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THE GAAR TRILOGY

— Samantha Prasad LL.B., Minden Gross LLP

Samantha Prasad is a tax partner at Minden Gross LLP, a member of MERITAS law firms worldwide. Her practice focuses on tax and estate planning for entrepreneurs and their corporations (sprasad@mindengross.com).

The last five months have been a busy time for the Tax Court of Canada. In fact, a new GAAR case was released every other month. July brought us *Triad Gestco Ltd. v. The Queen*;[1] September brought us *1207192 Ontario Limited v. The Queen*;[2] and the end of October gave us *Global Equity Fund Ltd. v. The Queen*.[3] All three cases have some similar fact patterns; however, the three judgments appear to tread their own path somewhat with respect to the application of GAAR.

The taxpayer in *Triad Gestco* realized a capital loss on the sale of common shares of a subsidiary to a new trust, the sole beneficiary of which was also the principal of the taxpayer. Prior to this sale, the taxpayer had received the subject common shares as consideration for the transfer of $8 million of assets to the subsidiary. Subsequent to the transfer of those assets, the subsidiary issued a stock dividend in the amount of $8 million (the fair market value of the transferred assets), which in effect reduced the value of the common shares of the subsidiary to nil. Accordingly, upon the sale of those common shares to the trust, the taxpayer realized a capital loss. Of note is that prior to these transactions, the taxpayer had realized an $8 million gain on the sale of some of its assets, which capital gain was offset by the resulting capital loss. The Minister reassessed on the basis that the capital loss realized by the taxpayer should be denied under GAAR.

Firstly, the Tax Court of Canada held that there was a tax benefit to the taxpayer which arose from the fact that no capital gains tax was payable due to the offsetting capital loss.

Secondly, the Tax Court of Canada did not accept the taxpayer's argument that it was not an avoidance transaction because it was implemented to reverse an estate freeze. In finding that the entire series of transactions was an avoidance transaction, the Court noted that even if there had been a non-tax purpose (i.e., the reverse freeze), such a purpose could have been achieved in many other ways without having triggered a capital loss.

Lastly, with respect to whether there was a misuse or abuse of the *Income Tax Act* (the "Act"), the Tax Court of Canada found that Parliament had specifically contemplated that GAAR would replace former subsection 55(1) of the Act, which was an anti-avoidance provision that disallowed losses that had been artificially or unduly created.

The Court went on to reaffirm that the marriage of subparagraph 40(2)(*g*)(i) and the definition of "superficial loss" in section 54 rendered nil any loss on the disposition of property to an affiliated person. From this principle, the Tax Court of Canada went on to consider the 2005 amendment to the definition of "affiliated persons" in section 251.1.

Taking the foregoing into consideration, the Court held that the tax transactions and the result achieved by the taxpayer were contrary to the object, spirit, and purpose of the Act.

The transactions in *1207192 Ontario Limited* were relatively similar to *Triad Gestco*. The taxpayer realized a capital loss on the sale of shares of a subsidiary to a family trust for the benefit of the wife and children of the taxpayer's principal (who was a former bankrupt). One distinguishing feature of the new preferred shares issued to the taxpayer by way of stock dividend (similar to the steps in *Triad Gestco*) was that the redemption amount of the preferred shares was reduced to nil if such shares were ever held by a third party. The Minister applied GAAR to deny the capital loss.

The analysis by the Tax Court of Canada in this case focused only on whether there was an avoidance transaction and whether there had been a misuse and abuse (the taxpayer conceded that a tax benefit had been realized).

While the Tax Court of Canada appeared to accept the taxpayer's argument that the subject transactions were primarily motivated by concerns about creditor proofing (the fact that the preferred shares lost their value if they ever fell into the hands of third parties may have been influential), the Court went on to find that the transactions also contemplated certain steps that were not required for creditor proofing, such as the taxpayer's subscription of common shares of the subsidiary company. The Tax Court of Canada found that the taxpayer took the latter step solely to create an eventual loss for the taxpayer by shifting the value to the preferred shares prior to the disposition of the common shares to the family trust.

