Tax Notes

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FEDERAL BUDGET HIGHLIGHTS

The 2021 Federal Budget was presented on April 19, 2021. Numerous new tax measures were announced in the Budget, and all of them are summarized below.

COVID-19 Measures

Tax Treatment of COVID-19 Benefit Amounts: Where an individual must repay their COVID-19 benefits, Budget 2021 proposes that they may have the option of deducting the repayment in the year in which the benefit was received, rather than the year of repayment. The Budget also proposes that federal and provincial/territorial benefits received by non-residents will be taxable in Canada.

Canada Emergency Wage Subsidy, and Canada Emergency Rent Subsidy and Lockdown Support:

- The Canada Emergency Wage Subsidy ("CEWS") and Canada Emergency Rent Subsidy ("CERS") will be extended to September 25, 2021, and additional qualifying periods may be added to further extend the subsidies to November 20, 2021.
- The CEWS subsidy rates will be gradually phased out beginning July 4, 2021.
- A publicly-listed corporation must repay wage subsidy amounts received for a qualifying period that begins after June 5, 2021, if its aggregate compensation for specified executives during the 2021 calendar year exceeds its aggregate compensation for specified executives during the 2019 calendar year.
- To ensure that the alternative baseline remuneration periods for a particular qualifying period continue to generally reflect the corresponding calendar months covered by the qualifying period, Budget 2021 proposes to allow an eligible employer to elect to use alternative baseline remuneration periods.
- The rate structure for the CERS will be gradually phased out beginning on July 4, 2021.

Canada Recovery Hiring Program: The Budget proposes to introduce the new Canada Recovery Hiring Program to subsidize up to 50% of the incremental remuneration paid to eligible employees between June 6, 2021, and November 20, 2021. An eligible employer can claim either the hiring subsidy or the CEWS for a particular qualifying period, but not both.

Personal Tax Measures

Disability Tax Credit: Various changes will be made to certain therapy requirements — these changes should ultimately help more Canadians qualify for the credit.

Canada Workers Benefit: The Budget proposes to enhance the Canada Workers Benefit by increasing the phase-in rate, decreasing the phase-out thresholds, and decreasing the

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phase-out rates.

Northern Residents Deduction: The Budget will expand access to the travel component of the Northern Residents Deduction.

Postdoctoral Fellowship Income: Budget 2021 proposes to include postdoctoral fellowship income in "earned income" for RRSP purposes.

Fixing Contribution Errors in Defined Contribution Pension Plans: The government will introduce rules to allow contributions to correct under-contributions and reimbursements to correct over-contributions to defined contribution pension plans.

Taxes Applicable to Registered Investments: Budget 2021 proposes that the tax imposed under Part X.2 of the *Income Tax Act* be pro-rated based on the proportion of shares or units of the registered investment that are held by investors that are themselves subject to the qualified investment rules.

Registration and Revocation Rules Applicable to Charities: The Budget proposes stricter rules for revoking a charity's status due to terrorism, ineligible individuals, and false statements made for the purpose of maintaining registration.

Electronic Filing and Certification of Tax and Information Returns: The Budget proposes several measures to encourage electronic filing of various types of returns. Moreover, the requirement that signatures be obtained in writing will be eliminated for certain forms.

Business Tax Measures

Immediate Expensing: A CCPC can immediately expense up to $1.5 million (per year) of newly-acquired depreciable property — subject to certain exclusions. This is a temporary measure that applies to property that becomes available for use before January 1, 2024.

Rate Reduction for Zero-Emission Technology: Manufacturers of zero-emissions technologies will qualify for reduced corporate tax rates. The rate is reduced to 7.5% if the income would be subject to the general rate, or is reduced to 4.5% if the income would be subject to the small business rate. Income must be zero-emission technology manufacturing and processing income.

CCA for Clean Energy Equipment: CCA Classes 43.1 and 43.2 will be expanded to provide accelerated CCA to additional types of technological investments.

Film or Video Production Tax Credits: The Budget proposes to extend various timelines in respect of these credits.

Mandatory Disclosure Rules: The government is consulting on various proposals that would enhance Canada's mandatory disclosure rules.

Avoidance of Tax Debts: Budget 2021 proposes to address aggressive schemes that involve transferring assets to avoid paying tax debts, as well as a penalty for those who devise and promote such schemes.

Audit Authorities: The Budget proposes amendments to clarify that CRA officials have the authority to require persons to answer all proper questions and provide reasonable assistance. An amendment will also clarify that persons must respond to questions in writing or orally, including in any form specified by the CRA official.

Base Erosion and Profit Shifting ("BEPS")

Interest Deductibility Limits: A corporation's deductible interest expense will be limited to its EBITDA for tax purposes.

Hybrid Mismatch Arrangements: Budget 2021 announced the government's intention to implement rules consistent with the OECD's BEPS Action 2. The first legislative package would be released for stakeholder comment later in 2021, and those rules would apply as of July 1, 2022. The second legislative package would be released for stakeholder comment after 2021, and those rules would apply no earlier than 2023. This package would comprise rules consistent with the Action 2 recommendations that were not addressed in the first package.

GST/HST

Application of the GST/HST to E-commerce: Budget 2021 proposes changes to the proposed legislation that was initially presented with the *2020 Fall Economic Statement*. These changes take into consideration feedback from stakeholders.

GST New Housing Rebate Conditions: Budget 2021 proposes to remove the condition that where two or more individuals buy a new home together, each of them must be acquiring the home for use as their primary place of residence, or the primary place of residence of a relation.

Rebate of Excise Tax for Goods Purchased by Provinces: Budget 2021 proposes to create a joint election mechanism to specify that the vendor alone would be eligible to apply for the rebate only if it jointly elects with the province to be the eligible party. If no joint election were made, then only the province would be eligible to apply for the rebate.

Input Tax Credit Information Requirements: Budget 2021 proposes to increase the current ITC information thresholds to $100 (from $30) and $500 (from $150), and to allow billing agents to be treated as intermediaries for purposes of the ITC information rules.

