantly lower than the fair market rate of return for a financial instrument whose risk profile is comparable to that of the agreement [119].

2. The agreement is subject to minimal positive and restrictive clauses and does not contain any of the financial clauses which would be characteristic of this type of ordinary commercial agreement .

3. The Agreement contains several other terms that are not typical of an ordinary business agreement. These conditions are primarily motivated by political considerations or government action, rather than commercial reasons HYPERLINK "https://decision.tcc-cci.gc.ca/tcc-cci/decisions/fr/item/512943/index.do?iframe=true" \l "_ftn121" \o "" .

V. POSITIONS OF THE PARTIES

A. Appellant's position

[82] The Appellant argues that the amounts of $57,084,395 and $59,148,888 received by CAE under the ISAD Agreement during the 2012 and 2013 taxation years respectively do not constitute "government assistance" within the meaning of paragraph 127(9) of the *ITA* [122].

[83] According to the appellant, paragraph 12(1)(x) and subsection 127(18) of the *ITA* apply when a taxpayer obtains “government assistance” within the meaning of subsection 127(9) of the *ITA* . However, since these provisions refer to the expression “amount received”, they can only apply if an amount has been “received” as “government assistance”.

[84] The appellant submits that the amount that was "received" by CAE is the sum of 250,000 $000. According to the appellant, in order to determine whether an amount of “government assistance” was “received”, it is necessary to characterize the agreement. The appellant maintained that the ISAD Agreement constitutes a simple loan since, under it, the Department of Industry of Canada lent a sum of $250,000,000 to CAE over a period of five years and that CAE, for its part, undertook to reimburse this sum unconditionally [123].

[85] The appellant maintains that the definition of a simple loan is found in article 2314 *CCQ* and that, according to this definition, a loan is a contract by which the

lender delivers a certain quantity of money or other property which consume by use to a borrower. The borrower undertakes for his part to return the same, of the same species and quality, after a certain period of time. According to the appellant, the ISAD Agreement clearly establishes a “lender-borrower” relationship between the Minister of Industry of Canada and CAE and the agreement was entered into in accordance with normal business practices for commercial loans. More specifically, the agreement contains clauses in the event of late repayments and in the event of default in repayment.

[86] The appellant submits that the definition of "government assistance" in subsection 127(9) of the *ITA* and the wording of subsection 127(18) of the *ITA* imposes a condition for a payment made in under a “government assistance” agreement; the amount must have been received by a taxpayer. According to the appellant, this is the case here because the expression “assistance received” is found in subsection 127(9) and the expression “amount received” in subsection 127(18). Finally, the appellant argues that, since the legislator used the verb “receive”, there must be a transfer of ownership for an amount to have been “received” within the meaning of these provisions.

[87] The appellant submits that, under the application of the *ITA* , the lender does not transfer ownership of the money lent to the borrower. In support of its position, the appellant cited the following authorities: *Dunkelman c. MNR* . [124] and *Fonthill lumber ltd. vs. R.* _ [125]. According to the appellant, there is no transfer of ownership in a loan because the lender will eventually be reimbursed. For these reasons, the amounts paid to CAE under the ISAD Agreement were not received as “government assistance”.

[88] Finally, the appellant argues that the monetary value of the difference between the interest rate implicit in the ISAD Agreement and the market interest rate for a similar loan cannot constitute "government assistance" because no amount was received by CAE as a result. The appellant argues that this issue was not referred to this Court, however, and therefore did not wish to make further submissions on this point, although the Court gave it the opportunity to do so.

B. Respondent's position

[89] The Respondent submits that the sum of $250,000,000 received by CAE under the ISAD Agreement was received as “government assistance” within the meaning of subsection 127(9) of the *ITA* . Consequently, CAE had to subtract in the calculation of its deductible SR&ED expenditures the amounts of $41,003,491 and

$40,652,951 during its 2012 and 2013 taxation years respectively, pursuant to paragraph 37 (1)(d) of the *ITA* .

[90] For the same reason, but according to subsection 127(18) of the *ITA* , CAE had to subtract in the calculation of its qualified SR&ED expenditures for the purposes of calculating the investment tax credit the sums of $57,084,395 and $59,148,888, as they were received or were to be received under the agreement during the said taxation years.

[91] Finally, the Respondent argues that the amount of $14,806,945, being the difference between the amount received or receivable by CAE during its 2012 taxation year ($55,810,430) and the amount actually received during that year ($41,003,491) was required to be included in CAE's income under subparagraph 12(1)(x)(iv) of the *ITA* .

[92] According to the respondent, the purpose of the provisions of the *ITA* is to provide tax incentives to businesses on the net costs relating to the performance of SR&ED work in Canada. The provisions at issue restrict access to tax relief for SR&ED expenditures and investment tax credits. On this point, the respondent's position is essentially the same as that defended by the Attorney General of Canada in the *Immunovacine case* – Subsection 37(1) of the *ITA* lists deductible SR&ED expenditures. The items listed in paragraphs 37(1)(a) to 37(1)(c.3) of the *ITA* increase the expense pool and those listed in paragraphs 37(1)(d) to 37(1)(h) decrease it. Government assistance reduces, under paragraph 37(1)(d) of the *ITA* , the pool of deductible SR&ED expenditures if it relates to an SR&ED expenditure of the taxpayer carrying on business in Canada during a tax year. When amounts received as government assistance and used for SR&ED purposes must be repaid, it will be possible to deduct these amounts from the taxpayer's income, once they have been reimbursed under paragraph 37(1) (c) the *ITA* .

