Tax Notes

February 2022
Number 709



# UPDATE ON BENEFICIAL OWNERSHIP TRANSPARENCY UNDER THE CBCA, ONTARIO, AND QUÉBEC MODELS

— *Daniel Frajman TEP, Spiegel Sohmer Attorneys, Montréal, Québec*

This article will briefly review some of the major similarities and differences between the rules under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA") model and the model under Québec's provincial and extra-provincial corporate registration statute, *An Act respecting the legal publicity of enterprises*, CQLR, c. P-44.1 (the "Québec Legal Publicity Act" or "QLPA") (the "Québec model"). These models require private corporations to record individuals with significant control over the corporation ("ISCs") as they are known under the CBCA model, and individuals who are the ultimate beneficiaries ("UBs") as they are known under the Québec model. The main elements of the ISC definition under the CBCA model are found at section 2.1 of the CBCA, and the main elements of the UB definition under the Québec model are at sections 0.4 to 0.7 of the QLPA. The goal of these definitions is to determine the individuals (i.e., natural persons) with significant control of the subject corporation by looking through as many levels of information as necessary, including looking through levels of shareholdings that may include holding corporations or trusts, and reviewing corporate documents including shareholder agreements and other commercial and contractual arrangements, regardless as to whether shareholdings are subject to nominee agreements.

This review is of interest because Canada's federal and provincial jurisdictions are for the most part proceeding with their commitment under a December 2017 agreement of the federal, provincial, and territorial finance ministers to amend the relevant legislation to ensure that corporations internally hold accurate information on beneficial ownership of issued shares and to make that information available to law enforcement and tax and other authorities. As a result, the CBCA model came into force in June 2019, and substantially similar rules to amend the respective provincial corporate statutes are in force or close to being so in several provinces, e.g., Manitoba, Prince Edward Island, Saskatchewan, and Nova Scotia. British Columbia has put into place a similar model. Notably, Ontario released draft legislation on November 4, 2021, as part of Bill 43, the *Build Ontario Act (Budget Measures), 2021* (the "Ontario Bill"), to adopt provisions substantially similar to the CBCA model as proposed amendments to the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, which would come into force on January 1, 2023, if the Ontario Bill is passed as expected.

Similarly, Québec has moved along with the commitment made by the finance ministers by enacting, with some last-minute changes, the final version of its Bill 78, *An Act mainly to improve the transparency of enterprises*, S.Q. 2021, c. 19, on June 8, 2021, which makes the Québec model a part of the QLPA. The Québec model is not yet in force, awaiting proclamation from the Québec government which currently is scheduled to occur by October 2022 according to its most recent announcement. The Québec model is unique in North America in that it is not internal to the corporation, but rather

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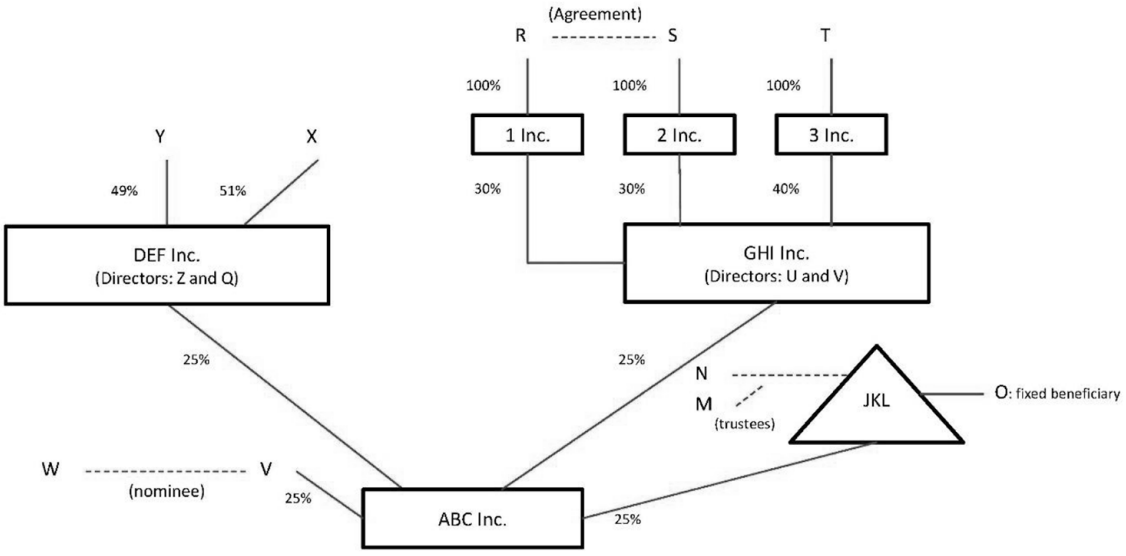
provides for a pubic register (the "Québec Enterprise Register") that lists UBs, to be freely accessible (and searchable by names of corporations, ultimate beneficiaries, directors, and principal officers) at: www.registreentreprises.gouv.qc.ca/en/.

The Québec model essentially applies to any corporation incorporated in Québec, or anywhere else in the world but with activity in Québec such that it is required to extra-provincially register in Québec; hence, the Québec model and the need to accurately record UBs must also be considered by those outside of Québec. What follows below is a brief review of how each of the CBCA model and the Québec model determine respectively ISCs and UBs in certain common scenarios. The Québec register also requires registration and listing of UBs for other entities carrying on activity in Québec, such as private business trusts (not family trusts with passive investments which do not have to be registered), general partnerships, and limited partnerships (with very generally UBs for partnerships determined by application of the corporate UB rules, *mutatis mutandis*). These other entities will not be dealt with in this article (except for trusts when they come up in the example below as a shareholder of the subject corporation). As will also be referred to below, the notion of *de facto* control of the corporation by a UB under the final legislation for the Québec model, and by an ISC under the Ontario Bill, was further developed in 2021 with inclusion in the Québec model of the *de facto* control rules currently found at sections 21.25 and 21.25.1 of the Québec *Taxation Act* (the "QTA") (which are essentially the same as the current *de facto* control rules at subsections 256(5.1) and (5.11) of the *Income Tax Act* (Canada) ("ITA")), and the apparent inclusion in the Ontario Bill of the just-mentioned rules under the ITA for *de facto* control.

It will be interesting to see if the Québec model comes into force by October 2022 as currently scheduled. It will also be interesting in 2022 to see if further guidance as to how to determine ISCs and UBs is received from governments through either regulations or administratively (such guidance has not yet been received for either the CBCA model or the Québec model). A question and answer page posted by Québec on June 23, 2021, on the above-mentioned site of the Québec Enterprise Register appears to promise administrative guidance on UB determination in 2022 in advance of the Québec model coming into force.

## An Example

The following corporate chart is the example that will be used when referring to some of the major similarities and differences between the rules under the CBCA model for determining ISCs, and the rules under the Québec model for determining UBs. It will be seen that questions and grey areas remain in making the determinations. In this example, the subject corporation, ABC Inc., for which the ISCs or UBs must be determined, is a CBCA corporation carrying on business in Québec, so its ISCs under the CBCA model (the "ISC rules") and its UBs under the Québec model (the "UB rules") must be determined. Assume in this example one class of voting common shares throughout. Individuals are referred to on the chart by standalone letter.



## Direct and Indirect Ownership

Under both the ISC rules and UB rules, the goal essentially is to determine those individuals with at least 25% of the votes or fair market value of the subject corporation arising from shares of the corporation, so long as those individuals are a registered holder or beneficial owner (or additionally under the ISC rules, have direct or indirect control or direction) of the shares in question, or those individuals with control in fact (*de facto* control) of the corporation.

As regards holding or owning shares, the ISC rules look only at direct ownership (as apparently the default corporate law rule would apply, which recognizes direct ownership of shares and not indirect ownership, pursuant to long-standing principles (see, for example, *Army and Navy Department Store Limited v. Minister of National Revenue*, 53 DTC 1185 (SCC)). The only individuals in our example with such direct ownership of a 25% minimum in ABC Inc. are the individuals V (as registered holder) and W (a beneficial owner), who would both be ISCs.

