Tax Notes

Report No.: 667

Date: August, 2018

21-YEAR TAX ISSUES AND THE NON-SPECIALIST ADVISOR—PART 3[1]

- –Michael Goldberg, partner through a professional corporation at Minden Gross LLP

Part 1 of this Series reviewed what the 21-year deemed disposition rules are and introduced three approaches to planning that appear to be most commonly used to manage the effects of the 21-year deemed disposition rules: Do Nothing, the *Simple* Roll-Out, and Vesting Indefeasibly. Part 1 of the Series also reviewed the Do Nothing approach. Part 2 of the Series reviewed the *Simple* Roll-Out approach in detail and, in this third instalment of the Series, the Vesting Indefeasibly approach will be discussed.

VESTING INDEFEASIBLY APPROACH

Unfortunately, sometimes either a trust won't be able to utilize *Simple* Roll-Out planning to distribute its appreciated property to its beneficiaries on a tax-deferred basis prior to its 21st anniversary, or the trustees may determine that it is not desirable to distribute trust property to the beneficiaries for non-tax reasons.

In these types of situations, the Vesting Indefeasibly approach can be extremely helpful.[2]

Paragraph (*g*) Trusts

To understand this exception to the 21-year deemed disposition rules it is important to review the meaning of the term "trust" in subsection 108(1). In particular, one needs to look to the mid-amble just before paragraph (f) of the definition, which provides an exception to the 21-year deemed disposition rules if a trust satisfies the tests in either paragraph (f) or (g) of the trust definition.

Paragraph (f) provides an exception for "unit trusts" and will not be discussed further.

A trust will be a paragraph (g) trust if it is a trust, all of the interests in which have vested indefeasibly at a particular time unless certain exceptions to this relieving rule are applicable. The exceptions that are generally of most common concern apply to Canadian-resident trusts where the interests of non-resident beneficiaries in the trust exceed 20% of the FMV of all of the interests in the trust, to trusts that are subject to any life interests,[3] and to trusts that are terminable with reference to a period of time, including a person's death.

The rationale for the exception allowing the Vesting Indefeasibly approach appears to be that because the interest the beneficiary has in such a trust does not cease on death, or by reference to a period of time, including a person's death, the interest will be subject to the ordinary deemed disposition rules in subsection 70(5).

What Does "Vest Indefeasibly" Mean?

From a property law perspective, the concept of "vest indefeasibly" essentially means that the beneficiary who is entitled to the vested interest is in existence and ascertained and the beneficiary's interest in the trust cannot be subject to any condition or limitation.[4] A useful case to review about the meaning of the term vested indefeasibly is *The Queen v. Boger Estate*.[5]

An interest that has vested indefeasibly has been described as "a gift without strings".[6] However, this isn't necessarily true since, in many cases, the trustees will be entitled to remain in possession of the trust property associated with the vested interest until the trustees make a determination to make distributions of the trust property, which seems to be a fairly significant string.

In most Canadian provinces, pursuant to the rule arising from the case of *Saunders v. Vautier*,[7] as modified by statute,[8] even where the trustees are intended to remain in possession of the trust property, if all of the beneficiaries with vested interests are *sui juris* (i.e., beneficiaries under no legal incapacity) and act together, they might be able to force the hand of the trustees to distribute the trust property.[9]

How Do Interests in a Trust Vest Indefeasibly?[10]

In a typical discretionary family trust situation, causing trust interests to vest indefeasibly can be accomplished[11] by the trustees passing a series of resolutions that will ensure that the class of beneficiaries has closed; confirms that no further additions to the trust property are possible; and identifies the beneficiaries and their respective interests in the trust as well as the trust property that is to be applied for the benefit of each particular beneficiary.

In addition to the foregoing steps, the resolutions should make it clear that the vested interests in the trust are to be held by the beneficiaries unconditionally and that the interests must not be subject to any conditions precedent, conditions subsequent, or determinable limitations.[12]

It will be important to analyze the trust deed to determine whether there may be impediments to taking steps to cause the interests to vest indefeasibly. Although it has been suggested that it would be ideal for the trust document to contain a clause allowing the trustees to convert a discretionary interest to a non#discretionary interest specifically assigned or fixed to a beneficiary on a chosen date, there does not appear to be any particular authority to suggest that such a clause is a requirement to cause interests to vest indefeasibly.

Risks and Issues Associated with the Vesting Indefeasibly Approach

Some risks and issues associated with the Vesting Indefeasibly approach are described below:

- As is the case with all trustee decisions, the trustees will need to properly address their fiduciary obligations. This is particularly so in a situation where certain beneficiaries may be expressly excluded from benefitting from the trust as a result of the process.
- Even if the Vesting Indefeasibly approach doesn't create legal issues that could give rise to a claim by the beneficiaries against the trustees, the process could create family discord if family members who might otherwise have been beneficiaries of the trust are excluded.
- The beneficiaries may act together to force the trustees to distribute the property of the trust pursuant to the rule in *Saunders v. Vautier*.[13]
- Even though the beneficiary does not own the underlying trust property, because a vested trust interest is a fixed and determinable interest in property, it will become an asset that is fully exposed to creditors of the vested beneficiary.
- The interest will be an asset that is considered to be owned by the beneficiary and subject to tax on death. In addition, double taxation could arise under certain circumstances.[14]

CURRENT ITEMS OF INTEREST

CANADIAN RESPONSE TO US TAX REFORM IN THE WORKS

On July 23, 2018, the OECD published its Economic Survey of Canada. Although the OECD projects strong economic growth for Canada, one of the risks it identified is the effects of US tax reform and the NAFTA renegotiation. The Department of Finance estimates that the US marginal tax rate is 19.2%, compared to Canada's 17.6%. The Bank of Canada estimates that the US tax changes will reduce business investment in Canada by 0.9% by the end of 2020. As such, the OECD recommended that the Canadian government review the tax system to ensure it is efficient, equitable, and competitive while continuing to raise revenues to support public spending.[15]

On the same day, Bloomberg published an interview with Minister of Finance Bill Morneau. Morneau said that Canada will address competitiveness issues created by US tax reform in his fall fiscal update. Key themes will include: business taxation, oil pipelines, and the NAFTA renegotiation. He is focused on lowering the cost of new investment rather than a broad-based cut to tax rates. A consultation on these issues and more will take place prior to the fiscal update.[16]

VDP USAGE BOOMED PRIOR TO CHANGES TAKING EFFECT

According to the CBC,[17] applications under the voluntary disclosure program ("VDP") nearly doubled in the months leading up to March 1, 2018, when significant changes to the program took effect. In the 11 weeks leading up to that date, 6,612 taxpayers submitted applications, compared to 3,432 for the same period in the prior year. In the first two months of the updated VDP regime, there were 1,413 applications, which is down 65% from the previous year.

GOVERNMENT ANNOUNCES CONSULTATION ON DRAFT TAX PROPOSALS

On July 27, 2018, the Department of Finance announced a new consultation for draft tax proposals relating to income tax, GST/HST, and excise tax. Explanatory notes have also been provided.

The income tax proposals relate to:

- Improving access to the Canada Workers Benefit;
- The deductibility of employee contributions to the enhanced portion of the Quebec Pension Plan;
- The reporting requirements for trusts;
- Artificial losses using equity-based financial arrangements;
- The stop-loss rule on share repurchase transactions;
- The at-risk rules for tiered partnerships;
- Cross-border surplus stripping using partnerships and trusts;
- Foreign affiliate proposals relating to investment businesses, controlled foreign affiliate status, trading or dealing in indebtedness, reassessments, and reporting requirements;
- Passive income—the allocation rule for losses applied against Part IV taxes;
- Reassessment periods—requirements for information and compliance orders;
- Reassessment periods—non-resident non-arm's length persons; and
- The sharing of information relating to criminal matters.

The GST/HST and excise tax proposals relate to:

- The excise refund in respect of diesel fuel used for certain purposes;
- The GST/HST holding corporation rules;
- The GST/HST rebate for printed books for qualifying public service bodies;
- Reassessment periods—requirements for information and compliance orders; and
- The sharing of information relating to criminal matters.

The government has also issued a consultation paper regarding certain aspects of the holding company rules. Comments on the issues in this paper must be submitted by September 28, 2018.

Comments on all other proposals in the consultation must be submitted by September 10, 2018.

All of the relevant documents will be posted to IntelliConnect. Wolters Kluwer will also issue a Special Report in print, which is available by calling 1-800-268-4522.

HEALTH CANADA PROPOSES FEES FOR CANNABIS BUSINESSES

Health Canada has published a 30-day consultation paper titled: *Proposed Approach to Cost Recovery for the Regulation of Cannabis*. Based on the principle that "the public should not bear the costs of government activities when private parties derive the primary benefit from these government activities and services", Health Canada proposes to apply fees on licensed cultivators, processors, nurseries, and sellers of cannabis. The paper proposes flat fees for application screening, import/export permits, and security screening. The paper also proposes fees levied on gross revenue of different types of cannabis-related activities (e.g., cultivation, nursery, processing, etc.). Gross revenue of $1 million or less from most activities will be subject to a 1% fee, and revenue exceeding $1 million will be subject to a 2.3% fee on gross revenue.

SENATE COMMITTEE REPORTS FINDING REGARDING DISABILITY TAX CREDIT

Following an increase in the number of disability tax credit ("DTC") applications being rejected, the Senate Committee on Social Affairs, Science and Technology held three meetings and heard the concerns of witnesses with respect to the structure and administration of the DTC and RDSPs. The report was released on June 27, 2018. The report identifies several issues, including:

- the DTC is being underutilized;
- people with certain types of disabilities have more difficulty claiming the credit;
- the DTC is administered in a way that is rigid, complicated, and costly;
- the criteria related to mental functioning are problematic;
- people with lifelong disabilities are required to periodically reapply for the DTC;
- the costs of completing the application are a significant barrier;
- more low-income/vulnerable people should be using RDSPs; and
- the DTC should not be the only gateway to the RDSP.