[93] With respect to the investment tax credit, under subsection 127(18) of the *ITA* , government assistance received or receivable by the taxpayer relating to SR&ED activities must be deducted in calculating the expenditures of SR&ED eligible for the calculation of its investment tax credit. As for subsection 127(10.7) of the *ITA* , it specifies that the amount of assistance that is reimbursed may be added to the investment tax credit in the year in which it is reimbursed. Where the amount of assistance exceeds the amount of SR&ED expenditures relating to a particular project, the excess must be added to income in the tax year under paragraph 12(1)(x) of the *ITA* .

[94] The respondent is of the opinion that, given the legislative framework in which these provisions are found, it is clear that repayable government contributions can still constitute “government assistance”. The Respondent maintains that it is not necessary to characterize the agreement. The definition of “government assistance” does not require determining the legal classification of the arrangement under which the payments are made. This definition does not exclude any type of contract and lists in a non-exhaustive way different categories of aid.

[95] According to the respondent, in the *Immunovacine* [127] decision , the Federal Court of Appeal specified that a broad meaning must be given to the expression “government assistance”. Relying on paragraph 15 of that judgment, the respondent argues that “government assistance” may arise from agreements in which the sums paid must be reimbursed and in which the reimbursement includes a performance component.

[96] The respondent submits that, according to the test enshrined in *CCLC Technologie* [128], the question to be answered in order to determine whether a payment made by a government body was made as "government assistance" is this: was the agreement concluded "in exactly the same way and for exactly the same reasons as the payments made by private companies", that is to say in order to promote the interests of the payer ? According to the respondent, agreements of this type, qualified by the case law as “ordinary commercial agreements”, relate to payments made by a public body under agreements entered into in the course of operating a business. They also apply to payments made under agreements entered into to acquire goods and services that are incidental to the activities of a public body. These categories of payments are therefore excluded from the meaning of the word “aid”.

[97] According to the respondent, since Mr. de Gray concluded that the ISAD Agreement is not an ordinary commercial agreement, the Minister of Industry of Canada did not act "in exactly the same manner and for exactly the same reasons than private companies", i.e. to protect its commercial interests. Rather, it sought to promote the interests of companies operating in an important sector of Canadian industry, including those of CAE. Consequently, the contributions paid under the agreement can be qualified as “government assistance”.

[98] The respondent maintains that several elements demonstrate that the objective of the ISAD Agreement was to promote a sector of activity important to Canada and not to advance the commercial interests of the Minister of Industry of Canada. It is clear from the objectives of the ISAD Program that it was designed to encourage strategic SR&ED and to encourage innovation and business excellence in the field

of aerospace and defense in Canada; encourage strategic SR&ED work leading to innovation and excellence; increase the competitiveness of Canadian businesses; promote collaboration between research institutes, universities, colleges and the private sector. Furthermore, the advancement of the commercial interests of the government and the possibility of a return on investment are not criteria for evaluating a request for a contribution [129]. Canada's Minister of Industry reviews proposals on the basis of potential benefits to Canada, including technological, social and economic benefits [130], including job creation in Canada, training of work, collaboration with universities, colleges and research institutes, performance of the work exclusively or substantially in Canada and in Canadian facilities. According to the respondent, these objectives clearly reflect the government's desire to promote a government policy of a social and economic nature and not its own financial interests.

[99] As for the internal rates of return of the ISAD Agreement, they can be explained as follows: on the one hand, the terms and conditions of the program require that the recipient of the contributions repay a sum greater than the contribution paid; on the other hand, the government asks for a return on investment in order to reduce the risk that the assistance given to companies will be considered as not in conformity with the rules of the World Trade Organization.

[100] If the Court were to conclude that the amounts paid to CAE under the ISAD Agreement cannot be characterized as " government assistance", these amounts (all contributions) would still have to be taxed under paragraph 12(1). (x) of the *ITA* as reimbursement or contribution [131]. On the one hand, the amounts paid are clearly defined as being contributions. In addition, these contributions are paid as reimbursement of expenses incurred by CAE in connection with the Falcon project. All contributions received by the appellant during its taxation years ended March 31, 2012 and 2013 must therefore be included in computing its income for each of those years under section 12 of the ITA , and this, insofar as the inclusion of an amount does not increase the tax currently in question.

[101] Finally, like the appellant, the respondent submits that the question of whether the value expressed in money of the difference between the interest rate implicit in the ISAD Agreement and the interest rate on the market for a similar loan may constitute "government assistance" was not submitted to the Court. The respondent also said that it did not wish to make further submissions on this point, even though the Court gave it the opportunity to do so.

VI. DISCUSSION

[102] In order to answer the issues in dispute, the Court must determine whether the payments made to CAE under the ISAD Agreement constitute “government assistance” under subsection 127(9) of the *ITA* .

[103] It is first necessary to consider the various forms that "government assistance" may take under subsection 127(9) of the *ITA* to determine whether it may take the form of payments made to CAE under the ISAD Agreement. Next, the Court will examine the test established by case law to determine whether payments made by a government, municipality or other authority constitute “government assistance” under subsection 127(9) of the *ITA* . Finally, the Court will determine whether payments totaling $250,000,000 made to CAE under the ISAD Agreement constitute “government assistance” under this provision.

A. The different forms that assistance received from a government, municipality or other authority can take under subsection 127(9) of the *ITA* .

[104] The term "government assistance" is defined in subsection 127(9) of the *ITA* as follows:

> "government assistance" means assistance received from a government, municipality or other authority in the form of a grant, grant, conditionally repayable loan, tax deduction or investment allowance or in any other form , exclusion of a deduction under subsection (5) or (6).
>
> [I underline.]

[105] This definition is clear. Under it and given the use of the expression "in any other form", assistance received from a government, municipality or other administration may take any form, excluding deductions under subsections 127(5) and (6) of the *ITA* . The enumeration of forms of assistance in subsection 127(9) of the *ITA* is therefore not exhaustive and the forms of assistance listed are only examples. Moreover, our Court decided in *Immunovaccine Technologies Inc. c. R.* _ [132], that a repayable contribution to research projects paid by a government agency could constitute "government assistance" under subsection 127(9) of the *ITA* , even though this form of assistance is not specifically mentioned in this provision [133].