The UB rules, as regards holding or owning shares, are different, because they specifically recognize both direct and indirect holders. Extending UB status to indirect owners can help prevent certain holders of material interests at higher levels in a tiered structure from inadvertently falling through the cracks and not being shown on the register as having significant control, as can occur under the ISC rules. In our example, in addition to the above-mentioned V and W being UBs, one must also consider Y and X who have large direct ownership interests in the holding company DEF Inc. When we consider their interests in the subject corporation ABC Inc., X and Y have indirect ownership interests that apparently are 49% $\times$ 25% = 12.25% for Y and 51% $\times$ 25%= 12.75% for X. In both cases the interests are less than 25%, and therefore neither Y nor X are UBs on this basis. Notably, since the ISC rules do not refer to indirect ownership, there does not appear to be an ability under the ISC rules to determine a percentage interest by using multiplication to obtain a product as was just demonstrated above under the UB rules.

Interestingly, although the ISC rules explicitly recognize both registered and beneficial ownership, the UB rules do not do so, but instead refer to individuals with the minimum 25% interest as "a holder, even indirectly, or [as a direct] beneficiary." Therefore, under the UB rules, it appears likely that it is simply implied that a beneficial owner is implicitly included as a direct or indirect holder as is a registered owner. On the other hand, it may be that a beneficial owner has to have a direct (not indirect) ownership interest to be a UB as a direct beneficiary, due to a definition in a somewhat related statute, the Québec *Business Corporations Act*, which at section 2 includes beneficial shareholders in its definition of "beneficiaries". In our example, the beneficial owner W has a direct (not indirect) ownership interest and therefore would be both an ISC and UB without having to address this issue.

## Control or Direction

Under the ISC rules, direct or indirect "control or direction" of the minimum 25% also makes an individual an ISC. This is inapplicable to the UB rules, which have no similar provision.

In our example, who under the ISC rules has such control or direction? Most feel that this would apply to those individuals "controlling" relevant entities, such as trustees of a trust, or holders of more than 50% of the shares of a corporation. In our example, the ISCs in this regard would be trustees N and M of the JKL trust that owns the minimum 25% in the subject corporation, and would also be X, who controls (by virtue of owning 51% of) DEF Inc., which itself owns the minimum 25% in the subject corporation. Most feel this would apply also to those individuals with "direction" over relevant entities, such as directors of a corporation. In our example, the ISCs in this regard would be the directors of each of DEF Inc. and GHI Inc., corporations which both own the minimum 25% in the subject corporation.

One apparent advantage of this "control or direction" rule is that it finds ISCs where sometimes it would otherwise be difficult to find them. However, some have stated that this rule lacks precise definition and may unduly multiply the number of ISCs. This concern seems to have been expressed by Québec (which excludes such control or direction from the UB rules) and also by Ontario, given that the Ontario Bill states that Ontario may make regulations defining the meaning of an individual having "direct or indirect control or direction over shares."

## *De Facto* Control

Both the ISC rules and the UB rules indicate, respectively, that an individual is an ISC or a UB if the person has any direct or indirect influence that, if exercised, would result in control in fact (*de facto* control) of the subject corporation. In our example, R and S, through the voting trust agreement referred to in the diagram, have *de facto* control over the corporation GHI Inc. by virtue of being able to vote together over 50% of its shares, making R and S on that basis

both ISCs and UBs of GHI Inc. Note, however, that this rule does not make R and S ISCs and UBs of the subject corporation ABC Inc., because the *de facto* control rule relates to control over the corporation in question (here, ABC Inc.), and not simply control of say a 25% minimum in votes or value of that corporation.

The CBCA provisions for the ISC rules do not define the meaning of *de facto* control, leading some to take the view that *de facto* control under the CBCA may be as set out in the tax case of *McGillivray Restaurant Ltd. v. Canada*, 2016 DTC 5048 (FCA), where similar wording in the subsequently amended provision of the ITA dealing with association describes the corporate concept of *de facto* control as the right to effect a change to the board of directors or its powers and does not extend to operational control otherwise arising. However, there would appear to be no obvious reason to prevent agreements or arrangements providing for operational control from creating *de facto* control for ISC and UB purposes, and it is probably for this reason that, as mentioned above, the UB rules, and also the ISC rules as set out in the Ontario Bill, provide a definition of *de facto* control that refer respectively to the current QTA and ITA definitions and therefore appear to explicitly include operational control. In addition to the fairly substantial case law and commentary on what constitutes *de facto* control, the current QTA and ITA definitions would appear to consider as relevant the CRA's view on general factors that may be used in determining whether *de facto* control exists as set out in paragraph 23 of Interpretation Bulletin IT-64R4 (Consolidated), Archived — "Corporations: Association and Control".

## Joint Control

It's worth noting that the rule on this is wider for the ISC rules, which say that two or more individuals who jointly own the minimum 25% interest, or who have an agreement or arrangement to vote the minimum 25% interest, will all be ISCs. The Ontario Bill widens this further to also include as ISCs related parties who separately hold such rights, but their aggregate holdings are at least 25%.

The UB rule appears narrower, as it seems to refer only to an agreement relating to a minimum of 25% of the vote as giving UB status to all of the individuals with the right.

## Trust as a Shareholder

In our example, the JKL trust has the minimum 25% interest in votes. As throughout our example, this would also include a 25% interest in value, since we have one class of common voting shares. Therefore, our example does not address whether particular shares have sufficient value to meet the 25% minimum. This question can arise under the ISC rules and the Québec rules, for example after an estate freeze, when common non-voting shares issued to a trust start with no value and therefore do not meet the 25% minimum, but may meet that minimum later as their value rises.

As mentioned above, under the ISC rules, trustees N and M appear to be ISCs as individuals with control. Furthermore, O would be an ISC as a beneficiary with a fixed trust interest, therefore likely being seen as a beneficial owner under the ISC rules. Most feel that under the CBCA model, discretionary beneficiaries under a trust are not ISCs, as there is no basis for it in the CBCA, which includes "beneficial owners" as ISCs but does not refer to "beneficiaries" per se. Possibly a trust beneficiary with a fixed income interest but a discretionary capital interest would be an ISC, depending perhaps on factors such as whether the capital interest vests with the beneficiary's family on the death of the beneficiary.

Under the UB rules, the trustees of JKL trust are not UBs based on control, as that is not part of the UB rules. However, although the UB rules could be clarified on this point, subsection 0.5(2) of the QLPA seems to say in a roundabout way that if a trust as shareholder meets the 25% minimum or has *de facto* control, then the UBs are the trustees (N and M in our example) and the "beneficiaries" of the trust (O in our example). It is unclear as to whether trust beneficiaries for UB purposes include discretionary beneficiaries. For example, there is a view by some in Québec that a discretionary trust beneficiary is a "candidate beneficiary" and not a trust beneficiary per se, and therefore not included as a UB.[1]

The ISC rules make no distinction between *inter vivos* and testamentary trusts as shareholders. Note, however, that the UB rules (subsection 0.5(3) of the QLPA) indicate that the beneficiaries of a testamentary trust are not UBs.

An unanswered question under the ISC rules is how to deal with the situation where a trust company is a trustee of the shareholder trust, as it is unclear who might in effect be the ISC of the trust company, which is often owned by a

[1] See, for example, Patrick Besner et al., *Panel sur la transparence corporative — Nouvelles exigences législatives canadiennes et québécoises*, in Bar of Québec, Développements récents en droit des affaires (2020, Editions Yvon Blais), pp. 331 and following, at p. 418. See also examples at Paul Martel, *Le nouveau registre des particuliers ayant un contrôle important* (October 29, 2019, Wilson & Lafleur; Réso gestion corporative inc.).

public financial institution. Some have speculated that if necessary, the highest-level manager(s) at the trust company dealing with the trust would be named as an ISC. Contrary to this, the UB rules deal with this situation in a clear manner, as follows.