Excise Tax

Excise Duty on Tobacco: Budget 2021 proposes to increase the tobacco excise duty rate by $4 per carton of 200 cigarettes, along with corresponding increases to the excise duty rates for other tobacco products.

Excise Duty on Vaping Products: Budget 2021 proposes to implement a tax on vaping products in 2022 through the introduction of a new excise duty framework.

Tax on Select Luxury Goods: Budget 2021 proposes an additional tax on luxury cars, boats, and aircraft. For vehicles and aircraft, the tax is equal to the lesser of 10% of its full value, or 20% of its value over $100,000. For boats priced over $250,000, the tax is equal to the lesser of: 10% of its full value, or 20% of its value over $250,000.

Other Measures

Digital Services Tax: Budget 2021 proposes to enact a Digital Services Tax ("DST"). Although a multilateral agreement on cross-border digital tax is currently in progress, the federal government plans to implement a tax until an agreement comes into force. The DST will be equal to 3% of revenue from digital services that rely on data and content contributions from Canadian users. The tax would only apply to large businesses with gross revenue of €750 million or more. The DST would apply from January 1, 2022, until an acceptable multilateral approach takes effect.

Consultation on Transfer Pricing: Citing the Federal Court of Appeal's recent *Cameco* decision, the federal government believes that the current transfer pricing rules can encourage multinationals to inappropriately shift income out of Canada and perceives this as a risk to the integrity of Canada's corporate tax system. As a result, the government intends to consult on Canada's transfer pricing rules. In the coming months, the Department of Finance will release a consultation paper to provide stakeholders with an opportunity to comment on possible measures to improve Canada's transfer pricing rules.

Tax on Unproductive Use of Canadian Housing by Foreign Non-Resident Owners: Budget 2021 announces the government's intention to implement a national, annual 1% tax on the value of non-resident, non-Canadian-owned residential real estate that is considered to be vacant or underused, effective January 1, 2022. The tax will require all owners, other than Canadian citizens or permanent residents of Canada, to file a declaration as to the current use of the property, with significant penalties for failure to file.

Modernizing the GAAR: Budget 2021 briefly reiterated the government's commitment to strengthen and modernize Canada's general anti-avoidance rule.

Disbursement Quotas for Charities: Budget 2021 proposes launching public consultations with charities over the coming months on potentially increasing the disbursement quota and updating the tools at the CRA's disposal, beginning in 2022. This could potentially increase support for the charitable sector and those that rely on its services by between $1 billion and $2 billion annually.

Investment Tax Credit for Carbon Capture: Budget 2021 proposes to introduce an investment tax credit for capital invested in carbon capture, utilization, and storage ("CCUS") projects with the goal of reducing emissions by at least 15 megatonnes of CO2 annually. This measure will come into effect in 2022. The government will move quickly with a

90-day consultation period with stakeholders on the design of the investment tax credit, after which it will announce more details — including the rate of the incentive. Following consultations, the government intends to introduce legislation at the earliest opportunity to implement the investment tax credit.

Previously Announced Measures: Budget 2021 reiterated the government's commitment to various measures that have been proposed but not yet enacted.

COVID-19 UPDATE

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

Federal

CRA Provides More International Income Tax Relief (March 31, 2021)

In the earlier days of the pandemic, the CRA announced a series of temporary policies that provide relief in respect of international tax provisions. These policies applied from March 13 to September 30, 2020. However, due to ongoing travel restrictions, there are concerns about income tax issues that may extend beyond the initial relief period. Accordingly, the CRA has added a new section to this international tax guidance that provides additional guidance and relief. This new supplemental section discusses the following:

- extending the administrative relief for individual income tax residence to December 31, 2021;
- clarifying some of the CRA's views regarding the effect of the travel restrictions on the determination of a permanent establishment in Canada; and
- summarizing the Canadian income tax and compliance requirements of certain cross-border employees and providing some relief from these requirements.

CRA Updates CEWS FAQ (March 30, 2021)

Frequently asked questions — Canada emergency wage subsidy (CEWS), has been updated again on the CRA's website. Numerous questions have been updated to reflect the latest proposed changes to the CEWS.

Provincial

Alberta

New Small and Medium Enterprise Relaunch Grant Payment (April 13, 2021)

The Alberta government is offering small businesses affected by the most recent public health orders another payment of up to $10,000 from the Small and Medium Enterprise Relaunch Grant ("SMERG").

Alberta businesses affected by the latest public health orders can apply for another payment in the second half of April. This additional payment will also be available to new businesses that began operating between March 1, 2020, and March 31, 2021, as well as hotels, taxis, and ride-sharing services.

The SMERG offers financial assistance to Alberta businesses, cooperatives, and non-profit organizations with fewer than 500 employees that have faced restrictions or closures due to COVID-related public health orders and have experienced revenue losses of at least 30%.

Funds can be used to:

- Cover costs of items that help prevent the spread of COVID-19, such as personal protective equipment and cleaning supplies;
- Pay rent and employee wages, or replace inventory; and
- Help businesses expand their online presence or e-commerce opportunities so that they can continue to serve customers.

The program is scheduled to be open for applications until May 31 and is capped at $350 million.

The updated SMERG program will replace the previously announced Enhanced COVID-19 Business Benefit and will provide funding to more businesses facing increased public health measures as announced on April 6.

Applications for the additional $10,000 payment will open in the second half of April for any organization that meets the eligibility criteria. Applications received before the previous program closure on March 31 will continue to be processed. Companies that did not apply under the first run of SMERG will not be able to apply for the initial payments — only the new $10,000 payment. Money received under SMERG does not need to be repaid.

British Columbia

Online Applications Open for PST Rebate (April 8, 2021)

In September 2020, the government announced a new rebate that will allow incorporated businesses to recover 100% of the PST on most machinery and equipment purchased between September 17, 2020, and September 30, 2021.