[106] This interpretation giving a broad meaning to the expression “government assistance” was adopted by the Federal Court of Appeal of Canada (“Federal Court of Appeal”) when the judgment *Immunovaccine Technologies Inc. c. R.* _ [134] was appealed. In its decision, the Federal Court of Appeal said in this regard:

> It should be noted that the expression “aid received from a government” precedes an enumeration: bonus, subsidy, loan with conditional repayment, tax deduction, investment allowance. However, the phrase “or in any other form” immediately follows this enumeration . Contrary to the appellant's assertion — and as the judge concluded at paragraph 45 of her reasons — such an expression does not limit the form of assistance referred to in subsection 127(9). Rather, it gives a broad meaning to the word “aid”, encompassing various forms of government assistance that are not necessarily part of the said enumeration. Therefore, this definition can include agreements that are not purely gratuitous and unilateral [135].
>
> [I underline.]

[107] Therefore, pursuant to subsection 127(9) of the *ITA* , it is possible that payments made to CAE under the ISAD Agreement may constitute “government assistance”.

B. The established case law test for determining whether a payment made by a government, municipality or other authority constitutes “government assistance” under subsection 127(9) of the *ITA* .

[108] In order to determine whether a payment constitutes "government assistance" under subsection 127(9) of the *ITA* , the Court must apply the test enshrined in the Federal Court Appeal Division in *Consumers ' Gas Co. c. R.* _ [136] (“ Consumers ' Gas”) and repeated by the Federal Court of Appeal in *Canada v. CCLC Technologies* Inc. [137] (“CCLC Technologies”) and *Immunovaccine Technologies Inc. v. R.* [138] (“ Immunovaccine ”). The test established by these judgments is as follows: if payments have been made in exactly the same way and for exactly the same reasons as those made by private companies, i.e. in order to promote the interests of the payer, it is not “government assistance” under subsection 127(9) of the *ITA* .

[109] However, it is worth examining these judgments in more detail in order to identify how this test was applied.

[110] In *Consumers ' Gas* , the Court was called upon to rule on the application of subsection 13(7.1) of an old version of the *Income Tax Act* . The taxpayer was a public natural gas distribution company in the Province of Ontario which distributed natural gas by means of pipelines which followed the course of streets and roads. Various agencies, including public authorities, occasionally required the Company to relocate portions of its pipeline system to undertake construction work. In these cases, the company tried to recover the full cost of relocating the pipelines from the

organization that had requested it, particularly when it involved public authorities [139].

[111] In that case, it was clear that the refunds made to Consumers ' Gas did not constitute a form of government assistance, because those payments were made in exactly the same way and for exactly the same reasons as those made by private companies, that is, in order to promote the interests of the payer. These payments had been made pursuant to an ordinary commercial arrangement. The relevant passage from that judgment is as follows:

> In my opinion, the key word in this text is “aid” , which, in this case, clearly includes the notion of grant or subsidy. In this case, it is clear from the evidence that the payments made to Consumers ' Gas by public bodies such as municipalities, Ontario Hydro and the like were made in exactly the same way and for exactly the same reasons. that payments made by private companies, i.e. in order to promote the interests of the payer … [140]
>
> [I underline.]

[112] In the same case, the Court also relied on certain observations made in *Ottawa Valley Power Co. c. MRN* [141](“Ottawa Valley”) to conclude that payments made under an ordinary business arrangement entered into for business purposes could not be characterized as “ government assistance”. These observations are as follows:

> This rule appears to cover the case where a taxpayer has acquired property for a capital cost and has also received a grant, subsidy or other assistance from a public authority "in respect of or for the purpose of acquiring property", in which case the capital cost is deemed to be "the amount that such property cost the taxpayer capital less ... the amount of the grant, subsidy or other assistance". It does not appear that this rule can apply where a public authority has actually granted capital assets to a taxpayer for the purposes of his business at no cost to him. Notwithstanding the fact that the rule thus interpreted does not apply in the present case, I do not think that it can apply to ordinary commercial transactions between a public authority and a taxpayer, in the case where the public authority is dealing and deals with an individual in the same way as any other person carrying on such a business would. I do not think that the words used in paragraph (h) — "a grant, subsidy or other assistance from a public authority" — can be applied to an ordinary commercial agreement entered into between the two parties to the agreement for commercial reasons . If the Legislature used Ontario Hydro to carry out some legislative scheme to make grants to encourage businessmen to enter into certain types of business, then it would be easy for me to apply the (h) to the grants in question. Here, however, it seems to me, the legislature has simply authorized Ontario Hydro to do certain things deemed conducive to the success of certain changes in its methods of operation; what Ontario Hydro was thus authorized to do was of the same nature as

> others carrying on a similar business and compelled to make similar changes might see fit to do. I cannot consider what is done in such circumstances as being “help” granted by a public authority as a public authority. [142]
>
> [I underline.]

[113] In *CCLC Technologie* and *Immunovaccine* , the Federal Court of Appeal ruled on the meaning to be given to the expression “government assistance” in subsection 127(9) of the *ITA* . In Immunovaccine *, the* Court adopted the test that a payment constitutes "government assistance " if it was not made in exactly the same manner and for exactly the same reasons as a payment made by a private company, i.e. in order to promote the interests of the payer.

