



SR&ED Practitioner Meeting
MEDICAL ISSUES
May 14, 2019

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Presented by
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Agenda

- SR&ED – issues for Medical practitioners
- presented 2016 & 2019 – partially resolved
 - **1) Directly Engaged / Undertaken**
 - **2) AFP/APP funding effects**
 - 3) Length of time for objections
 - 4) Consistency of rulings across Canada
- New issues raised during 2018 & 2019
 - **5) Proving involvement with protocols**



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SR&ED Medical Issues – unresolved by CRA 2016 – 2020

		2020	2020	2019	2019	2017	2017	2016	2016
1	AFP / APP funding as assistance	PDF	Video	PDF	Video	PDF	Video	PDF	Video
2	Directly engaged / entitlement to exploit	PDF*	Video	PDF	Video	PDF	Video	PDF	Video
3	Contract eligibility	PDF*		PDF	Video				
4	Proving input on protocols	PDF		PDF	Video				
5	Speed of appeals	PDF		PDF	Video				

Status of medical issues May 14, 2020

- Direction paper released
- 2 scenarios for who claims & tax effects
 - Individual Physician or
 - MPC

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Legal person or entity	Who is directly undertaking the work?	What this means
Scenario 1: Individual/ Independent Contractor (proprietor unincorporated business)	A) Physicians directly undertaking SR&ED	Physicians doing SR&ED work for themselves No contract to perform SR&ED behalf of another party
	B) Physicians undertaking SR&ED behalf another party	Physicians have contractual relationship to perform SR&ED work.
	C) Physicians undertaking SR&ED behalf another party AND ALSO themselves	Physicians have contractual relationship perform SR&ED behalf another party & also doing SR&ED for themselves & incurring costs outside contractual obligations.

Legal person or entity	Who is directly undertaking the work?	Who claims the SR&ED?	Considerations
Scenario 1: Individual/ Independent Contractor (proprietor unincorporated business)	A) Physicians directly undertaking SR&ED	Individual physicians	SR&ED expenditures must be paid and incurred. Proprietors cannot receive a salary (T4 income) as qualified SR&ED expenditure.
	B) Physicians undertaking SR&ED behalf another party	Individual physicians	Qualified expenditures may be reduced by assistance and contract payments.
	C) Physicians undertaking SR&ED behalf another party AND ALSO themselves	Individual physicians	Qualified expenditures may be reduced by assistance and contract payments.

Legal person or entity	Who is directly undertaking the work?	What this means
Scenario 2: MPC	A) MPCs directly undertaking SR&ED work	MPCs doing SR&ED work for themselves & incur expenditures No contractual obligation to perform SR&ED behalf another party
	B) MPCs undertaking SR&ED work on behalf of another party	MPCs have a contractual relationship to perform SR&ED work.
	C) MPCs' employees SR&ED another party AND only physicians on contract performing SR&ED	Physicians have a contractual relationship to perform SR&ED work. See Scenario 1 (b) for more information.
	D) MPCs research behalf another party AND ALSO directly undertaking (and funding) themselves	Important contracts reflect SR&ED work behalf another party & directly undertaken (& funded) by MPCs themselves - Scenario 2 (a) and 2 (b)

Legal person or entity	Who is directly undertaking the work?	Who claims the SR&ED?	Considerations
Scenario 2: MPC	A) MPCs directly undertaking SR&ED work	MPCs	SR&ED expenditures must be paid and incurred.
	B) MPCs undertaking SR&ED work on behalf of another party	MPCs	Qualified expenditures may be reduced by assistance and contract payments.
	C) MPCs' employees SR&ED another party AND only physicians on contract performing SR&ED	Individual physicians	Qualified expenditures may be reduced by assistance and contract payments.
	D) MPCs research behalf another party AND ALSO directly undertaking (and funding) themselves	MPCs	Qualified expenditures may be reduced by assistance and contract payments.

Definition of “contract payment”

ITA 127(9)

Contract payment means

- **(a)** an amount paid or payable to a taxpayer, by a **taxable supplier** in respect [SR&ED] ...performed
 - **(i)** for or on behalf of a person ... **entitled to a deduction** in respect of **37(1)(a)(i.01)** or (i.1), and
 - **(ii)** at a time when the taxpayer is dealing at arm’s length with the person or partnership, **or**
- **(b)** an amount in respect of an expenditure of a current nature ... payable by a **Canadian government or municipality or other Canadian public authority** or by a **person exempt, because of section 149, from tax ..** for [SR&ED] to be **performed for it** or on its behalf;

Effect?

