

TAX INFORMATION

Bulletin

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YOUR OPPORTUNITY TO COMMENT

Inland Revenue regularly produces a number of statements and rulings aimed at explaining how taxation law affects taxpayers and their agents. Because we are keen to produce items that accurately and fairly reflect taxation legislation and are useful in practical situations, your input into the process, as a user of that legislation, is highly valued.

You can find a list of the items we are currently inviting submissions on as well as a list of expired items at www.taxtechnical.ird.govt.nz (search keywords: public consultation).

Email your submissions to us at public.consultation@ird.govt.nz or post them to:

Public Consultation
Tax Counsel Office
Inland Revenue PO Box 2198
Wellington 6140

You can also subscribe at www.taxtechnical.ird.govt.nz/subscribe to receive regular email updates when we publish new draft items for comment.

IN SUMMARY

New legislation

Order in Council

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LI 2021/194 - Tax Administration (Top of the South Island Flood Event) Order 2021

This order, which comes into force on its notification in the *Gazette*, declares the Top of the South Island Flood Event to be an emergency event for the purpose of section 183ABA of the Tax Administration Act 1994.

Rulings

BR Prd 21/04: StockCo Limited and StockCo Capital Limited

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The Arrangement is the leasing of livestock by either StockCo Limited or StockCo Capital Limited to their customers to use solely in a farming business.

Notice of Withdrawal of Product Ruling BR Prd 20/03

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Notice of withdrawal of a product ruling under section 91FJ of the Tax Administration Act 1994

Legal decisions - case summaries

CSUM 21/07 – Supreme Court dismisses Mr Dowden’s Application for Leave to Appeal the court of Appeal’s Refusal to Extend Time to Appeal.

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The Supreme Court applied an orthodox approach to this leave application. There is no further impact beyond the immediate case. The decision puts an end to a longstanding tax challenge that has progressed from the Taxation Review Authority, the High Court, the Court of Appeal and finally to the Supreme Court.

CSUM 21/08 - Supreme Court dismisses Ms Sisson’s applications for leave to appeal.

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This was an unsuccessful attempt by Ms Sisson for leave to appeal three Court of Appeal decisions which collectively dismissed 11 appeals against judgments of the High Court. The three Court of Appeal judgments relate to the following: (1) the liquidation of Chesterfields Preschools Ltd (“CPL”); (2) the vesting of property in CPL; and (3) Ms Sisson’s personal bankruptcy.

The primary focus of the applications concerns the liquidation of CPL. The Supreme Court held an oral hearing directed at Ms Sisson’s case that if the tax debt is correctly calculated, CPL is not insolvent.

NEW LEGISLATION

This section of the *TIB* covers new legislation, changes to legislation including general and remedial amendments, and Orders in Council.

Order in council

Tax Administration (Canterbury Flood Event) Order 2021

The flooding created by the heavy rain that fell in the West Coast, Nelson, Tasman and Marlborough regions between 15 and 18 July 2021 has been declared to be an emergency event for the purposes of section 183ABA of the Tax Administration Act 1994. This section allows the Commissioner to remit use-of-money interest payable on late tax payments following emergency events.

The declaration applies to taxpayers who were physically prevented from paying their tax on time as a result of the floods. The declaration commenced 22 July 2021 and expires 30 September 2021.

Taxpayers may apply for remission once their tax returns and payments are up to date. Different rules apply in cases of financial hardship.

Find out more about Inland Revenue's tax relief measures at www.ird.govt.nz

Tax Administration (Top of the South Island Flood Event) Order 2021

BINDING RULINGS

This section of the *TIB* contains binding rulings that the Commissioner of Inland Revenue has issued recently. The Commissioner can issue binding rulings in certain situations. Inland Revenue is bound to follow such a ruling if a taxpayer to whom the ruling applies calculates their tax liability based on it.

For full details of how binding rulings work, see *Binding rulings: How to get certainty on the tax position of your transaction (IR715)*. You can download this publication free from our website at www.ird.govt.nz

BR Prd 21/04: StockCo Limited and StockCo Capital Limited

This is a product ruling made under s 91F of the Tax Administration Act 1994.

