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BUDGET 2017 — SHOTS ACROSS THE BOW — AND SOME DIRECT HITS. . .

— *Michael Goldberg, partner through a professional corporation at Minden Gross LLP*

The lead-up to the March 22, 2017 Federal Budget ("Budget") was filled with fear and trepidation that the Trudeau Liberal Government ("Government") would use the Budget to grab more taxes from Canadians to pay for their platform promises. In particular, in advance of the Budget, there was concern that capital gains inclusion rates were likely to increase significantly, from the 50% inclusion rate to 75% or possibly even more.

The good news for taxpayers — at least for now — is that the Budget did not make any particularly significant *tax rate* changes at all.[1] Unfortunately, that is not to say that the Budget was a tax non-event.

Shots Across the Bow

Tax professionals are always worried about something. It seems to be an occupational hazard, or perhaps a deeply-ingrained socialized character flaw. Perhaps it is that we've adopted Bruce Cockburn's song "The Trouble with Normal (is it always gets worse)" as our theme song — or maybe that's just me. In any case, it appears this Budget has left us with reason to be worried.

Contained deep in the Budget papers,[2] under the heading "A Tax System That's Fair for Middle Class Canadians", is a discussion about "Tax Planning Using Private Corporations", setting out the theme that high-income individuals are using corporations to avoid paying their fair share of taxes. Some of the variety of strategies that the government notes it is concerned about *include* using private corporations to:

> (1) allow high-income individuals to shift income to lower-income family members or other non-arm's length persons that can reduce (or even eliminate) overall taxes in a non-arm's length group;
>
> (2) cause passive income to be taxed at *much* lower tax rates than if the income had been earned personally; and
>
> (3) convert regular income into capital gains, which because of the high tax rates on dividend income can significantly reduce the integrated tax rate in connection with earning income through a corporation as opposed to if such income had been earned personally.

In short, the Government is not amused. Stay tuned for more developments — which may be coming in the form of a report in the next few months.

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[1] The Budget does contain significant tinkering with various credits and other tax attributes that will impact individuals and corporations. In addition, although for now services such as Netflix have dodged the bullet, a new Uber tax has scored a direct hit by extending GST/HST to ride-hailing services so that they are treated in a manner similar to traditional taxi services.

[2] See page 199 of the Budget Plan.

Some other shots fired in the Budget include commitments made to collaborate with the provinces to ensure transparency regarding beneficial ownership, which is in keeping with broader anti-money laundering initiatives carried on by the Government. In addition, as if taxpayers didn't have enough to worry about, the Budget proposes investments of more than half a billion dollars in the Canada Revenue Agency — which the Budget projects will result in revenue of $2.5 billion over five years.

Direct Hits

Some of the direct hits fired in the Budget, while disappointing, were at least foreseeable.

A number of strategies used by taxpayers to manage their tax situations and/or to benefit from certain fact patterns took direct hits in the Budget. For example, the use of straddle transactions (or "straddles", colloquially)[3] to manage a taxpayer's taxable income appear to have been effectively eliminated in respect of straddles entered into on or after the date of the Budget. Also, the "*de facto* control" test, a test that is critical to causing a number of provisions in the *Income Tax Act* (Canada) ("Act") to become applicable, including the association rules,[4] is proposed to be broadened significantly. The change to this test is intended to legislatively override recent case law that the Government obviously did not agree with.[5]

On the other hand, I don't know any advisors who foresaw the elimination of the so-called "billed-basis accounting" exclusion available to professionals who elect to defer the value of their work-in-process ("WIP"). Assuming that this proposal is enacted, professionals will be required to determine the lesser of the cost and fair market value of their WIP each year ("WIP Amount") and, beginning in the taxation year ending after the particular professional's current taxation year, the professional will be required to take 50% of the WIP Amount at year-end into income for that taxation year (for professionals with calendar year-ends, the relevant period for this first inclusion will be the taxation year ended December 31, 2018). Thereafter, the professional will be required to include the full year-end WIP Amount in income, subject to claiming deductions for the WIP Amount included in the preceding year.[6]

The government has touted this change as being capable of raising nearly half a billion dollars of tax revenues over the next three years.[7] Sadly, I can't imagine that in the current political/class warfare environment the general public will have much sympathy for the professionals being forced to pay these additional taxes.

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[3] Straddles generally involve a taxpayer taking opposing positions (short and long positions) and managing them in a manner that will result in one position being in a gain position and the other in a nearly identical loss position. The taxpayer can then choose to time the realization of losses in a manner that would allow those losses to offset current year income and move the gain position into a subsequent taxation year. Similar transactions can be put in place year after year. The proposed changes are intended to defer the ability to realize the loss position to the extent that the gain remains unrealized.

[4] Association has a number of consequences, including causing associated corporations to have to share certain Canadian controlled private corporation benefits such as access to the $500,000 small business deduction limit and SR&ED benefits. The association rules are found in section 256 of the Act.

[5] *McGillivray Restaurant Ltd. v. R.*, 2016 DTC 5048.

[6] Assuming WIP Amounts are constant over the first two post-Budget taxation years of the professional, effectively 50% of the WIP Amount will be included in income in each year. Subsequent increases or decreases in year-end WIP Amounts will give rise to net income inclusions or deductions, as the case may be.

[7] It has been noted that this change may lead to many more professionals incorporating their practices, which generally appears to be sound advice. However, given the potential for ongoing changes to the taxation of corporations (not just corporations earning passive income — we tax advisors worry about there being further changes to the taxation of professional corporations too!), it is unclear whether such a strategy will be appropriate for all professionals in the long run.

While the elimination of billed-basis accounting is likely to impact all professionals to a certain degree, it would appear to especially hurt lawyers and accountants, who often carry large WIP balances at year-ends. This is particularly the case for any professionals who work on a contingency basis.

Assuming the billed-basis accounting proposals are enacted, the future battleground for professionals seeking to defer taxation of their WIP will shift to the valuation of WIP, since it is the lesser of the cost and fair market value of the WIP that will be taxable. However, that is an article that can be written[8] on another day.

CURRENT ITEMS OF INTEREST

Notice of Ways and Means Motion for 2017 Federal Budget

On April 7, 2017, the Department of Finance released a Notice of Ways and Means Motion and related explanatory notes to implement certain, but not all, provisions of the Federal Budget tabled in Parliament on March 22, 2017.