Online applications are open. The first window is open until September 20, 2021, followed by a second window after the eligible rebate period (October 1, 2021, to March 31, 2022). Rebate eligibility is based on the CRA's CCA classes.

To apply for the PST rebate on select machinery and equipment, visit: https://www2.gov.bc.ca/gov/content/taxes/sales-taxes/pst/rebate-machinery-equipment.

Circuit Breaker Business Relief Grant (April 8, 2021)

The government will provide more than $50 million to help the 14,000 restaurants, bars, breweries, wineries, gyms, and fitness centres affected by the March 30, 2021, provincial health orders. Grants of $1,000 to $10,000 are available to hospitality and fitness businesses impacted by the March 30, 2021, Public Health Officer ("PHO") orders on gatherings and events and liquor and food-serving premises. Grants are available until June 4, 2021, or until funds are fully expended, whichever comes first.

All hospitality and fitness businesses that partially or fully closed to comply with the March 30, 2021, PHO orders are eligible. Examples include:

- Restaurants, pubs, and bars;
- Coffee shops, cafes, and cafeterias;
- Lounges and nightclubs;
- Breweries, wineries, and tasting rooms;
- Pilates and yoga (Hatha) studios;
- Barre studios; and
- Gyms offering indoor low-intensity group exercise classes.

Grants are fully funded and do not have to be paid back. Grants can be used for expenses like:

- Rent and utilities;
- Insurance;
- Maintenance; and
- Cost of perishable food loss.

The grant amount is based on number of employees:

- No employees: $1,000 grant
- 1 to 4 employees: $2,000 grant
- 5 to 99 employees: $5,000 grant
- 100+ employees: $10,000 grant

Applications opened the week of April 12. Applicants must confirm:

- The business was impacted by the March 30, 2021, PHO orders;
- The business is registered as a BC business;

- The business can demonstrate majority ownership and operations in BC; and
- The business pays taxes in BC.

Prince Edward Island

New Supports for Community Museums and Cultural Venues (April 13, 2021)

The provincial government is providing funding to help community museums and cultural venues impacted by COVID-19. The COVID-19 Operational Support Program for Community Museums and Cultural Venues provides support for operational expenses to help compensate for reduced revenue due to the pandemic. Funding up to a maximum of $2,500 is available for expenses. The deadline to apply is September 30, 2021.

For further details, see: https://www.princeedwardisland.ca/en/service/covid-19-operational-support-program-community-museums-and-cultural-venues.

Reduced Interest Rate on Overdue Property Tax Balances (April 14, 2021)

The province will lower the interest rate on overdue property taxes, which had been announced in the 2021–2022 Operating Budget, to help reduce the financial burden for Island property owners.

The rate will be adjusted from 1.5% per month to match the median Atlantic Canadian rate of 1% per month and will take effect on January 1, 2022. The change comes after a jurisdictional scan indicated that the Province's rate of 1.5% was on the upper end of the scale nationally.

Québec

Temporary Interest and Late-Filing Penalty Relief (April 15, 2021)

Revenu Québec will be flexible with citizens who submit their tax returns after the April 30 deadline. Thus, no late-filing penalty will be imposed and no interest will be applied on a 2020 tax balance from May 1 to 31, 2021. This flexibility measure is intended to give Québecers affected by the COVID-19 crisis more time to fulfill their tax responsibilities.

AERAM Program Enhanced (April 9, 2021)

The government is proposing additional enhancements to the Assistance to Businesses in Regions on Maximum Alert ("AERAM") Program to further mitigate the difficulties encountered by businesses due to the recent public health measures.

The following enhancements will apply to businesses subject to a closure order:

- The moratorium for repayment of principal and interest related to the financial assistance granted is extended until September 1, 2021.
- There is a maximum additional amount of $10,000 to compensate for the cost of closing a restaurant or a gym. This additional support applies to companies qualifying for AERAM and aims to support establishments that had recently resumed their activities, but which had to cease them following a re-closure order in the context of the COVID-19 pandemic.
- There is additional support equal to a maximum amount of $45,000 for establishments that were closed for more than 180 days, i.e., $15,000 per month, for fixed costs disbursed the three months following the last month of eligibility under closure. This support is in addition to the non-repayable contributions of previous months, up to a maximum of 100% of the funding granted for companies that demonstrate liquidity needs.
- Companies offering catering service are added to the category of restaurants, retroactive to January 1, 2021.

Saskatchewan

Re-Open Saskatchewan Training Subsidy Extended (April 9, 2021)

The Government of Saskatchewan announced an extension of the Re-Open Saskatchewan Training Subsidy ("RSTS") from March 31, 2021, to June 30, 2021. The RSTS was launched on June 18, 2020. The program provides a temporary training subsidy to provide businesses with financial support to train employees as they adjust to the impacts of the pandemic and safely align business activities with the Re-Open Saskatchewan Plan. The RSTS reimburses eligible private-sector employers 100 per cent of employee training costs up to a maximum of $10,000 per business.

Cap on Third-Party Food Delivery Fees (April 14, 2021)

The Government of Saskatchewan has introduced *The Supporting Saskatchewan Restaurants Act*, which extends the cap on fees on food delivery charges, offering a longer period of support to restaurants who have had to shift much of their business to online delivery and pick-up orders during the global COVID-19 pandemic.

The caps in *The Supporting Saskatchewan Restaurants Act* remain the same as those in the emergency order announced in March, where food delivery service providers can charge up to 18% of the order price for services including delivery, and up to 10% when restaurants use a third-party ordering app but the restaurant fulfills the delivery or consumers choose a pick-up option.

The caps apply to pre-PST order prices and apply for delivery services offered to restaurants regularly offering dine-in eating facilities. The cap does not apply to delivery fees for grocery stores or convenience stores. Provincial health orders have restricted dine-in capacity for restaurants, requiring them to rely more heavily on delivery services.

The cap will be in effect from May 1 to August 31, 2021.

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.