The report made numerous recommendations to significantly alter the rules and administration of the DTC and RDSPs. The Committee recommends that the Minister of Finance revise the tax rules as follows:

- impairments in problem solving, goal setting, and judgment need not be present together to be eligible;
- work should be included as a basic activity of daily living;
- administrative guidance not clearly specified in the *Income Tax Act* should be reviewed so that they better capture the realities of living with a severe disability and are not prohibitive;
- the lifelong nature of certain disabilities should be recognized in such a way that taxpayers need not reapply for the credit;
- the period between when bond and grant contributions end and when an RDSP beneficiary can begin to make withdrawals (without having to repay the federal contributions) should be reduced from ten years to five years;
- individuals who are not eligible for the DTC but are eligible for provincial/territorial disability support payments should be eligible for the RDSP;
- the DTC should be made a refundable credit; and
- the federal government should coordinate with the provinces/territories to ensure that income from the credit is exempt for the purposes of disability support eligibility.

The Committee also recommended that the Minister of National Revenue review the appeals process in order to create a straightforward, transparent, and informed process where the applicant has access to all relevant information. Another recommendation suggested that individuals should be allowed to keep all RDSP contributions for periods in which they were eligible for the DTC. Most notably, the Committee recommended that the Minister of Finance shift the responsibility of assessing eligibility for the DTC and RDSP to Employment and Social Development Canada.

It is important to note that tax-related recommendations from a House of Commons or Senate committee are not always acted upon. The government has not yet responded to this report, and it remains to be seen whether it will make any changes to the DTC or the RDSP.

MINISTER OF REVENUE RELEASES OFFSHORE TAX GAP STUDY

On June 28, 2018, Minister of Revenue Diane Lebouthillier announced the release of the CRA's fourth tax gap study. This particular study relates to the income tax gap for individuals earning offshore investment income. The study found that in 2014, this tax gap was between $0.8 billion and $3.0 billion, or between 0.6% and 2.2% of income tax revenue from individuals.

COMFORT LETTER REGARDING FOREIGN SPIN-OFF

The Department of Finance provided a comfort letter dated April 30, 2018. The letter recommends to the Minister of Finance that a distribution of shares of Essity Aktiebolag by Svenska Cellulosa Aktiebolaget be a prescribed distribution for the purposes of the foreign spin-off rules under section 86.1. This distribution, which occurred on June 15, 2017, satisfies the technical requirements of the foreign spin-off rules.

PROPOSED GST/HST RULES FOR CARBON EMISSION ALLOWANCES RELEASED

On June 27, 2018, the Department of Finance released legislative proposals and explanatory notes setting out proposed GST/HST rules for carbon allowances, which will cover emission allowances traded under a cap-and-trade or similar system.

"CRA" FRAUDS INCREASING

There has been a significant increase lately in the number of calls people are getting from criminals pretending to be from the CRA, and even a recent case in British Columbia where criminals dressed as police showed up at a person's door and handcuffed them. Some of these criminals have highly detailed information, which adds to their credibility. Most calls are computer generated and the number vanishes immediately after the call is made, but any losses or more serious matters should be immediately reported to the RCMP Fraud Centre at 1-888-495-8501, who will contact the relevant local police force for enforcement action, or the local police.

BRITISH COLUMBIA TO INTRODUCE PUBLIC REGISTRY OF BENEFICIAL OWNERSHIP OF PROPERTY

The BC government announced that it will introduce legislation to set up Canada's first public registry of the beneficial ownership of property in the province to crack down on people hiding their ownership in BC real estate through the use of nominee companies and trusts. The province's Finance Minister, Carole James, noted that BC had developed a reputation as an attractive place to anonymously invest and hide wealth. This move follows many months of concern that real estate is being used to launder money in Canada.

PROGRESS OF LEGISLATION

Bill C-45 and Bill C-74 received Royal Assent on June 21, 2018. Bill C-45, *Cannabis Act*, legalizes and regulates the sale of cannabis nation-wide. Bill C-74, *Budget Implementation Act, 2018, No. 1*, implemented several tax measures, including:

- changes to the tax on split income rules;
- the passive income changes for private corporations;
- other income tax and GST/HST measures announced in Budget 2018;
- introducing the excise tax on cannabis (plus related GST/HST amendments); and
- the *Greenhouse Gas Pollution Pricing Act*.

Also, Bill C-82, *Multilateral Instrument in Respect of Tax Conventions Act*, was read for the first time in the House of Commons on June 20, 2018. This legislation was recently introduced as a Notice of Ways and Means Motion on May 28, 2018. As the name implies, this Act will implement the multilateral instrument which is a part of the G20 and OECD's project to address base erosion and profit shifting ("BEPS").

GOVERNMENT ANNOUNCES JUDICIAL APPOINTMENTS TO THE TAX COURT OF CANADA

Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, announced a judicial appointment to the Tax Court of Canada: Ronald V. MacPhee, General Counsel with the Tax Law Services Division of the Department of Justice Canada in Ottawa. He is replacing Justice Gaston Jorré, who resigned as of October 1, 2017.

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.

MORE FROM THE FEDERAL COURT OF APPEAL ON DE FACTO CONTROL

***Aeronautic Development Corporation v. The Queen*, 2018 DTC 5044 (Federal Court of Appeal)**

The issue in this case was whether the taxpayer corporation was directly or indirectly (i.e., *de facto*) controlled by a non-resident entity, such that it could not be a Canadian-controlled private corporation ("CCPC") and was therefore ineligible for the preferred treatment that CCPCs enjoy under the *Income Tax Act* (Canada) (the "Act") in respect of scientific research and experimental development ("SR&ED") investment tax credits (i.e., refundable and at the enhanced rate of 35%). The Tax Court had held that the taxpayer was *de facto* controlled by a non-resident shareholder, as it was economically dependent on the cash flow provided to it by the non-resident pursuant to a development agreement. The Federal Court of Appeal agreed with the Tax Court's disposition of the case but, as discussed below, found that the Tax Court made certain legal errors in its analysis to arrive at the result.

The non-resident individual who was the principal behind ADC, Mr. Richard Silva, was an engineer and an architect with considerable experience in the field of aeronautics. Mr. Silva invested in a Canadian company that tried to develop and market a small aircraft but the company eventually declared bankruptcy. Mr. Silva acquired the intellectual property rights to the aircraft from the bankrupt company and was advised by Investissement Québec and Industry Canada that he would be eligible for refundable investment tax credits if the development work on the airplane was carried on in Canada by a CCPC.

In April 2009, Mr. Silva caused ADC to be incorporated as a Nova Scotia unlimited liability corporation, with Seawind Corp., a US-resident corporation controlled by Mr. Silva, as its sole shareholder. In that same month, ADC and Seawind Corp. entered into a development agreement to have ADC complete the prototyping and certification of the aircraft.

Pursuant to the development agreement, all intellectual property rights associated with the work to be carried out by ADC were to be the property of Mr. Silva and Seawind Corp., all of ADC's prototyping and certification expenses (net of the refundable investment tax credits received by it) would be reimbursed by Seawind Corp., ADC would remit the refundable investment tax credits it received to Seawind Corp., the material, equipment, and tools acquired by ADC and funded by Seawind Corp. were to be transferred to Seawind Corp. on completion of the certification work, and ADC was to be paid a mark-up of 5% over its expenses, to be used to finance its certification expenses. Operationally, ADC operated out of a hangar that was leased by another corporation controlled by Mr. Silva but was made available to ADC on a rent-free basis. ADC's sole client was Mr. Silva and/or Seawind Corp.

In August 2009, ADC issued additional common shares to a group consisting of ADC's employees or Canadian-resident corporations controlled by ADC employees. The new share issuances resulted in Seawind Corp. owning 46% of the issued and outstanding common shares.

The Minister reassessed ADC's 2009, 2010, and 2011 taxation years to disallow the taxpayer's claim for SR&ED investment tax credits on the basis that ADC was not a CCPC at the relevant time. As noted earlier, the Tax Court dismissed the taxpayer's appeal and the taxpayer appealed to the Federal Court of Appeal.

Whether ADC was a CCPC at the relevant time depended on whether ADC was "controlled, directly or indirectly, in any manner whatever" (i.e., *de facto* control) by Seawind Corp. based on the meaning ascribed to that expression in subsection 256(5.1) of the Act. Subsection 256(5.1) of the Act provides that a person will be considered to have *de facto* control of a corporation if "the [person] has any direct or indirect influence that, if exercised, would result in control in fact of the corporation." However, subsection 256(5.1) also expressly excludes situations where "the corporation and the [person] are dealing with each other at arm's length **and** the influence is derived from a franchise, licence, lease, distribution, supply or management agreement or other similar agreement or arrangement, the main purpose of which is to govern the relationship between the corporation and the [person] regarding the manner in which a business carried on by the corporation is to be conducted…" [emphasis added].

Accordingly, in the context of ADC and Seawind Corp., the text and structure of subsection 256(5.1) require one to first identify whether Seawind Corp. exerted influence over ADC that resulted in Seawind Corp. having control in fact of ADC at the relevant time and, if so, then to consider whether the exception will apply. For the exception to apply in this case, the taxpayer needed to demonstrate two things:

(i) ADC and Seawind Corp. dealt at arm's length, and
(ii) Seawind Corp.'s influence over ADC was derived from an agreement or arrangement between ADC and Seawind Corp. of a type described in subsection 256(5.1).