Recent Changes to Income Tax Folios

Last week, the CRA introduced a new income tax folio and made minor amendments to two others. The summary introduction of S7-F1-C1, *Split-receipting and Deemed Fair Market Value*, was updated to better articulate the meaning of a "gift" under common and civil law. Paragraph 4.12 of S1-F3-C4, *Moving Expenses,* was updated with a more detailed explanation of where an individual would be considered absent from Canada, but resident in Canada. An example was added for further illustration.

New S3-F8-C2, *Tax Incentives for Clean Energy Equipment*, discusses the tax rules applicable to clean energy equipment — specifically: accelerated capital cost allowance, Canadian renewable and conservation expenses, flow-through shares, and the Atlantic investment tax credit. The folio also contains a table which simplifies the categories of equipment that are included in CCA Classes 43.1 and 43.2. Suggestions about the structure or content of the folio will be accepted until July, 20, 2017.

Minister Clears the Air on Marijuana Taxation

According to the Canadian Press, Minister of Finance Bill Morneau suggested that the tax policy with respect to legalized recreational marijuana will be to keep the cost of the product low. Rather than raising revenues, the Minister stressed the importance of maintaining a price that will eliminate the black market. In November 2016, the Parliamentary Budget Officer published a report on the fiscal considerations of marijuana legalization. This report estimated that fiscal revenues from GST/HST would be in the hundreds of millions of dollars per year (depending on the price). The report also highlighted two potentially-conflicting goals: "[t]ax policy decisions will involve trade-offs between two of the federal government's goals: discouraging consumption among young Canadians and reducing the profits in the illicit cannabis market."

Taxpayers' Ombudsman To Review CRA Practices

The Taxpayers' Ombudsman has reportedly received complaints of the CRA taking legal action to collect unpaid taxes without notifying the taxpayer. As a result, the Ombudsman will be examining how the CRA notifies taxpayers before taking legal steps to collect tax debts. Upon completion of the examination, the Ombudsman will publish the findings in a report.

[8] By someone else.

Interest Rates for Second Calendar Quarter

The CRA announced the prescribed annual interest rates applicable to amounts owed to/by the CRA for the second calendar quarter (April 1–June 30, 2017). None of the rates have changed since last quarter except for the rate applicable to corporate taxpayers' pertinent loans or indebtedness, which is 4.47% (down from 4.50% for the first quarter).

CRA Introducing ReFILE

The CRA has launched its new ReFILE service, which allows EFILE service providers to send T1 adjustments electronically for the 2015 and 2016 tax years. This service basically allows for changing the same lines on a return that individual taxpayers can change through *My Account*. Since ReFILE is intended to replace filing T1 Adjustments on paper, adjustments will hopefully be processed more quickly. For more information on the new service see: http://www.cra-arc.gc.ca/esrvc-srvce/tx/bsnss/rfl/menu-eng.html.

FOCUS ON CURRENT CASES

This is a regular feature examining recent cases of special interest, coordinated by John C. Yuan and Christopher L.T. Falk of McCarthy Tétrault LLP. The contributors to this feature are from McCarthy Tétrault LLP, Montreal, Toronto, Calgary, and Vancouver.

Taxpayer Successfully Sets Aside a Jeopardy Order

***Minister of National Revenue v. 684761 B.C. Ltd.*, 2017 DTC 5010 (Federal Court)**

When the Minister reassesses a taxpayer, the Minister's powers under the *Income Tax Act* (the "Act") to collect the corresponding tax debt are stayed if the taxpayer files an objection to the reassessment (unless the taxpayer is a large corporation, in which case the Minister is entitled to enforce payment of up to 50% of the amount in dispute). However, in appropriate circumstances, section 225.2 of the Act allows the Minister to obtain an *ex parte* court order, which allows the Minister to take collection action forthwith despite the fact that the taxpayer has disputed the assessment. A court order obtained pursuant to section 225.2 is known colloquially as a jeopardy order.

This case was a decision on a motion pursuant to subsection 225.2(8) to set aside or vary the terms of the jeopardy order the Minister obtained against the taxpayer corporation. The taxpayer was initially reassessed to disallow its deduction of a charitable donation. The taxpayer objected to the reassessment and the dispute was being litigated in the Tax Court, but the proceeding was subject to a Court-ordered stay when this motion was heard.

When a taxpayer challenges a jeopardy order, there are two steps to the proceeding. First, the taxpayer bears the burden of establishing that there are reasonable grounds to doubt that the collection of the amounts assessed would be jeopardized by the delay associated with disputing the relevant assessment. Second, if the taxpayer establishes the first step, the onus shifts to the Minister to justify the jeopardy order by demonstrating on a balance of probabilities that it is more likely than not that collection would be jeopardized by delay. The Federal Court (*per* Phelan J) emphasized that the nature of the inquiry is not only on the extent and nature of assets that the taxpayer has to pay the debt, but also an examination of whether the collection is at risk from the delay in collection.

In this case, the Court found that the taxpayer satisfied the first step of demonstrating that there were reasonable grounds to doubt that the collection of the tax debt would be jeopardized by the delay. The Court indicated that, under the first step, the evidentiary burden to establish reasonable grounds to doubt collection does not require proof based on a balance of probabilities; rather, the taxpayer merely needs to show that there is a *bona fide* belief in a serious possibility.

The Court found that there were reasonable grounds to doubt the collection would be jeopardized by delay because the taxpayer provided evidence that the company's sole shareholder and his wife had $2.8 million in equity in their family home, which was sufficient equity to cover the tax liability. There was also no evidence of any attempt by the sole shareholder to evade taxes or move assets outside of the jurisdiction. Interestingly, although the Court mentioned at the outset of its reasons for its decision that the taxpayer corporation was in the process of being dissolved, it would seem that the fact that the interested parties were starting to take steps to cause the taxpayer to disappear from existence at law did not factor into either the Minister's position in this motion or the Court's decision.

Having made it past the first step, the onus then shifted to the Minister to demonstrate on a balance of probabilities that the delay in the tax appeal would jeopardize collection of the tax debt.

The taxpayer's principal asset appears to have been a $1.2 million loan receivable from another corporation whose sole shareholder was the same individual as the taxpayer's sole shareholder. The Minister's main concern seems to have been the fact that there were a number of real property transfers in and out of the debtor corporation, and that the debtor corporation would somehow deplete itself of assets or transfer them to related companies in a way that would leave it unable to repay its loan receivable to the taxpayer. Indeed, after the jeopardy order was issued, one of the steps that the Minister took pursuant to the jeopardy order was to issue a garnishment notice to the debtor corporation to have it pay over to the Minister any amounts that the debtor corporation owed to the taxpayer. The Minister expressly raised the concern that, if the jeopardy order was vacated, the debtor corporation might repay its loan receivable and the taxpayer would somehow transfer the proceeds out of the Minister's reach. The Minister also relied on the sole shareholder's acknowledgement that the corporate structure of his group of companies included single-purpose companies for specific projects or businesses as a creditor-proofing tactic.