Name of person who applied for the Ruling

This Ruling has been applied for by StockCo Limited and StockCo Capital Limited.

Taxation Laws

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This Ruling applies in respect of ss BG 1, DA 1(1), DA 2, EA 3, EJ 10, FA 6 to FA 11, FA 12 and GA 1 and subpart EW.

The Arrangement to which this Ruling applies

The Arrangement is the leasing of livestock by either StockCo Limited or StockCo Capital Limited (both referred to as StockCo in this Ruling) to their customers to use solely in a farming business. Each customer will be a "New Zealand resident" (as defined in s YA 1). StockCo will purchase the livestock either from the customer and then lease them back to the customer or from a third party and then lease them to the customer. The customer will lease the livestock over a period of usually four years. The livestock will be progressively culled (or may go missing or die) over the period of the lease, with cull payments being returned to StockCo.

Further details of the Arrangement are set out in the paragraphs below.

Purchase of livestock

1. The StockCo Group considered it commercially prudent to separate its livestock-leasing business from its usual banking arrangements and relationships, so incorporated StockCo Capital Limited (as a sister company to StockCo Limited) for this purpose.
2. StockCo will purchase an agreed number of "specified livestock" (as defined in s YA 1) – in this case cows – from the customer or a third party, for the purchase price as provided for in cls 4 to 6 of the Dairy Herd Lease Master Terms:

WE WILL PURCHASE THE HERD

4. We will purchase the Cows specified in each Lease Agreement for the Purchase Price detailed in the Lease Agreement on the Commencement Date.
5. When we purchase Cows from you we will create a buyer generated invoice.
6. We are purchasing the Cows at your request. You are responsible for inspecting and approving all Cows prior to us purchasing them.
3. The purchase price is the equivalent of the market value of the purchased cows at the time of acquisition.
4. Where the livestock are purchased from a third party, StockCo will pay the purchase price to the third-party vendor.
5. The customer will apply the purchase price to debt or other farming costs (such as expanding their farming operations or covering other business-related costs).

The Lease

6. The agreement entered into between StockCo and its customers is made up of two documents: the Dairy Lease Master Terms and the Lease Agreement (together, "the Lease"). The Lease sets out the terms of the sale (where StockCo purchases livestock from the customer) and the lease of the livestock.
7. The terms of the Lease will not be materially different from those in the version provided to Inland Revenue on 19 April 2021.
8. As provided for in cls 7 and 8 of the Master Terms, StockCo owns the cows and leases the purchased cows to the customer for the lease period, and the customer owns all milk and progeny the leased cows produce:
 7. We will own the Cows. You will own all progeny and milk produced by the Cows during the Lease period.

WE WILL LEASE YOU THE HERD

8. We lease to you, and you take on lease, the Herd for the term specified in the Lease Agreement from the time we purchase the Herd.
9. The progeny will be valued in accordance with the livestock valuation rules set out in subpart EC of the Act.
10. Clauses 11 to 14 of the Master Terms set out the customer's payment obligations:

YOUR PAYMENT OBLIGATIONS

11. You will pay us for each Herd:
 - 11.1 Lease Payments: the Lease Payments as set out in the Lease Payment and Cull Payment Schedule in the relevant Lease Agreement. The Lease Payments are the rent payable for the lease of the Herd.
 - 11.2 Cull Payments: the Cull Payments as set out in the Lease Payment and Cull Payment Schedule in the relevant Lease Agreement.
 - (a) The Cull Payments are the amounts we expect to realise from Cull Cows when they are culled. You agree to realise this amount for us by selling the Cull Cows on our behalf.
 - (b) You will pay us the Cull Payments regardless of the amount you realise from selling the Cull Cows on our behalf. If you realise more than the Cull Payments you may keep the additional amount, and any amount payable on a day that is not a working day, must be paid on the first working day after that date.
 12. On the Commencement Date (or as otherwise specified) you will also pay us any establishment fee or other fee specified in a Lease Agreement.
 13. You will provide us on or before the Commencement Date with:
 - 13.1 a signed Dairy Order so that the Lease Payments may be paid directly to us by the Dairy Company; and
 - 13.2 a signed direct debit authority so that the Lease Payments may be deducted directly from your Bank Account
 14. We will decide (at our discretion) whether Lease Payments are paid directly to us by the Dairy Company or direct debited from your Bank Account, and will confirm this with you in writing. We will also confirm to you in writing if we change how the Lease Payments will be paid.
11. The customer will use the livestock valuation regime in subpart EC to determine the value of the leased livestock.