Société de fiducie Blue Bridge Inc. v. Minister of National Revenue, 2021 DTC 5035 (Federal Court of Appeal)

On March 24, 2021, the Federal Court of Appeal ("FCA") upheld the decision of the Federal Court ("FC") denying an application for judicial review and declaratory judgement presented by Société de fiducie Blue Bridge ("Blue Bridge") and granting the application for an order to comply with the requests for documents and information ("RFDI") brought by the Minister of National Revenue (the "Minister").

Background

This decision follows a series of RFDIs sent by the Minister to Blue Bridge as trustee of certain Canadian trusts (as well as their former trustees) under section 231.2 of the *Income Tax Act* (the"ITA") in the context of requests for documents and information submitted by France to the Canadian tax authorities pursuant to Article 26 of the *Convention Between Canada and France for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (the"Treaty").

The French tax authorities sought, among other things,

(1) the identity of the beneficiaries;

(2) a detailed inventory of the property, rights, and capitalized income of the trusts, their "market value", as well as any modification, transmission, attribution, or distribution;

(3) the total amount of the assets of certain trusts; and

(4) a copy of the balance sheets and T3 declarations of the trusts.

According to Blue Bridge, certain information in the requests could, if disclosed, lead to taxation contrary to the Treaty. As a result, Blue Bridge refused to provide the information to the Minister and filed applications for declaratory judgement and judicial review with the FC. In addition to quashing the RFDIs, Blue Bridge sought an order declaring that, in its capacity as trustee of the Canadian trusts, it was not subject to French tax laws and that the Treaty did not permit French tax to be levied on Canadian capital that has no nexus with France.

In response to Blue Bridge's refusal to provide the documents, the Minister filed an application for an order to comply with the RFDIs under subsection 231.7(1) of the ITA.

Federal Court

On both matters, the FC decided in favour of the Minister.

Blue Bridge contended that Article 26 of the Treaty provides for the exchange of information between Canada and France in the application of the provisions of the Treaty and to the extent that the proposed taxation is not contrary to the Treaty. In that respect, Blue Bridge submitted that France sought to tax potential and discretionary beneficiaries on Canadian capital from the trusts without any nexus with France, which is not taxable under the Treaty. For Blue Bridge, the documents and information requested by France were therefore aimed at an illegal tax and, consequently, the RFDIs submitted by the Minister were not relevant to the application of the Treaty, since they would result in taxation contrary to the Treaty. Therefore, the Minister could not rely on section 231.2 of the ITA, which provides authority to request documents and information for purposes related to the administration or enforcement of a tax treaty, to request documents and information from Blue Bridge.

The FC dismissed Blue Bridge's application for lack of jurisdiction to dispose of the issues, judging that those issues related to the dispute between Blue Bridge and France (and not the Minister) on the merits.

In addition, the FC found that even if it had jurisdiction, Blue Bridge did not satisfy all conditions required to obtain a declaratory judgement. In particular, the FC noted that the debate was theoretical (no assessment having been issued by the French tax authorities) and that the French tax authorities should have been a party to the litigation because of their interest in opposing Blue Bridge's application.

The FC granted the Minister's application to obtain a compliance order under section 231.7 of the ITA, the Minister having demonstrated that all conditions were met.

The FC pointed out that Article 26 of the Treaty provides for the exchange of information "foreseeably relevant" for carrying out the provisions of the Treaty and concluded that the determination of the Minister that the requests were not made randomly and satisfied the "foreseeably relevant" test was well founded.

The FC ordered Blue Bridge to comply with the RFIDs based on subsection 231.2(1) of the ITA and Article 26 of the Treaty within 30 business days from the date of judgement.

Federal Court of Appeal

The questions before the FCA were:

(1) Did the trial judge err in dismissing Blue Bridge's applications for declaratory judgement and judicial review?

(2) Did the trial judge err in granting the compliance orders sought by the Minister on the basis that the criteria prescribed by Article 26 of the Treaty and subsection 231.7(1) of the ITA were met?

Standard of review

The FCA reiterated the applicable standards of review: questions of law are reviewed on a standard of correctness, and questions of fact or mixed fact and law are reviewed on a standard of palpable and overriding error, except where there is an extricable legal principle at issue, and therefore reviewed on a standard of correctness (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, and *Housen v. Nikolaisen*, 2002 SCC 33).

Did the trial judge err in dismissing Blue Bridge's applications for declaratory judgement and judicial review?

The FCA did not accept either of Blue Bridge's contentions that the trial judge erred in law (1) in denying the applications for declaratory judgement and judicial review on the basis that it lacked jurisdiction, the court's powers of review and supervision in relation to the interpretation and application of international treaties being recognized in Canadian jurisprudence, and (2) in deciding that it is not for the FC to rule on the declarations sought or to decide the questions sought on judicial review since this would require ruling on the merits of a dispute that is really between Blue Bridge and France and not the Minister, whereas the debate at hand was exclusively between Blue Bridge and the Minister, in Canada, under the Treaty and Canadian law.

The FCA determined that the trial judge did not err in exercising his discretion to dismiss Blue Bridge's application for declaratory judgement on the basis that representations were based on facts the Minister could not verify, and because

it would require the Minister to decide in advance the validity of potential French assessments with incomplete facts and a superficial knowledge of the tax laws of France (no expert evidence on French law having been introduced). The FCA did not agree with Blue Bridge that only Canadian law was at issue and that the debate did not involve the interests of France. The FCA relied in particular on *Hillis v. Canada (Attorney General)*, 2015 DTC 5098 (FC), in which a similar issue was before the court and in which similar conclusions had been reached by the judge (in particular as to the preliminary stage, the expertise in foreign law, and the foreign state not being a party to the proceedings).

Furthermore, the FCA concluded that the trial judge did not err in choosing not to rule on the merits of the applications for judicial review and in exercising his discretion to dismiss them. The FC may decline to intervene in the administrative process and refuse to grant relief for reasons other than the merits of the application for judicial review.