Under the first part of the analysis—identifying the level of influence that Seawind Corp. exerted over ADC—the Federal Court of Appeal began by reviewing its own decision in *McGillivray* (2016 DTC 5048) which held that, in determining whether a person exerts direct or indirect influence over a corporation for purposes of the *de facto* control test, the only relevant sources of influence are those that are derived from "a legally enforceable right and ability to effect a change to the board of directors or its powers, or to exercise influence over the shareholder or shareholders who have that right and ability" and that taking into account "operational" control "would import a degree of subjectivity into the *de facto* analysis that … would lead to unpredictability, rather than predictability, as mandated by the *Canada Trustco* interpretative approach."

The Federal Court of Appeal observed that, while the Tax Court purported to rely on *McGillivray*, the Tax Court nonetheless went on to take into account operational factors to decide that Mr. Silva and/or Seawind Corp. exercised *de facto* control over ADC from August 2009 to December 31, 2011. More specifically, the Tax Court improperly took into account the facts that:

- there was no lease governing ADC's occupation of Seawind Corp.'s premises,
- ADC had nominal share capital and was dependent on the cash flow provided by Seawind Corp. under the development agreement,
- ADC operated at a deficit in the taxation years in question, and
- ADC did not own the intellectual property rights that resulted from the development and certification work it was carrying on.

However, the Federal Court of Appeal reasoned that the fact that the Tax Court took into account operational factors was not a basis for overturning the Tax Court's decision because the parties were in agreement that the terms of the development agreement alone gave Seawind Corp. sufficient influence over ADC to allow Seawind Corp. to have control in fact of ADC. In other words, based on the way the parties had framed their dispute, the outcome of the first part of the analysis was a given and the only real issue was whether the exception in subsection 256(5.1) applied.

As noted above, there are two aspects to the second part of the analysis: whether the parties dealt at arm's length, and whether the influence was derived from the type of agreement or arrangement contemplated by the exception in subsection 256(5.1). The Tax Court found that Seawind Corp. and ADC were not dealing at arm's length and, therefore, the arm's length requirement for the exception had not been met. The Federal Court of Appeal agreed with the Tax Court's conclusion on the arm's length question but addressed two aspects of the lower court's approach to the issue.

First, the Federal Court of Appeal acknowledged that the Tax Court had erred in taking into account the fact that Seawind Corp. and ADC were related corporations (and, therefore, deemed to be not dealing at arm's length) during the period between ADC's incorporation in April 2009 and the subscription for shares by the employee group in August 2009. The relevant question in the case was whether Seawind Corp. had *de facto* control of ADC after August 2009 and the Federal Court of Appeal confirmed that the language in subsection 256(5.1) makes it clear that the legal relationship between parties at a time other than the relevant time is not part of the analysis.

Second, the Federal Court of Appeal addressed the taxpayer's objection to the fact that, in considering whether Seawind Corp. and ADC dealt at arm's length, the Tax Court took into account the fact that the terms of the development agreement were dictated by Seawind Corp.'s sole shareholder. The Federal Court of Appeal agreed with the Tax Court's view that Mr. Silva's ability to set the terms of the agreement was an appropriate consideration, to be examined together with other factors, such as ADC's near-total economic dependence on Seawind Corp., Mr. Silva's ability to make the two companies disregard terms of the development agreement where he unilaterally decided that the 5% mark-up would not be paid to ADC, and the fact that ADC operated lease-free on premises that were leased by Seawind Corp.

This case clarifies the factors to be taken into consideration in determining whether or not *de facto* control exists and reaffirms the *McGillivray* decision. The Federal Court of Appeal accepted the taxpayer's position that the development agreement was the type of agreement that could engage the exception in subsection 256(5.1). However, the parties to the agreement failed the arm's length test. One can probably assume that, at the time the operational structure was created, the taxpayer and its advisors were confident that, if *de facto* control existed, the exception in subsection 256(5.1) of the Act would apply to its fact scenario. Unfortunately, neither the Tax Court nor the Federal Court of Appeal saw it that way.

—Jaspreet Kaur

INTEREST PAYABLE ON LOANS FROM CORPORATE PARENT HELD TO BE UNREASONABLE; IN CONSIDERING ARM'S LENGTH INTEREST RATE, IMPLICIT PARENTAL SUPPORT NEEDED TO BE REFLECTED

***Alberta v. ENMAX Energy Corporation*, 2018 DTC 5054 (Alberta Court of Appeal)**

This decision of the Alberta Court of Appeal concerning the reasonableness of interest deductions, though it deals directly with an Alberta legislative scheme unrelated to the *Income Tax Act* (the "Act"), is of potential relevance to the deductibility of interest under the Act because the Alberta legislative scheme incorporates by reference the Act's income computation provisions. This decision analyzes in detail the reasonableness of interest paid by the corporate respondents on loans received from their parent corporation in the context of an electricity market regulatory regime. The Court held that the interest paid was not reasonable and in so holding emphasized the importance of assessing the reasonableness of interest paid to a non-arm's length party by reference to comparable transactions with arm's length parties.

The Alberta legislative scheme in question arises from the restructuring of electricity markets that occurred in Alberta in the 1990s. This restructuring was intended to promote increased competition in the marketplace, including competition between municipal entities that are exempt from income tax and private sector entities that are not. To achieve a "level playing field" between such tax-exempt municipal entities and their private sector counterparts, the tax-exempt municipal entities are required to make annual payments in lieu of tax, known as "Balancing Pool Payments", to a statutory corporation known as the "Balancing Pool". The Balancing Pool Payments are equivalent to the amount of tax that would otherwise be payable under Parts I and I.3 of the Act (and under its Alberta counterpart) were the municipal entities not exempt from income tax. As such, subparagraph 20(1)(c)(i) of the Act, which deals with interest deductions, is incorporated by reference into the Balancing Pool Payment regulatory regime. The overarching question in this decision was how the reasonableness of interest should be determined in the context of the Balancing Pool Payment statutory scheme.

Before Alberta's electricity market was restructured, the City of Calgary ("Calgary") was already involved in the electrical power system as an electricity distributor. In the relevant years, Calgary's involvement in that system occurred through ENMAX Corporation ("ENMAX") which was (and is) 100% owned by Calgary. Two of ENMAX's subsidiaries (the respondents in this decision), ENMAX Energy Corporation ("Energy") and ENMAX PSA Corporation ("PSA"), competed directly in electricity markets in the relevant years and, as such, were liable to make Balancing Pool Payments. ENMAX was not subject to Balancing Pool Payments and was tax-exempt. At issue in this case were loans made by ENMAX to Energy and PSA. The loans totalled over $860 million at interest rates between 9.9% and 11.5%. Alberta's Minister of Finance reassessed the amounts of Energy's and PSA's Balancing Pool Payments on the basis that a reasonable interest rate would be about one half of that claimed by Energy and PSA. Energy and PSA appealed to the Alberta Court of Queen's Bench, which set aside the reassessments on the basis that the interest on the loans was fully deductible in the computation of Energy and PSA's Balancing Pool Payments. The Minister appealed that decision to the Alberta Court of Appeal.

The Court of Appeal allowed the Minister's appeal. While the Court of Appeal's reasons delve into much detail regarding the computation of a reasonable interest rate in the circumstances, it appears that the Court of Appeal's disagreement with the lower court was based on a fundamental difference in approach. The Court of Appeal placed great importance on a comparison between the actual interest rates at issue and the interest rates that Energy and PSA might have paid to a hypothetical arm's length lender. By contrast, the lower court was willing to permit a greater deviation in interest rates from such an arm's length loan on the grounds that the loans were made under an "idiosyncratic arrangement specially constructed to meet the business policy objectives of the ENMAX corporate group". The Court of Appeal regarded this approach as flawed in light of the purpose of the statutory scheme in question—to "level the playing field" and ensure that an entity liable for Balancing Pool Payments did not inappropriately reduce its liability for such payments through excessive interest payments to related corporations. According to the Court of Appeal's analysis, the interest rate must be objectively reasonable, which means, except in very unusual circumstances, the same interest rate that would be paid to an arm's length lender.

In this case, according to the Court of Appeal, the trial judge did not adequately consider several aspects of the loans in question, and of the surrounding circumstances, that rendered the actual interest amounts payable by Energy and PSA to ENMAX objectively unreasonable. For instance, the trial judge did not consider whether an arm's length lender would rely on implicit parental support provided by ENMAX to Energy and PSA that would reduce the likelihood of default even when ENMAX had not guaranteed the loans. The Court of Appeal was of the view that such implicit parental support would reduce the interest rate that an arm's length lender would be willing to accept. Given the importance of Energy and PSA to ENMAX, the Court of Appeal considered it unlikely that ENMAX would allow Energy or PSA to default on its loans to a third party; thus, ENMAX would effectively "backstop" such hypothetical loans. As a result, Energy and PSA would likely have been able to negotiate a better interest rate from an arm's length party. The Court of Appeal identified a number of other errors, including:

- permitting "saved" transaction costs, which were not actually incurred, to be added to the range of market interest rates to which the actual interest rates were compared;
- reliance on internal ENMAX memoranda regarding the selection of the interest rates which were based on flawed logic;
- "double-counting" difficult to quantify factors that may influence the reasonable interest rate by including them in the determination of the credit rating of the loans (which was used in the calculation of the reasonable interest rates) and by adding the factors to the interest rate allocable to the selected credit rating;
- erroneously "splitting the difference" between the competing experts' credit ratings after adjusting only the Minister's expert's credit ratings; and
- concluding that interest rates outside the market range were still reasonable because they were "not so great as to bring the rates outside what any business would have contracted to pay"—an approach that was found to be in error given the large amounts involved, which resulted in large amounts of additional interest from small increases in interest rates.