[114] The relevant passage from the *CCLC Technologie* judgment is as follows:

> This appeal raises two issues.
>
> (1) Do the amounts paid by the Government of Alberta to the Respondent constitute a form of "assistance" paid in the form of a bonus, grant, forgivable loan, tax deduction, investment allowance or in any other form ... within the meaning of subparagraph 12(1)(x)(iv) of the Income Tax Act, in which income is defined, and within the meaning of subsections 127(11.1) and 127(9) in which investment tax credits are defined?
>
> (2) If the answer to the first question is yes, should not these amounts nevertheless be excluded from income under subparagraph 12(1)(x)(viii) because they are a payment made in respect of the acquisition by the debtor [...] of a right over the taxpayer, in his business or in his property [...]? With respect to the first question, we are of the opinion that the sums paid to the respondent constitute a form of government assistance. In The Queen v. Consumers Gas Company Ltd., the Court contrasted “government assistance” with payments made by public bodies.
>
> > in exactly the same way and for exactly the same reasons as payments made by private companies, i.e. to promote the interests of the payer .
>
> In this context, it is clear that the Court was dealing with payments made to promote the commercial interests of the payer .
>
> 3 The Agreement, in our view, does not constitute an ordinary commercial agreement between the parties . The Government of Alberta undertook to provide the technology and to pay the respondent funds. Although the government obtained a short-term participation, it would have been obliged, if the project had proved commercially viable, to sell its participation to the respondent for a consideration equivalent simply to the amount of its financial contribution, plus costs of related interest. If the project turned out to have no commercial value, as it did during the

> period in question, the government was entitled to nothing except a stake in technology that had no current commercial value. We believe that it is impossible to characterize this agreement as an ordinary commercial agreement. Whatever the value of the agreement, from the perspective of public policy in Alberta, it does not constitute an agreement that a company would agree to enter into to further its commercial interests. A company that invests funds in projects and agrees to get no net profit if the project is successful and only get a stake if the company has no commercial value would not survive long [143] .
>
> [I underline.]

[115] The relevant passage from the *Immunovacine judgment* is the next :

> 10 In Canada v. CCLC Technologies Inc., [1996] FCJ No. 1226 (QL), 1996 CanLII 11571 (CCLC Technologies), this Court adopted a test to determine whether payments made by a public authority similar to ACOA pursuant to an agreement have the characteristics of a commercial enterprise. In other words, the key question is: is the public authority in question acting in a commercial rather than a governmental capacity ?
>
> 11 The judge referred to the test set out in CCLC Technologies and applied it to determine whether the government agency acted "in exactly the same way and for exactly the same reasons as the payments made by private companies, c 'that is, in order to further the [business] interests of the payer " (para. 46 of the judge's reasons) .
>
> [I underline.]

[116] After reading *Consumers ' Gas* , *CCLC Technologies and Immunovaccine* , I am of the opinion that in order to determine whether payments made under an agreement constitute "government assistance", it is not enough to determine whether payments were made in exactly the same way and for exactly the same reasons as those made by private companies. Rather, I am of the opinion that in order to determine whether the test established by these judgments is met, the Court must determine whether the payments were made in order to promote the commercial interests of the payer, that is to say whether they were made pursuant to an "ordinary commercial arrangement" [145] . Indeed, I believe that an agreement can be an "ordinary commercial agreement" even if the payments made under it were not made in exactly the same way and for exactly the same reasons as those made by private companies. Given the circumstances, a company may very well determine that it is expedient for it, in the interest of furthering its commercial interests, to enter into an agreement whose terms differ from comparable agreements entered into between private companies during the same period. . Finally, I also believe that since payments made under an agreement are made in accordance with its terms, it is

appropriate to examine the said terms to determine whether they correspond to the terms of an ordinary commercial agreement and, if necessary, to make a comparative analysis [146]. In this regard, it is logical to conclude, unless there is evidence to the contrary, that it is generally contrary to the commercial interests of an enterprise to be party to an agreement whose terms are substantially less advantageous than those of agreements ordinarily concluded under the same circumstances.

C. Is the ISAD Agreement an "ordinary commercial agreement"?

[117] Upon reading the ISAD Agreement and taking into account the circumstances, it is not possible to determine whether or not it is an "ordinary commercial agreement". The facts show that by entering into the ISAD Agreement, the Government of Canada wanted to help a sector of activity important to Canada and not to advance its commercial interests. This does not allow the Court to conclude that the ISAD Agreement is not an ordinary commercial agreement. As mentioned previously, in order to make this determination, I am of the opinion that the Court must compare the terms of the ISAD Agreement to those of commercial agreements that were entered into by private companies at the same time in order to obtain financing of $250,000,000. For this purpose, it is necessary to qualify the agreement. Once the agreement has been qualified, the Court will be able to identify the main terms of this type of agreement for comparison purposes and thus be able to determine whether it is an "ordinary commercial agreement". It is therefore necessary to carry out a comparative analysis.

1. ISAD Agreement Qualification

[118] The ISAD Agreement has not been expressly qualified by the parties. The respondent maintains that this is a contribution agreement aimed at granting financial assistance to a research and development project. As for the appellant, it maintains that it is a simple loan within the meaning of article 2314 of the *CCQ* . The agreement does refer to "contributions", but that is not determinative in itself. During his testimony, Mr. Lemieux described these contributions as "investment", but again, this is not decisive. A "contribution" to research and development work can take different forms, as can an investment in a company.

[119] In this case, it is necessary to have recourse to the civil law in force in Quebec in order to qualify the ISAD Agreement. In fact, under the terms of section 8.1 of the *Interpretation Act* [147], in order to ensure the application of the *ITA* in the province of Quebec, when it is necessary to resort to rules, principles or concepts

belonging to the field of property and civil rights, the Court must have recourse to the rules, principles and concepts in force in Quebec [148].

[120] Can the ISAD Agreement be characterized as a loan, as the appellant maintains? The simple loan is defined by article 2314 of the *Civil Code of Quebec* as follows:

> 2314 A simple loan is a contract by which the lender delivers a certain quantity of money or other property which is consumed by use to the borrower, who undertakes to return the same amount to him, of the same kind and same quality.