Not surprisingly, the Court was not satisfied that the Minister discharged the onus under the second step. The Court pointed out that the business of the debtor corporation was real estate development and, consequently, there was nothing unusual about the debtor corporation engaging in several property transfers. The Court characterized the Minister's position as one based on mere suspicion, which is not enough to warrant the continuation of a jeopardy order. The Court also noted that the Minister's reliance on the sole shareholder's "creditor-proofing" intentions in structuring the related group of companies was overblown, as this was one of the usual and legitimate purposes of incorporating corporations.

The Court then reviewed some of the jurisprudence where it was found that tax debtors engaged in "unorthodox transactions" or "unorthodox behaviour" to contrast the conduct in those cases with the circumstances of the taxpayer and its sole shareholder. The Court noted that the cases where jeopardy orders were upheld contained elements of criminality and questionable or nefarious behaviour, and there was often a taint of impropriety, duplicity, and/or questionable conduct.

Since the Minister's principal concern seemed to be future property transfers among corporations within a related group of companies, the Court also went on to note that it was not satisfied that this particular concern was not fully addressed by section 160 of the Act. Section 160 allows the Minister to pursue collection of tax debts from a non-arm's length transferee of property from the tax debtor where inadequate consideration was provided for the transfer.

This case demonstrates that to uphold a jeopardy order there needs to be more than simply suspicion of unorthodox behaviour or questionable conduct. Instead, there needs to be evidence of behaviour beyond the ordinary course of business containing elements of criminality and questionable or nefarious behaviour.

— *Andrea Schneider, Student-at-Law*

Federal Court Says Taxpayers Cannot Use the *Canadian Human Rights Act* To Launch Direct Challenges to Specified Provisions of the *Income Tax Act*

***Fannon v. The Queen*, 2017 DTC 5008 (Federal Court of Canada)**

This case was a judicial review of a decision of the Canadian Human Rights Commission concerning the applicant's allegation that the child fitness tax credit regime (under section 122.8 of the *Income Tax Act* (the "Act")) and certain child care expenses (under section 63 of the Act) discriminated against the applicant in contravention of the *Canadian Human Rights Act* and in violation of the applicant's section 15 equality rights under the *Canadian Charter of Rights and Freedoms* (the "Charter").

The applicant had claimed certain child care expenses under section 63 of the Act for his 2007 and 2008 taxation years. His child did not reside with him during the years in question, but pursuant to the terms of a court order dated April 22, 2001, he was required to pay child support and special expenses. The special expenses included day care costs and child fitness expenses. The applicant filed further requests for taxpayer relief in order to allow him to deduct child care expenses in the years 2001 to 2005.

In order to claim child care expenses, subsection 63(3) of the Act requires a taxpayer to have resided with the child. Consequently, the CRA denied the applicant's request for taxpayer relief and reassessed the applicant's 2007 and 2008 taxation years to deny the claim for those amounts on the basis of the fact that the applicant did not reside with his child in the years for which he had claimed the expenses.

The applicant appealed the reassessment to the Tax Court claiming that the "resided with the child" requirement in the definition of "child care expense" violated section 15 of the Charter by discriminating against him on the basis of non-custodial or split family status (2012 DTC 1007). The applicant made a further claim that the effect of the provision also represented a discriminatory practice under the *Canadian Human Rights Act*.

Purporting to apply *Minister of Human Resources Development v. Hodge*, the Tax Court applied a mirror comparator group analysis and held that section 15 of the Charter was inapplicable to the applicant as section 63 of the Act did not differentiate between the applicant and those entitled to claim the deduction on the basis of an enumerated or analogous ground. The Tax Court determined that it did not have jurisdiction to hear the *Canadian Human Rights Act* portion of the claim.

The applicant also applied to the Federal Court for judicial review of the Minister's decision to deny taxpayer relief for child care expenses in the years 2001 to 2005. Once more, he alleged that subsection 63(3) of the Act discriminates against non-custodial parents by disallowing the deduction of such expenses (2012 DTC 5130). The Federal Court referred to the Tax Court's section 15 analysis and dismissed the applicant's application, finding that the Minister's decision was reasonable and that the applicant had failed to make out a claim under section 15 of the Charter. The Federal Court was neither asked about, nor did it consider, the CRA's denial of the applicant's claim under section 122.8 of the Act for child fitness tax credits.

The applicant appealed the Federal Court's decision to the Federal Court of Appeal, which upheld the reasonableness of the Minister's decision to deny the child care expenses (2013 DTC 5088). In respect of the Charter challenge, the Federal Court of Appeal applied the Supreme Court of Canada's decision in *Quebec (Attorney General) v. A.*, 2013 SCC 5, in order to find that the applicant had not demonstrated that the statutory distinction between those entitled to claim the child care expenses and those who could not was a distinction based on an enumerated or analogous ground creating a disadvantage by perpetuating prejudice or stereotyping. Like the Federal Court, the Federal Court of Appeal did not consider the CRA's denial of the applicant's claim under section 122.8 of the Act for child fitness tax credits.

Following the Federal Court of Appeal decision, the applicant filed a complaint with the Canadian Human Rights Commission alleging that section 63 (child care expenses) and section 122.8 (child fitness tax credit) of the Act discriminated against parents of children in split families on the discriminatory grounds of "marital status" and "family status" under the *Canadian Human Rights Act*. The applicant further alleged that section 63 and 122.8 of the Act contravened his rights under section 15 of the Charter.

Subsection 41(1) of the *Canadian Human Rights Act* obliges the Commission to deal with any complaint filed with it unless, amongst other enumerated reasons, the human rights issues in the complaint are trivial, frivolous, vexatious, or made in bad faith. The Commission staff prepared a Section 40/41 Report and invited the parties to make submissions as to whether the matter was vexatious because it had already been dealt with through the proceedings of the applicant before the Federal Court and the Federal Court of Appeal.

The applicant submitted a letter to the Commission in response to the Section 40/41 Report alleging numerous reasons for why his complaint was not vexatious, chief amongst them being that neither the Federal Court nor the Federal Court of Appeal had dealt with the child fitness tax credit issue under section 122.8 of the Act.