As a result, the Court of Appeal concluded that the interest paid by Energy and PSA to ENMAX was unreasonable and that the trial judge committed reviewable errors in concluding otherwise. The Court of Appeal therefore allowed the appeal and reinstated the Minister's assessments. Although this decision does not deal with the Act directly, its analysis is of interest to taxpayers that pay interest on loans from related parties. Readers should note, however, that Energy and PSA have sought leave to appeal to the Supreme Court of Canada, so this decision may not be the final word on the issues discussed in this comment.

—*Theodore Stathakos*

WHEN DO CONSTRUCTION HOLDBACKS BECOME PART OF THE CRA'S TAX COLLECTION REGIME?

***Guarantee Company v. Manitoba Housing and Renewal Corporation*, 2018 DTC 5046 (Manitoba Court of Appeal)**

This case is an appeal of a decision from an interpleader proceeding in the Manitoba Court of Queen's Bench. An interpleader is a court process whereby a person holding funds on behalf of another party can obtain a court order that establishes how the funds should be disbursed among competing claimants. In this case, the party initiating the interpleader was a customer of a general contractor who was seeking court direction on the payout of statute-mandated (i.e., *The Builders' Lien Act*) holdbacks following completion of the construction project. The competing claimants were the Minister, who was claiming the amount of the holdbacks on the basis of an enhanced requirement to pay that was issued to the customer in respect of amounts the general contractor owed to the Minister, and a bonding company, who was claiming the holdbacks pursuant to a right of recovery as a consequence of having made payments to the project's sub-contractors under the terms of a payment bond following the default of the general contractor.

The lower court ruled that the Minister's claim to the funds, based on subsection 224(1.2) of the *Income Tax Act* (the "Act"), took priority over the lien rights of unpaid subcontractors and the bonding company. While the Minister's entitlement under subsection 224(1.2) generally takes priority over lien and trust claims arising under provincial law, the legal relationship between subcontractors, the bonding company, and the specific statutory builder's lien regime created some complexities. This case ultimately turned on whether the claimants and bonding company had a direct right to the holdback monies, rather than a derivative or residual one through the general contractor.

The facts in this case were relatively straight-forward. The applicant in the interpleader, Manitoba Housing and Renewal Corporation ("MHRC"), hired Falcon Creek as the general contractor for a construction project. Falcon Creek retained the bonding company to provide both a performance bond and a labour and materials payment bond. While the two bonds are often written in tandem, each bond serves a distinct purpose: a performance bond financially insures the fulfillment of some contracted duties of a contractor, while a payment bond insures the proper payment of any subcontractor or materials ascertained for the project. Together, the bonds are intended to financially insure the completion of a project. After a default by Falcon Creek, the bonding company financed the project to its completion, paying out over $600,000 under the payment bond to partially satisfy a portion of the outstanding payments towards lien claimants and unpaid subcontractors.

The Builders' Lien Act requires the owner to withhold 7.5% of the total contract price in trust for the contractor. The purpose of the holdback regime is to provide some level of assurance that subcontractors and suppliers will be paid in the event of a default by the general contractor. Presumably, the bonding company was expecting to mitigate its losses from having to make payouts under the bonds by accessing the statutory holdbacks that the owner was holding in trust for the general contractor to ensure that monies were available to pay subcontractors.

As noted earlier, the Minister's claim to the holdbacks was based on subsection 224(1.2) of the Act, which gives the Minister enhanced garnishment rights where the garnishee failed to withhold and remit to the Minster certain amounts, such as payroll source deductions, section 116 amounts, or Part XIII tax, notwithstanding any security interest or other legal claims over the relevant amount. In the case at hand, the CRA delivered to the MHRC an enhanced requirement to pay that called for the owner to pay over to the CRA any amounts that would otherwise be payable to the general contractor during the period specified in the notice.

Recognizing the difficulties created by the Minister's super-priority over amounts held by the owner in favour of the general contractor, the bonding company attempted to establish its right to the funds by demonstrating a direct right of recovery from the owner, rather than a claim derived from a right against the general contractor. More particularly, the bonding company principally relied on the law governing guarantees, which allowed the bonding company to try to establish a direct claim to the holdback by depicting the owner as the beneficiary of the bond. According to the bonding company, payments were made under the bond in order to guarantee the completion of the project. Since the Manitoba Housing and Renewal Corporation is the owner of the project, all the benefits under the bond ultimately accrued to the owner. According to the law governing guarantees, the beneficiary of the guarantee has a duty to mitigate against losses of the guarantor. The bonding company viewed the holdback as the most obvious way for the owner to help mitigate against the loss associated with making payments to the subcontractors for the benefit of the owner. The bonding company also appears to have been arguing that, by paying the subcontractors pursuant to the terms of the bond, the bonding company was subrogated to rights of the general contractor against the owner, displacing the owner's obligation to pay over the holdbacks to the general contractor with an obligation to pay the bonding company instead.

The Manitoba Court of Appeal rejected the bonding company's characterization of the project owner as the beneficiary under the bond, as the MHRC had no contractual relationship with the subcontractors and therefore no legal obligation to pay them. Rather, under a payment bond, the bonding company insures the payment of the subcontractors, who are therefore the proper persons to regard as the beneficiaries. The distinction between performance and payment bonds is significant here, as payouts made to secure the performance of duties contracted between the project owner and the general contractor confer a more direct benefit to the owner. Nevertheless, given the facts of this case, it is the subcontractors, and not the owner, who have the obligation to mitigate the exposure of the bonding company. The Court also went on to find that, in paying the subcontractors, the bonding company was not subrogated to any rights of the owner but was, instead, subrogated to the rights of the subcontractors against the non-paying general contractor. As the right of the subcontractors against the general contractor is a right to lien, the bonding company's claim to the statutory holdback was derivative and therefore did not supersede the Minister's rights in this situation. The Manitoba Court of Appeal thus dismissed the bonding company's appeal of the lower court ruling.

Statutory holdbacks are required in most common law jurisdictions to ensure the payment of all parties to the various tiers of a construction project. The Minister's super-priority to deduct unpaid tax debt from the holdbacks, while legitimate, no doubt contradicts the intention behind the holdback regime. This case highlights the risk exposure of bonding companies that issue payment bonds in connection with construction projects. It also serves as a reminder that an unpaid subcontractor's ability to access the statutory holdbacks (that are supposed to be available to ensure that funds are available to pay subcontractors) can be thwarted by the Minister's enhanced garnishment rights against the general contractor in respect of amounts owed to the Minister.

—*Tony Zhou*

RETURNS OF CAPITAL ADVERSELY AFFECT INTEREST DEDUCTIBILITY

***Van Steenis v. the Queen*, 2018 DTC 1063 (Tax Court of Canada—Informal Procedure)**

In this appeal, the Tax Court of Canada considered the extent to which the taxpayer was entitled to deduct interest payments on a loan used to purchase units in a mutual fund trust after the taxpayer received a series of return of capital distributions from the fund.

In 2007, the taxpayer borrowed $300,000 to purchase units of a mutual fund trust. The fund made a series of payments to unit holders during the 2007 to 2015 period which included certain return of capital payments. In the taxpayer's case, he received aggregate return of capital payments of approximately $196,850, the majority of which he applied towards non-income producing uses. Throughout the period, the taxpayer annually deducted the full amount of his interest expense on the $300,000 loan.

The Minister reassessed the taxpayer to deny a portion of his interest expenses in 2013, 2014, and 2015 on the basis that, after the return of capital distributions from the fund, the "present" use of a corresponding portion of the $300,000 purchase loan ceased to be one that was for the purpose of producing income where the proceeds of the return of capital distribution were put to non-income producing uses.

Interest is generally considered to be a payment on account of capital, the deduction of which would be denied by paragraph 18(1)(b) of the *Income Tax Act* (the "Act") without the application of paragraph 20(1)(c). Paragraph 20(1)(c) of the Act permits a taxpayer to deduct a reasonable amount of interest paid on borrowed money used for the purpose of earning non-exempt income from a business or property.

The Tax Court reiterated the four requirements for the application of paragraph 20(1)(c) to a payment of interest as set forth by the Supreme Court of Canada in *Shell Canada Ltd.* (99 DTC 5669):

(1) the amount must be paid or payable in the year of deduction;
(2) the amount must be paid pursuant to a legal obligation to pay interest on borrowed money;
(3) the borrowed money must be used for the purpose of earning non-exempt income from a business or property; and
(4) the amount must be reasonable.

For the purposes of the taxpayer's appeal, the Tax Court found it necessary to only consider the third requirement from *Shell Canada Ltd.*: whether the current use of the money was gaining or producing income from property.

The taxpayer made several arguments to support his overall claim that, despite having received $196,850 in return of capital distributions, which he had spent on non-income producing uses, the present use of the loan proceeds was still income producing.

First, the taxpayer argued that he continued to own all of the income-producing mutual fund trust units he had initially purchased using the loan proceeds.

Second, the taxpayer argued that he had no control over the distributions made by the fund and that the Tax Court should take note of the disconnect between a unitholder's actual investment and what a mutual fund trust distributes as a return of capital, since there are circumstances where a mutual fund trust may distribute to a unitholder more than the particular unitholder's invested capital in the trust.

Finally, the taxpayer argued that, absent a sham, the Tax Court was obliged to respect the substance of the taxpayer's legal relationship rather than rule on the basis of economic realities. In the taxpayer's view, this would preclude the Tax Court from linking the current use of the borrowed money to his non-income producing expenditures given his continued ownership of the income-producing mutual fund trust units.