The UB rules (at sections 33 and 0.7 of the QLPA) state that a number of entities and institutions (essentially, non-profits and charities, unincorporated associations, public companies, insurers, trust companies, and banks) do not have to declare their UBs,[2] and also contains curious wording to the effect that these entities and institutions are considered to be individuals (natural persons) for the purposes of the UB rules. That latter reference is in fact helpful, in that it has the effect, when one encounters such an entity or institution with a sufficient interest when determining UBs, to stop at that entity or institution and consider it to be a UB. One result of this: to the extent that a trust with a sufficient interest in or *de facto* control of a subject corporation has to name its trustees as UBs, if there is a trust company trustee, then that trust company (although it is not in actual fact an individual) can be named as a UB.

## Director Identification

Once the UB rules are in force, all registrants on the Québec Enterprise Register will be obliged to provide to the Register a copy of identification issued by a government authority for each director (not for each UB per se). Presumably, this is one further way to assure the veracity of the Register. Interestingly, the above-mentioned Québec Enterprise Register Q&A of June 23, 2021, notes that the public nature of the Register will also help flag potential errors and maximize the accuracy of the Register.

## Transitional Period

A registrant on the Québec Enterprise Register will not have to declare its UBs until it files its first annual update after the coming into force of the UB rules. Notable among the penalties for violating the QLPA, in addition to possible fines, is the possible striking off of a registrant from the Québec Enterprise Register, which would in effect prevent that registrant from carrying on business or other activity in Québec.

In conclusion, as time passes we continue to have more questions answered as to how to deal with the rules for determining individuals with significant control under the CBCA model and ultimate beneficiaries under the Québec model. Further questions will hopefully be answered on a timely basis through regulations and administrative guidance. In some ways, Québec's UB register, when it comes into force, will be for now Canada's *de facto* public beneficial ownership register as regards corporations and often their shareholders, insofar as the Québec register applies essentially to entities carrying on activity in Québec regardless of where the entity is formed. One of the reasons why the Québec register will be public is probably because it has a stated goal of essentially leveling the economic playing field among contractual counterparties, in addition to the often-cited purposes of the CBCA model of combatting tax evasion, undue tax avoidance, money laundering, and terrorist financing.

# COVID-19 UPDATE

*Given the rapidly changing information related to COVID-19 we are providing continuously updated information at blog.intelliconnect.ca/.*

## Federal

### Update on Flat Rate Method for Home Office Deduction (January 18, 2022)

The CRA updated its webpage pertaining to the temporary flat rate method for claiming the home office expense deduction for employees. For the 2021 and 2022 taxation years, the maximum deduction is increased to $500 (from $400 in 2020), but employees are still limited to claiming $2 per day that they worked from home.

### Bill C-2 Explanatory Notes (January 14, 2022)

The Department of Finance published the explanatory notes for Bill C-2 on its website on January 14.

### CEBA Loan Forgiveness Deadline Extended (January 12, 2022)

The Canada Emergency Business Account ("CEBA") allows a business to borrow up to $60,000, of which up to $20,000 is forgivable if the loan is repaid on or before December 31, 2022. The CEBA program provided more than $49 billion in loans to over 898,000 businesses. On January 12, the federal government announced that the repayment deadline to

[2] Not requiring these entities to declare their UBs reduces their reporting requirements, is in accordance with the ISC rule that public companies are not subject to these transparency rules due to their own public company transparency requirements being sufficient, and essentially shields from the UB rules various entities that would otherwise be subject to those rules due to essentially all entities with activity in Québec having to register under the QLPA.

qualify for loan forgiveness will be extended to December 31, 2023, for all eligible borrowers in good standing. Outstanding loans will convert to two-year term loans with interest of 5% per annum commencing on January 1, 2024, with the loans fully due by December 31, 2025. The government also announced that the repayment deadline for partial forgiveness for CEBA-equivalent lending through the Regional Relief and Recovery Fund is also extended to December 31, 2023.

## Tax Court Cancels In-Person Sittings (January 6, 2022)

Chief Justice Eugene P. Rossiter notified the public and profession in a letter that all Tax Court of Canada sittings scheduled between January 10, 2022, and January 28, 2022, inclusively, are cancelled. The Court will aim to conduct virtual hearings for select appeals that were scheduled during that period. All parties affected by this notice will be contacted by the Registry staff. The Court and its Registry offices remain open with reduced staff. Also note that conference calls and virtual hearings previously scheduled to proceed between January 10, 2022, and January 28, 2022, inclusively, will proceed as scheduled.

## CRA Extends COVID-19 Relief Policies (December 29, 2021)

The CRA has extended certain administrative policies that were intended to provide relief from certain issues that may have been created due to the pandemic.

First, the CRA previously introduced relief for employment benefits for 2020. These policies have now been extended so that they apply for 2021 too. These relief policies apply with respect to certain commuting costs, employer-provided parking, computer and home office equipment, meal costs, and cell phone and/or home internet plans. For more information visit www.canada.ca/en/revenue-agency/campaigns/covid-19-update/covid-19-benefits-credits-support-payments/employer-provided-benefits.html.

Second, the CRA previously provided certain relief with respect to specific international tax matters. Most of this relief has expired, but the CRA has now extended administrative relief for Canadian-resident cross-border workers such that it also applies to 2021. For further information see Section VII of the following page: www.canada.ca/en/revenue-agency/campaigns/covid-19-update/guidance-international-income-tax-issues.html.

## Expanding Access to the Local Lockdown Program (December 22, 2021)

The Department of Finance announced that the government intends to expand eligibility for the Local Lockdown Program so more organizations affected by the current situation can access the wage and rent subsidies.

The Local Lockdown Program would be expanded such that an organization could also qualify if:

- one or more of its locations is subject to a public health order that has the effect of reducing the entity's capacity at the location by 50% or more, and
- activities restricted by the public health order accounted for at least 50% of the entity's total qualifying revenues during the prior reference period.

Also, the government plans to temporarily lower the minimum current-month revenue loss threshold from 40% to 25%.

These temporary changes would apply for qualifying periods from December 19, 2021, to February 12, 2022 (Periods 24 and 25). The government plans to enact them by passing regulations.

## Lockdown Benefit To Be Expanded (December 22, 2021)

The Department of Finance announced that the government will expand the Canada Worker Lockdown Benefit to include workers in regions where provincial or territorial governments have introduced capacity-limiting restrictions of 50% or more. The government will implement this expansion by passing regulations. As a result, eligible workers affected by these restrictions who have lost 50% or more of their income as a result will be eligible for a $300 weekly benefit.

The CRA implemented these changes as of December 30, so individuals in designated regions affected by a lockdown or capacity restrictions can now apply for the benefit. A current list of eligible regions can be accessed at www.canada.ca/en/services/benefits/covid19-emergency-benefits/designated-lockdown-regions.html.

# Provincial

## Alberta

### Support for Tourism Industry (December 28, 2021)

The government is introducing a revenue-tested tourism levy abatement. Eligible accommodation providers with a 40% decline in room revenue compared with 2019 will be able to keep tourism levy amounts collected between October 1, 2021, and March 31, 2022.

The revenue-tested abatement will be administered using TRACS (the Tax and Revenue Administration Client Self-Service) secure online portal for the majority of hotels. The system will determine whether an accommodation provider is eligible for the abatement for each period. Implementing this program will take up to six weeks.

Revenue for each collection period (i.e., month or quarter) of the abatement period will be the amount of room revenue that is subject to the tourism levy. Accommodation providers that were not required to collect the tourism levy in the corresponding month or quarter of 2019, hosts providing short-term accommodation in residential units, and hotels not in operation in 2019 are not eligible for the tourism levy abatement.

Eligible accommodation providers that have already remitted tourism levy amounts collected on or after October 1 will automatically receive a refund from Alberta's Tax and Revenue Administration.

Accommodation providers are still required to file returns as per the *Tourism Levy Act* and will be expected to resume regular tourism levy remittances of amounts collected on or after April 1, 2022.

Additional information on program qualifications, processes, and timing for refunds of tourism levy already remitted will be provided in the coming days at www.alberta.ca/tourism-levy.aspx.