Despite the applicant's submission, the Commission decided not to proceed with the complaint on the basis of the fact that it was vexatious within the meaning of paragraph 41(1)(d) of the *Canadian Human Rights Act*.

The applicant applied to the Federal Court for judicial review of the Commission's decision, giving rise to the present case.

In respect of the child care expense claim, based on the Federal Court of Appeal decision in *Canada (Attorney General) v. Brown*, 2001 FCA 385, the Federal Court found that the section 15 Charter decisions rendered by the Federal Court (which incorporated by reference the Tax Court's reasons) and Federal Court of Appeal constituted proceedings that sufficiently dealt with the applicant's *Canadian Human Rights Act* complaint.

In respect of the child fitness tax credit, the Federal Court found the Commission's decision not to deal with the complaint to be unreasonable as the Commission failed to consider the fact that the applicant had never previously litigated the issue of the child fitness tax credit.

The Federal Court rejected the Crown's argument that the discrimination claim under the Charter and the *Canadian Human Rights Act* in respect of the child care expense deduction was similar enough to the discrimination claims in respect of the child fitness tax credit. In support of this finding, the Federal Court observed that child care expenses may only be claimed by persons who reside with the child while child fitness tax credits are not so restricted, and that the child care expense is a deduction while the child fitness relief is a tax credit.

The Federal Court then went on to consider what remedies it could provide to the applicant. The Federal Court noted that under section 5 of the *Canadian Human Rights Act*, the "discriminatory practices" which the Commission is empowered to address do not contain a discriminatory practice that encompasses a complaint directed at legislation. Section 5 merely allows a complainant to allege discrimination in the provision of goods, services, facilities, or accommodation customarily available to the general public, with the provision of services not being broad enough to capture a complaint directed at legislation.

In support of this finding, the Federal Court cited the 2012 Federal Court of Appeal decision in *Public Service Alliance of Canada v. Canada Revenue Agency*, 2012 FCA 7. As stated in that decision, the *Canadian Human Rights Act* does not provide for the filing of a complaint directed against an act of Parliament.

The Federal Court noted that it was thus within the power of the Commission under paragraph 41(1)(c) of the *Canadian Human Rights Act* to have rejected the applicant's complaint on the basis that it was beyond the jurisdiction of the Commission.

As a result, the Federal Court in the present application determined that the appropriate remedy was to order that the matter of the applicant's complaint regarding the child fitness tax credit be reconsidered by the Commission.

This decision represents a creative (and persistent) attempt by the applicant to repeatedly litigate his challenge of the non-deductibility of child support payments under paragraph 60(*b*) of the Act, which makes such payments non-deductible if the payments are made pursuant to an order or agreement that is either made or modified after April 1997.

The Federal Court decision signals that the *Canadian Human Rights Act* alone cannot be used to directly challenge the validity of the Act, though it leaves open challenges to the manner in which the Act is applied by the Minister as well as CRA personnel.

In regard to both the child fitness tax credit and the child care expense, the decision highlights a balancing exercise undertaken by the Federal Court to allow both the Tax Court and the Commission to render decisions about their own home statute without causing the pronouncement of one tribunal to outweigh the expertise of the other in respect of its own home statute.

In respect of the child care expense, though the Tax Court denied that it had jurisdiction to decide a matter under the *Canadian Human Rights Act*, its Charter decision had the indirect effect of blocking the applicant's recourse to the Commission since the Tax Court's decision, as adopted by the Federal Court in the judicial review of the Minister's decision to deny taxpayer relief, rendered the applicant's subsequent human rights complaint vexatious before the Commission.

In respect of the child fitness tax credit, by referring the matter back to the Commission, the Federal Court chose to skirt the issue of whether the denial of the child fitness tax credit under the Act was grounds for a section 15 Charter argument advanced through the Canadian Human Rights Tribunal, preferring instead to refer the matter back to the Commission for reconsideration, albeit with guidance suggesting that the Commission should refuse to accept the complaint as outside of its power to remedy.

— *Justin Shoemaker*

Taxpayers' Claims of Issue Estoppel and Abuse of Process Rejected in Tax Appeal

***Samaroo et al. v. The Queen*, 2017 DTC 1003 (Tax Court of Canada)**

The issue in the *Samaroo* case was whether the Crown was precluded in a tax appeal from challenging certain factual findings reached in a criminal trial, in which the taxpayers had been acquitted, where the tax appeal and the criminal trial related to the same matter.

The taxpayers in the *Samaroo* case, a married couple, were prosecuted for tax evasion in relation to their activities in operating a hotel and nightclub. In addition to Notices of Reassessment in respect of income that was said to be understated, criminal charges were brought against the taxpayers for offenses under the *Income Tax Act* and the *Excise Tax Act*. The taxpayers were acquitted on all counts in the BC Provincial Court (*Samaroo*, 2011 BCPC 503). The Provincial Court held that the taxpayers were credible witnesses and that the Minister did not prove the net worth analysis beyond a reasonable doubt.

On their appeal from the tax assessments, the taxpayers sought an order preventing the Minister from adducing further evidence which sought to challenge the factual findings made by the Provincial Court in the criminal proceedings. The taxpayers maintained that the doctrines of issue estoppel and abuse of process dictated this result.

The Tax Court stated that the three preconditions for the application of issue estoppel were as follows:

a. That the same question or issue has been decided ('issue symmetry');

b. That the judicial decision which is said to create the estoppel was final ('finality'); [and]

c. That the parties to the judicial decision [. . .] were the same persons as the parties to the proceedings in which estoppel is raised [. . .] ('mutuality').

Moreover, the Court noted that because issue estoppel is a discretionary remedy, even if the preconditions for the operation of the doctrine were met, the courts must still determine, as a matter of discretion, whether issue estoppel *ought* to be applied.

With respect to the taxpayer's abuse of process claim, the Tax Court held that two of the three elements for abuse of process are the same as those for issue estoppel, namely issue symmetry and finality, but that the primary rationale and purpose of abuse of process differs from issue estoppel. In respect of abuse of process, the Tax Court stated that:

> [T]he courts' multiple processes should not compromise the integrity of the justice system by affording a party the opportunity to relitigate the same question twice where doing so would result in a misuse of the courts' procedures and bring the administration of justice into disrepute.

As summarized below, the Tax Court reached the conclusion that neither issue estoppel nor abuse of process applied to prevent the Crown from challenging the findings of the Provincial Court. However, the Tax Court determined that the Provincial Court findings themselves were admissible evidence; therefore, although the findings could be challenged by the Crown, they could be used as evidence by the taxpayers in seeking to demolish the Minister's assumptions underlying the assessments.