Where the Tax Court of Canada judges of the two cases differed in their analysis was in deciding whether there was a misuse or abuse of the Act. The Tax Court of Canada judge in *1207192 Ontario Limited* disagreed with the Court in *Triad Gestco,* which had found that the Act had a general policy of disallowing losses between the taxpayer and the family trust (or other parties having the same degree of connection). However, the finding in *1207192 Ontario Limited* did mirror that in *Triad Gestco* with respect to former subsection 55(1): both judges found that Parliament did intend for GAAR to enforce the policy behind the former provision. Accordingly, the Tax Court of Canada in *1207192 Ontario Limited* found that there was a misuse or abuse because the capital loss in this case did not represent a decrease in the taxpayer's actual economic power.

The third instalment of the Tax Court of Canada's GAAR trilogy was *Global Equity Fund*, released on October 28, 2011. The facts in *Global Equity Fund* were somewhat similar to those in *Triad Gestco* and *1207092 Ontario Limited*, but unlike in the two previous cases, the taxpayer in this case was on the winning side. The taxpayer subscribed for common shares of a new subsidiary; the latter then issued to the taxpayer a stock dividend whose aggregate redemption amount equalled the fair market value of the subsidiary, thereby rendering the common shares nil as to value. These common shares were then sold to a family trust for a loss. However, the taxpayer claimed the loss was on account of income, not capital, on the basis that the taxpayer was in the business of trading securities.

As in *1207092 Ontario Limited*, the taxpayer argued that the transactions were entered into with the aim of creditor proofing its assets. The Tax Court of Canada did not accept this rationale in this instance, holding that the primary purpose of and driving force behind the transactions was a tax benefit.

Unfortunately for the Crown, the Tax Court of Canada went on to hold that the Crown did not meet its burden in arguing that the transactions were abusive under GAAR. The Crown argued that the object and spirit of the provisions that the taxpayer relied upon were influenced by other provisions that restricted the deduction of losses. The Court, however, was not convinced and held that none of the provisions the Crown relied upon were indicative of the "broad object and spirit that business losses are limited to real losses realized outside the economic unit". Moreover, the Tax Court of Canada held that Parliament's purpose behind business losses was generally distinct from its purpose behind capital losses. And those provisions that the Crown relied on with respect to business losses were narrow in focus and thus did not indicate a general policy that would restrict business losses. So the Court found that although there was an avoidance transaction, the Crown failed to show that there was a misuse or abuse. Notably, the Court did not actually state that there was no misuse or abuse, merely that the Crown had not met its burden in establishing abusive tax avoidance.

So the final tally for this trilogy is Crown, 2, and taxpayers, 1. But whether it was a clear win for the taxpayer remains to be determined. In fact, the Tax Court of Canada in *Global Equity Fund* offered up a word of caution in case taxpayers might be inclined to test their luck with GAAR in light of the taxpayer's win. In fact, the Court did its best to deter this type of tax planning, advising that the taxpayer might not have won if the Crown had raised different arguments. Moreover, the Court in *Global Equity Fund* went on to comment, at the end of the judgment, that although it did not have to consider whether the transactions frustrated the object and spirit of the subject provisions, it felt obliged to advise that the taxpayer would have lost that argument, since, the Court found, the transactions were "clearly so vacuous" that they met the relevant test. Happily for the taxpayer in *Global Equity Fund*, they appear to have dodged a bullet, for now.

So tax practitioners can now add this trilogy of GAAR cases to other previous ones and try to discern a general policy with respect to the application of GAAR. However, because their transactions are so similar, this trio of cases does provide interesting comparisons. *Triad Gestco* and *1207192 Ontario Limited* came together on the issue of the former subsection 55(1) by holding that Parliament did not intend to give effect to artificial losses, but *1207192 Ontario Limited* seemed to take it one step further by focusing on the lack of an "economic" loss to the taxpayer. Thus *1207192 Ontario Limited* appears to import a true economic test for determining whether a capital loss should be recognized, whereas *Triad Gestco* focuses on the interplay of the stop-loss rules and affiliated persons. And although it appears that the decision in *Global Equity Fund* favoured the taxpayer because the losses were on account of income and not capital, the Tax Court of Canada, by placing a warning at the beginning of its decision, as well as by issuing harsh words for the transaction and suggesting that it frustrates the object and spirit of the Act, should have done enough to dissuade any would-be copycats. Moreover, the Court in *Global Equity Fund* did note that the loss created resulted simply from the shuffling of paper — in fact, the Court, reminiscent of the Court in *1207192 Ontario Limited*, also noted that the taxpayer suffered no real economic loss.