## British Columbia

### Tourism Accommodation and Commercial Recreation Relief Fund (January 14, 2022)

As much as $15 million will be provided through the Tourism Accommodation and Commercial Recreation Relief Fund through three streams:

(1) BC-owned large accommodation providers employing more than 150 people;

(2) Indigenous-owned large accommodation properties employing more than 100 people and located on reserve; and

(3) Tenure and BC Parks permit holders that operate as tourism businesses.

The grants will help offset fixed costs for eligible large accommodation operators with property taxes, hydro fees for Indigenous-owned accommodation, or assistance for tourism businesses operating on Crown land and in BC Parks with tenure and park permit fees incurred in 2021. Eligible large accommodation providers can receive up to 25% of property taxes up to a maximum of $500,000 in stream one.

In stream two, eligible Indigenous-owned large accommodation providers on reserve can receive 100% of BC Hydro fees, up to a maximum of $200,000. Large accommodation providers include hotels, motels, resorts, and lodges, including strata hotels.

Eligible commercial recreation businesses can receive 100% of eligible tenure or park-use permits under stream three, to a maximum of $200,000. Tourism businesses with tenures under the *Land Act* or permits under the *Park Act* include businesses such as:

- wildlife viewing, fishing, hunting, mountaineering, horseback riding, off-road vehicle touring, whitewater rafting, and heli-skiing;
- small destination resorts such as guest ranches or ecotourism lodges; and
- campgrounds and outdoor recreation parks that offer activities such as waterslides and ziplines.

Application intake is open from January 14 to February 14, 2022. Eligibility criteria and application information can be found online at: www.gov.bc.ca/accommodation-commercial-recreation-fund.

### COVID-19 Closure Relief Grant Extension (January 19, 2022)

The government is extending the COVID-19 Closure Relief Grant and doubling supports for eligible businesses that have been ordered to remain temporarily closed through public health measures until February 16, 2022. Businesses that

were directed to remain temporarily closed on January 18, 2022, through public health orders are now eligible for up to $20,000 in total funding, based on staffing levels at the time of closure. Eligible businesses include:

- bars, nightclubs, and lounges that do not serve full meals; and
- event venues that had to close due to cancellations.

Eligible fitness facilities that were ordered closed on December 22, 2021, but can now reopen, will receive the original four-week temporary-closure grant of up to $10,000 based on staffing levels at the time of closure. Businesses that have applied for a COVID-19 Closure Relief Grant do not need to reapply. To apply for a grant, visit: www2.gov.bc.ca/gov/content/covid-19/economic-recovery/closure-relief-grant.

### Relief Funding Coming for Businesses Ordered Closed (December 23, 2021)

British Columbia businesses that were mandated to temporarily shut down through public health orders because of surging COVID-19 cases will be eligible to receive a new, one-time relief grant of up to $10,000.

Businesses ordered fully closed include:

- gyms, fitness centres, and adult dance centres;
- bars, lounges, and nightclubs; and
- event venues that can no longer hold events.

Relief grants of between $1,000 and $10,000 will be provided to eligible businesses based on their number of employees, following a formula similar to the previous Circuit Breaker Relief Grant that supported businesses in the spring of 2021.

Applications for the grant will begin in January 2022. More information on how to apply will be made available over the next few weeks, with the application process open until the end of February 2022. Business advisors will be able to support and direct applicants through a dedicated call centre that will be set up in January by the province and Small Business BC. Businesses will also be able to email questions to: covid@smallbusinessbc.ca.

## Manitoba

### Financial Relief for Businesses Affected by New Public Health Orders (December 22, 2021)

The Manitoba government is introducing the Sector Support Program to provide up to $22 million in further support for businesses affected by the most recent COVID-19 public health orders.

An online assessment tool was open until January 31, 2022, to help business owners determine their level of eligibility for the Sector Support Program. Businesses can apply for grants based on the number of employees:

- one to nine employees: $3,000;
- 10 to 19 employees: $6,000;
- 20 to 49 employees: $9,000; and
- more than 50 employees: $12,000.

The program is available to businesses such as restaurants, hotels and bars that provide dine-in food services, fitness and recreation facilities, movie theatres, performance venues, and museums. More information on the Sector Support Program is available at: manitoba.ca/covid19/programs/issp.html.

## New Brunswick

### Self-Employed Lockdown Fund (January 19, 2022)

Opportunities NB announced it is launching a financial support program that offers non-repayable grants to self-employed businesspeople who have had to close due to restrictions put in place to slow the spread of COVID-19. Businesses eligible for the Self-Employed Lockdown Fund include those who do not have employees but were ordered to close under the COVID-19 Winter Plan. Funding will take the form of a one-time grant of $2,000.

To be eligible for the program, businesses must meet the following criteria:

- be a permanent New Brunswick-based business or organization physically operating in the province;
- had been actively operating or conducting business before being ordered to close;

- possess an active and valid CRA Business Number;
- be in good standing with the provincial government and with the Corporate Registry of New Brunswick; and
- provide evidence of annual gross business income of more than $30,000.

Applicants will be required to produce recent tax documents, like a T2, HST, or a copy of form T2125, Statement of Business or Professional Activities, from their personal income or corporate tax return. Applications can be made online through the Opportunities NB website at onbcanada.ca/ beginning February 1, 2022. More information, including application requirements, is available by contacting Opportunities NB's Business Navigators by email (nav@navnb.ca) or phone (1-833-799-7966). Eligible businesses should expect payment within 10 business days following receipt of a complete application.

### Small Business Grant Enhanced and Extended (January 13, 2022)

Opportunities NB is launching a third phase of the New Brunswick Small Business Recovery Grant program, extending the program until the end of February 2022. Phase 3 of the program includes enhanced eligibility for businesses impacted by recent pandemic measures. Businesses that accessed the grant under the first phases remain eligible to apply for the full amount available under Phase 3 — $10,000 — which applies to the reduction of sales incurred beginning December 2021.

Eligible businesses include restaurants (excluding quick-service restaurants with drive-thru options), caterers, and drinking establishments; retail stores; gyms and fitness facilities; personal services (barbers, hair stylists, and spas); and entertainment centres. This phase of the program has also been enhanced to now include all retail.

To meet eligibility criteria for Phase 3, small businesses, employing between two and 99 full-time equivalent employees, must submit:

- their number of employees;
- evidence of revenue decreases of 20% or more compared to the same month in 2019/2020, or 10% or more compared to the previous year if they are a new business in operation started after December 1, 2020; and/or
- evidence that they were subject to elevated Public Health measures (such as modified Level 1, Level 2, Level 3, or Lockdown) for at least one week and/or that their level of activity has been significantly reduced due to reductions in travel into their Public Health Zone from December 13, 2021, until February 28, 2022.

Funding will take the form of a maximum payment of up to $10,000 per business. Included in the one-time payment, applicants may receive up to $300 for supplementary work provided by additional accounting or bookkeeping staff required to assist with the preparation of an application, provided they can demonstrate evidence of additional costs incurred.

Applications can be made online through the Opportunities NB website beginning on January 24 and will be accepted for the period ending February 28. More information, including application requirements, can be found by contacting Opportunities NB's Business Navigators by email (nav@navnb.ca) or phone (1-833-799-7966).

## Nova Scotia

### New Sector Impact Support Program (December 17, 2021)

The province announced additional support for Nova Scotia businesses impacted by the new, province-wide public health restrictions. The Sector Impact Support Program will provide a one-time grant of up to $7,500 to help small business owners in industries such as restaurants, bars, gyms, live performing arts facilities, and recreation facilities.

Applications will open in early January. Eligible businesses can receive the following amounts based on November 2021 gross payroll costs:

- payroll costs between $1,000 and $15,000, grant of $2,500;
- payroll costs between $15,001 and $25,000, grant of $5,000; and
- payroll costs of $25,001 or more, grant of $7,500.

## Ontario

### Applications Open for Ontario Business Costs Rebate Program (January 18, 2022)

Effective January 18, eligible businesses required to close or reduce capacity due to the current public health measures put in place to blunt the spread of the Omicron variant of COVID-19 can apply for the new Ontario Business Costs Rebate Program.