Early termination of the Lease and events of default

12. Clause 22 of the Master Terms provides for the early termination of the Lease by the customer in certain situations:

EARLY TERMINATION

- 22 Where there is a material change in your circumstances, you may terminate the Lease early by:
 - 22.1 purchasing the remainder of the Herd for the Net Present Value of the unpaid Lease Payments and Cull Payments; and
 - 22.2 paying us any other amount owing to us under this agreement in relation to the relevant Lease.
13. It is expected that cl 22 of the Master Terms would be applied only in rare cases, as a cost–benefit analysis would usually favour the customer remaining in the Lease and continuing to meet the Lease obligations.

14. Clause 23 of the Master Terms provides for early termination by StockCo:
- 23 We can end the Lease under clause 26 because of your default.
15. Clause 26.2 of the Master Terms states:
- 26 If an Event of Default has occurred, we may:
- ...
- 26.2 end the Lease with effect from any date specified by us and require you to, at our option:
- (a) return the Herd to us at the location and by the date nominated by us. If we end the Lease under this clause 26(a) you will pay us liquidated damages equal to the amount (if any) by which the market value of the Herd (as determined by us, acting reasonably) is less than the Net Present Value of the unpaid Lease Payments and Cull Payments; or
- (b) purchase the Herd for the sum of the Net Present Value of the unpaid Lease Payments and Cull Payments.
16. Clause 26.1 of the Master Terms allows for StockCo to repossess the herd or any cows following an event of default:
- 26.1 enter the Land (or any land where we consider the Herd or any Cows may be) without notice and repossess any or all of the Cows; ...
17. This Ruling does not consider or rule on early termination or events of default that occur as part of the Arrangement.

Return of the leased cows

18. The leased cows are returned to StockCo by way of an agreed culling process over the term of the Lease. In this respect, cls 9 and 10 of the Master Terms state:

YOU WILL CULL THE COWS ON OUR BEHALF

- 9 We recognise that the Herd will progressively reach the end of its useful milking life over the Lease period.
- 10 You agree to reduce the Herd to zero over the Lease period at the approximate Annual Cull Rate specified in the relevant Lease Agreement. The Annual Cull Amount Due has been determined on the basis of the Annual Cull Rate and Cull Value specified in the relevant Lease Agreement.
19. Despite cl 10 of the Master Terms, it is acknowledged in the Lease that cows may die or go missing. Clauses 16 and 17 of the Master Terms set out terms relating to missing and dead cows:

MISSING AND DEAD COWS

- 16 We understand that deaths occur and that Cows may go missing. The Lease Payment calculation includes an annual death and missing cow allowance at the assumed death rate specified in the Lease Agreement
- 17 You agree that the Cows are at your sole risk. You must pay the Lease Payments and Cull Payments regardless of anything else, including the reason for, or the number of, deaths or missing cows.
20. A dairy herd generally loses about 25% of its mature cows annually through culling of older cows and natural attrition. Therefore, it is expected that none of the leased livestock will remain at the end of the lease period.

Deferred cull payment

21. The amount and timing of the cull payments are agreed at the time of entering into the Lease and are reflected in the payment schedule. As the amounts payable are fixed, the customer takes on the risk of under-recovery from the meat works on the culled cows but gets the benefit of any over-recovery.
22. The customer and StockCo negotiate the frequency and timing of cull payments, but payment will generally be at the time the livestock are culled or deferred until the end of the lease term and paid as a lump sum.
23. As StockCo retains legal ownership of cull payments, it will return them as income in the year in which those payments are derived

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- (a) The lease payments are deductible under s DA 1(1) and none of the general limitations in s DA 2 applies to prevent deductibility, provided that no provision in subparts DB to DZ applies to prevent a deduction under s DA 1(1).