In determining that the doctrine of issue estoppel did not apply to preclude a challenge by the Minister to the factual findings of the Provincial Court, the Tax Court noted that finality and mutuality existed. Thus, the key issue for the application of issue estoppel was whether issue symmetry existed and, if so, whether the Tax Court should exercise its discretion and reject the application of issue estoppel notwithstanding that the three preconditions were satisfied. The Tax Court held that the issue symmetry prong of the test was not satisfied, given the shift in the burden of proof from that of criminal proceedings to that which exists in the context of tax appeals; in tax appeals, the burden is placed on the taxpayer to refute the Minister's assessing assumptions on a balance of probabilities (as opposed to the standard of guilt beyond a reasonable doubt which must be met by the Crown in criminal matters). Bocock J. held that if the taxpayer's motion in the case was accepted, the result would be to undermine the Tax Court's ability to determine the correctness of the tax assessments in the appeals:

> If this position is accepted, this effectively allows the Appellants to discharge their burden of proof without ever being required to affirmatively establish their case in the context of the correctness and quantum of the assessment; the Court would have no information other than the Findings in Samaroo [. . .] with which to make its own findings with respect to the factual issues allegedly resolved in that case. This definitionally encroaches upon the exclusive and originating jurisdiction of this Court to determine the correctness and extent of the tax assessments in the Tax Appeals.

Bocock J. also held, in the course of considering the issue of symmetry, that the "[Tax] Court's maintenance of its exclusive and originating jurisdiction should be balanced with the principle of judicial comity" (which, generally, is the principle of a court in one jurisdiction recognizing the decision of a court in a different jurisdiction). The Tax Court went on to remark that the concept of judicial comity "should not be accepted indiscriminately. Where the factual matrix or evidentiary basis between two cases is different, or where the issue to be decided is different, judicial comity does not apply." Based on the different purposes served by the criminal trial and tax assessment appeal processes, the Tax Court determined that judicial comity did not exist in this matter:

> [T]he purposes of a criminal trial and a tax assessment appeal are fundamentally different. The former is to determine whether the accused is guilty of the elements of the criminal offence beyond a reasonable doubt. The latter is to determine whether the Minister's assessment of the taxpayer's tax liability is correct and, also, the quantum to which such assessed tax liability exists [. . .] The Tax Appeals are not re-litigation at all, but are distinctly mandated legal processes evaluating and determining different legal rights and obligations than do the previous criminal proceedings. In this circumstance, to allow the Appellant's *voir dire* motion, in toto, gives short shrift to a taxpayer's fundamental obligation in our self-reporting system of establishing the correctness of their tax filings in the face of the Minister's reassessment.

In the course of addressing the taxpayer's abuse of process claim, the Tax Court noted that "maintaining the [Tax] Court's exclusive statutory jurisdiction to determine the validity and correctness of tax assessments" was a significant concern and that, if the exclusion order sought by the taxpayer was granted, the Tax Court would not be able to consider an additional rebuttal or reply evidence surrounding the original decision. Additionally, the difference between the civil standard of proof (a balance of probabilities) and the criminal standard of proof (beyond a reasonable doubt) meant that it was not clear that the findings in the criminal matter would have been the same if the civil standard had applied, such that this was not a case in which abuse of process should be applied.

In addition, in rejecting the claims of issue estoppel and abuse of process, the Court held that "not all factual issues that need to be resolved in the Tax Appeals have in fact been resolved in *Samaroo* [. . .] such that an exclusion order for similar or rebuttal evidence should be issued [. . .] As such, applying issue estoppel or abuse of process in this case would cause rather than cure any potential injustice."

Notwithstanding the Tax Court's rejection of issue estoppel and abuse of process, the Court determined that the factual findings of the Provincial Court were admissible as evidence by the taxpayers in seeking to demolish the assumptions underlying the Minister's assessments, holding that "to do otherwise lacks common sense and fails to deploy the considerable time, effort and considerable determination on similar facts within the Findings."

The *Samaroo* decision provides an interesting illustration of how the findings of a court acquitting an accused in a criminal matter may be relevant in a subsequent appeal of a tax assessment involving matters dealt with in the criminal trial.

— *Krupa Kotecha, Articling Student*

Tax Lawyer and Law Firm Preparing Tax Opinion for Company Owed No Duty of Care to Investors

***Melvin Schneider v. Royal Crown Gold Reserve Inc*, 2017 DTC 5002 (Saskatchewan Court of Queen's Bench)**

This case was a decision in a class action by investors against promoters of a fraudulent tax scheme and the tax lawyer and law firm that provided favourable tax opinions that the promoters used, at least in part, to help market the scheme.

What was presented to investors was an opportunity to purchase interests in placer gold mining cells that were alleged to have been owned by the company, Royal Crown Gold Reserve Inc. It was unclear from the private offering memorandum the specific nature of the property that investors would be acquiring (e.g., a direct ownership interest in the mining cell, an interest in a limited partnership that owned the mining properties, or something short of an ownership interest in the mining properties). However, central to the attractive economics of the opportunity were the tax deductions that the investors would be able claim from the Canadian Development Expenses ("CDE") pool that would be created for an investor through the purchase price of a unit in the investment. Not surprisingly, the purchase price was highly leveraged, with 10% paid in cash up front, another 10% payable (in aggregate) in cash over the following two years, and the remaining 80% paid by way of a long-term promissory note. To assist investors with their financial exposure under the promissory note, it appears from the marketing materials that purchasers had the future right to force the company to acquire the investor's interests in the mining cells in satisfaction of the particular purchaser's obligations to the company under his or her promissory note.

The company retained the McMillan Binch law firm in December 2005 to provide a preliminary legal opinion, referencing a specific mining cell number, on the potential tax deductibility of amounts that investors would be spending to acquire legal and beneficial ownership of Canadian mining claims from the company. Further letters were issued in 2005 and 2006, identical in content but referencing other mining cell numbers. The company provided the factual information (supported by a certificate from an officer of the company) on which the opinions were based and the law firm was instructed to treat it as being accurate. Each tax opinion expressly stated that it was "intended solely for the benefit of Royal Crown Gold Reserve Inc. and is limited to the issues specifically dealt with in [the tax opinion]". While the tax opinions did express the view that a taxpayer is generally entitled to claim a deduction of up to 30% of his or her cumulative CDE on a declining balance basis, the opinions also noted that a particular taxpayer's cumulative CDE will depend on a number of factors. The tax opinions also contained a recommendation in bold text stating that investors need to consult their own tax advisors to ensure that their other investment activities or past tax affairs would not preclude them from claiming a deduction in respect of CDE. While the plaintiffs were unable to prove that the tax opinions were given to every single investor or that, as a practical matter, sales of the mining interests could not have been made without the tax opinions, the defendant lawyer and the law firm conceded that it was foreseeable that the company would share the tax opinions with the prospective purchasers. However, the lawyer and the firm argued that they could not reasonably foresee that, in light of the specific caveats in the body of the tax opinions, the purchasers would rely on the tax opinions to confirm their individual tax consequences, or that the tax opinions would be used as part of a fraudulent tax scheme.