[121] According to civil law, when the judge must qualify an agreement, he must look for the legal transaction envisaged by the parties. This can be done by determining what the objective of the parties was when entering into the agreement or, more frequently, by determining what is the essential benefit that is at the heart of the agreement . An examination of the obligations and other effects of the agreement may also be useful or necessary in order to qualify the agreement [150]. When qualifying the agreement, the elements extrinsic to it, such as the circumstances surrounding its formation and its application by the parties, are facts to which the judge may refer, but only when the agreement is ambiguous [151]. It should be noted that the judge is never bound by the qualification given to the agreement by the parties [152].

[122] The essential services of the parties to the ISAD Agreement are easily identifiable. For the Minister of Industry of Canada, this involves paying a maximum total contribution of $250,000,000 to CAE over a period of 5 years, i.e. from 2009 to 2015, according to the conditions set out in the agreement. As for CAE's essential service, it involves reimbursing the contributions received according to the conditions and schedule set out in the agreement.

[123] It appears that the essential services of the parties to the ISAD Agreement correspond to the two conditions that must be met for an agreement to be qualified as a loan: According to article 2314 CCQ, *either* the remittance of a certain amount of money from one party to another and the obligation for the party who received it to return it in the same kind and quality. Under the agreement, Canada's Minister of Industry provided CAE with $250,000,000. Therefore, the first condition is met. Also under the agreement, CAE was to remit $337,500,000 to the Minister of Industry Canada. Therefore, the second condition is met. Since the two conditions set out in article 2314 *CCQ* . met, the Court concludes that the arrangement is a loan.

2. M. de Gray's expert report

[124] In order to demonstrate to the Court that the ISAD Agreement is not an "ordinary commercial agreement", the respondent called Mr. de Gray to testify. Most of the Respondent's arguments on this point are based on the content of its expert report. This expert report was entered into evidence at the trial. For its part, the appellant did not produce either an expert report or a second report.

1. Qualifications of Mr. de Gray as an expert

[125] The respondent asked the Court to recognize Mr. de Gray as an expert in corporate finance. More specifically, it requested that Mr. de Gray be recognized as an expert in the valuation of debt instruments and equity securities. The Court accepted this request. This decision is based on the following facts subject to the Court's assessment:

- Throughout his career, Mr. de Gray has authored or co-authored articles on business valuation principles. He has been writing expert reports for more than ten years, many of which have been presented in court.

- Mr. de Gray studied at the Rotman School of Management at the University of Toronto, where he obtained his Bachelor of Commerce.

- He obtained his Chartered Accountant designation after a three-year internship with Ernst & Young.

- He obtained his Chartered Business Valuator designation in 2012.

- He obtained a certificate in forensic accounting from the American Institute of CPAs in 2017.

- Currently, he is Director of Disputes and Investigations at Duff & Phelps. This department is responsible for analyzing appraisals, expert reports, damage quantification analysis and financial loss reports.

[126] The appellant did not object to the qualification of Mr. de Gray as an expert.

2. The task of Mr. de Gray and the question before the Court

[127] The Respondent asked Mr. de Gray the following question: Were the payments made under the ISAD Agreement made in exactly the same way and for

exactly the same reasons as the payments made by private companies, c ie in order to promote the [commercial] interests of the payer? Mr. de Gray's report addresses this issue. In order to answer this question, Mr. de Gray first determined whether the agreement constituted an “ordinary business arrangement”. It is therefore relevant for the Court to examine the analysis made by Mr. de Gray for this purpose.

[128] After reviewing the key terms of the ISAD Agreement, Mr. de Gray concluded that it was not an “ordinary business arrangement”. In order to draw this conclusion, Mr. de Gray first drew the following three conclusions:

1. The rate of return implicit in the agreement of approximately 2.5% is significantly lower than the fair market rate of return for a financial instrument whose risk profile is comparable to that of the agreement;

2. The agreement is subject to minimum clauses and does not contain any of the financial clauses characteristic of a commercial agreement of this type;

3. The agreement contains several other terms that are not typical in a commercial agreement of this type. Its terms are driven primarily by political considerations or government action, rather than commercial motives.

[129] It is therefore appropriate to examine each of these conclusions in more detail.

[130] Mr. de Gray concluded that the rate of return is one of the main conditions of an agreement such as the ISAD Agreement. The Court finds based on the testimony of Mr. de Gray and in the absence of other evidence, that the rate of return of an agreement having the same object as the ISAD Agreement is one of the main conditions of such an agreement. For the same reasons, the Court also concludes that the implied rate of return of the ISAD Agreement of approximately 2.5% is substantially lower than that of financial instruments with a similar risk profile. Moreover, the appellant has not presented any evidence to establish that a lender would have concluded , in order to promote its commercial interests, an agreement such as the ISAD Agreement at an interest rate of 2.5% . In view of this and the fact that the Court has already found that the rate of return of the ISAD Agreement is one of its principal terms, the Court has concluded that the ISAD Agreement is not an "ordinary commercial agreement ".

[131] That said, the Court nevertheless examined the facts on which Mr. Gray has relied on the conclusion that the rate of return on the ISAD Agreement is substantially lower than that of financial instruments with a similar risk profile.

[132] Mr. de Gray examined, for the period from 2008 to 2014, the interest rates of Government of Canada bonds, United States treasury bills, bonds issued by Canadian companies and those issued by companies operating specifically in the aerospace and defense sectors. Mr. de Gray also reviewed the commercial loans obtained by CAE during the same period. Finally, he reviewed how CAE has treated the ISAD Agreement in its financial reports.