### Grant for Businesses Impacted by Closure (January 7, 2022)

The government announced an Ontario COVID-19 Small Business Relief Grant for small businesses that are subject to closure under the modified Step Two of the Roadmap to Reopen. It will provide eligible small businesses with a grant payment of $10,000.

Eligible small businesses include:

- Restaurants and bars;
- Facilities for indoor sports and recreational fitness activities (including fitness centres and gyms);
- Performing arts and cinemas;
- Museums, galleries, aquariums, zoos, science centres, landmarks, historic sites, botanical gardens, and similar attractions;
- Meeting or event spaces;
- Tour and guide services;
- Conference centres and convention centres;
- Driving instruction for individuals; and
- Before- and after-school programs.

Eligible businesses that qualified for the Ontario Small Business Support Grant and that are subject to closure under modified Step Two of the Roadmap to Reopen will be pre-screened to verify eligibility and will not need to apply to the new program. Newly established and newly eligible small businesses will need to apply once the application portal opens in the coming weeks. Small businesses that qualify can expect to receive their payment in February.

### New Supports for Businesses (December 22, 2021)

The Ontario government is introducing new supports for many of the businesses that are most impacted by public health measures in response to the Omicron variant. These supports include a new Ontario Business Costs Rebate Program and a six-month interest- and penalty-free period to make payments for most provincially administered taxes.

Through the new Ontario Business Costs Rebate Program, eligible businesses will receive rebate payments equivalent to 50% of the property tax and energy costs they incur while subject to the current capacity limits. This will provide support to businesses that are expected to be most impacted financially by the requirement to reduce capacity to 50%. Examples of businesses that will be eligible for the Ontario Business Costs Rebate Program include restaurants, smaller retail stores, and gyms. A full list of eligible business types will be made available through a program guide in mid-January 2022.

Online applications for this program will open in mid-January 2022, with payments to eligible businesses provided retroactive to December 19, 2021. Businesses will be required to submit property tax and energy bills as part of the application process.

The province is also providing additional support to help improve cash flows for Ontario businesses by providing a six-month interest- and penalty-free period to make payments for most provincially administered taxes, supporting businesses in the immediate term while capacity restrictions are in place while providing flexibility for long-term planning. The six-month period will begin January 1, 2022, and end July 1, 2022.

With this help, approximately 80,000 businesses will have the option to delay their payments for the following provincially administered taxes, helping them free up cash flow during these challenging times:

- Employer Health Tax;
- Beer, Wine & Spirits Taxes;
- Tobacco Tax;

- Insurance Premium Tax;
- Fuel Tax;
- International Fuel Tax Agreement;
- Gas Tax;
- Retail Sales Tax on Insurance Contracts & Benefit Plans;
- Mining Tax; and
- Race Tracks Tax.

## Prince Edward Island

### New Wage Rebate for Impacted Industries (January 20, 2022)

The province is launching a new COVID-19 support program for industries impacted by the latest public health restrictions.

The Wage Rebate for Impacted Industries provides a 25% wage rebate on payroll for businesses of impacted industries, such as full-service restaurants and fitness centres, for the period of January 19 to 31, 2022. To review eligibility criteria and apply, visit: www.princeedwardisland.ca/en/service/covid-19-wage-rebate-for-impacted-industries.

Eligibility criteria include:

- Eligible businesses are those businesses closed to in-person services restricted by the enhanced public health measures introduced on January 18, 2022,
  - Gyms, group fitness classes and indoor recreational facilities, bingo halls, museums, casinos, theatres, and cinemas, and
  - Full-service restaurants, bars or other licensed premises closed to in-room dining; and
- Must be operating in PEI.

Seasonal businesses not operating during the period are not eligible.

### Emergency Payments for Workers and Self-Employed (December 30, 2021)

The province is reopening the COVID-19 Emergency Payment for Workers program to help Islanders get through the recent public health restrictions.

The COVID-19 Emergency Payment for Workers program provides financial support to residents of Prince Edward Island who had employment impacts as a result of the COVID-19 public health measures announced December 17, 2021. This emergency payment program is a one-time lump sum payment of $500 from the Government of Prince Edward Island. This emergency benefit is taxable income.

The province is also reinstating the Emergency Income Relief Program for the Self-Employed. This program supports self-employed Islanders who have lost more than 50% of their self-employment income due to public health restrictions put in place on December 17, 2021, who can show that self-employment income is their primary source of income, and who aren't eligible for other federal support programs.

Payments will be based on the amount of income reported as lost, up to a maximum of $300 per week, per applicant. For details and to apply to either program see www.princeedwardisland.ca/en/service/prince-edward-island-emergency-payment-for-workers.

## Québec

### Additional Financial Assistance for Food Losses in Restaurants (January 5, 2022)

The government announced new financial assistance for restaurants to mitigate the consequences of the closure of dining rooms due to public health measures. Restaurants that benefit from a financial contribution under the Assistance to Businesses in Regions on Maximum Alert ("AERAM") component are eligible for an additional non-refundable contribution of a maximum amount of $10,000 per establishment to cover the costs of unused perishable items.

### Assistance for Businesses in Regions on Maximum Alert (December 20, 2021)

The government announced the revival of the AERAM program to alleviate the difficulties encountered by certain businesses due to recent public health measures.

Businesses affected by a closure order will be able to submit their requests for financial assistance in order to obtain loan forgiveness, granted under the AERAM component of the Emergency Assistance to Small and Medium-Sized Enterprises ("PAUPME") program or the Temporary Concerted Action Program for Businesses ("PACTE"), up to $15,000 per month to cover eligible fixed costs. Companies that already obtained financial assistance under one of these programs can take advantage of a simplified procedure in order to reactivate their file. In addition, the government will also extend until March 31, 2022, the moratorium for the repayment of capital and interest related to financial assistance granted under the PAUPME.

# FOCUS ON CURRENT CASES

This is a regular monthly feature examining recent cases of special interest, coordinated by Tony Schweitzer of Dentons Canada LLP. The contributors to this feature are from Dentons Canada LLP, Montreal, Toronto, Calgary, and Vancouver.

## *Carroll v. Canada*, 2022 DTC 5008 (Federal Court of Appeal) — Subsection 163(2) Penalty Can Apply Where No Tax Refund Is Paid and Where There Is No Understatement of Income

### Background

Thomas Carroll engaged an organization known as Fiscal Arbitrators to prepare his income tax return for his 2009 taxation year (the "2009 Return"). Fiscal Arbitrators prepared, and Mr. Carroll filed, the 2009 Return on the basis that Mr. Carroll incurred a loss in 2009 from carrying on a business (the "Reported Business Loss") that exceeded Mr. Carroll's income from other sources in 2009. Accordingly, a request for loss carryback was filed with the 2009 Return, resulting in a refund of taxes for Mr. Carroll's 2007 and 2008 taxation years.

The Minister of National Revenue (the "Minister") assessed the 2009 Return on the basis that the Reported Business Loss was fictitious and that Mr. Carroll was liable for a penalty under subsection 163(2) of the *Income Tax Act* ("ITA") because he "knowingly, or under circumstances amounting to gross negligence, participated in, assented to or acquiesced in the making of, a false statement . . . in a return, form, certificate, statement or answer . . . filed or made in respect of a taxation year".

Mr. Carroll admitted before the Tax Court that he did not carry on a business personally in 2009 and that he reviewed and signed the 2009 Return and request for loss carryback that were prepared by Fiscal Arbitrators.

### Tax Court Decision

At the Tax Court, Mr. Carroll did not dispute the denial of the Reported Business Loss, but he did dispute the penalties, claiming that subsection 163(2) does not apply unless the Canada Revenue Agency ("CRA") accepts the false statement in question so that a tax refund is paid or some other benefit is enjoyed. The Tax Court disagreed with Mr. Carroll and stated that there is no requirement in subsection 163(2) that a refund be paid. However, there is a requirement that the conditions to impose a penalty under subsection 163(2) be supported by facts that are proved by the Minister on a balance of probabilities.