The Tax Court disagreed with all the arguments advanced by the taxpayer. The Tax Court linked the money the taxpayer had invested in the mutual fund to the return of capital distributions which the taxpayer then used for predominately non-income producing purposes. The Tax Court supported its position by reference to its reading of the scheme of the Act. The Tax Court contrasted subsections 104(6) and 104(13), which allow a trust to deduct amounts payable to unitholders and include such amounts in the income of unitholders, and subparagraph 53(2)(h)(i.1), which reduces a trust unitholder's adjusted cost base in a fund by the amount of any capital distributed to the unitholder. Where an adjusted cost base reduction pursuant to subparagraph 53(2)(h)(i.1) reduces a unitholder's adjusted cost base to less than zero, the amount in excess of adjusted cost base is a deemed capital gain to the unitholder pursuant to subsection 40(3). In the Tax Court's view, the adjusted cost base reduction and potential for a capital gain is consistent with the notion that the unitholder is receiving his or her originally invested capital where a mutual fund trust makes a return of capital distribution.

The Tax Court further disagreed with the taxpayer that the taxpayer's valid legal relationships would have to be overturned to characterize the present use of the borrowed money as being non-income producing rather than being the acquisition of the original investment in the mutual fund trust units. The Tax Court stated that the legal transactions that had occurred were the investment of the borrowed moneys in the trust, and the return by the trust of those same borrowed moneys by way of the return of capital.

As a result the Tax Court dismissed the taxpayer's appeal, effectively upholding the Minister's denial of the portion of the interest deduction taken by the taxpayer on the amounts distributed by the fund as a return of capital and put to personal uses by the taxpayer.

This case supports the reasoning put forward by the Canada Revenue Agency in administrative positions it has previously published such as *2007-0236351E5—Interest deductibility* and *2002-0142475—Interest deductibility income trust*. Outside the mutual fund trust investment context, this case underscores the implications for borrowers who receive return of capital distributions on private company shares acquired using interest-bearing debt.

—*Justin Shoemaker*

TRANSFERS NOT MADE WITH DONATIVE INTENT SO AS TO QUALIFY AS CHARITABLE GIFTS UNDER SECTION 118.1 OF THE ACT

***Jensen v. The Queen*, 2018 DTC 1047 (Tax Court of Canada); *Goheen v. The Queen*, 2018 DTC 1051 (Tax Court of Canada)**

The *Jensen* and *Goheen* cases, each of which was decided by the same Tax Court judge within a few days of the other, involved the Minister's denial of charitable donation tax credits claimed in relation to transfers made by the taxpayers to the "Global Institute". The Global Institute was a registered charity that purportedly worked to alleviate poverty in undeveloped areas. In the result, the Court found as fact that the taxpayers did not make the transfers with donative intent, but instead with a view to obtaining a financial return from the allegedly charitable organization. As such, the transfers did not qualify as "gifts" and the Minister's denial of the charitable donation tax credits was upheld.

In each of the *Jensen* and *Goheen* cases, one or more transfers were made to the Global Institute in the early 2000s. The Global Institute purported to conduct charitable work such as purification of water, improving farming techniques, and "helping people help themselves". In the *Goheen* case, the purported donation of US$30,000 (about C$46,667 based on the exchange rate at the time) was paid to the Global Institute in two components, one for US$10,000 and one for US$20,000. This was a significant amount to the taxpayer, whose net income averaged just over C$30,000 for the tax years in question and who had two children studying in the United States. In the *Jensen* case, the taxpayer transferred US$100,000 (about C $153,230 based on the exchange rate at the time) to the Global Institute, an amount that represented about 25% of his income for the tax year in question. In both cases, the arrangement between the taxpayers and the Global Institute involved tracking the transferred amounts in the taxpayers' names and paying them interest of 25% annually for five years, after which time they would no longer receive interest and the Global Institute would have unencumbered use of the transferred amounts.

As the Act does not define the word "gift", its meaning for the purposes of the charitable donation tax credit provisions has been established by the jurisprudence. For a "gift" to have been made, the test developed by the authorities in this area requires:

(1) a voluntary transfer of property by the donor;
(2) that the donor owned the property immediately prior to the transfer; and
(3) that the donor did not receive a non-tax benefit from the donation.

This third branch of the "gift" test is also expressed as whether the donor had "donative intent". Anticipation or expectation by the donor of a material benefit is sufficient to vitiate an otherwise valid gift, that is, to find that the taxpayer did not have the required donative intent. To demonstrate donative intent, the donor must be aware at the time of the donation that the donor "will not receive any compensation other than pure moral benefit and must have intended to impoverish himself or herself from the gift in such a manner that the donor does not benefit from the deprivation." For the purposes of this analysis, the tax advantage gained by claiming the charitable donation credit is not normally considered a "benefit" that may vitiate an otherwise valid gift.

Apart from the obvious benefit of the 25% interest to be paid to the taxpayers for five years, the Court had numerous reasons for finding that the taxpayers did not have the necessary donative intent and for rejecting the taxpayers' testimony in this regard. In *Goheen*, the taxpayer had received a US$30,000 payment several months after making the transfers, a payment that the taxpayer could not adequately explain although he denied that it was a return of funds from the Global Institute. The Court rejected the taxpayer's evidence on this point. The taxpayer's case in *Goheen* faced several other factual problems, including the unusually large amount of the transfer relative to his and his family's income, his lack of due diligence (even indifference) regarding the alleged charitable activities of the Global Institute, and the numerous inconsistencies in his and his spouse's testimony.

Likewise, the taxpayer in *Jensen* advanced a factually problematic case. His testimony was vague, speculative, and evasive, and in some instances inconsistent with the testimony he gave in discoveries. He also did not do any due diligence to determine what, if any, charitable activities were actually carried on by the Global Institute. This was implausible to the Court considering that the taxpayer in *Jensen* had donated over C$150,000; approximately 25% of his income for the year. The Court found as fact that the taxpayer in *Jensen* transferred the amount to the Global Institute "with an investment intent" in anticipation of "a financial return". Although the Court could not determine how, precisely, the taxpayer received the financial return (perhaps in part due to the taxpayer's refusal to provide all relevant banking information), the Court found that the taxpayer intended to receive the return either directly from the Global Institute or indirectly in an arrangement between himself, the Global Institute, and other entities involved in the donation program.

In both the *Goheen* and *Jensen* cases, the Court held that the Minister had met its onus to establish the facts underlying the imposition of gross negligence penalties as the taxpayers knew that they had not made genuine gifts that could form the basis of a claim for charitable donation tax credits.

The *Goheen* and *Jensen* decisions both largely turn on their particular facts and the application to those facts of well-established principles regarding the validity of gifts that are asserted to justify charitable donation tax credits. In *Goheen*, the taxpayer has appealed to the Federal Court of Appeal, but such appeal will presumably face an uphill battle as the Tax Court's findings of fact will be entitled to considerable deference. In any event, these cases show that the Court will likely doubt that the required donative intent is present if there is evidence that the taxpayer received a return of, or on, the donated funds.

—*Theodore Stathakos*

NON EST FACTUM APPLIED TO INCORPORATION?

***Le v. The Queen*, 2018 DTC 1055 (Tax Court of Canada)**

The appellant in this case was an individual on whom the Minister assessed unremitted employee source deductions and GST of a corporation on the basis that the individual was a director of the corporation. Canadian tax jurisprudence has established that director's liability for unremitted source deductions under the *Income Tax Act* (the "Act") or GST under the *Excise Tax Act* can arise when an individual is a director by virtue of the relevant corporate legal instruments or if the person has acted as a *de facto* director of the corporation. In this case, the principal issue was whether the appellant was a director by virtue of the relevant legal instruments.

On its face, it appears that the Minister had a very strong case. The appellant, Ms. Le, was identified as a director in the Notice of Articles, she signed the Articles as an "Incorporator", and she was identified as a director in the incorporation agreement, which she also signed. Nonetheless, the Tax Court held that the appellant was not a director.

Ms. Le lived in North Vancouver where she owned and operated several beauty salons. In 2006, one of her employees, Ms. Landry, suggested to her that they partner up to open a new salon. Le agreed. Le is of Vietnamese descent and, at the time, she was not fluent in English. Ms. Landry's husband suggested that he prepare the requisite paperwork for creating the business vehicle for carrying on the business. Le testified that, while Mr. Landry suggested incorporation, she desired that the business be carried on through a partnership. It is to be noted that, as Mr. Landry could not speak Vietnamese, the communications between Mr. Landry and Ms. Le were in English. It appears that, despite Ms. Le's expressed desire to carry on the operations through a partnership, Mr. Landry, who was not a lawyer, produced a Notice of Articles, which appointed Le as director, and filed an incorporation application. The BC Registry accepted these documents and 0780221 B.C. LTD. was formed.

Under the relevant BC statute, the *British Columbia Business Corporations Act* ("BCBCA"), the required element for creating a valid corporation is the execution of an incorporation agreement. Incorporation agreements need not be filed with the registry, but they must meet the requirements laid out in subsection 10(2) of the BCBCA. The agreement that Le and Landry entered into had the heading "Partnership Agreement of 0780221 B.C. Ltd., a British Columbia Corporation". Oxymoronic title aside, the Tax Court (*per* Russell J) found that the document itself "conflated the concepts of corporation and partnership". Le and Landry duly executed this document, as well as articles for the corporation, which Le signed as "Incorporator". At the hearing in the Tax Court, Le testified she believed that, by signing these documents, she was entering into a partnership. Mr. Landry testified that he believed an incorporation agreement "was something similar to a partnership agreement", and that the above-referenced partnership agreement met the BCBCA requirements of an incorporation agreement.

In the years after the corporation was formed, Le was hardly involved in the salon's operations or management, as she spent most of her time overseas. Le ended her business relationship with Landry in 2009. In 2013, she received notification from the CRA that a corporation for which she was registered as a director was delinquent in its remittances. She replied that she had ended the business relationship years ago and was unaware that she was a director, or even that she had formed a corporation. The Minister's assessments followed in 2014.