Did the trial judge err in granting the compliance orders sought by the Minister on the basis that the criteria prescribed by Article 26 of the Treaty and subsection 231.7(1) of the ITA were met?

Blue Bridge argued that the trial judge erred in law in interpreting Article 26 of the Treaty by only considering one of its purposes, namely to "promote the widest possible scope of exchange of information", a test that he applied indifferently to the criteria of "foreseeable relevance" and "taxation not contrary to the Treaty".

In addition, Blue Bridge argued that the FC could not grant the orders requested by the Minister without considering both tests. In Blue Bridge's view, the judge erred in law by not making any findings with respect to the second test, "taxation [or proposed taxation] not contrary to the Treaty", focusing only on the "foreseeable relevance" test.

Blue Bridge argued that it is the Minister's responsibility to ensure that the criteria in the Treaty are met before transmitting the information requested by the foreign state. Blue Bridge argued that France was seeking to tax the capital of Canadian trusts under the *Loi n° 2011-900 du 29 juillet 2011 de finances rectificative pour 2011* ("Loi rectificative de 2011") which attaches all foreign trust assets to a French settlor or beneficiary in order to subject them to the *impôt de solidarité sur la fortune* ("ISF"). Thus, if the information requested by France were to be provided by the Minister, there would be a possibility of taxation contrary to the Treaty.

The FCA did not uphold Blue Bridge's claims and determined that the FC did not have expert evidence of French law to conclusively determine the issue of taxation contrary to the Treaty. It was therefore impossible for the trial judge to rule on the effect of the Loi rectificative de 2011.

Furthermore, the FCA emphasized that the RFDIs requested by France were aimed at determining whether income tax, ISF, and the *sui generis* levy and gift, transfer, and/or inheritance tax applied. In this respect, the FCA stated in its conclusion that it is not convinced that any assessment by France would be contrary to the Treaty.

Blue Bridge alleged that the trial judge erred in law by failing to analyze the principles under which France claimed to be able to tax trust assets in France despite the Treaty. Blue Bridge argued that the legal fiction in the Loi rectificative de 2011 attaching all the assets of a foreign trust to a French settlor or beneficiary in order to subject them to the ISF rules is contrary to Article 22(6) of the Treaty, which confers exclusive jurisdiction on Canada to tax the capital of Canadian trusts.

The FCA noted that the French tax authorities considered that certain assets received or placed by French taxpayers in a foreign trust may be subject to French tax even if they are located in Canada in accordance with the Treaty, and did not deny that tax treaties take precedence over the Loi rectificative de 2011.

In the FCA's view there was insufficient evidence of French law to decide the legal issue, and Blue Bridge's argument was based on facts that had not been verified, and could not be verified at this stage, by the Minister.

The FCA considered that the trial judge's reasoning in rejecting Blue Bridge's interpretation of the Minister's duties to analyze requests for assistance, was based on the degree of analysis required to satisfy such an obligation (and not on the continuity of the obligation). In the FCA's opinion, the trial judge rightly concluded that the requirement for a thorough search and analysis of the facts and law of the requesting state would impede the proper and effective operation of the Treaty provisions.

The FCA determined that the trial judge considered all of the evidence introduced before the court by Blue Bridge (not just the facts before the Minister at the time of the issuance of the RFDIs) in concluding that the Minister properly

applied the standard of foreseeable relevance and that he did not err in failing to analyze the validity of the French tax system in light of the matter before him.

The FCA reiterated that once the notices of assessment are issued (if any), French taxpayers will be able to object to them before the competent French authorities, and they, or Blue Bridge, will be able to request assistance from the competent authorities under Article 25 of the Treaty. At that time, the Minister will be able to take an informed position on the validity of the regime.

With respect to subsection 231.7(1) of the ITA, Blue Bridge argued that requests for assistance must be analyzed on an ongoing basis, in light of all of the evidence presented by the Canadian taxpayers, and that the judge erred in law in concluding that the Minister's duties to analyze requests for assistance from France were strictly limited to the time of their receipt and that it was not the Minister's role, or the FC's role, to re-analyze them based on the evidence presented by Blue Bridge.

The FCA found that the trial judge had not erred in concluding that the requirements of subsection 231.7(1) of the ITA were met on a balance of probabilities given that:

(1) Blue Bridge was required to provide the information or documents requested by the Minister and the Minister acted for purposes related to the administration or enforcement of the Treaty;

(2) Blue Bridge did not provide the information or documents; and

(3) the information or documents were not protected by solicitor-client privilege.

— *Sabrina Gravel*

Enid D. Oddleifson v. Her Majesty the Queen, 2021 DTC 1021 (Tax Court of Canada)

Background

In *Enid D. Oddleifson* v. *Her Majesty the Queen*,[1] Justice Graham of the Tax Court of Canada ("TCC") reviewed a motion to quash the appeals of Ms. Oddleifson (the "Taxpayer") on the basis that she waived her right to appeal the reassessments to the Court. The reassessments resulted from the denial by the Canada Revenue Agency ("CRA") of the taxpayer's claim of donation tax credits in respect of gifts that she claimed to have made through a tax shelter known as the Global Learning Gifting Initiative ("GLGI"). The Taxpayer appealed those denials.

Thousands of other taxpayers who claimed donation tax credits in respect of gifts supposedly made to GLGI were reassessed by the CRA and denied the credits. Many of those taxpayers filed notices of objection.

Certain of the taxpayers who filed notices of objections appealed to the TCC and four cases were selected to proceed to trial. The remaining taxpayers who had filed objections received a letter (the "Options Letter") from the CRA presenting those taxpayers with a number of options. One option was to agree to a settlement offer and sign a waiver of the right to appeal. The Options Letter enclosed an agreement giving effect to this option (the "Settlement Agreement").

Another option available to the taxpayers was to sign an agreement to be bound by the outcome of the four lead cases and agree to a corresponding waiver of their rights of appeal if the CRA reassessed based on the outcome in the lead cases (the "Agreement to be Bound"). Along with other taxpayers, the Taxpayer signed an Agreement to be Bound.