The Tax Court analyzed the evidence before it and concluded that Mr. Carroll participated in the making of a false statement in his 2009 Return in circumstances that amounted to gross negligence and that the conditions for imposing a penalty under subsection 163(2) were met. Accordingly, Mr. Carroll's appeal was dismissed.

### Issues

The issues before the Federal Court of Appeal ("FCA") were:

(1) Did the Tax Court err in its conclusion that there is no requirement in subsection 163(2) that a refund be paid? Related to this point, Mr. Carroll added the argument that subsection 163(2) penalties cannot be imposed unless the return as filed has been accepted or there is an amount of income or tax in dispute.

(2) Were the conditions in subsection 163(2) met as a factual matter?

(3) Was Mr. Carroll denied procedural fairness at the Tax Court?

## FCA Decision

### Did the Tax Court Err In Its Conclusion That There Is No Requirement In Subsection 163(2) That a Refund Be Paid?

Mr. Carroll argued that subsection 163(2) only applies if the return containing a false statement is accepted, a refund is paid, or an amount of income or taxes is in dispute. Accordingly, Mr. Carroll claimed that he cannot be liable for penalties under subsection 163(2) because his 2009 Return and request for loss carryback were never accepted and he never received a refund or enjoyed a benefit from the false statement. Mr. Carroll also argued that if there is no assessment accepting the false statement or an amount of income or tax in dispute, subsection 163(2) does not apply because there is no understatement of income.

The FCA agreed with the Tax Court that a refund is not required to be paid as a precondition to imposing a penalty under subsection 163(2). The FCA further concluded that the imposition of a penalty under subsection 163(2) does not depend in any way on what is accepted or assessed or taxes or taxable income in dispute.

The FCA also stated that regardless of whether the Minister accepts or assesses a return, if a taxpayer falsely claims a loss in a return, there is an "understatement of income" as defined in subsection 163(2.1) of the ITA because that definition focuses on the difference between what should have been reported and what was actually reported in the return; not on what the Minister accepts or assesses.

### Were the Conditions in Subsection 163(2) Met as a Factual Matter?

The FCA must treat the Tax Court's findings of fact and the inferences drawn from those findings with a high degree of deference. Citing *Housen v. Nikolaisen*, 2002 SCC 33, the FCA stated that they would only interfere with the Tax Court's findings and inferences drawn if Mr. Carroll could demonstrate that the Tax Court made a "palpable and overriding error", which is a very high standard and very difficult to meet. Citing *Salomon v. Matte-Thompson*, 2019 SCC 14, the FCA stated that to meet this high standard, the error in question must be obvious and determinative of the outcome of the case.

The FCA ultimately held that Mr. Carroll did not demonstrate that the Tax Court made a "palpable and overriding error" and that "there was ample evidence before the Tax Court, including Mr. Carroll's evidence given during cross-examination, to conclude that the test for gross negligence was satisfied".

### Was Mr. Carroll Denied Procedural Fairness at the Tax Court?

Mr. Carroll argued that he was denied procedural fairness at the Tax Court because he was not permitted to cross-examine a CRA representative and because the Tax Court ignored his attempts to read submissions and arguments into the record. The FCA disagreed with Mr. Carroll and held that there was no procedural unfairness.

The Minister was not required to call a witness from the CRA to establish the facts required under subsection 163(2). Accordingly, if Mr. Carroll wanted to examine a CRA representative, he should have either sought the Minister's agreement to have a CRA representative appear or compelled the attendance of a CRA representative with a subpoena. However, Mr. Carroll did neither. In addition, the FCA reviewed the Tax Court transcripts and found that Mr. Carroll did not ask the Tax Court about examining or cross-examining a CRA representative.

In reviewing the Tax Court transcripts, the FCA found that the Tax Court did not ignore Mr. Carroll's attempts to read submissions and arguments into the record but instead the Tax Court permitted Mr. Carroll to present his case, asked Mr. Carroll if he wished to add anything after the Minister cross-examined him, and again invited Mr. Carroll to present any additional arguments he wished after the Minister's argument.

## Conclusion

The FCA dismissed the appeal and held that the imposition of a penalty under subsection 163(2) does not require a refund to be paid as a precondition and does not depend in any way on whether the Minister accepts or assesses a return or whether there are taxes or taxable income in dispute.

— *Francis Chang*

# *Stewart v. The Queen*, 2022 DTC 1002 (Tax Court of Canada) — Tax Court Allows Claimed Sub-Contractor Payments From Net Worth Assessment

## Background

In 2010, Mr. Stewart and his father, Raymond Sr., started a barn painting business in Port Rowan in rural Norfolk and Haldimand counties along the northern shore of Lake Erie. By trade, Raymond Sr. was a lifelong painter. Mr. Stewart's two cousins, Dave and Mike, were also involved in the business and had experience in barn repair, spray painting, and maintenance. While Mr. Stewart was the sole owner, Raymond Sr., Dave, and Mike provided essential operational services as sub-contractors.

For each barn painting job, the proceeds would be divided based upon a proportional share, relevant to each person's contribution of services, and paid in cash to Dave and Mike, although there was the occasional cheque. There was a high level of trust among the four of them and much of this arrangement was agreed to verbally only. No records were produced reflecting invoices, payments, or receipts.

Raymond Sr. was given a debit and credit card by Mr. Stewart to buy the necessities of life, such as food, gas, amenities, and other personal items. These expenses "roughly" represented Raymond Sr.'s compensation for working as a sub-contractor for the business.

Mr. Stewart filed timely tax returns for 2011 and 2012 and used the services of H&R Block to prepare the returns; however, the information that was provided to H&R Block was markedly incomplete. Mr. Stewart's 2011 and 2012 taxation years were audited and, using a net worth assessment ("NWA"), the Minister reassessed Mr. Stewart for additional business income of $84,000 and $110,000 for those years. The Minister also imposed "gross negligence penalties" under subsection 163(2) of the *Income Tax Act* (the "ITA").

The CRA auditor, Ms. Misner, had over two decades of experience with the agency before her recent retirement and this experience was evident in her NWA working papers, her justification for the NWA, and the methodology used. There were few, if any, business records, there were no separate business bank accounts, there were two distinct business sources, and there was a record of late filings before 2011.

Ms. Misner demonstrated in her testimony why there was no issue regarding the need for the NWA or the methodology followed and Mr. Stewart did not contest this. Mr. Stewart stated that his mistakes were made through ignorance and were corrected soon after the auditor explained them to him.

## Issues

The two issues before the Tax Court were:

(1) If and to what extent should the alleged payments to the sub-contractors be allowed, the NWA amended accordingly, and the unreported income reduced?

(2) Are the subsection 163(2) penalties warranted in the circumstances?

## Analysis

### The Sub-Contractor Expenses

The bases for a taxpayer to challenge an NWA are as follows: (1) the taxpayer may challenge the need for an NWA ("necessity"); (2) the taxpayer may challenge the methodology used in the NWA ("methodology"); and (3) the taxpayer may challenge the quantum of the reassessment based upon errors, such that avoidable, identifiable, and inappropriate errors should be reversed ("patent errors"). The taxpayer must provide the evidence to challenge an NWA, regardless of whether the NWA is challenged based on necessity, methodology, or patent error.

Mr. Stewart did not challenge the necessity for the NWA nor the methodology used, conceding that his books were insufficient and incorrect. The sole issue was therefore whether the complete rejection of any amounts attributable to sub-contractor expenses was a "patent error" that should be reversed.

The Tax Court held that Mr. Stewart had shown, more probably than not, that payments were in fact made to sub-contractors and that it was a "patent calculation error" for Ms. Misner to first conduct the NWA based on the conclusion that a barn painting business that required sub-contractors was operated in 2011 and 2012 and then later, primarily because there was mathematical incongruity, reject any and all allocation of amounts to sub-contractor expenses. More specifically, Ms. Misner should not have rejected the amounts because they:

(i) did not match the Industry Canada direct cost to wages comparison;

(ii) were greater than the cash the NWA identified as being available;

(iii) were not disclosed in the initial tax returns;

(iv) lacked recipient taxpayer verification; and

(v) were vague rounded amounts.