Contract payments for SR&ED only if:

- it is from a
 - “government” or
 - “taxable supplier” (i.e. another taxable Canadian company), &
- if “taxable supplier,” it intends to claim SR&ED ITC.

Implications

Qualified Expenditures reduced by:

- Government Assistance
- **Canadian sourced payments** for SR&ED performed on behalf of a customer
(**Contract Payments**)

Qualified Expenditures not reduced by:

- **Foreign sourced** payments for SR&ED performed **on behalf of** a customer

Factors determining performance of SR&ED work

1. Are there **written or verbal agreements** between the parties? Do these agreements include an **obligation to perform medical research**?
2. Are there written or verbal **agreements** between parties and the physician(s) describing **which entity paid the expenses** related to the provision of medical services and medical research?
3. **If the agreements were verbal**, is there **objective evidence** regarding the terms of such agreements and the moment of their formation?
Emails or signed attestations may be acceptable to validate this information.

4. Do **corporate documents**, such as articles of incorporation, amendments thereto, resolutions, minutes of meetings of the directors and/or shareholders, etc. refer to:

The **major business activity** as the provision of medical services and medical **research**?

Any agreement with the **health care entities**?

Payments or **compensation** for the provision of medical services & **research**?

Any agreement between the **MPC and the physician**?

What **services** the physician is to provide to the MPC?

How the physician is to be **compensated** for the work performed for the MPC?

How much of the **physician's time** should be spent on **medical research**?

How much of the physician's time should be spent on **other activities**?

What portion of the physician's **remuneration** pertains to the medical **research** performed?

What method was used to determine what portion of the physician's salary pertains to the medical research performed?

Issue 1 - CRA Statement :“directly undertaken”

In assessing the claim for wages paid to Dr. X in his MPC the CRA stated,

- “We have determined that the specified wages claimed were not incurred for scientific research and experimental development "**directly undertaken by the taxpayer**" nor was it for work "**directly undertaken on behalf** of the taxpayer" as required under Paragraph 37(1) (a) and Subparagraph 37(1) (a) (i) of the Income Tax Act (ITA).

Guidelines from SR&ED Director General – May 2, 2019

- Directly engaged – what is the CRA’s position?

As the legislation allows, “To claim SR&ED tax incentives, the Income Tax Act requires that the SR&ED work must be directly undertaken by the taxpayer or undertaken on behalf of another party and have resulted in expenditures.” Physicians and corporations (MPCs, HCEs, etc.) are distinct legal entities for tax purposes.

As you are aware, the medical guidance document key point is that for this community the CRA recognizes that several parties can collaborate to carry out the medical research, and determining the payer and performer can be challenging. We also recognize that we must have reasonable approaches for identifying distinct work. However, performers doing eligible research work can submit a SR&ED claim if they incurred their own eligible expenses and after reducing the qualified SR&ED expenditures for ITC purposes by compensation received or receivable.

Legislation

- Income tax act “SR&ED” (248(1))
 - “Scientific research and experimental development... includes ... d) engineering, design, operations research, **mathematical analysis**, computer programming, **data collection**, **testing** or psychological research, where the work is **commensurate with the needs**, and directly in support, of....”

Legislation

- Income tax act “Directly undertaken” (37(1))
 - “...there may be deducted ... all amounts each of which is an expenditure .. on scientific research and experimental development related to a business of the taxpayer, **carried on in Canada and directly undertaken by the taxpayer, ...**

CRA SR&ED Salary or Wages Policy – Dec. 18, 2014, section 7.1

Meaning of "directly engaged"

- “Directly engaged in SR&ED – ... based on the tasks .. not job title of the employee.
- refers to "hands-on" work,... paragraphs (a) to (d) ...definition of SR&ED ...Tax Act.”
- Generally, employees, including managers and supervisors, conducting experimentation and analysis in the performance of basic research, applied research, or experimental development are considered to be directly engaged in SR&ED.”

Issue & Analysis

- Are doctor's wages "directly undertaken?"
 - term "directly undertaken" not defined ITA or related CRA documents.
 - propose CRA term "directly engaged"
 - Example: Dr. X was one of the principal investigators both with the university and in clinical testing in her professional practice.
 - As such she was "directly engaged" in both design & related testing.
 - Only wages paid by professional practice have been claimed in the SR&ED claim.

Intellectual property

- IP often a “red herring”
- SR&ED eligibility based on “entitlement to exploit”
- Do NOT need to own IP but
 - positive indicator of entitlement

Entitlement to Exploit – has the concept been removed?