Both *Triad Gestco* and *1207192 Ontario Limited* have been appealed; assuming that *Global Equity Fund* will also be appealed, tax practitioners will have to bide their time until the next instalment from the Federal Court of Appeal in order to see how the above arguments hold up and whether we will get some consistency with respect to the GAAR.

Notes:

[1] 2011 TCC 259.

[2] 2011 TCC 383.

[3] 2011 TCC 507.

WHY NOT TO BECOME A U.S. GREEN CARD HOLDER OR U.S. CITIZEN

— *Jack Bernstein, Aird & Berlis LLP, Toronto*

Throughout my career, whenever Canadian clients emigrated to the United States, I always cautioned them against obtaining a green card or U.S. citizenship. I advised any Canadian who moved to the United States for business reasons to get a work visa instead of applying for permanent residency. I advised U.S. parents living in Canada not to rush U.S. citizenship for a child born a Canadian citizen, and if the child was deemed a U.S. citizen, to have that child renounce or expatriate at age 18. Over the past few years, I've advised clients who are U.S. citizens resident in Canada to relinquish their U.S. citizenship if their net worth and U.S. tax was below the thresholds for the expatriation rules.

While obtaining a green card or U.S. citizenship may appear to be attractive because it confers the ability to live and work in the United States, it brings with it a lifetime of onerous U.S. tax responsibilities, which are as follows:

(1) A requirement to always file a U.S. 1040 tax return regardless of where you reside and, subject to some minor relief (the foreign-earned income exemption of approximately $90,000), to pay U.S. tax on worldwide income computed under U.S. rules. This effectively means that U.S. taxpayers living in Canada must pay tax at the higher of the two rates on all income and cannot benefit from tax incentives in the other country. For example, a U.S. citizen resident in Canada cannot benefit on the U.S. tax return from the deduction for an RRSP contribution or the 100% deduction for Canadian exploration expenses. Although Canada has a principal residence exemption, any gain over $250,000 on the sale of a house is taxable in the U.S.

(2) U.S. gift tax, which may restrict estate freezing, asset protection, and gifting to spouses and children. The traditional Canadian corporate estate freeze will attract gift tax in the United States. It is permitted to make annual gifts of up to only US$13,000 to each child and US$134,000 to a non-U.S.-citizen spouse. It is difficult to do elementary asset protection, such as having the family home in the name of the non-U.S. citizen. There is also a requirement to report gifts of US$100,000 or more received from non-residents.

(3) U.S. estate tax and gift tax of up to 35% for estates over US$5 million, which may impair or preclude the transfer of wealth to the next generation.

(4) Annual reporting requirements for settlors and beneficiaries of foreign trusts. Penalties for not reporting may be 35% of properties transferred to a trust, 35% of distributions from a trust, and 5% a month for gifts from non-U.S. persons. Reporting is also required for foreign grantor trusts.

(5) Controlled Foreign Corporation (CFC) rules, which require paying tax on subpart F (passive) income, regardless of whether it is distributed. This could apply to a U.S. citizen Canadian resident who forms a Canadian holding company to own investments.

(6) Passive Foreign Investment Company (PFIC) rules, which require taxation of undistributed passive income and gains in foreign (non-U.S.) companies not controlled by U.S. shareholders. A PFIC is a foreign corporation having passive income of at least 75% of its gross income and having more than 50% of its assets generate passive income. Recent amendments require annual reporting of PFICs regardless of whether distributions are made. There is a US$10,000 penalty for not filing.

(7) Foreign Bank Account Reporting (FBAR), which results in onerous penalties for non-compliance (e.g., wilful forfeiture of 50% of the account balance computed annually and possible criminal sanctions). The penalty for multiple years of non-reporting may exceed the cash in the account. FBAR requires annual reporting of financial interests in or signing authority over bank accounts, securities accounts, or other financial accounts in foreign countries.

(8) Disclosure requirements for specified foreign financial assets having an aggregate value over US$50,000. It is part of the tax return. This will require reporting depository accounts, financial accounts, stocks and securities issued by a non-U.S. person, and an interest in a foreign entity. The minimum penalty is US$10,000 for not complying. This is separate from the FBAR rules. There is an additional penalty of 40% of undisclosed or undervalued foreign financial assets.