A review of the Canadian tax jurisprudence reveals that the courts have been historically reluctant to attach director's liability to individuals who appear to be unsophisticated, often by finding that the individual was not actually a director. For example, in a series of decisions between 2002 and 2005, the Tax Court established that being listed in a provincial registry as a director of a corporation merely created a rebuttable presumption that the taxpayer was a director (*Hay v. The Queen*, 2004 GTC 138; *Lambert v. The Queen*, 2005 GTC 863; *Lau v. The Queen*, 2002 DTC 2212; *Colbran v. The Queen*, 2003 GTC 720). Le's case presented unique difficulties, however, because her appointment was associated with the original organization of the corporation and she signed several documents as part of that process that could be taken as explicit consent of her desire to be a director and her acknowledgment that she knew she was one.

The Minister's reasoning to support the conclusion that the appellant was a director was the following:

(a) Le was designated as a director in the Notice of Articles. This makes her a "first director" via the definition of "first director" in section 1 of the BCBCA.
(b)

BCBCA section 121 states that no designation of an individual as a first director is valid unless they are (i) an incorporator who (ii) has signed the Articles.

(i) An incorporator is defined in BCBCA section 1 as someone who signs the incorporation agreement as an incorporator. Le signed the "Partnership Agreement of 0780221 B.C. Ltd., a British Columbia Corporation", therefore meeting this requirement.
(ii) Le signed the Articles as "Incorporator".

(c) Therefore, Le is a first director, and as an incorporator who has signed the Articles, her designation as such is valid.

Le took issue with the premise underlying (b)(i) above. As noted earlier, subsection 10(2) of the BCBCA requires that although it need not be filed, the incorporation agreement must meet certain requirements to be valid. Notably, 10(2)(i)(B) requires that the agreement state the number of shares each incorporator has taken. Her counsel argued that since their incorporation agreement did not do so, it was not a valid incorporation agreement. This would mean that she was not an incorporator. If she was not an incorporator, then her designation as a first director was not valid. If she was not a director, then she cannot be liable for remittances.

The Minister responded that, although the "Partnership Agreement of 0780221 B.C. Ltd., a British Columbia Corporation" did not meet the exact requirements of section 10, it was saved by section 413, which is a remedial provision that gives deficient filings the force of law they were intended to have until the Registry requests that the incorporator rectify the filings. This provision does not appear to have a counterpart in other Canadian jurisdictions and had not been previously considered in the jurisprudence.

The Court accepted the appellant's argument, and with regards to section 413, found that since an incorporation agreement need not be filed with the BC registry, it does not fall within the purview of section 413. Hence, Le was relieved of liability.

When reflecting on the outcome in this case, it is useful to observe that Le's principal assertion in her defence was her belief the parties had formed a partnership and that the business was being carried on in partnership form during the relevant period. Had that been the case, Le would have been a partner of that partnership and would presumably have had joint and several liability with her partners for the unremitted source deductions and GST of the partnership in her capacity as a partner of the firm. In fact, the Minister's case against her would have been more straightforward since she would have been directly liable, instead of derivatively through the corporation.

Also, with respect, the Tax Court's finding that the corporation never existed because of a minor technical deficiency in the incorporation agreement is shaky reasoning. There was an understanding between the two about how many shares each of them owned, as when the business relationship was terminated in 2009 it was by Mr. Landry purchasing Le's shares. These understood terms could have been implied.

Reading between the lines, it appears the Tax Court was trying to avoid finding liability against Le because she did not understand what she was signing. *Non est factum* (not his deed) is a contract law doctrine that relieves a signatory of contractual obligations if the agreement they executed is significantly different than the one they intended to. Although only narrowly applied, it has expanded beyond its origins as a defence for the blind and illiterate and, arguably, was applied by the Tax Court here in an incorporation context.

—*Brendan Festeryga, Summer Student*

RULE 147(3.1): WHEN A SETTLEMENT OFFER TRIGGERS SUBSTANTIAL INDEMNITY COSTS

***MacDonald v. The Queen*, 2018 DTC 1045 (Tax Court of Canada)**

This case clarifies that subsection 147(3.1) of the *Tax Court of Canada Rules* (the "Rules") operates within the broader scheme of section 147 to presumptively trigger substantial indemnity cost consequences when one party makes a clear and unequivocal offer to settle and then goes on to secure an equally or more favourable judgment in the proceeding.

The taxpayer had characterized certain cash settlement payments totaling $9,956,837 made in the 2004, 2005, and 2006 tax years as on account of income, giving rise to business losses. The Minister had reassessed the taxpayer on the basis that the payments were actually on account of capital, and resulted in capital losses. The taxpayer appealed. The Court, *per* Lafleur J, allowed the appeal and awarded costs to the taxpayer at the Tariff rate as prescribed in Schedule II to the Rules.

Thirty-six days after the judgment, the taxpayer brought a motion seeking enhanced costs pursuant to subsection 147(3.1) of the Rules on the basis that he had made two offers to settle that presumptively triggered the enhanced costs scheme of that provision. He argued that he was entitled to costs calculated on a partial indemnity basis up to the date of service of the first offer, and substantial indemnity costs thereafter.

The issues on the motion were:

(1) whether the taxpayer was beyond the 30-day time limit provided in subsection 147(7) to bring the motion;
(2) if so, whether a time extension should be provided to allow the motion to proceed in any event; and
(3) whether enhanced costs were warranted in the circumstances pursuant to subsection 147(3.1).

The Minister opposed the motion on the threshold issue that the taxpayer was out of time, pursuant to subsection 147(7), to apply to the Court to "reconsider" its decision on costs. Subsection 147(7) of the Rules requires the taxpayer to bring such a motion within 30 days of having knowledge of the initial judgment on costs.

The taxpayer explained the reason for the six-day delay beyond the 30 days was to allow him time to assemble a proper bill of costs, which he now presented to the Court so that it could make a proper determination on the issue of costs. He argued that rather than asking the Court to "reconsider" its previous decision to award costs at the Tariff rate, he was simply furnishing the Court with further information that would allow it to properly apply the presumption in subsection 147(3.1). Put simply, since the Rules already prescribed the proper outcome, there was no reason for the taxpayer to ask the Court to "reconsider" its prior decision within the meaning of subsection 147(7), which therefore did not apply to subsection 147(3.1) in the circumstances.

The Court rejected the taxpayer's argument and concluded that the 30-day time limit prescribed in subsection 147(7) applied to subsection 147(3.1). However, the Court agreed with the taxpayer that a presumption of substantial indemnity costs had arisen, which would be relevant in deciding whether a time extension was warranted in the circumstances.

Lafleur J then weighed the factors relevant in deciding whether to grant an extension of time. She concluded that the taxpayer's short delay of six days beyond the 30-day time limit (i) suggested that the taxpayer had a continuing intention to seek enhanced cost; and (ii) would not result in prejudice to the Minister. Deciding that the interests of justice prevailed over the principle of finality in the circumstances, the Court allowed the extension.

The Court then turned to the substantive question of whether substantial indemnity costs were warranted. Noting at the outset that although subsections 147(3.1) to (3.8) of the Rules established a default scheme to promote settlement offers, the Court clarified that it retained a broad discretion to apply that scheme in awarding substantial indemnity costs. The taxpayer's two settlement offers were then analyzed to determine whether their content was sufficient to trigger the scheme.

Lafleur J determined that the taxpayer's first settlement offer did not meet the requirements of subsection 147(3.1) because it was not "clear and unequivocal". The offending content was language at the end of the last paragraph which qualified the offer even if the Minister accepted it. The qualifier explained that if the Minister accepted the offer, the taxpayer's lawyers "would be prepared to recommend this settlement to [the taxpayer]". As a result of this language, Lafleur J concluded that, in the event the Minister accepted the offer, the taxpayer retained the option to ultimately avoid the agreement by not accepting the recommendation of his counsel. Accordingly, this offer did not trigger subsection 147(3.1).

There was no dispute that the second offer met the technical requirements of subsection 147(3.1). Accordingly, the Court found that the second settlement offer attracted the consequences prescribed in subsection 147(3.1) and awarded substantial costs from the date of the service of the second offer to settle.

The *MacDonald* case helps to clarify the Court's approach to the enhanced costs scheme in subsection 147(3.1) and how that provision fits within the broader framework of section 147. An offer to settle must be timely and "clear and unequivocal" in order to meet the requirements of subsection 147(3.1). The spirit of the settlement provisions prescribed in the Rules is to encourage open, honest, and frank discussions in order to effect a *final* settlement. To ensure clients are availed of the benefits of the presumptive scheme, practitioners should be careful to give effect to this principle of finality and be wary of including overly flexible and/or clever language that could prompt the Court to exercise its discretion and deny the operation of the scheme.

—*Peter Leigh*

AMOUNT OWING IN CIVIL ACTION TO BE HELD IN TRUST UNTIL CORPORATE DIRECTOR'S TAX LIABILITY IS QUANTIFIED

***Paria Enterprises Inc. v. Bravo*, 2018 DTC 5025 (Ontario Superior Court)**

This Ontario Superior Court decision (*per* Pattillo J) concerns two applications regarding a group of companies controlled by family members. In about 1945, the Bravo family established and developed the Bravo cement contracting business in Windsor and Hamilton. The family business operated as a partnership with several companies incorporated for various reasons including tax planning, liability management, and integration of non-family-member minority partners in various ventures. Related businesses were started in London and Toronto. In the late 1990s, the businesses passed to the next generation: the respondent brothers Warren, Mark, and Brian Bravo in Hamilton, and their distant cousin Paul Bravo in Windsor.