- (b) At the end of an income year, unless the customer is excused from this requirement pursuant to a determination issued by the Commissioner, s EA 3 applies to require the unexpired portion of any lease payments to be included in the customer's income in the current income year and to be an amount for which the customer is allowed a deduction in the following income year, provided the Lease is not the customer's "revenue account property" or "trading stock" (within the meaning of s YA 1).
- (c) The financial arrangements rules in subpart EW do not apply to the Arrangement, because the lease is an excepted financial arrangement.
- (d) Section EJ 10 does not apply to the Arrangement.
- (e) Sections FA 6 to FA 11 do not apply to the Arrangement.
- (f) Section FA 12 does not apply to the Arrangement.
- (g) Sections BG 1 and GA 1 do not apply to negate or vary the above conclusions.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 21 July 2021 and ending on 21 July 2025.

This Ruling is signed by me on the 22nd day of July 2021.

Dinesh Gupta

Tax Counsel Lead

Tax Counsel Office

Notice of Withdrawal of Product

1. This is a notice of withdrawal of a product ruling under section 91FJ of the Tax Administration Act 1994.
2. Product ruling BR Prd 20/03 is hereby withdrawn to allow for a replacement ruling to be issued.
3. Product ruling BR Prd 20/03 applied for the period 14 July 2020 to 14 July 2024. It was published in the *Tax Information Bulletin* in Vol 32 No 9 in October 2020.
4. It is withdrawn on 21 July 2021.

Dinesh Gupta

Tax Counsel Lead

Tax Counsel Office

LEGAL DECISIONS – CASE SUMMARIES

This section of the *TIB* sets out brief notes of recent tax decisions made by the Taxation Review Authority, the High Court, Court of Appeal, and the Supreme Court.

We've given full references to each case, including the citation details where it has already been reported. Details of the relevant Act and section will help you to quickly identify the legislation at issue. Short case summaries and keywords deliver the bare essentials for busy readers. The notes also outline the principal facts and grounds for the decision.

These case reviews do not set out Inland Revenue policy, nor do they represent our attitude to the decision. These are purely brief factual reviews of decisions for the general interest of our readers.

Case summary

Supreme Court Dismisses Mr Dowden's Application for Leave to Appeal the Court of Appeal's Refusal to Extend Time to Appeal

Decision date: 15 July 2021

CSUM 21/07

Case

Dowden v Commissioner of Inland Revenue [2021] NZSC 86

Legislative References

Senior Courts Act 2016, s 74; and Court of Appeal (Civil) Rules 2005, r 43

Legal terms

Leave to Appeal, Extension of Time, General or Public Importance, Miscarriage of Justice

Impact

The Supreme Court applied an orthodox approach to this leave application. There is no further impact beyond the immediate case. The decision puts an end to a longstanding tax challenge that has progressed from the Taxation Review Authority, the High Court, the Court of Appeal and finally to the Supreme Court.

Facts

The Commissioner of Inland Revenue ("**the Commissioner**") assessed Mr John Alfred Dowden ("**Mr Dowden**") for tax liabilities in relation to his business, Safeguard Security, for the periods between 2004 and 2012.

Mr Dowden challenged these assessments in the Taxation Review Authority ("**the TRA**"). Mr Dowden's position was that he transferred his interest in Safeguard Security to his former partner, Ms Maureen Jackson ("**Ms Jackson**") in December 2003 and so she was liable for the tax liabilities assessed by the Commissioner. The Commissioner's position was that Mr Dowden owned and operated Safeguard Security at all relevant times.

In 2018, the TRA dismissed Mr Dowden's challenge. Mr Dowden appealed to the High Court. In October 2019, the High Court dismissed Mr Dowden's appeal and upheld the findings of the TRA. In November 2019, Mr Dowden appealed to the Court of Appeal.

On 14 July 2020, Mr Dowden's appeal was deemed abandoned after an unsuccessful application to dispense with security for costs, an unsuccessful review of that refusal and after being granted multiple extensions to apply for a hearing date.

Mr Dowden then applied to the Court of Appeal for a further extension of time (pursuant to r 43 of the Court of Appeal (Civil) Rules 2005) to file the case on appeal and pay the scheduling fee. The Court of Appeal declined to grant the extension.