(9) Expatriation rules (departure tax) if you decide to renounce your green card or U.S. citizenship, and some U.S. reporting for 10 years after expatriation if assets in excess of $2 million and annual taxes exceed a threshold. Recipients of gifts from individuals who have expatriated in the 10 years after expatriation may be subject to gift or estate tax.

(10) Increased difficulties for a U.S. citizen in opening foreign bank accounts and investment accounts as a result of Foreign Account Tax Compliance rules (FACTA), which come into effect in 2014. FACTA can result in 30% withholding for payments made to a financial institution or a foreign financial institution (FFI) that does not enter into a disclosure agreement with the IRS. The agreement requires that the FFI identify U.S. accounts and annually report them to the IRS. The banks will have to inquire not only about the citizenship but also the place of birth of the accountholder. Many foreign banks are refusing to deal with U.S. citizens.

(11) Punitive voluntary disclosure rules, which are not permanent, with a fixed penalty as well as taxes and interest.

INFORMATION CIRCULAR IC82-6R9, CLEARANCE CERTIFICATE

The CRA has released Information Circular IC82-6R9, Clearance Certificates, dated November 25, 2011. This Circular cancels and replaces IC82-6R8, dated December 10, 2010. IC82-6R9 sets out why a clearance certificate is required and how to obtain a clearance certificate.

CANADA PENSION PLAN MAXIMUM PENSIONABLE EARNINGS FOR 2012

On November 1, 2011, the CRA announced that for 2012, the maximum pensionable earnings on which Canada Pension Plan contributions are made will be $50,100, increased from $48,300 in 2011. The basic exemption remains at $3,500 for 2012. The employee and employer contribution rates for 2012 remain at 4.95%, and the self-employed contribution rate remains at 9.9%. In 2012, the maximum employer and employee CPP contributions will be $2,306.70 (up from $2,217.60 in 2011), and the maximum self-employed contribution will be $4,613.40 (up from $4,435.20 in 2011).

MONEY PURCHASE LIMITS AND RRSP LIMITS

The CRA has released the money purchase limit for 2012, which corresponds to the RRSP limit for 2013. As set out in the definition of "RRSP dollar limit" in subsection 146(1), the RRSP dollar limit is the amount of the money purchase limit for the preceding year. The "money purchase limit" is defined in subsection 147.1(1). As described there, after 2009, the money purchase limit is adjusted by the increase in the average wage for the year. For 2011 and 2012, the money purchase limit is $22,970 and $23,820, respectively. As a result, the RRSP limit for 2012 and 2013 is $22,970 and $23,820, respectively. The RRSP limit for 2011 is $22,450, which is the money purchase limit for 2010.

INDEXED AMOUNTS FOR 2012

On November 22, 2011, the CRA released a Fact Sheet setting out the federal 2012 personal tax bracket thresholds and amounts and thresholds pertaining to personal tax credits. The Fact Sheet stated that the federal indexation factor for 2012 is 2.8%. As well, the CRA has posted a draft version of its guide T4127-JAN, Payroll Deductions Formulas for Computer Programs — 95th Edition — Effective January 1, 2012. The guide contains the formulas needed by payroll professionals to calculate federal, provincial (except Quebec), and territorial income taxes and CPP and EI deductions effective January 1, 2012. The guide states that for 2012 the federal indexing factor of 2.8% also applies to New Brunswick, Northwest Territories, Nunavut, Saskatchewan, and Yukon. The indexing factors for the other provinces are as follows: Alberta 1.8%, British Columbia 2.4%, Newfoundland and Labrador 3.1%, and Ontario 3.3%. There is no indexing applied to Manitoba, Nova Scotia, and Prince Edward Island.

The following chart lists the federal indexed amounts for 2011 and 2012. Generally, the increased amounts take effect as of January 1. However, increases to the Canada Child Tax Benefit (including the National Child Benefit Supplement and the Child Disability Benefit) and the Goods and Services Tax Credit take effect as of July 1. The Fact Sheet does not list the indexed amounts relating to the Working Income Tax Benefit in subsections 122.7(2) and 122.7(3).