Although the lawsuit included claims against the company and the individual promoters, the company was insolvent and the promoter defendants were either deceased or missing. Therefore, even though the Court (*per* Scherman J) issued an $11.8 million judgment against the company and the promoters for deceit and negligent misrepresentation, the principal focus of the case was whether the members of the class were entitled to recover damages from the tax lawyer and/or his firm on the basis of either negligence in providing the legal advice contained in the tax opinions, or for having made negligent misrepresentations to investors through the tax opinions which the investors relied on to their detriment.

For the reasons outlined below, the Court held that neither the tax lawyer nor the law firm was liable to the plaintiffs either on the basis of negligence in providing their legal services, or for having made a negligent misrepresentation. The Court also went on to find that, in any event, there was no causal connection between the tax opinions and any harm that the plaintiffs alleged to have suffered in connection with the fraudulent scheme and, therefore, the plaintiffs would not have been entitled to damages even if the Court found that the tax lawyer or the law firm had breached a duty of care to the investor plaintiffs either on the basis of negligence or negligent misrepresentation.

The Court first addressed the plaintiffs' negligence claim. Since the tax lawyer and the law firm were engaged by the company in its own capacity and not on behalf of the investors, a threshold issue was whether the lawyer and the law firm owed a duty of care to the investors in the delivery of legal advice in the circumstances.

The legal test for deciding whether a duty of care exists between two parties is derived from a UK case, *Anns v. Merton London Borough Council* ([1977] 2 All ER 492 (HL)). According to *Anns*, determining whether a duty of care exists in a particular relationship is a two-part test. The first step requires the identification of a sufficiently close relationship between the parties through foreseeability of harm and proximity of the parties. If the first step results in a finding of the requisite relationship, the second step requires the identification of any policy considerations that should limit the scope of the duty, the class of plaintiffs, or damages.

In the first step, the Court found that the law firm did not owe a *prima facie* duty of care to the plaintiffs because the harm from the opinions was not foreseeable and the law firm did not have sufficient proximity to the plaintiffs' class.

With respect to foreseeability of harm, the Court indicated that the law firm and the tax lawyer should have expected to foresee economic loss in connection with their legal opinions if any of the following were true:

i) their conclusion that amounts paid by investors to acquire ownership of the mining claims would qualify as CDE was incorrect,

ii) they failed to caution readers that the legal advice was limited to matters specifically addressed in their opinions, or

iii) they failed to caution readers to seek independent legal advice which would take into account investors' individual circumstances.

However, the Court found that the economic loss alleged to have been suffered by the plaintiffs did not relate to the content of the legal opinions or a failure to properly caution readers but, instead, was a consequence of the false representations from the promoters (i) that investors would, in fact, acquire ownership interests in mining claims, and (ii) detailing the profile of tax deductions that investors would be able to claim over a period of years in connection with the transaction.

With respect to proximity of the parties, the Court found that the tax lawyer and the law firm had a limited degree of proximity with the investors. While the tax lawyer and the law firm had foreseen that the opinions might be shared with potential investors, the Court held that the degree of proximity was limited by (i) the statement in the opinion that it was being provided for the benefit of the company, (ii) the circumscribed nature of the opinion, and (iii) the warnings placed in the opinion that it did not constitute an opinion as to the tax result in a particular case or from a particular transaction, and that deductibility for individual taxpayers was dependent on individual and independent factors.

Even though the Court found that the law firm did not owe a *prima facie* duty of care, the Court nonetheless then went on to find that, even if there had been a *prima facie* duty of care, public policy considerations would have negated any finding of a duty of care in the circumstances and that, in any event, the tax lawyer and the law firm did not breach the standard of care required of them in providing their legal opinion.

In coming to its conclusion that the lawyer and the law firm did not breach the standard of care, it was interesting that the Court's reasons for decision did not include a detailed discussion concerning the fact that the tax opinions did not warn investors that their investments in the mining claims might be tax shelter investments for the purposes of section 237.1 of the *Income Tax Act* (the "Act"), such that a tax shelter registration number should have been obtained by the promoter from the CRA before investors could claim any tax deductions in respect of their investment. Generally, a potential tax shelter investment concern arises whenever there is a promoted investment and the tax deductions that are represented to be available to an investor exceed the investor's cost for the investment less the value of certain types of loss-mitigating benefits that were extended to the investor in connection with their purchase.

Examples of relevant benefits are non-recourse purchase debt and the right to resell the property back to the vendor for a predetermined price. The Court found that the lawyer and the law firm did not know that the investors would be funding a portion of their purchase price by way of promissory notes and, presumably, the lawyer and the law firm also did not know that the investors would get the benefit of a right to have the company repurchase the property in satisfaction of the amount outstanding under their notes. However, the lawyer and the law firm would have been well aware that the available tax deductions were central to this investment opportunity and, in light of the fact that the company was coming back to have additional tax opinions issued, covering the same advice but referencing additional mining cells, the investments were likely being marketed to a group of potential investors to whom representations would be made on the tax deductions that would be available by making the investment. Therefore, one might have thought that the requisite standard of care would have required the lawyer and law firm to have at least directed an investor to the existence of the tax shelter registration regime in the Act. The Court acknowledged that the plaintiffs' tax expert testified that the lawyer and the law firm should have identified the tax shelter registration issue, but observed that the expert did not expressly state that the failure to do so fell below the applicable standard of care.

Having found that the tax lawyer and the law firm were not liable to the plaintiff class on the basis of negligence, the Court went on to consider whether the plaintiffs would be entitled to recover damages from the tax lawyer and the law firm under a claim for negligent misrepresentation.