One of the lead cases that proceeded to trial was reported as *Mariano v. The Queen*,[2] where the appeal was dismissed by Justice Pizzitelli. The reassessments of the taxpayers who had signed Agreements to be Bound were confirmed by the CRA but certain taxpayers, including the Taxpayer, nevertheless appealed to the TCC.

The Tests of *Abdalla v. The Queen*

The Minister of National Revenue ("MNR") filed motions to quash the appeals of 27 of the taxpayers who had signed Agreements to be Bound.

[1] 2021 DTC 1021 (TCC).

[2] 2015 DTC 1209 (TCC).

In that regard, in *Abdalla v. The Queen* ("Abdalla"), the TCC granted the MNR's motion on the basis of the Supreme Court of Canada's decision in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co*[3] and the wording of subsection 169(2.2) of the *Income Tax Act* (the "Act"), and determined that for a waiver of a taxpayer's right to appeal to be effective the following conditions must be satisfied:

(a) the waiver must be in writing;

(b) the taxpayer must have full knowledge of his or her rights; and

(c) the taxpayer must have an unequivocal and conscious intention to abandon those rights.

In *Abdalla*, the TCC carefully analyzed the Options Letter, the Settlement Agreement, and the Agreement to be Bound and found that:

- there were four options presented to taxpayers:
  (1) agreeing to be bound to the test cases;
  (2) accepting the settlement offer;
  (3) doing nothing and running the risk that the Minister would take further action without notice; and
  (4) appealing directly to the Court; and
- there was sufficient explanation in the documents provided that a taxpayer would have had full knowledge of the rights that they were waiving if they had signed the Agreement to be Bound.

Based on the above conditions, the TCC held that Ms. Abdalla had waived her right to appeal to the TCC and the TCC quashed Ms. Abdalla's appeal.

Ms. Abdalla appealed the TCC's decision to the Federal Court of Appeal, which upheld the TCC's decision. Her leave to appeal to the Supreme Court of Canada was dismissed.

Application of the *Abdalla* Tests

The three tests established in *Abdalla* for a waiver of a taxpayer's rights of appeal to be valid applied in this case. The waiver must be in writing, the taxpayer must have full knowledge of their rights, and the taxpayer must have an unequivocal and conscious intention to abandon those rights.

The Taxpayer signed the Agreement to be Bound, which contained a waiver of her rights to appeal, and accepted that the first test was met as well as the third test as she had an unequivocal and conscious intention to abandon the rights that she had.

Issue to be Considered

The question to be determined by the TCC was whether the Taxpayer had full knowledge of the waiver of her rights.

Analysis

The Taxpayer submitted that the CRA had the burden of proving her full knowledge of her rights. The TCC agreed with this position.

The TCC also agreed with the TCC's decision in *Abdalla* that, after reading the Options Letter, the Settlement Agreement, and the Agreement to be Bound, a person would have full knowledge of the rights being waived.

Notwithstanding the conclusions in *Abdalla* at the TCC and the Federal Court of Appeal levels, although the burden of proof remained on the CRA, the Taxpayer was aware that the burden of proof would likely be met by the CRA based on the documents themselves. Although the Taxpayer was not required to prove anything, the absence of sufficient evidence could cause her to lose her appeal if the CRA provided sufficient proof.

The Taxpayer's counsel argued the Taxpayer's evidence must be accepted unless her evidence is "inherently incredulous". The TCC disagreed with this argument because:

(a) It is not required to accept a taxpayer's evidence simply because it was not challenged on cross-examination. The evidence must be credible and reliable and a failure to conduct a cross-examination on an affidavit is not an

[3] [1994] 2 SCR 490.

admission as to the truth of its contents.

(b) To the extent that there are gaps in the Taxpayer's evidence, the MNR is not required to flesh out the missing evidence through cross-examination of the Taxpayer. The Taxpayer cannot ask the TCC to infer the truth of missing evidence because of an alleged lack of cross-examination.

The Taxpayer's Knowledge of her Rights

As previously mentioned, in *Abdalla*, the TCC found that the Options Letter gave taxpayers four options: settle, agree to be bound by the outcome in the lead appeals, appeal directly to the Court, or do nothing.

The Taxpayer argued that she had a clear misapprehension that half of her rights did not exist as she thought she only had two choices, rather than the four she was entitled to. The TCC found that this was not supported by the evidence and the Taxpayer's affidavit, which made no mention of her right to appeal directly to the TCC, and the MNR was not required to make the Taxpayer's case through cross-examination. Considering the lack of evidence, the TCC determined that the Taxpayer was aware of her right to appeal. The Taxpayer's affidavit also supported the conclusion that she was aware that she had the option of doing nothing.

The Taxpayer argued that she did not clearly understand what the option of doing nothing entailed. The Options Letter did not describe which action the MNR would take but all parties understood that the MNR's plan was to bring an application under subsection 174(1) of the *Income Tax Act* (the "Act") and to join under the same appeal the 17,000 taxpayers who had objected to the appeals of other taxpayers who appealed directly to the TCC.

The Minister ultimately withdrew the application under subsection 174(1) of the Act and the Taxpayer submitted that the CRA should have mentioned to her that its subsection 174(1) application was likely to fail and that the absence of this information caused her to not have full knowledge of her rights.

The TCC dismissed this argument because:

(a) the CRA did exactly what it said it would do by bringing the application;

(b) the right that the Taxpayer had to be made aware of was her right to do nothing and the Options Letter made her aware of that right; and

(c) at the time that the CRA wrote the Options Letter, it did not know how many taxpayers would accept the settlement offer or how many taxpayers would agree to be bound by the outcome of the lead appeals and it would not have known that the application under subsection 174(1) of the Act would involve a large number of taxpayers.

The TCC held that the Taxpayer had full knowledge of her rights and therefore that the waiver she signed was effective.