	2012 ($)	**2011 ($)**
Tax bracket thresholds		
Taxable income above which the 22% bracket begins	42,707	41,544
Taxable income above which the 26% bracket begins	85,414	83,088
Taxable income above which the 29% bracket begins	132,406	128,800
Amounts relating to non-refundable tax credits		
Basic personal amount	10,822	10,527
Age amount	6,720	6,537
Net income threshold	33,884	32,961
Spouse or common-law partner amount (max.)	10,822	10,527
Spouse or common-law partner amount (max. if eligible for the family caregiver amount)	12,822	N/A
Amount for an eligible dependant (max.)	10,822	10,527
Amount for an eligible dependant (max. if dependant eligible for the family caregiver amount)	12,822	N/A
Amount for children under age 18 (max. per child)	2,191	2,131
Amount for children under age 18 (max. per child eligible for the family caregiver amount)	4,191	N/A
Canada employment amount (max.)	1,095	1,065
Infirm dependant amount (max. per dependant)	6,402[1]	4,282
Net income threshold	6,420	6,076
Caregiver amount (max. per dependant)	4,402	4,282
Caregiver amount (max. per dependant eligible for the family caregiver amount)	6,402	N/A
Net income threshold	15,033	14,624
Disability amount	7,546	7,341
Supplement for children with disabilities (max.)	4,402	4,282
Threshold relating to allowable child care and attendant care expenses	2,578	2,508
Adoption expenses (max. per adoption)	11,440	11,128

Medical expense tax credit — 3% of net income ceiling	2,109	2,052
Refundable medical expense supplement		
Maximum supplement	1,119	1,089
Minimum earnings threshold	3,268	3,179
Family net income threshold	24,783	24,108
Old Age Security repayment threshold	69,562	67,668
Certain board and lodging allowances paid to players on sports teams or members of recreation programs		
Income exclusion (max. per month)	329	320
Tradesperson's tools deduction		
Threshold amount relating to cost of eligible tools	1,095	1,065
Goods and Services Tax/Harmonized Sales Tax credit		
Adult maximum	260	253
Child maximum	137	133
Single supplement	137	133
Phase-in threshold for the single supplement	8,439	8,209
Family net income at which credit begins to phase out	33,884	32,961
Canada Child Tax Benefit		
Base benefit	1,405	1,367
Additional benefit for third child	98	95
Family net income at which base benefit begins to phase out	42,707	41,544
National Child Benefit (NCB) supplement		
First child	2,177	2,118
Second child	1,926	1,873
Third child	1,832	1,782
Family net income at which NCB supplement begins to phase out	24,863	24,183
Family net income at which NCB supplement phase-out is complete	42,707	41,544
Canada Disability Benefit (CDB)		
Maximum benefit	2,575	2,504
Family net income at which CDB supplement begins to phase out	42,707	41,544
Children's Special Allowances (CSA)		
CSA Base Amount	3,582	3,485

[1] Includes family caregiver amount of $2,000.

RECENT TECHNICAL INTERPRETATIONS

Capital Gains Exemption — Qualified Small Business Corporation Shares

The CRA was asked whether certain shares would be "qualified small business corporation" ("QSBC") shares such that a capital gains exemption under s. 110.6(2.1) could be claimed.

Section 110.6 provides a lifetime $750,000 exemption in respect of capital gains realized on the disposition of QSBC shares. Since the capital gains inclusion rate is one-half, the current lifetime exemption for taxable capital gains is $375,000 (i.e., one-half of $750,000). The definition of a QSBC is therefore relevant in determining whether a portion of a taxable capital gain is eligible for the lifetime capital gains exemption. The definition is applicable at a point in time, referred to in the definition as "the determination time", which is the time at which the share is being disposed. The definition contains three tests that must be met in order for the shares to be considered QSBC shares.

The first test, the "small business corporation test", requires that at the determination time (i.e., the time of the disposition or deemed disposition) the share be a share of the capital stock of a small business corporation owned by the individual, the individual's spouse or common-law partner, or a partnership related to the individual. A "small business corporation" is defined as a Canadian-controlled private corporation, all or substantially all (90%) of the fair market value of the assets of which were at the particular time (subject to s. 110.6(15)) attributable to assets that

were: (a) used principally (50% or more) in an "active business", as defined in s. 125(7), carried on primarily in Canada by the particular corporation or a corporation related to the particular corporation; (b) shares or indebtedness of other small business corporations which were connected with the particular corporation within the meaning of s. 186(4) when applied with appropriate changes in the wording; or (c) assets described in (a) and (b), above.
Paragraph 110.6(15)(*a*) is a relieving provision that applies if a corporation holds a life insurance policy and, as a result, the corporation would, but for this provision, fail to meet the tests relating to the fair market value of assets used in a farming business or in an active business. Paragraph 110.6(15)(*b*) states that for purposes of applying the definitions of "qualified small business corporation share", the "fair market value of any shares" or "indebtedness of a connected corporation" (i.e., a holdco) owned by a particular corporation (i.e., a subco) is nil.