The legal test for determining negligent misrepresentation is set out in *Queen v. Cognos*, [1993] 1 SCR 87. The test requires:

- establishment of the "special relationship" between the parties,
- misrepresentation,
- an element of negligence in relation to the making of the misrepresentation, and
- reliance of investors on that misrepresentation to their detriment.

First, the Court held that the law firm and investors had no "special relationship" because when the lawyer drafted the opinions he was only aware of hypothetical future investors. The Court also observed that there was no contractual or fiduciary relationship between the lawyer and investors, and also no basis to regard potential investors as vulnerable. Second, relying on the same facts that it relied on to evaluate whether the law firm fell short of the standard of care in its negligence analysis, the Court concluded that the law firm made no misrepresentation in its opinions. And third, the Court held that investors could not have reasonably relied on the opinions to their detriment because they did not read the opinions with an appropriate level of care and did not seek further advice or clarifications. Investors ended up relying on what they were told by the promoters and marketing agents rather than on what the opinions set out.

Despite concluding that there was no misrepresentation, and that it would not have been reasonable for the plaintiffs to rely on a misrepresentation by the law firm or the tax lawyer if there was one, the Court proceeded to consider whether a misrepresentation by the law firm or the tax lawyer could be considered to have caused the losses alleged to have been suffered by the plaintiffs on the balance of probabilities. The legal test for causation is the "but for" test set out in *Athey v. Leonati*, [1996] 3 SCR 458, where the plaintiff must prove that the injury would not have occurred but for the negligence of the defendant.

The plaintiffs advanced two positions with respect to the causation issue. First, the plaintiffs argued that, but for the existence of the tax opinions, the investment could not have been marketed, the company would not have sold the investments, and the plaintiffs would not have purchased the interests. Second, the plaintiffs argued that, if the law firm had given a correct opinion, the investors would not have been misled as to the prospective tax benefits of the investment, which caused them to invest and thus caused their loss.

The Court did not accept either of the plaintiffs' arguments and found that the law firm did not cause the harm. On the first argument, the Court concluded that the opinions were not the necessary prerequisites to the marketing and sale of the mining claims because there was no information that the plaintiffs saw the opinions before they made their investments. Furthermore, the small number of investors who may have actually received the opinions before they invested would have relied on the information contained in the offering memorandum, the question and answer sheets, and what they were told by the selling agents about the tax opinions, rather than on the tax advice reflected in the opinions themselves. On the second argument, the Court held that the legal advice in the tax opinion was, in fact, correct and, to the extent that the plaintiffs were misled, they were misled by persons other than the tax lawyer or the law firm. At no time after the investors' claims for deduction were disallowed did they contact the law firm. The Court found that had the plaintiffs, in fact, relied upon the tax opinions when making their investment, it would have been logical for them to speak to the law firm with inquiries or for assistance when the CRA denied their claims for deductions.

Even though the Court cited multiple reasons for concluding that the law firm and the tax lawyer were not liable to the investors for any of the economic loss suffered by the investors in connection with this investment, it seems that the Court's decision in this issue was ultimately rooted in two facts. First, the tax lawyer and the law firm were directly engaged by the promoter to act solely on behalf of Royal Crown Gold Reserve Inc. and not on behalf of others, such as investors. Second, the tax opinions contained enough caveats or qualifications such that an investor reading the opinions could not have reasonably treated the tax advice stated in the opinions to be the tax consequences for any particular investor. However, it is worth considering whether the Court's reliance on those two facts reflects a disconnect with a realistic portrayal of the relationship between the promoter, the lawyer and the law firm giving the tax opinion, and the investors to whom the investment would be promoted in the context of a typical tax-driven, multi-investor transaction. It would be naïve for anyone to think that the tax lawyer and the law firm did not fully anticipate that the promoters were likely making representations to investors concerning the tax benefits, and that the tax opinions were being sought to give the target investors comfort that the represented tax benefits would be enjoyed by the investors through the making of the investment. Accordingly, at the very least, one would have thought that the Court's foreseeability or standard of care analysis would have been more critical of the tax lawyer's failure to:

i) make specific reference to the punitive consequence of the investments being tax shelter investments for the purposes of the Act — a risk that is typically engaged in tax-driven transaction that involves a promoter and multiple, unsophisticated investors;

ii) make a more express statement in the tax opinions that each investor should obtain his or her own tax advice as to the tax consequences from making the investment (as opposed to suggesting that they do so to confirm that their past activities would not affect their ability to claim the tax benefits outlined in the tax opinions); or

iii) make specific reference to the fact that the tax opinions may not cover all the tax consequences that the promoters have represented to investors that they would be able to enjoy in connection with the transaction.

It seems that the Court was mostly focused on what the tax lawyer said in the tax opinions rather than what might have been inappropriately left unsaid in light of the role that the tax lawyer knew that the opinions would likely be playing in the promoters' marketing efforts.

The decision has been appealed to Saskatchewan Court of Appeal.

— *Yaroslavna Nosikova, Articling Student*

RECENT CASES

Minister not entitled to general and unrestricted access to internal accounting documents

The taxpayer was appealing a Federal Court order that allowed the Minister's application compelling production of internal accounting documents ("tax reserve papers") generated by the taxpayer. The taxpayer was a Canadian subsidiary of a UK company, active primarily in the oil and gas industry. It was required to prepare consolidated financial statements and in the course of so doing, it prepared tax reserve papers ("TRPs"). These papers reflected uncertain tax positions ("soft spots"), opinions as to the likely outcome if the positions were challenged by the Minister, and related reserves established to ensure fair financial reporting. In the course of a 2005 audit, original supporting working papers were requested. The taxpayer provided redacted versions of the TRPs which led to further questions regarding amounts recorded as "tax at risk" amounts associated with its uncertain tax positions. The auditor wanted disclosure of the uncertain tax positions as laid out in the TRPs. The taxpayer was able to clarify those questions, but the auditor still insisted on the working papers being produced (regardless of whether the tax at risk amounts were a concern). The auditor requested the TRPs for the 2005–2010 taxation years, arguing it would make the audits more cost efficient. The taxpayer's refusal to comply with the auditor's request led to the Federal Court order.

The appeal was allowed. The Minister is given broad powers to access information to help carry out its audit functions, but it must be exercised appropriately. The auditor continued to insist that the taxpayer produce the TRPs even after legitimate concerns were addressed. The auditor was insisting on information being produced on the grounds that they were compellable under the *Income Tax Act* (the "Act") without particular justification. The Federal Court judge erred in holding that unrestricted and ongoing access to working papers is consistent with government policy. The Federal Court decision would compel the taxpayer to self-audit. It could also lead to publicly traded corporations not fully documenting issues for their external auditors and being less than candid in disclosing tax risks. This in turn would mean financial statements would be less than reliable and would imperil the integrity of the financial reporting system.
Self-assessment is at the basis of the tax compliance system but taxpayers should not be compelled to reveal their soft spots. The taxpayer provided all the information necessary to answer the questions raised. A request for TRPs that would facilitate an audit might be granted, but the Minister is not entitled to general and unrestricted access to papers.