Mark and Warren controlled and managed two corporations in Hamilton: Bravo Cement Contracting (Hamilton) Inc. ("Bravo Hamilton") and the respondent 1121357 Ontario Inc. ("112") (together, the "Hamilton Corporations"). Paul controlled and managed the two applicant corporations in Windsor: Bravo Cement Contracting (Windsor) Inc. ("Bravo Windsor") and Bravo Cement Contracting (Winham) Inc. ("Bravo Winham") (together, the "Windsor Corporations"). Mark, Warren, and Brian collectively owned 80% of the Hamilton Corporations, and 829194 Ontario Inc. ("829"), their family holding company, owned 25% of the Windsor Corporations. Paria was a holding company controlled by Paul, which owned 75% of the Windsor Corporations and 20% of the Hamilton Corporations.

Relationships between the Bravo family members broke down and gave rise to two applications. One application requested a declaration of oppressive conduct by the respondent Bravo Hamilton towards the applicant Paul Bravo and compensation or, in the alternative, contribution or indemnity for tax liability, pursuant to the *Income Tax Act*, the *Excise Tax Act*, and the Ontario *Business Corporations Act*.

The other application was for a declaration that the applicant Paria Enterprises Inc. and respondent 829 are in a partnership, an order to dissolve the partnership, and ancillary relief or, in the alternative, an order to wind up various corporate applicants and defendants pursuant to section 201(1)(*b*)(iv) and/or section 207(1)(*b*)(iii) of the Ontario *Business Corporations Act*.

The parties' overall objective was to resolve all issues as to amounts outstanding between them and to buy out minority shareholdings at fair market value. The court considered five issues.

The first two issues were regarding the fair market value of 829's 25% minority interest in the Windsor Corporations, including whether the applicants' expert valuation report should be accepted by the court, and the fair market value of Paria's 20% minority interest in the Hamilton Corporations.

Regarding 829's minority interest in the Windsor Corporations, the court accepted the applicants' expert valuation report on the basis of the evaluator's education and experience and disregarded the respondents' criticisms as mere conjecture. Although the Windsor Corporations' financial statements were not audited, Pattillo J accepted that they were accurate and could be relied on to calculate the Windsor Corporations' fair market value. Pattillo J also noted that the respondents did not file an expert opinion responding to the applicants' report and relied on the Windsor Corporations' financial statements to establish that the Windsor Corporations owed 829 amounts on account of loans. The respondents could not criticise reliance on the Windsor Corporations' statements in one instance while themselves relying on them in another. Pattillo J determined that the value of 829's 25% interest in the Windsor Corporations was $169,750.

Neither party provided an expert report regarding the value of Paria's minority interest in the Hamilton Corporations, Bravo Hamilton and 112. Bravo Hamilton had only liabilities and therefore the value of Paria's 20% interest was $0. Regarding 112, there was some dispute about relying on unaudited financial statements that were prepared by 112's management. Pattillo J deemed them reliable for valuation purposes, as the unaudited Windsor Corporations' financial statements were similarly accepted. Pattillo J determined that the value of Paria's 20% interest in the Hamilton Corporations was $93,059.11.

The third issue was whether the Windsor Corporations should repay loans to 829 that appeared on their 2010 to 2016 financial statements as loans payable to related parties. The applicants submitted that this issue should be determined later on a more thorough record. Pattillo J noted that the parties agreed to resolve all financial issues between them in these applications and determined, based on the financial statements and other documents regarding the loans and their terms, that the Windsor Corporations owed $375,339 to 829.

The fourth issue was whether Paria was obliged to pay one half of the legal and accounting costs incurred in litigation regarding Bravo Cement Contracting (Toronto) Inc. ("Bravo Toronto"). Bravo Toronto was owned 25% by 829, 25% by Paria, and 50% by a third party that managed day-to-day operations. Paul told Warren sometime in 2013 that the third party was misappropriating funds from Bravo Toronto. Litigation commenced and Bravo Hamilton and 829 ultimately paid $270,015.06 in legal, audit, and forensic accounting fees. Pattillo J held that since Paul raised the misappropriation issue and as 829 and Paria would benefit equally from resolving the misappropriation, it must have been agreed that Paria would reimburse Bravo Hamilton and 829 for half of these fees ($135,007.53).

The fifth issue was whether the Hamilton Corporations were required to indemnify Paul in respect of a tax liability which he was facing as a director of Bravo Hamilton. Paul received a Notice of Assessment from the CRA in 2015, in his capacity as director, regarding $433,668.34 in unpaid source deductions. Paul filed a Notice of Objection and was appealing the issue to the Tax Court. The respondents were first made aware of this assessment when served with the indemnity application in 2017. While the respondents concede that Paul would be entitled to indemnification for reasonable legal costs and expenses incurred in defending the assessment, and a contribution from Mark and Warren who were also directors, Pattillo J held that it would be premature to award an amount in respect of the indemnity when the underlying tax liability remained unresolved and it was unclear whether Paul's ongoing expenses were reasonable. The indemnification application was therefore adjourned until after the CRA assessment was resolved.

Aside from the indemnification issue, Pattillo J determined that the respondents were entitled to a set-off amount of $587,037.42 and ordered that this amount be held in trust by the respondents' solicitors until the indemnification issue was resolved. No costs order was made in the decision because both parties were successful in some respects and each unnecessarily delayed proceedings by taking unreasonable positions, although Pattillo J noted that a cost award may arise in respect of the indemnification issue once it is resolved.

—Alyssa Novoselac, Articling Student

RECENT CASES

SIGNING BONUS RECEIVED BY TAXPAYER CONSTITUTING A CAPITAL GAIN AND NOT INCOME

The appellant owned farm property which was part of the planned route for a pipeline project. He entered into an agreement with the pipeline company to allow the pipeline to be installed on his property; in exchange, he was paid an amount of $254,870 which was identified as a "signing bonus", and which he reported as a capital gain. The Minister assessed the payment as income, taking the position that it was received in the course of the taxpayer's income-earning activity of farming and did not relate to the disposition of capital property, or, in the alternative, that it represented an inducement to sign the agreement, taxable under section 12(1)(x). The taxpayer appealed from that assessment.

The appeal was allowed. The Tax Court of Canada held the only issue for determination on the appeal was the characterization for tax purposes of the signing bonus received. While the Minister had argued that such amount was received by the appellant in the course of carrying on a farming business, the Court noted that according to the Statement of Agreed Facts the farming business was carried on by the appellant's corporation and not by the appellant personally. The Court concluded therefore that the appellant did not receive the signing bonus in the course of earning income from a farming business, since the corporation and not the appellant carried on the farming business. The Court then considered whether such payment was to be included in the appellant's income as an inducement or incentive under section 12(1)(x) of the *Income Tax Act* or whether, as argued by the appellant, such payment was subject to the exclusion in paragraph 12(1)(x)(viii). That exclusion applies, in part, where an inducement may reasonably be considered to be a payment made in respect of the acquisition by the payer of an interest in the taxpayer's property. In the Court's view, the amount at issue was paid as an incentive for the early signing of the easement agreement and was therefore paid in connection with the appellant's granting of the easement on his property. As a result, such amount was paid in respect of the acquisition by the pipeline company of an interest in the appellant's land, and the Court concluded that paragraph 12(1)(x) did not apply to the payment. Since the amount was paid in respect of the disposition by the appellant of a capital asset, being an interest in his land, it was a capital receipt to the appellant. The appeal was allowed and the assessment referred back to the Minister for reconsideration and reassessment on the basis that the signing bonus must be included for the purpose of determining the appellant's capital gain under section 39(1) from the disposition of the interest in his land, and that the taxpayer had realized a taxable capital gain of $127,435 in respect of that signing bonus.

Ritchie v. The Queen

2018 DTC 1088

APPEAL FROM TAX COURT DECISION THAT GAAR APPLIED TO CORPORATE REORGANISATION ALLOWED

The individual taxpayer, who was the sole owner of a corporation, carried out a corporate reorganization. He used his lifetime capital gains exemption when reporting the reorganization transactions, such that no tax was paid on any of those transactions. The Minister reassessed on the basis that the series of transactions constituted tax avoidance under the general anti-avoidance rule ("GAAR"). The taxpayer appealed to the Tax Court of Canada, which confirmed the Minister's assessment and the application of the GAAR. The Tax Court held that the series of transactions carried out allowed the individual taxpayer to indirectly withdraw corporate earnings on a tax-free basis by using his capital gains exemption to offset the capital gain realized on a sale to a non-arm's-length party in a share-for-share exchange. That result was achieved by triggering the paid-up capital averaging mechanism in section 89 of the *Income Tax Act* (the "Act"), resulting in the artificial inflation of the paid-up capital of the taxpayer's shares in circumstances where he made no new capital contribution. The Tax Court found that the series of transactions achieved a result that section 84.1 of the Act was intended to prevent, and defeated that provision's underlying rationale, which was to prevent the removal of taxable corporate surplus as a tax-free return of capital through the use of the capital gains exemption. The Tax Court concluded that the transactions had been undertaken in a manner that defeated the object, spirit, and purpose of sections 84.1 and 89.1 of the Act, and it followed that the transactions constituted an abuse under GAAR, which had been properly applied by the Minister. The taxpayer appealed from that decision to the Federal Court of Appeal.