[133] The interest rate of a financial instrument considered risk-free is useful for the purposes of the analysis to be carried out by the Court. However, only the Government of Canada bond rate is retained by the Court, because Mr. de Gray did not explain why the Court should consider the risk-free rate in effect on the American market. On March 30, 2009, when the ISAD Agreement was signed, this rate was 3.65 % on average. During the period from 2008 to 2014, the average rate fluctuated from 2.88% to 4.33%.

[134] In this case, it is not necessary to study the interest rates of bonds issued by companies in the Canadian market. A bond issue is not a loan, they are completely different transactions. The Court understands that it is possible to compare different “financial instruments” according to the risk associated with each of them. However, it is not necessary to do so in this case because Mr. de Gray had access to information concerning commercial loans obtained by CAE. The Court agrees with Mr. de Gray's conclusion that the commercial loan interest rate is an indication of the market interest rate applicable to an agreement comparable to the ISAD Agreement. The commercial loans obtained by CAE effectively constitute transactions with a higher degree of comparability than bond issues.

[135] As for the commercial loans obtained by CAE, Mr. de Gray noted that CAE entered into a number of loan agreements during the period 2008 to 2014. He pointed out that an amount of $120,000,000 was obtained by CAE in 2010 as part of a private placement. This one was particularly relevant as it was unsecured, had an average term to maturity of 8.5 years and a combined interest rate of 7.15% with interest payable semi-annually. Given the proximity of the date of conclusion of this agreement to the ISAD Agreement, the amount of the loan and the fact that it was not accompanied by any guarantee, Mr. de Gray concluded that this agreement gave him a reasonable approximation of a prevailing market interest rate for an agreement comparable to the ISAD Agreement. In fact, he is of the opinion that the interest rate

of the ISAD Agreement should have been higher than 7.15% for the following reasons: the agreement had a longer term than the private placement, namely 15-20 years ; it benefited from a preferential classification; finally, it did not include the usual restrictive clauses.

[136] Finally, Mr. de Gray noted that, in its financial reports, CAE acknowledged that the “lender” contributions under the ISAD Agreement had been obtained at an interest rate lower than the prevailing market interest rate.

[137] In view of this and as mentioned above, the Court concludes that the ISAD Agreement does not constitute an “ordinary commercial agreement”. The appellant has not proven that a private company, with the aim of promoting its commercial interests, entered into this agreement. Rather, the evidence shows that the rate of return implicit in the agreement is significantly lower than the market rate of return for a comparable loan. Moreover, it is established that the risk-free interest rate on the market for the period in question was 3.65%. The Court therefore concludes that the present case concerns a loan granted at a rate substantially lower than the market rate and that it would have been contrary to the commercial interests of a private lender to grant a loan at this rate .

D. Was the sum of $250,000,000 paid to CAE under the ISAD Agreement "received" by CAE within the meaning of subsections 12(1), 127(9) and 127(18) of the *LIR* ?

[138] The appellant submits that subsections 12(1), 127(9) and 127(18) of the *ITA* can only apply if the taxpayer has “received” an amount as “government assistance”. The appellant submits that CAE did not "receive" an amount of money under the ISAD Agreement because it is a loan and that a taxpayer cannot have "received" an amount without there has been a transfer of ownership of the amount in question.

[139] The verb "to receive" is not defined in the *ITA* . It is defined in the Le Robert dictionary as follows:

> “To be put in possession of (sth.) as a result of a sending, a gift, a payment, a communication, etc. »

[140] This definition makes no reference to a transfer of ownership. It is therefore sufficient to be placed in possession of a good to have “received” it, whether or not there has been a transfer of ownership. The same applies to the English language

version of those provisions in which the verb “ received ” appears. The Merriam - Webster dictionary defines the word " Receive " as:

> “To come into possession”.

[141] There is no indication or evidence showing that the legislator intended to add this condition, namely the transfer of ownership of the property received, so that subsections 12(1), 127(9) and 127(18) of the *LIR* can find application. Accordingly, the Court finds that the contributions made to CAE under the ISAD Agreement were indeed “received” within the meaning of subsections 12(1), 127(9) and 127(18) of the *ITA* .

[142] As for the appellant's argument based on the *Dunkelman case law* , the Court noted that it concerned the interpretation of the expression " transferred property ” as it appears in subsection 22(1) of an earlier version of the *ITA* . However, since the definition of “government assistance” does not refer to this expression, the Court is of the opinion that it is not relevant to consider this case law in this case.

VII. CONCLUSION

[143] The Court concludes that the ISAD Agreement does not constitute an ordinary commercial agreement. Therefore, the amounts paid to CAE under the agreement during the 2012 and 2013 taxation years respectively constitute amounts received as “government assistance” within the meaning of subsection 127(9) of the *ITA* . For the same reason, the amounts that CAE was entitled to receive under the agreement during the said taxation years constitute "government assistance" within the meaning of subsection 127(18) of the *ITA* .

[144] Since the Court can dispose of this appeal on the basis of the conclusions set out above, it will not consider the subsidiary question set out in paragraph 8 of this judgment.

[145] For these reasons, the appeal is dismissed with costs.

These Amended Reasons for Judgment replace the Reasons for Judgment dated the 14th day of September, 2021.

Signed at Ottawa, Canada, this 8th day of November 2021.