Mr Dowden applied to the Supreme Court for leave to appeal the Court of Appeal decision declining to grant the extension.

Issues

Is it necessary in the interests of justice for the Supreme Court to give leave to appeal?

Namely, has Mr Dowden satisfied the criteria set down in s 74 of the Senior Courts Act 2016:

- Does the appeal involve a matter of general or public importance?
- Will a substantial miscarriage of justice occur unless the appeal is heard?

Decision

The Supreme Court declined to give Mr Dowden leave to appeal.

The Supreme Court did not consider Mr Dowden's application raised any issues of general or public importance. The Court of Appeal applied settled law to the application before it. Mr Dowden did not challenge the Court of Appeal's application of the settled law or its application in this leave application.

The Supreme Court was not satisfied there would be a miscarriage of justice if Mr Dowden was not permitted to continue his appeal in the Court of Appeal and submit evidence from Ms Jackson that he alleged would prove he should not be liable for the tax which he was assessed.

The Supreme Court considered Mr Dowden's case was fully ventilated before the TRA (in which Mr Dowden gave evidence and was cross examined at length). Ms Jackson's statements were fully dealt with in the TRA. The TRA considered all the evidence and made credibility findings against Mr Dowden.

About this document

These are brief case summaries, prepared by Inland Revenue, of decisions made by the Taxation Review Authority, the District Court, the High Court, the Court of Appeal or the Supreme Court in matters involving the Revenue Acts. For Taxation Review Authority matters, names have been anonymized. The findings of the court described in a case summary will no longer represent current law where the matter has been successfully appealed or subsequent amended legislation has been enacted.

Case summary

Supreme Court dismisses Ms Sisson's applications for leave to appeal.

Decision date: 12-July-2021

CSUM 21/08

Case

Chesterfields Preschools Ltd (in liq) v Commissioner of Inland Revenue [2021] NZSC 83

Legislative References

Senior Courts Act 2016, s 74(2)(a), (b) and (c)

Supreme Court Act 2003, s 13(2)(a) and (b)

Legal terms

Application for leave to appeal, general or public importance, miscarriage in relation to civil appeals

Summary

This was an unsuccessful attempt by Ms Sisson for leave to appeal three Court of Appeal decisions which collectively dismissed 11 appeals against judgments of the High Court. *Chesterfields Preschools Ltd (in liq) v Commissioner of Inland Revenue* [2020] NZCA 686 (Miller, Venning and Katz JJ) [Second liquidation appeal judgment]; *Sisson v Chesterfields Preschools Ltd (in liq)* [2020] NZCA 687 (Miller, Venning and Katz JJ) [Vesting orders judgment]; and *Sisson v Chesterfields Preschools Ltd (in liq)* [2020] NZCA 689 (Miller, Venning and Katz JJ) [Bankruptcy judgment].

The three Court of Appeal judgments relate to the following: (1) the liquidation of Chesterfields Preschools Ltd ("CPL"); (2) the vesting of property in CPL; and (3) Ms Sisson's personal bankruptcy.

The primary focus of the applications concerns the liquidation of CPL. The Supreme Court held an oral hearing directed at Ms Sisson's case that if the tax debt is correctly calculated, CPL is not insolvent.

Impact

No impact. The issues arising are unique. They reflect both the particular litigation history and the particular facts of this case. No question of general or public importance or of commercial significance accordingly arises.

Facts

CPL operated a preschool business. It was one of a number of business entities associated with Ms Sisson and Mr Hampton. In April 2004, the Commissioner served a statutory demand on CPL for a debt of \$620,545.94 comprising unpaid tax, late payment penalties and interest. CPL applied to set aside the demand, disputing the amount demanded. A range of related litigation followed, before CPL was eventually put into liquidation on 6 October 2015 (the first liquidation order).

The related litigation in the initial period included two judicial review proceedings. Further, in May 2008, CPL and associated entities filed a statement of claim alleging misfeasance in public office by the Attorney-General, the Commissioner and various other officers. The claim was stayed until repleaded by a lawyer holding a current practising certificate and leave was granted by the High Court (the misfeasance claim).