The appeal was allowed. The appellate Court held that the standard of review to be applied with respect to whether there had been an abuse was that of palpable and overriding error, and that the Tax Court had erred in law and in fact with respect to the tax benefit which it perceived to have been realized. The Federal Court of Appeal held that while there was no issue with respect to the Tax Court's characterization of the object, spirit, and purpose of section 84.1, there was no evidence before the Tax Court that there had been any distribution of retained earnings. In the appellate Court's view, while the corporate reorganization changed the tax attributes of a class of preferred shares in a way which created the potential for a tax-free distribution of retained earnings, that potential had not, to date, been realized. The appellate Court concluded therefore that because the tax-free distribution of retained earnings which section 84.1 was intended to prevent had not occurred, there was no evidence that would allow the Tax Court to conclude that, to date, section 84.1 had been misused or abused. As no misuse or abuse of section 84.1 had taken place, the Minister had erred in applying the GAAR. The Federal Court of Appeal noted, however, that its judgment on that issue was without prejudice to the entitlement of the Minister to reassess the appellants in the event that they moved to remove the taxable corporate surplus in issue as a tax-free return of capital.

1245989 Alberta Ltd. et al v. AG of Canada

2018 DTC 5067

TAX REFUNDS ARISING FROM DISABILITY TAX CREDIT CLAIMS FOR PRE-BANKRUPTCY YEARS NOT TREATED AS INCOME OF BANKRUPT

The bankrupt assigned herself into bankruptcy in May 2013 and was discharged in February 2014. Following her discharge, the bankrupt became aware that she could make a claim for the disability tax credit on behalf of her disabled child. She applied for and received that credit for each of the taxation years between 2005 and 2014. The resulting tax refunds, totalling $20,339.82, were sent to the trustee, who applied to the Court for direction on how to deal with those amounts.

Order issued providing that only the refund for the 2013 tax year to be treated as income of bankrupt. The Registrar in Bankruptcy reviewed the wording of sections 67 and 68 of the *Bankruptcy and Insolvency Act* ("BIA"). Section 67 deals with the property of the bankrupt which is to be divided among creditors by the trustee. Section 68 defines the bankrupt's "total income" and "surplus income". He noted that the current wording of section 68 limits "total income" to "revenues … earned or received by the bankrupt between the date of the bankruptcy and the date of the bankrupt's discharge." The Registrar noted that had the claims for the disability tax credit for years prior to the bankruptcy been made during those years, the resulting tax refunds would have gone to the bankrupt, and the trustee would have no claim at all to the funds. The Registrar noted as well that, notwithstanding subsequent amendments to the relevant statutory provisions, Supreme Court of Canada jurisprudence indicated that income tax refunds such as the disability tax credit are to be treated as income and not as property, and therefore are governed by section 68 of the BIA. The Registrar concluded that, based on the current wording of section 68, if money was either earned or received during the bankruptcy, including tax refunds, such money forms part of the "income" for purposes of section 68. The tax refund in issue was not claimed until after the bankrupt had been discharged, and, consequently, she was required to account only for the portion that she "earned" during the bankruptcy. Accordingly, the Registrar ordered that the funds held by the trustee should be paid to the bankrupt, with the exception of the funds that were received from the Canada Revenue Agency on account of the calendar year 2013 and in respect of the bankrupt's earnings up to the date of her discharge from bankruptcy in February 2014. The amounts to be paid to the trustee were to be treated as part of the bankrupt's income.

Re Chomistek

2018 DTC 5068

CPP CONTRIBUTIONS NOT REQUIRED ON INCOME ALLOCATIONS MADE TO RETIRED PARTNER

The taxpayer was a retired partner of an accounting firm, who received income allocations from that firm during the 2008 taxation year. He was assessed in 2009 on the basis that the income that was allocated to him resulted in a Canada Pension Plan ("CPP") contribution payable, and that he was entitled to a deduction and tax credit in respect of that contribution. Four years later, he submitted a T1 adjustment form in respect of his return for 2008, requesting that the Minister reverse the amount payable for CPP. In response, the Minister issued a reassessment in 2014 which reversed the deduction and credit claimable in respect of the contribution, but did not eliminate the taxpayer's CPP payable. The taxpayer filed a Notice of Objection, and a subsequent reassessment in 2015 restored the Minister's assessing position as set out in the 2009 assessment. The taxpayer appealed from the reassessment to the Tax Court of Canada. His appeal was dismissed, with the Tax Court finding that the allocations to the appellant were to be included in income as business income and should also be treated as self-employment income for purposes of the CPP. The appellant then appealed from the Tax Court decision to the Federal Court of Appeal.

The appeal was allowed. The Federal Court of Appeal held first that the appellant had the right to object to the reassessment issued in 2014 and that there was therefore a valid appeal to the Tax Court of Canada in relation to the subsequent related reassessment issued in December 2015. The Court then considered whether CPP contributions were payable on the income allocations received by the taxpayer following his retirement. The Court reviewed sections 10, 13, and 14 of the *Canada Pension Plan*, which provide that individuals are required to make contributions based on their contributory self-employed earnings for the year, that the amount of contributory self-employed earnings is equal to the amount of the self-employed earnings, and, finally, that the amount of self-employed earnings for the year is equal to the taxpayer's income for the year from all businesses carried on by him. Based on those provisions, the Court held that, in order for the income allocated to the appellant to be considered his self-employed earnings, it would have to be income from a business that was carried on by him. The appellate Court noted that since the appellant had ceased to be a member of the partnership in 2007, he ceased to carry on business in common with the other members of a partnership at that time. As a result, in the appellate Court's view, he was not carrying on business in common with other partners at any time in 2008 for purposes of the CPP. The Tax Court had found that the amount allocated to the appellant was included in his income under subsection 96(1.1) of the *Income Tax Act*, which applies only when income is allocated to a person who has ceased to be a member of the partnership. The appellate Court disagreed, noting that the deeming rule in that subsection provided that an individual was a member of a partnership only for purposes of specified sections of the *Income Tax Act*. In the appellate Court's view, none of those provisions deemed the appellant to be a member of the partnership or to be carrying on business for purposes of the CPP. In addition, there was no other provision of the statute that had such effect. The Court concluded, therefore, that the appellant would not be a member of the partnership in 2008 for CPP purposes, nor would he be carrying on a business in 2008 for CPP purposes. Consequently, the income allocated to the appellant in 2008 was not self-employment income for purposes of the CPP, as such income did not arise from a business that he carried on in that year. The Court concluded that as no CPP contribution was payable by the appellant in relation to the income that was allocated to him, the appeal was allowed and the matter was remitted back to the Minister for reconsideration and reassessment on that basis. Costs were awarded to the appellant.

Freitas v. The Queen

2018 DTC 5064

Footnotes

[1] Unless otherwise noted, defined terms in this article have the meaning designated in the first instalment of the Series.

[2] See the “Do Nothing” approach discussion in Part 2 of the Series.

[3] In this regard life interests means “an alter ego trust, a joint spousal or common-law partner trust, a post-1971 spousal or common-law partner trust or a trust to which paragraph 104(4)(a.4) applies.”

[4] For more on the meaning of the vested indefeasibly concept see M. Elena Hoffstein and Corina S. Weigl, "Overview of the Twenty One Year Rule—A Trust Lawyer's Perspective", in 2014 Ontario Tax Conference (Toronto: Canadian Tax Foundation, 2014), 7:1-62. See also, Catherine Brown, "Vested Indefeasibly: Its Importance for Tax Purposes", Personal Tax Planning feature (2006) 54:4 Canadian Tax Journal 968-991. In addition, for the CRA’s views, see Interpretation Bulletin IT-449R, "Meaning of Vested Indefeasibly", dated September 25, 1987 (cancelled).

[5] 1993 DTC 5276 (FCA).

[6] Catherine Brown, *supra* note 4 at 973.

[7] (1841), 49 ER 282 (Rolls Ct.); aff'd. (1841), 41 ER 482 (Ch. D.).

[8] For example, in Ontario see *Variation of Trusts Act*, RSO 1990, c. V.1.

[9] This principle is often referred to as the rule in *Saunders v. Vautier*. The rule in *Saunders v. Vautier* has been abolished in Manitoba and Alberta. There may be a risk that the rule in *Saunders v. Vautier* could be extended to permit a single beneficiary with an indefeasibly vested interest in a trust to force an immediate distribution of his/her share of the property of a trust even when other beneficiaries with indefeasibly vested interests object to the distribution (for example, see *Re Campeau Family Trust* (1984), 4 D.L.R. (4th) 667, 44 O.R. (2d) 549, 16 E. T.R. 97 (H.C.J.), applying principles identified in *re: Marshall*, [1914] 1 Ch. 192, [1911-13] All E.R. Rep. 671 (C.A.)). However, many elements of the *Campeau Family Trust* decision, including its purported extension of the rule in *Saunders v. Vautier* have been the subject of critical review (for example, see David M. Paciocco and Vern Krishna, "Re Campeau Family Trust: Two Wrongs Make a Right" (1985) 7:1 Estates and Trusts Quarterly 65-82).

[10] Many of the items discussed in this section are discussed in the articles referred to in note 4, *supra*.

[11] The discussion in this section is not intended to be comprehensive of all of the ways that can result in interests in a trust becoming vested indefeasibly.

[12] As mentioned previously, there is no requirement for a beneficiary with a vested interest in a trust to have the right to compel the trustees to distribute the trust property associated with the vested interest.

[13] *Supra*, note 9.

[14] For example, see Jason M. Stephan, "Understanding and Dealing With the 21-Year Deemed Disposition Rules Affecting Certain Trusts", *2008 Prairie Provinces Tax Conference*, (Toronto: Canadian Tax Foundation, 2008), 14:1-35 at page 25.

[15] http://www.oecd.org/canada/economic-survey-canada.htm.

[16] https://www.bloomberg.com/news/articles/2018-07-23/canada-to-respond-to-u-s-tax-reform-challenge-in-fiscal-update.

[17] https://www.cbc.ca/news/politics/canada-revenue-agency-voluntary-disclosures-tax-offshore-mulroney-rotfleisch-1.4755367.