The Tax Court further stated that this "patent calculation error" more likely than not rendered the calculation of unreported income and assessed tax incorrect.

Having held that a "patent calculation error" existed, the next issue for the Tax Court was to determine what amount and where that amount should be reasonably reflected in the NWA to reverse the rejection of all sub-contractor expenses. The Tax Court acknowledged that, from the evidence before it, there was no exact way to determine with any certainty what these amounts actually were. However, the Tax Court accepted Mr. Stewart's explanation that some of these amounts were paid to Raymond Sr. "in kind" during the years in question.

The Tax Court found that the "in kind" payments would have been withdrawn from Mr. Stewart's personal bank accounts and/or charged to Mr. Stewart's personal credit cards because, as confirmed by Ms. Misner in the NWA, there were only personal cards and accounts (no business cards or accounts). These withdrawals would have appeared in the NWA as personal expenses that were comingled and indiscernible among Mr. Stewart's other personal expenses. The "in kind" payments were added as an unexplained increase to personal net worth, but not deducted as a business expense. This would be a double entry error and a patent double-counting error in the NWA.

Accordingly, the Tax Court allowed the amounts identified as variances in the NWA as sub-contractor expenses, being $44,681.12 and $65,775.25 for 2011 and 2012, respectively. The Tax Court acknowledged that it may never be known what the exact amounts that were paid to the sub-contractors were; however, some amounts were paid to Raymond Sr. as well as to Dave and Mike. Raymond Sr.'s amounts were paid "in kind" in a fashion that had a negative double impact given the use of the NWA. The Tax Court held that any amount within the NWA variances that were not paid to sub-contractors were more than offset by the imprecise amount paid to Raymond Sr., which had a double impact which is probably never to be known. The Tax Court held that the amounts were likely much higher and that Mr. Stewart bears the responsibility of their continued imprecision and the likely shortfall.

### The Subsection 163(2) Penalties

The Minister asserts that Mr. Stewart was grossly negligent in failing to include the (now reduced) unreported amounts in income and that there was a "knowing act" of omission on Mr. Stewart's part.

Mr. Stewart agreed that he omitted portions of revenues and expenses attributable to the sub-contractors, but the Tax Court held that Mr. Stewart did not undertake a "knowing act" of withholding any amount from income as his "records would not afford him or anyone the luxury of knowing what his revenue, income, expenses or any such notion was".

Further, the Tax Court held that Mr. Stewart was not grossly negligent because he lacked the intent and the "where with all" comprising "wilful blindness".

The Tax Court found it difficult to ascribe indifference and total disinterest towards compliance to Mr. Stewart in the years in question. The Tax Court accepted, on balance, that Mr. Stewart's conduct and omissions arose out of significant inexperience and ignorance in accounting for his new business during its early days, where the new owner and operator himself was surrounded by equally new and inexperienced personnel. The Tax Court also noted that Mr. Stewart used a tax preparer to file his taxes and "applied his (il)logic in doing so" and then corrected his ways when he learned of the audit, even before the reassessments and penalties were imposed.

Accordingly, the Tax Court vacated the penalties for both years.

## Conclusion

The Tax Court allowed the appeal and held that the NWA included a "patent calculation error" that should be reversed because the CRA auditor completed the NWA based on the conclusion that Mr. Stewart's business required sub-contractors to operate but then completely rejected any allocation of unallocated cash to sub-contractor expenses because she "could not assign them any value".

The Tax Court also vacated the gross negligence penalties for 2011 and 2012, having found that Mr. Stewart lacked the intent and the wherewithal that constitute "wilful blindness".

— *Francis Chang*

# CURRENT ITEMS OF INTEREST

## Reporting Requirements for Trusts Update

Budget 2018 introduced proposals that would require certain trusts to report additional beneficial ownership information with the T3 return. This information reporting requirement would apply to returns in respect of the 2021 and subsequent taxation years. However, the proposed legislation was never included in a bill or enacted.

On January 14, the CRA added an update on the status of these proposals to its website. Because the legislation to support this proposed measure is still pending, the CRA will administer the new reporting and filing requirements once there is supporting legislation that receives Royal Assent. Until that time, the CRA will continue to administer the existing rules for trusts under enacted legislation. The proposed beneficial ownership reporting requirements will not be part of the published 2021 T3 income tax return. As such, taxpayers should not delay filing their 2021 T3 tax returns.

The CRA will provide an update when more information is available.

## Interest Rates for the First Calendar Quarter

The CRA published the prescribed interest rates that apply to amounts owing to the CRA and amounts owed by the CRA to individuals and corporations. The rates apply from January 1, 2022, to March 31, 2022. As far as income tax is concerned, the rates are as follows:

- The interest rate charged on overdue taxes, Canada Pension Plan contributions, and employment insurance premiums will be 5%.
- The interest rate to be paid on corporate taxpayer overpayments will be 1%.
- The interest rate to be paid on non-corporate taxpayer overpayments will be 3%.
- The interest rate used to calculate taxable benefits for employees and shareholders from interest-free and low-interest loans will be 1%.
- The interest rate for corporate taxpayers' pertinent loans or indebtedness will be 4.15%.

## 2022 Automobile Deduction Limits and Expense Benefit Rates for Businesses

The Department of Finance announced the automobile income tax deduction limits and expense benefit rates for 2022 on December 23, 2021. Effective January 1, 2022, many of the amounts will be adjusted to reflect increases to the consumer price index.

- The ceiling for capital cost allowances ("CCA") for zero-emission passenger vehicles will increase from $55,000 to $59,000 before tax, in respect of vehicles (new and used) acquired on or after January 1, 2022.
- The ceiling for CCA for passenger vehicles will increase from $30,000 to $34,000 before tax, in respect of vehicles (new and used) acquired on or after January 1, 2022.
- Deductible leasing costs will increase from $800 to $900 per month, before tax, for new leases entered into.
- The limit on the deduction of tax-exempt allowances paid by employers to employees who use their personal vehicle for business purposes in the provinces will increase by two cents to 61 cents per kilometre for the first 5,000 kilometres driven, and 55 cents for each additional kilometre. For the territories, the limit will also increase by two cents to 65 cents per kilometre for the first 5,000 kilometres driven, and 59 cents for each additional kilometre.
- The general prescribed rate used to determine the taxable benefit of employees relating to the personal portion of automobile expenses paid by their employers will increase by two cents to 29 cents per kilometre. For people who are employed principally in selling or leasing automobiles, the rate used to determine the employee's taxable benefit will increase by two cents to 26 cents per kilometre.
- The maximum allowable interest deduction for new automobile loans will remain at $300 per month for 2022.

## Taxpayers' Ombudsperson Makes Recommendations to CRA

Canada's Taxpayers' Ombudsperson has included five recommendations in his report this year for improvements at the Canada Revenue Agency ("CRA").

The Annual Report provides key achievements, identifies CRA service issues, and outlines trends in complaints. It also provides an overview of the activities undertaken by the Office of the Taxpayers' Ombudsperson for the period of April 1, 2020, to March 31, 2021.

In 2020–2021, the Office of the Taxpayers' Ombudsperson received twice the number of complaints and referrals to CRA Service Feedback and almost three times the calls. Many of the complaints received related to the CRA's administration of COVID-19 benefits, with the majority coming from people experiencing financial hardship.

The Ombudsperson has recommended that a link be added to the CRA website directing taxpayers to the taxpayer ombudsperson, and that the CRA should increase awareness of the ability to complain or provide feedback about the agency's services.

Further, the Ombudsperson has recommended that the CRA create a process to ensure that any unclassified information that is provided by the CRA to assist contact centre agents is also made publicly available.

The CRA was also urged to develop systems to allow taxpayers to securely submit documents electronically, without the need for a CRA account.

Regarding the CRA's call centre services, the Ombudsperson said Canadians are commonly faced with long wait times, premature disconnections, or are told the queues are full. It recommended the CRA should offer a callback service for taxpayers seeking advice on tax matters.