The "holding period test" found in s. 110.6(1)(*b*) of the definition of QSBC requires that throughout the 24-month period immediately preceding the disposition, the shares not be owned by anyone other than the individual or a person or partnership related to the individual. It will therefore generally be necessary that an individual or someone related to the individual hold the shares for at least 24 months in order that they qualify for the enhanced capital gains exemption. Subsection 110.6(14) provides special rules for determining when a person or partnership is related to the individual for this purpose, which may permit holders of new small business corporations to have access to the exemption.

Paragraph (*c*) contains the "active business asset test". It imposes restrictions on the use of assets by the corporation during the 24-month period immediately preceding the disposition of the shares. It generally provides that a share will qualify if the corporation was throughout that period a Canadian-controlled corporation, more than 50% of the fair market value of the assets of which was attributable to assets used principally in an active business in Canada.

Also see CRA Document No. 2010-0367031E5, "QSBCS — 24 Month Holding Period" (June 24, 2010).

CRA File Number: 2011-0410871E5 (August 15, 2011)

Change in Use of a Principal Residence

The CRA was asked to describe the income tax consequences concerning a change in use and the eventual sale of a real property in Canada.

The taxpayer purchased and used a property as his personal residence until the taxpayer emigrated from Canada. The property was converted to a rental property at that time and the taxpayer filed an election under s. 45(2) to defer the application of the deemed disposition upon the change of use. No capital cost allowance had ever been claimed on the property. The taxpayer recently returned to Canada and now wants to sell the property. The property continues to be rented.

If a property qualifies as a taxpayer's "principal residence", any capital gain realized on the disposition of the property can be reduced or eliminated by the exemption under s. 40(2)(*b*), which states that a property can be a taxpayer's principal residence for a taxation year that ends after its acquisition and during which the taxpayer was resident in Canada and for which the property was the taxpayer's principal residence (see definition in s. 54). The taxpayer does not have to be resident in Canada throughout the entire taxation year in order to make a designation for that year. The period during which a residence can qualify as a taxpayer's principal residence can be extended by one year (even where the taxpayer was never resident in Canada) by adding one to the number of taxation years for which the property was so otherwise designated.

Pursuant to s. 45(1), where a taxpayer converts a principal residence to an income-producing use, there is a deemed disposition of that property for proceeds equal to the fair market value of the property and a deemed acquisition at the same amount. Any capital gain may be reduced or eliminated under the principal residence exemption in s. 40(2)(*b*). Further, a taxpayer may elect under s. 45(2) to defer the application of the deemed disposition and reacquisition rule in s. 45(1)for up to four years, but during this time the taxpayer must be resident in Canada in order to designate the property as his or her principal residence. In this case, the taxpayer was not resident in Canada and, therefore, could not elect under s. 45(2).

See also Interpretation Bulletin IT-120R6, "Principal Residence" (July 17, 2003), CRA Document No. 2010-0357631E5, "Principal residence exemption" (June 4, 2010), CRA Document No. 2008-0286721E5, "Principal residence exemption"

(October 6, 2009), CRA Document No. 2005-0157441I7, "Principal residence" (April 28, 2006), and CRA Document No. 2005-0125831E5, "Principal residence deduction" (October 26, 2005).

CRA File Number: 2011-0415731E5, August 30, 2011

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For CCH Canadian Limited

Susan Peart, C.A., LL.M.
(416) 224-2224, ext. 6434
email: Susan.Peart@wolterskluwer.com

Natasha Menon, Content Product Manager
Tax, Accounting and Financial Planning
(416) 224-2224, ext. 6360
email: Natasha.Menon@wolterskluwer.com

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CCH Canadian Limited
300-90 Sheppard Avenue East
Toronto ON M2N 6X1
416 224 2248 · 1 800 268 4522 tel
416 224 2243 · 1 800 461 4131 fax
www.cch.ca

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