Canada Customs
and Revenue Agency

Agence des douanes
et du revenu du Canada

NO.: IT-151R5 DATE: October 17, 2000
SUBJECT: INCOME TAX ACT
Scientific Research and Experimental Development Expenditures

Entitlement to Exploit the Results

¶ 37. The determination of whether a taxpayer is "entitled to exploit the results" of SR&ED is a question of fact that can only be determined on a case-by-case basis. For example, this requirement is **considered to be met in cases where the taxpayer has the right to use a patent that results from the SR&ED project even if the taxpayer is charged a royalty or similar fee for the use of the patent. This requirement is also considered to be met in cases where the taxpayer is entitled to distribute and market any product that results from the SR&ED project.**

In addition, when a taxpayer makes a payment for SR&ED to a corporation described in subparagraph 37(1)(a)(i.1) or to an approved university or other entity described in subparagraph 37(1)(a)(ii) and it is likely that the SR&ED project will not result in a product or patent, the taxpayer will be considered to have **met this requirement** if it can be established that the taxpayer has, as a consequence of the payment, been granted a **preferential right to use the results** of the SR&ED in its business.

CRA Third-Party Payments Policy

Date: December 18, 2014

5.0 Entitlement to exploit the results

To be entitled to exploit the results of the SR&ED, a claimant must have **gained the right to use the results** of the SR&ED in their business **as a direct result of the payment**. Whether a claimant is entitled to exploit the results of the SR&ED is a question of fact and will be determined on a case-by-case basis.

5.1 Two basic situations

5.1.1 Resulting in a product or patent

If the SR&ED results in a product or patent, then this requirement could be satisfied if the claimant has the right to use a resulting patent (even for a royalty), or where the claimant is entitled to **distribute or market any resulting product**. If the claimant cannot use the patent or can only obtain the product through normal commercial channels, this requirement would not be satisfied.

5.1.2 Resulting in a gain of knowledge

If the SR&ED does not result in a product or patent, but results in a gain of knowledge (such as by publication of a scientific paper), then one way this requirement could be satisfied is if the claimant has, as a consequence of the payment, been **granted a preferential right** to use the results of the SR&ED (the knowledge gained) in its business. A preferential right could be access to unpublished results, or early access to results. If results are presented at a conference or published in a journal, this requirement could be met if the sponsor received a prepublication print of the paper. If the results of the SR&ED are in the public domain before the sponsor receives them, then that would not be considered to be a preferential right.

Issue 2 -“All AFP or surgical funding SR&ED assistance”

CRA stated,

- “The doctor being a member of the Department of the hospital AFP Practice Plan is receiving **\$X of AFP academic funding** from the Government of Ontario, as well as receiving **\$Y of surgical repair funding**.
- These amounts ... considered Government Assistance ... per subsection 127(18) of the ITA.”

Update to position 2020

AFP agreement defined

- "Academic funds" as "monies to support teaching and research activities by Participating Physicians" and
- "Clinical Repair Funds" as "monies to support clinical activities by Participating Physicians".
- Therefore, we conclude that part of the academic funding was in respect of the SR&ED. Since **Y% of Dr. X's' time is dedicated to research per the "Letter of Offer"** provided, we are reducing the qualified expenditures by Y% of the academic funding received.

Our comment on 2020 position

- New allocations attempting a reasonable basis vs. 100% prior
- Only research vs. non research payments are being considered assistance
- Both positive steps by CRA

Guidelines from SR&ED Director General – May 2, 2019

- Government assistance – whether AFP or any other funding included?

This item is still under review by Rulings/Legal Services. For now, we must continue to apply the contract payment policy.

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Legislation

- Income tax act “Reduction of qualified expenditures” (127(18))
 - “Where ...taxpayer has received, is entitled to receive or can reasonably be expected to receive a particular amount that is government assistance, non-government assistance or a contract payment that can **reasonably be considered to be in respect of** scientific research and experimental development, ...

AFP Practice Models – purpose & variations



HealthForceOntario

Specialist Practice Models

Compensation Options

Specialists in Ontario may be compensated through a fee for service system or through an Alternative Funding Plan (AFP) or Alternative Payment Plan (APP). AFPs/APPs are contractual arrangements between the Ministry of Health and Long-Term Care and a group of physicians, and may include other organizations such as hospitals and universities. Some AFPs/APPs also include funding for teaching and **research**.

These agreements provide flexibility in practice, encourage coordination and integration of medical services, and stabilize compensation for highly specialized groups, specialists and sub-specialists. AFPs/APPs have become more attractive and desirable to many physicians seeking a more balanced working life, regular hours, and acknowledgement of patient acuity, geographical challenges and financial security.