The Options Letter stated that the settlement offer or the offer to be bound by the lead cases was open for 30 days but no time limits applied to the options of doing nothing or appealing directly to the TCC.

The TCC determined that the delay of 30 days was an adequate amount of time to seek advice in respect of the available options. The Taxpayer argued that 30 days was not sufficient time to seek advice and she was not a sophisticated taxpayer. These arguments were rejected by the TCC.

The TCC quashed the Taxpayer's appeals of her various reassessments with costs being awarded to the MNR.

— *Marc-André Bélanger*

CURRENT ITEMS OF INTEREST

2021 British Columbia Budget

British Columbia Finance Minister Selina Robinson presented *Budget 2021: A Stronger BC for Everyone* ("Budget 2021") on April 20, 2021. Budget 2021 announced several tax measures that include changes to the BC *Income Tax Act* and the *Provincial Sales Tax Act*. Highlights from the tax measures include the following:

- The book publishing tax credit is extended for five years to March 31, 2026.
- Self-employed individuals are not required to repay the BC Emergency Benefit for Workers if they would have qualified for the benefit or the Canada Emergency Response Benefit on their gross income.
- The mining flow-through share tax credit eligibility period during which an expenditure must be incurred by the issuer to be renounced in favour of flow-through shares is temporarily extended by 12 months.
- Effective July 1, 2021, the climate action tax credit rate remains at $174 per adult and $51 per child due to the delay in the carbon tax rate increase.
- Effective April 21, 2021, electric bicycles and tricycles are exempt from provincial sales tax ("PST"). Also, conversion kits used to electrify conventional bicycles and tricycles, and parts and services for electric bicycles and tricycles, are exempt from PST.
- Effective March 11, 2019, the exemption for a new resident's effects is expanded to provide more time for new residents to bring their vehicles and other goods into BC without being subject to PST.
- The PST refund for motor vehicles purchased in BC and resold within seven days will be eliminated.
- Several technical amendments to the BC *Income Tax Act* and *Provincial Sales Tax Act* are proposed.
- Budget 2021 also proposed changes to the:
  - *Carbon Tax Act*;
  - *Motor Fuel Tax Act*;
  - *Tobacco Tax Act*;
  - *Employer Tax Act*;
  - *School Act*;
  - *Taxation (Rural Area) Act*; and
  - *Speculation and Vacancy Tax Act*.

See the Wolters Kluwer Dispatch for a complete summary of Budget 2021's measures at: https://resource.intelliconnect.ca/resource/scion/document/default/cchcaabe5bfe619931b65b8c864ea72a8ac3d?cfu=null&cpid=WKCA-TAL-IC&uAppCtx=RWI.

Manitoba Budget

Manitoba's 2021 budget was presented on April 7, 2021, by Finance Minister Scott Fielding. Budget 2021 projects a deficit of $1.597 billion for 2021–2022.

Budget 2021 included numerous tax changes, some of which were announced in the days leading up to the budget. The tax changes from the budget are summarized below.

Teaching Expense Tax Credit

The budget announced a refundable Teaching Expense Tax Credit for educators in childcare and K–12 facilities. They will be able to claim a 15% credit for up to $1,000 of eligible teaching supplies, resulting in a refundable credit of $150. Manitoba will adopt the same eligibility criteria as the federal Eligible Educator School Supply Tax Credit.

Small Business Venture Capital Tax Credit

Effective for the 2021 taxation year, the Small Business Venture Capital Tax Credit will be amended to increase the maximum annual tax credit claim from $67,500 to $120,000 and to increase an investor's maximum eligible investment from $450,000 to $500,000.

Film and Video Production Tax Credit

The frequent filming bonus, under the Film and Video Production Tax Credit, will be paused for two years, allowing companies that had to shut down for COVID-19 to remain fully eligible until March 31, 2022.

Interactive Digital Media Tax Credit

The Interactive Digital Media Tax Credit will be made permanent. In addition, eligibility will be expanded to allow add-on activities, such as downloadable content, on-going maintenance and updates, and data management and analysis that are complementary to the main product.

Tax Credit Extensions

Expiration dates for the following tax credits will be extended:

- the Book Publishing Tax Credit will be made permanent; and
- the Cultural Industries Printing Tax Credit and Community Enterprise Development Tax Credit will be extended to December 31, 2022.

Exemption for Personal Care Services

As announced on April 1, 2021, Retail Sales Tax ("RST") will be removed from personal care services, such as hair services, non-medical skin care and aesthetician services, body modifications, and spa services. The budget announced that this exemption will take effect on December 1, 2021. This exemption will not apply to tanning services provided by a device that uses ultraviolet radiation

Streaming Services, Online Marketplaces, Online Accommodation Platforms

RST will be expanded to apply to the following out-of-province businesses, effective December 1, 2021:

- Streaming service providers will be required to collect and remit RST on the sale of audio and video streaming services.
- Online marketplaces will be required to collect and remit RST on the sale of taxable goods sold by third parties on their online platforms.
- Online accommodation platforms will be required to collect and remit RST on the booking of taxable accommodations in Manitoba.

Further details will be provided before these changes come into force.

Education Property Tax Rebates

The budget provided additional details on Manitoba's plan to phase out the education property tax announced on April 1, 2021. Property owners will continue to pay education property taxes but will receive an education property tax rebate cheque in the same month that municipal property taxes are due. Rebates will be sent automatically and no application is necessary. Rebate amounts are as follows:

- A 50% property tax rebate will be paid to residential and farm property owners over the next two years (25% in 2021 and 25% in 2022). This rebate will be based on the school division special levy and community revitalization levy before the education property tax credit advance.
- Other property owners will see a 10% rebate this year of the total of both the school division special levy and the education support levy payable.

Other Property Tax Rebates and Credits

Existing education property tax credits and rebates will be proportionately reduced by 25% in 2021. These include the: Education Property Tax Credit and Advance, Seniors School Tax Rebate, Seniors Education Property Tax Credit, and Farmland School Tax Rebate.