"Sylvain Ouimet"
Judge Ouimet

REFERENCE :	2021 CCI 57
COURT FILE NO.:	2016-4984(IT)G
TITLE OF CAUSE :	CAE INC. AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec)
HEARING DATE :	June 3 and 4, 2019 and August 24 and 25, 2020
REASONS FOR JUDGMENT AMENDED BY:	the honorable Judge Sylvain Ouimet
DATE :	September 14 , 2021
DATE OF AMENDED REASONS FOR JUDGMENT:	November 8 , 2021

APPEARANCES:

Appellant 's lawyer :	Mr. Wilfred Lefebvre Mr. Marc -Olivier Plante
Respondent 's Counsel :	Mr. Dany Leduc Mr Antonia _ Pereharakis

LAWYER OF RECORD:

For the appellant:

Name :	Mr. Wilfred Lefebvre Mr. Marc -Olivier Plante
Office:	Norton Rose Fullbright Canada

For the Respondent : Francois Daigle
Deputy Attorney General of Canada
Ottawa, Canada

[1] The amounts of $41,003,491 and $40,652,951 received by CAE during the 2012 and 2013 taxation years respectively are included in the amounts of $57,084,395 and $59,148,888 mentioned in the second issue in dispute.
[2] Partial agreement on the facts at para 1.
[3] *Ibid* at para 2.
[4] *Ibid* .
[5] *Ibid* at para 4.
[6] *Ibid* at para 7.
[7] *Ibid* at para 6.
[8] *Ibid* at para 5.
[9] Translation of the title of the agreement in English.
[10] *Supra* note 2 at para 8. The initial agreement was amended four times between March 2010 and March 2013.
[11] Respondent's expert report at p 5.
[12] *Supra* note 2 at paras 12-13. See also clauses 6.1 and 6.2 of the ISAD Agreement as well as the definition of the word “Project” in “Schedule 1” as well as the description set out in “Schedule 2” of the ISAD Agreement.
[13] Means the costs incurred and paid by the Recipient in relation to the Project set out in Schedule 2 and in accordance with Schedule 5, excluding those which are specifically identified in the Statement of Work as not being covered, if any, or other charges prohibited elsewhere in this agreement.
[14] *Supra* note 2 at para 10, clause 4.1 of the ISAD Agreement.
[15] *Ibid* ; Exhibit A-1, clause 4.3; Exhibit A-1, Tab 3, Fourth Amendment to the ISAD Agreement, clause 3.
[16] *Ibid* at para 26.
[17] *Ibid* at para 28.
[18] *Ibid* at paras 18, 19; Exhibit A-1, *supra* note 15, Tab 2 “ISAD Agreement”, Appendix 3, clauses 1, 2.1 and 2.2.
[19] *Ibid* at paras 16, 37; Exhibit A-1, *supra* note 15, Tab 2 “ISAD Agreement”, Appendix 3, clauses 1, 2.1 and 2.2.
[20] *Ibid* at para 17; Exhibit A-1, *supra* note 15, Tab 2 “ISAD Agreement”, Appendix 3, clauses 1, 2.1 and 2.2.
[21] *Ibid* in para 21.
[22] *Ibid* at para 20; Exhibit A-1, *supra* note 15, Tab 2 “ISAD Agreement”, Appendix 3, clauses 1, 2.1 and 2.2.
[23] *Ibid* at para 34; Exhibit A-1, *supra* note 15, Tab 2 “ISAD Agreement”, clause 8.1(e).
[24] *Ibid* at para 35 .
[25] *Ibid* at para 36.
[26] *Ibid* at para 32; Exhibit A-1, *supra* note 15, Tab 2 “ISAD Agreement”, Appendix 6, clause 1.2.
[27] *Ibid* at para 30–31.
[28] Exhibit A-1, *supra* note 15, Tab 2 “ISAD Agreement” Appendix 6, clauses 1.1(a) and 1.2(a).
[29] *Supra* note 2 clauses 1.2(b), 1.3.
[30] *Ibid* clause 1.3.
[31] *Ibid* at para 38; Exhibit A-1, *supra* note 15, Tab 2 “ISAD Agreement”, clause 8.17.
[32] Transcripts of the hearing of June 3, 2019 at p 24.
[33] *Ibid* at p 23.
[34] *Ibid* at p 24.
[35] *Ibid* at p 25.
[36] *Ibid* .
[37] *Ibid* at p 26.
[38] *Ibid* at pp 29, 31–33.
[39] *Ibid* at p 33.
[40] *Ibid* at p 69.
[41] *Ibid* at pp 34, 36.
[42] *Ibid* at pp 36–38.
[43] *Ibid* at p 37.
[44] *Ibid* at p 40.
[45] *Ibid* at p 45.
[46] *Ibid* at p 41.

[47] *Ibid* .
[48] *Ibid* .
[49] *Ibid* at pp 47–48. The effective interest rate was defined by Mr. Malatesta as the interest rate incurred even if no repayment was payable within the year.
[50] *Ibid* at p 41.
[51] *Ibid* at pp 52–53.
[52] *Ibid* at pp 47, 53.
[53] *Ibid* at p 53.
[54] *Ibid* at p 73.
[55] *Ibid* at pp 53–54.
[56] *Ibid* at p 80.
[57] *Ibid* at pp 73, 77, 84–85.
[58] *Ibid* at p 85.
[59] *Ibid* at pp 83–84.
[60] *Ibid* at pp 93–94.
[61] *Ibid* at pp 112, 118.
[62] *Ibid* at p 112.
[63] Exhibits A-4 and A-5 “Schedule 1 – Net income (loss) for income tax purposes”; Transcripts of the hearing of June 3, 2019, at p 111.
[64] *Ibid* at pp 122–123.
[65] *Ibid* at pp 154–155.
[66] *Ibid* at p 171.
[67] *Ibid* at p 127.
[68] *Ibid* at pp 143–144.
[69] *Ibid* at p 133.
[70] *Ibid* at p 149; Exhibit I-1, “Falcon Project Business Plan”.
[71] *Ibid* at p 133.
[72] Exhibit I-2, “Falcon Project Business Plan” at p 12.
[73] *Ibid* at p 13.
[74] Transcripts, *supra* note 32 at 160, 163; Transcripts of the June 4, 2019 hearing at p 68.
[75] *Ibid* at pp 166–167.
[76] Exhibit A-1, *supra* note 15, Tab 1A “Industry Canada SADI Program Guide”, at p 5; Transcripts, *supra* note 32 at 167; Exhibit I-4, “Directive on Transfer Payments”.
[77] Exhibit I-4 “Directive on Transfer Payments”, Appendix C, no 2.
[78] Exhibit I-4, *supra* note 77, Appendix E, at p 25.
[79] *Ibid* at pp 69–72.
[80] *Ibid* at p 57.
[81] *Ibid* at pp 174–177.
[82] *Ibid* at p 175.
[83] *Ibid* at p 81.
[84] *Ibid* at p 60.
[85] Respondent's Expert Report at para 1.10.
[86] *Ibid* at para 1.4.
[87] *Ibid* at para 7.1.1.b.
[88] *Ibid* at para 7.1.1.1.
[89] *Ibid* at para 7.3.5.
[90] *Ibid* at para 7.2.1.
[91] *Ibid* at para 7.2.2.
[92] *Ibid* at para 7.2.3.
[93] *Ibid* at para 6.1.
[94] *Ibid* at para 6.2.
[95] *Ibid* at para 6.5.
[96] *Ibid* at para 7.3.2
[97] *Ibid* at para 7.3.4.
[98] Transcripts of the August 24, 2020 hearing at pp 75–76.
[99] *Ibid* at pp 76–77.