Over the years, a variety of compensation models have been developed and used by AFPs/APPs. Presently, most agreements are blended models that combine a base rate, incentive/premium payments and possibly a fee-for-service component payment. There are several remuneration methods:

- Global/block funding based on specific services or locations
- Blended funding models that include a base payment for clinical services, teaching, research, administration or indirect services plus a premium payments, which could be based on a percentage of the value of Fee-for-Service billings
- Bed utilization rate
- Sessional payment plus fee-for-service billings

AFP/APP Models

There are a variety of models used to cover:

- Specific communities and under-served specialties
- Individual departments in a single hospital
- Entire services of all physicians at a single hospital
- Services of all full-time specialists at an academic health science centre
- Province-wide gynaecology oncology, radiation oncology and medical oncology services
- Emergency services in hospitals, specialist services in the north and agreements with specialists and subspecialists associated with academic health science centres
- Regional trauma hospitals to ensure the 24-hour availability of high-level care for patients with serious trauma (Trauma Team Leader global funding agreements)
- Academic Health Science Centres, for clinical services, education and **research**
- Services such as psychiatry, the Regional Surgical Network, neurosurgery/neurology and anaesthesia in northern regions

For more information, read the [Ministry's Resource Manual for Physicians](#).

Author's summary / opinions

1) Need for disclosure of SR&ED portion

- Many uses of funds,
 - Many require breakdown of research / AFP approved by every member however,
 - procedure seldom followed.
- Nature of AFP model
 - strong argument that none, or perhaps only a minimal amount AFP funding
 - directly related to SR&ED
 - More REGULATION than ASSISTANCE
 - **Recent CRA approaches “reasonable” allocation**

Author's summary / opinions

2) Status of current CRA position unclear

Ontario District initiative?

- As of May 14, 2020 there appears a federal initiative to address factors on who claim ITC's and how

Need for national direction

- Additional direction & examples would be welcome on issues including
 - relevant evidence
 - Degrees of influence on protocols required

Recommendations

1) Improve reporting by hospitals

- If hospitals / universities begin to
 - report the “research” component
 - of any AFP funding
 - should resolve “assistance” issue

3) Objection delays

Guidelines from SR&ED Director General – May 2, 2019

- the length of time that objections & appeals are taking to be addressed.

As Appeals is independent of SR&ED, we don't have this information at hand. We are however in discussion with Appeals and they are aware of the direction we are taking.

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4) Consistency of Assessments Guidelines from SR&ED Director General – May 2, 2019

- Consistency of the application of these policies across Canada & within regions &/or

The guidance will be shared Nationally and the HQ plans to continue monitoring these claims to help ensure consistency and identify any further guidance or training requirements that may arise. We are also briefing the A/Ds in person shortly on the file.

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5) Evidence of protocol design Guidelines from SR&ED Director General – May 2, 2019

- Challenging if the Dr. was involved on protocol designs (e.g. What evidence is relevant)?

Medical guidance document does not specifically address this. It does speak generally to documentation for the work performed and the importance of agreements demonstrating the research relationships and responsibilities.

What if example, claimant provides

- list recommended changes to protocols &
- Supporting emails, transcripts & sponsor support letters confirming inputs & significant resultant protocol changes.

What if CRA responds,

“No documents available to substantiate claimant contribution toward scientific input to hypothesis formulation, study design, and protocol.” - **How to prove?**

Some of the documents requested

- Evidence of scientific uncertainties
- Departures from routine practice
- Study protocols & amendments
- Research Ethics Board documentation
- Clinical Study agreements
- Consent Form(s)
- Other docs; laboratory notebook entries, data analyses, meeting minutes, emails, etc.

Recommendations

- Prepare R&D contract from MPC to the doctor
- Document R&D time clearly vs. other professional obligations, clinic time, patient time, academics, ...
- Include evenings & weekends if appropriate
 - legitimately, many doctors use for private research
- Ask for a PCPR (Pre Claim Project Review)

Recommendations

- Review contracts with hospitals & universities, contract MPC directly & not individual doctor
- Grant & research contracts should be in name of MPC & funds paid to it
- Deduct research grants & contract payments to MPC from SR&ED claim
- Provide the personal tax return to CRA to prove that
 - doctor not receiving employment T4 income
 - from contracting hospitals or universities
 - If receiving T4 allocation of SR&ED time to MPC

FTCAS – don't quit > strike 1

- First Time Claimant Advisory Service
- First time MPC claims often receive a presentation which clearly dissuades against further claims
- The next claim may be approved even after an intimidating FTCAS (first) meeting
- Less of problem >2018 but many may have dissuaded

More clarification expected

- Given the positive trend of claims from 2018-2020
- Expect clarification of current issues
- Clearing of objections & appeals backlog