Ms Sisson, a director of CPL, was joined as a party to the liquidation proceedings to enable her to pursue an appeal. After a partially successful appeal to the Court of Appeal from the first liquidation order, the Supreme Court ultimately set the first liquidation order aside by consent on 23 November 2017 and the matter was remitted to the High Court for rehearing.

On 15 December 2017, CPL was put into interim liquidation. Then, on 26 February 2019, CPL was once more put into liquidation by Osborne J in the High Court (the second liquidation order). Ms Sisson unsuccessfully appealed against that second liquidation order to the Court of Appeal (the second liquidation appeal judgment).

Issues

Whether the approach taken by the Court of Appeal to the calculation of the tax debt gives rise to the appearance of a miscarriage of justice in the civil sense such that it is in the interests of justice for the Court to hear the proposed appeal

Decision

The Liquidation of CPL: SC 12/2021

The Supreme Court saw no appearance of a miscarriage of justice in the Court of Appeal's approach and accordingly dismissed the application for leave to appeal in relation to the liquidation order.

The Court summarised Ms Sisson's case as being if the debt was properly calculated there would be a "modest balance" left to pay in the situation where CPL has "a substantial unencumbered property asset" to draw on. She developed this by arguing:

- the calculation does not comply with the requirements of the earlier judgments in the context of the taxpayers' largely successful judicial review litigation;
- the Commissioner misapplied the ordering rules; and
- the Commissioner's approach breached an arrangement agreed between Mr Hampton and the IRD (the Aronsen arrangement).

The Court stated that whether there is an appearance of a miscarriage of justice really turns on whether anything raised by Ms Sisson suggests that the Court of Appeal was wrong in its interpretation of the requirements for the tax calculation set out in that Court's earlier 2010 judgment.

The Supreme Court found that to the extent Ms Sisson challenges the appropriateness of the 15 per cent reduction, that argument has no prospect of success.

The Supreme Court also dismissed Ms Sisson's argument that the liquidation order should have awaited the outcome of misfeasance proceedings as it was satisfied the misfeasance proceedings has insufficient prospects to warrant leave.

Vesting orders: SC 17/2021

The Supreme Court dismissed Ms Sisson's application for leave to appeal the vesting orders as it saw no apparent error in the Court of Appeal's assessment of these matters.

The Supreme Court also noted that to the extent Ms Sisson's arguments reflect a concern about the costs orders, there are insufficient prospects of success to warrant a grant of leave on this basis.

Bankruptcy: SC 18/2021

This application was also dismissed. The Supreme Court noted that Ms Sisson accepts, as the Court of Appeal held, that her application regarding the bankruptcy "rests entirely on the fate of the ... application for leave to appeal the liquidation judgment". As leave to appeal has not been granted in relation to the liquidation judgment, the Supreme Court found it need not consider this application further. The criteria for leave to appeal are not met.

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REGULAR CONTRIBUTORS TO THE TIB

Tax Counsel Office

The Tax Counsel Office (TCO) produces a number of statements and rulings, such as interpretation statements, binding public rulings and determinations, aimed at explaining how tax law affects taxpayers and their agents. The TCO also contributes to the "Questions we've been asked" and "Your opportunity to comment" sections where taxpayers and their agents can comment on proposed statements and rulings.

Legal Services

Legal Services manages all disputed tax litigation and associated challenges to Inland Revenue's investigative and assessment process including declaratory judgment and judicial review litigation. They contribute the legal decisions and case notes on recent tax decisions made by the Taxation Review Authority and the courts.

Technical Standards

Technical Standards sits within Legal Services and contributes the standard practice statements which describe how the Commissioner of Inland Revenue will exercise a statutory discretion or deal with practical operational issues arising out of the administration of the Inland Revenue Acts. They also produce determinations on standard costs and amortisation or depreciation rates for fixed life property used to produce income, as well as other statements on operational practice related to topical tax matters. Technical Standards also contributes to the "Your opportunity to comment" section.

Policy and Regulatory Stewardship

Policy advises the Government on all aspects of tax policy and on social policy measures that interact with the tax system. They contribute information about new legislation and policy issues as well as Orders in Council.

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