[100] *Ibid* .
[101] *Ibid* .
[102] *Ibid* .
[103] *Supra* note 85 at para 7.3.7.
[104] *Ibid* at para 7.3.7.
[105] *Ibid* at para 7.3.10.
[106] *Ibid* at para 7.3.13.
[107] *Ibid* at para 7.3.18.
[108] *Ibid* at para 7.3.26.
[109] *Ibid* at para 7.3.28.
[110] *Ibid* at para 7.4.1.
[111] *Ibid* at para 7.4.1 a.
[112] *Ibid* at para 7.4.1 b.
[113] *Ibid* at para 7.4.4.
[114] *Ibid* at para 7.5.7.
[115] *Ibid* at para 7.5.9.
[116] *Ibid* at p 30.
[117] *Ibid* at p 3.
[118] *Ibid* .
[119] *Ibid* at para 3.1 a; Transcripts, *supra* note 98 at pp 57–58.
[120] *Ibid* at para 3.1 b.
[121] *Ibid* at para 3.1 c.
[122] Transcripts, *supra* note 3 at 3, at paras 7–16.
[123] *Supra* note 2 at para 16.
[124] *Dunkelman v MNR* , 59 DTC 1242 (E C).
[125] *Fonthill Lumber Ltd v R* , 81 DTC 5333 (T.D.) .
[126] *Immunovacine Technologies Inc. v R* , 2013 CCI 103.
[127] *Immunovacine Technologies Inc. v R* , 2014 FCA 196.
[128] *The Queen vs CCLC Technologies Inc.* , 96 DTC 6527 (Appeal Division).
[129] Exhibit A-1, *supra* note 15, Tab 1A), “Industry Canada's ISAD Program Guide” at p 7.
[130] Exhibit A-1, *supra* note 15, Tab 1B), “Information about the program” at p 10; Exhibit I-3, "Application Preparation Guide", at p 22.
[131] Transcript of hearing of August 25, 2020 at p 156.
[132] *Supra* note 126 .
[133] *Ibid* at para 45.
[134] *Supra* note 126.
[135] *Supra* note 127 at para 15.
[136] *Consumers' Gas Co v R,* [1987] 2 FC 60, 1986 CarswellNat 496.
[137] *Canada v CCLC Technologies Inc.,* (1996) ACF no 1226 (QL), 1996 CanLII 11571.
[138] *Supra* note 127 .
[139] *Supra* note 136 at para 4. In this case, the Court was called upon to rule on the application of subsection 13(7.1) of the former Income Tax Act. More specifically, it had to determine the meaning of the expression “aid from a government, a municipality or any other public body”. The Court concluded that the key word in this expression was the word “help”. According to the Court, the word "aid" clearly includes the notion of grant or subsidy and it concluded that, in this case, the reimbursements of the costs of moving the pipelines made by public bodies had been made in exactly the same way in the same way and for exactly the same reasons as the reimbursements made by private companies which have submitted similar requests. Therefore, reimbursements made by the authorities did not constitute "assistance from a government, municipality or other public body".
[140] *Ibid* at para 11.
[141] *Ottawa Valley Power Co v MRN* , [1969] 2 Ex CR 64, 1969 CarswellNat 283.
[142] *Ibid* at para 72 .
[143] *Supra* note 137 at paras 1–3.
[144] *Supra* note 127 at paras 10–11.
[145] *Ibid* at para 16; *supra* note 137 at para 3.
[146] *Supra* note 127 at para 16.

[147] *Law interpretation* , RSC 1985, c I-21.

[148] It should be noted that according to clause 21 of the ISAD Agreement, it must be interpreted according to the laws in force in Canada in the Canadian province where CAE has its head office. CAE is headquartered in Ville Saint-Laurent in the province of Quebec.

[149] Didier Lluelles and Benoît Moore, *Droit des obligations* , 3rd ed , Montreal, Éditions Thémis, 2018, at paras 1733-1734.

[150] *Ibid* . See also: *Uniprix Inc. c Gestion Gosselin et Bérubé Inc.* , 2017 SCC 43, at para 38.

[151] *Eli Lilly and Co v Novopharm Ltd* , [1998] 2 SCR 129, at paras 54–55.

[152] Jean-Louis Baudouin, Pierre-Gabriel Jobin and Nathalie Vézina., *Les obligations* , 7 th ed, Cowansville, Yvon Blais, 2013, at p 85, no. 56.