BP Canada Energy Company v. MNR

2017 DTC 5028

Appeal from Rule 58 determination of Tax Court judge allowed

The appellant had obtained court orders from two foreign jurisdictions which provided a rectification remedy re-characterizing dividend payments made as loans, but the Minister of National Revenue refused to accept such re-characterization for Canadian tax purposes. The taxpayer appealed to the Tax Court of Canada which held, on a Rule 58 application, that the foreign orders did not bind the Minister. That decision was based on a finding that, under the Civil Code, homologation was required to render the foreign judgment enforceable in the province of Quebec and to bind the Minister. The taxpayer appealed further to the Federal Court of Appeal.

The appeal was allowed. The appellate Court held, in agreement with the appellant, that foreign judgments must be taken as fact, even in the absence of homologation. The Civil Code provides that "an act purporting to be issued by a competent foreign public officer makes proof of its content against all persons . . ." The Court concluded that, as such, factual findings contained within those judgments were facts that could not be disregarded by a Court and that the foreign judgments in question were proof that the corporate resolutions had been rectified to authorize the dividend payments and to transform them into indebtedness. The Court held as well that as the Minister was not a party to the foreign proceedings, there was nothing to enforce against the Minister and homologation was therefore a non-issue. On the question of the effect of the foreign orders with respect to the Minister, the Court held that the resolution of that question would necessarily depend on the evidence adduced by the parties and the weight ascribed to the foreign orders as facts, pursuant to the provisions of the Civil Code. In the Court's view, such determination was to be made not on a Rule 58 application, but by the Tax Court judge on the basis of the full evidentiary record at his or her disposal. The appellate Court concluded, therefore, that it would allow the appeal, set aside the judgment of the Tax Court and decline to answer the question under Rule 58, and that it would also dismiss the Rule 58 motion before the Tax Court.

Canadian Forest Navigation v. The Queen

2017 DTC 5026

Corporate documentation rectified, but without a declaration that such documentation having retroactive legal effect

The appellant Anderson was the sole director and shareholder of the corporate appellant (the “Company”). The Company was advancing money to Anderson by way of a shareholder loan, and the Company’s accounting advisors (the “Accountants”) were concerned that this loan could result in deemed income in Anderson’s hands for 2011. The solution proposed by the Accountants in October 2011 was a section 85 rollover involving the transfer by Anderson to the Company of land and equipment owned by him personally. Nothing was documented, however, until May 2013, when the Accountants instructed the Company’s lawyers to prepare the necessary documentation implementing the section 85 rollover. This was done in a series of documents dated January 1, 2011, and executed in June 2013. After examining this documentation, the CRA determined that a proper section 85 rollover had not been accomplished. As a result, a reassessment would likely result in a substantial increase in Anderson’s taxable income. The appellants therefore sought rectification from the Court of Queen’s Bench for Saskatchewan on the ground that the documentation executed in June 2013 allegedly did not reflect the oral agreement reached in 2011. The Chambers judge rectified the documents by correcting the specified effective date from January 1, 2011, to October 6, 2011, but declined to declare them to be retroactively legally effective and binding as of October 6, 2011, as the appellants had requested. However, he did not see the equitable remedy of rectification as being available to change the erroneous dates in the corporate documents (i.e., the corporate resolutions and share certificates), saying that they were not agreements that failed to reflect the intention of the parties. Conversely he determined that he had the authority to correct the documents under the provisions of section 236 of the *Business Corporations Act*. The appellants appealed to the Court of Appeal for Saskatchewan.

The appeal was dismissed. The documentation in this case was in fact rectified. But the appellants were seeking a secondary remedy, which was to have the Court declare the rectified documentation as having a decided legal effectiveness as of a specific date. In refusing to make such a declaration the Chambers judge correctly recognized that such a declaration was “an attempt to bind the CRA in such a fashion as to prevent the Tax Court of Canada from reviewing any eventual appeal of a reassessment”. Under section 12 of the *Tax Court of Canada Act*, the Tax Court has exclusive original jurisdiction to hear appeals relating to federal income tax assessments. Accordingly the Chambers judge properly limited his decision in this case to the issue between the appellants themselves. He correctly identified the intended purpose of their application and recognized the specialized nature of the Tax Court and its jurisdiction to decide the ultimate issue concerning the tax implications of the rollover in question, and the effectiveness of the tax planning activity of the appellants. He therefore correctly declined to pronounce on that issue. As a result the documents were rectified but the tax effect of those corporate documents would fall to be determined by the Tax Court, and not by the Chambers judge who lacked the jurisdiction to assess such tax effect.

Anderson v. Benson Trithardt

2017 DTC 5022

Order requiring taxpayer to provide information upheld

The taxpayer was appealing a Federal Court order requiring it to comply with requests for documents and information issued against it during an audit. The taxpayer refused to comply, arguing the request was subject to legal professional privilege and the Federal Court committed a reviewable error. For the Federal Court of Appeal to intervene the taxpayer must show that the Federal Court erred in law or on legal principles or committed a palpable and overriding error on a question of fact.

The appeal was dismissed. Proving a palpable and overriding error is a high standard to meet and the taxpayer failed to meet that burden. The taxpayer raised a new argument, purely legal in nature, based on Supreme Court decisions released since the date of the Federal Court order. The respondent had no objection to the argument being raised and as further evidence was not needed to raise the argument it was acceptable. The Supreme Court decisions held that the requirements to provide information do not apply to lawyers or notaries. As the request for information was made to the taxpayer, who is neither a lawyer nor a notary, the decisions do not impact the taxpayer. The taxpayer also raised the argument that the Federal Court order directly or indirectly ordered the taxpayer's law firm to disclose information in contravention of the Supreme Court decisions. The Federal Court order was directed only against the taxpayer, requiring it to disclose all documents in its power, possession, or control. The concern of the Supreme Court was that requests issued against lawyers could subvert a client's legal professional privilege. However, the taxpayer had a full opportunity to contest issues relating to legal professional privilege and that privilege was fully respected.

Revcon v. MNR

2017 DTC 5019

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