## Government's Future Tax Policies Outlined in Mandate Letter

Deputy Prime Minister and Minister of Finance Chrystia Freeland received a new mandate letter from Prime Minister Justin Trudeau on December 16. The letter outlines the government's future tax commitments.

The letter calls on the minister to set out plans for the implementation of the following measures:

- the introduction of legislation to raise the corporate income tax payable by banks and insurance companies that earn more than $1 billion and to require them to pay a temporary Canada Recovery Dividend;
- the creation of a minimum 15% tax rule for top-bracket earners;
- the introduction of a tax on luxury cars, boats, and planes;
- increased investment in the CRA, to close the tax gap and combat aggressive tax planning and avoidance; and
- modernization of the general anti-avoidance rule regime to focus on economic substance and to restrict the ability of federally regulated entities, including financial institutions such as banks and insurance companies, to use tiered structures as a form of corporate tax planning to flow Canadian-derived profit through entities in low-tax jurisdictions in order to reduce taxes back in Canada.

Trudeau also said, to boost business investment and productivity, amendments to the *Income Tax Act* should be introduced to allow privately owned, Canadian-controlled businesses to expense up to $1.5 million of growth-enhancing investments, such as software, patents, and machinery. He also asked to reform the Scientific Research and Experimental Development Program to reduce red tape, align eligible expenses with today's innovation and R&D, and make the program more generous for companies that take the biggest risks.

To improve the supply of affordable housing, the letter calls on the Minister to:

- introduce amendments to the *Income Tax Act* to require landlords to disclose in their tax filings the rent they receive pre- and post-renovation and to pay a proportional surtax if the increase in rent is excessive;
- establish an anti-flipping tax on residential properties, requiring properties to be held for at least 12 months;
- implement a tax on non-resident, non-Canadian owners of vacant, underused housing, and subsequently include foreign-owned vacant land within large urban areas; and

- review and consider possible reforms to the tax treatment of Real Estate Investment Trusts, reviewing the down-payment requirements for investment properties, and developing policies to curb excessive profits while protecting small independent landlords.

The letter also calls for the following measures:

- The introduction of a tax credit for small businesses to invest in improvements to ventilation, to combat the spread of COVID-19;
- Increasing the Eligible Educator School Supply Tax Credit to 25%, expanding eligibility to include tech devices, and ensuring that teaching supplies purchased for employment duties are eligible no matter where those duties are performed;
- To address labour shortages and help businesses grow, introducing a Labour Mobility Tax Credit of up to $600 per year for workers in the building and construction trades in eligible travel and temporary relocation expenses, and a Career Extension Tax Credit of up to $1,650 per year for seniors who want to stay in the workforce;
- Introducing an investment tax credit for capital invested in carbon capture, utilization, and storage ("CCUS") projects;
- Supporting clean energy and clean technologies by introducing additional investment tax credits for renewable energy and battery storage solutions;
- Doubling the Mineral Exploration Tax Credit for minerals essential to the manufacture of vital clean technologies;
- Establishing an investment tax credit of up to 30% for a broad range of clean technologies, both market-ready and emerging, to be identified in ongoing consultation with experts;
- To extend the life of home appliances, introducing a 15% tax credit of up to $500 to cover the cost of repairs performed by technicians;
- Supporting first-time home buyers with the introduction of legislation to double the First-Time Home Buyers' Tax Credit;
- Working with financial institutions to create a tax-free First Home Savings Account;
- Supporting homeowners by introducing legislation to double the Home Accessibility Tax Credit and to establish a new Multigenerational Home Renovation tax credit;
- Introducing a one-time income tax deduction for health care professionals who are just starting out in their careers to help with the costs of setting up their practice in a rural community;
- Advancing the priority of Indigenous communities to reclaim full jurisdiction over tax matters;
- Implementing a national tax on vaping products;
- Introducing amendments to the *Income Tax Act* to make anti-abortion organizations that provide dishonest counselling to pregnant women about their rights and options ineligible for charitable status;
- Expanding the Medical Expense Tax Credit to include costs reimbursed to surrogate mothers for IVF expenses;
- Converting the Canada Caregiver Credit into a refundable tax-free benefit, allowing caregivers to receive up to $1,250 a year; and
- Working with the Minister of Innovation, Science and Industry, and with the support of the Minister of National Revenue, to implement a beneficial ownership registry.

# RECENT CASES

## Tax Court rejects application of adoption tax credit to surrogacy expenses

The appellant claimed the adoption expense tax credit ("AETC") provided by section 118.01 of the *Income Tax Act* ("ITA") for expenses related to a gestational surrogacy arrangement. The CRA denied the credit because the surrogacy organization was not a licensed adoption agency and the appellant's claimed legal fees were not incurred with respect to an adoption order. Acknowledging that the AETC does not apply to surrogacy expenses, the appellant argued that the credit infringed his equality rights under the Charter.

The appeal was dismissed. Subsection 15(1) of the Charter establishes "the right to the equal protection and equal benefit of the law without discrimination", subject to an exception in subsection 15(2) for "the amelioration of conditions of disadvantaged individuals or groups". For the appellant to prevail, the AETC must violate subsection 15(1) and not be saved by subsection 15(2). The Court stated that the appellant's evidentiary record was insufficient even to establish that he had advanced "analogous grounds" for applying subsection 15(1). This alone was enough to justify dismissal, but the Court went on to note that adoptees face disadvantages — vulnerability, hindered emotional development, and the like — that surrogate children, with a home and parents waiting for them, do not. Parliament meant to encourage adoption via the AETC, as it does throughout the ITA when it offers tax credits. To extend the credit to surrogacy would be inconsistent with this intention. The statute is tailored to encourage adoption, not to discourage surrogacy; the small tax advantage provided by the AETC does not disparage or disadvantage surrogate parents.

*Foley v. The Queen*

2021 DTC 1066

## Profit from sale of vacant lots purchased from municipality confirmed as taxable business income, not capital gain

This is an appeal of a decision rendered against the appellant by the Tax Court of Canada ("TCC"). The TCC confirmed the validity of assessments raised against the appellant with respect to the tax implications of vacant land, situated in downtown Mascouche, Québec, purchased by the appellant in 2006 and 2008 and resold in 2009 and 2010 (2019 DTC 1159). The city of Mascouche intended for these lots to be developed and commercialized. The appellant considered the gains realized on the sale as capital gains, while the CRA considered it as taxable business income for purposes of the *Income Tax Act*. The appellant appealed the decision to the FCA, arguing its intent was to make a long-term investment and that it could not be faulted for selling the land after receiving a very lucrative, non-solicitated offer.

The appeal was dismissed with costs. In such cases, questions of law must be analyzed based on the standard of correctness, while questions of fact or mixed questions of fact and law can only be revised if a palpable and overriding error is demonstrated. Since both parties agreed that the conclusions reached by the TCC were questions of mixed facts and law, to justify the intervention of the FCA, the appellant needed to demonstrate a palpable and overriding error. The threshold to demonstrate a palpable and overriding error is very high. The FCA ruled that the appellant did not succeed in proving its case. In fact, the appellant invited the Court to review all the evidence and reach its own conclusions, for which the FCA had no jurisdiction in the absence of a demonstrated palpable and overriding error. The FCA ruled that the case, as evaluated by the TCC, contained sufficient evidence to justify the validity of the assessments. The FCA noted that the Tax Court had concluded the evidence showed that the unique motivation of the appellant at the time of purchase, as well as afterwards, was to resell the lots at a profit and the appellant never intended to pursue the development project. The actions of the municipality regarding the development project rendered a rapid increase in the value of the lands objectively predictable. Accordingly, since the appellant failed to demonstrate the existence of a palpable and overriding error, the FCA dismissed the appeal with costs.

*6610048 Canada Inc. v. The Queen*

2021 DTC 5135

**TAX NOTES**

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Wolters Kluwer Canada Limited
300-90 Sheppard Avenue East
Toronto ON M2N 6X1
1 800 268 4522 tel
1 800 461 4131 fax
www.wolterskluwer.ca