Health and Post-Secondary Education Tax Levy

Thresholds for the Health and Post-Secondary Education Tax Levy, commonly called the payroll tax, will increase effective January 1, 2022. The exemption threshold will increase from $1.5 million to $1.75 million of annual remuneration and the threshold below which employers pay a reduced rate will be increased from $3 million to $3.5 million.

Saskatchewan Budget

Saskatchewan Finance Minister Donna Harpauer presented the province's 2021–2022 budget on April 6, 2021. The budget projects a deficit of $2.6 billion for 2021–2022, with a return to balance not expected before 2026–2027. The budget included several tax changes, which are summarized below.

Active Families Benefit

Saskatchewan will reintroduce the Active Families Benefit, as announced in the 2020 Speech from the Throne. Effective January 1, 2021, this refundable income tax credit will assist families with the cost of registering children in cultural, recreational, and sports activities. It will be available to families with a combined net income of $60,000 or less and will provide up to $150 per child, with an additional $50 for children with disabilities.

Saskatchewan Technology Start-Up Incentive

The budget announced the following changes to the Saskatchewan Technology Start-up Incentive, a 45% income tax credit for individual, corporate, or venture capital investments in an eligible start-up business ("ESB"):

- the credit will be extended for an additional five years;
- the amount that an ESB can raise under the program will double, from $1 million to $2 million;
- the carry-forward period to claim unused tax credits will increase from four years to seven years; and
- an annual cap of $2.5 million per year will be established on the maximum value of tax credits that can be issued.

Vapour Products Tax

The budget introduced a new Vapour Products Tax with a rate of 20% on the retail price of all vapour liquids, products, and devices, effective September 1, 2021. Complementary amendments will be introduced to exempt vapour products from the Provincial Sales Tax.

Tobacco Tax

The budget added a new tobacco tax category for heat-not-burn ("HNB") tobacco sticks. Effective June 1, 2021, HNB tobacco sticks will be taxed at a rate of 20.5¢ per stick.

Taxation of Electric Vehicles

The budget introduced a new tax on electric vehicles to help fund provincial highway maintenance. Effective October 1, 2021, a tax of $150 will apply to each passenger electric vehicle registered in Saskatchewan. It will be collected at the time of vehicle registration.

Education Property Tax

The budget announced changes to the education property tax mill rates for 2021. Rates for agricultural property will decrease, but all other property classes will see a small increase. The mill rates for 2021 are listed below.

- Agricultural — 1.36 (down from 1.43 in 2020)
- Residential — 4.46 (up from 4.12 in 2020)
- Commercial/Industrial — 6.75 (up from 6.27 in 2020)
- Resource — 9.79 (up from 9.68 in 2020)

Resource Royalties

The budget announced the following changes to resource royalties.

- A five-year moratorium on associated gas royalties will take effect as of April 1, 2021, to encourage oil producers to invest in new methane emission reduction projects.
- The High Water-Cut Program will be modernized and expanded to provide a new royalty benefit where substantial investments in water handling capacity are made. These changes apply from April 1, 2021, for a period of five years.
- The sodium sulphate royalty will be replaced with a flat royalty rate of 3% on all sodium sulphate production and a 10% incentive credit will be introduced for approved capital projects that diversify products or improve operating efficiency. These changes apply retroactively from April 6, 2020.

Updated CRA Information Circular

The CRA published IC70-6R11, *Advance Income Tax Rulings and Technical Interpretations*. It cancels and replaces Information Circular IC70-6R10. The new circular's effective date is April 1, 2021.

New PST Rules in British Columbia Now in Effect

British Columbia's new PST requirements on sellers of digital software and telecommunication services came into effect on April 1, 2021. Sellers of such services must collect PST on sales to British Columbia residents if their revenues in the province are more than $10,000. As part of these new requirements, all Canadian sellers of vapour products must register to collect PST on all online or mail-order sales to British Columbia customers, even if the minimum revenue threshold is not met.

Further, as of April 1, 2021, the province began charging PST on sweetened carbonated beverages.

SCC Finds Federal Carbon Pricing Constitutional

On March 25, 2021, the Supreme Court of Canada ruled that the federal carbon pricing law is constitutional (see 2021 DTC 5026, summarized under "Recent Cases").

Under the *Greenhouse Gas Pollution Pricing Act* (the "Act"), the federal government can impose its carbon price backstop in any province or territory that does not have a carbon pricing policy or whose price falls below that set by the backstop. The backstop is currently $30 per tonne of carbon dioxide equivalent and will rise by $10 in April. The rate will be $50 in 2022 and, under the government's latest plans, the price is to rise at $15 per tonne per year from 2023 until 2030.

Saskatchewan, Ontario, and Alberta challenged the constitutionality of the Act by referring the legislation to their respective courts of appeal. The courts of appeal for Saskatchewan and Ontario found the Act constitutional, while the Alberta Court of Appeal found it unconstitutional. The Ontario government referred the legislation to the Supreme Court.

The Supreme Court found the federal legislation to be constitutional. The majority of the judges noted that "global warming causes harm beyond provincial boundaries and that it is a matter of national concern under the 'peace, order, and good government' clause of the constitution." They also noted that the "legislation would only apply where provincial or territorial pricing systems are not strict enough to reduce global warming."

In addition, the majority noted that the term 'carbon tax' is often used to describe the pricing of carbon emissions. However, they said this has nothing to do with the concept of taxation, as understood in the constitutional context. As such, they also concluded that the fuel and excess emission charges imposed by the Act were constitutionally valid regulatory charges and not taxes.

RECENT CASES

Supreme Court determines *Greenhouse Gas Pollution Pricing Act* is constitutional

Parliament passed the *Greenhouse Gas Pollution Pricing Act* (the "Act") in 2018, based on the consensus that greenhouse gas emissions contribute to global climate change. Countries around the world committed to drastically reduce their greenhouse gas emissions under the 2015 Paris Agreement. In Canada, the federal government passed the Act to implement its commitments. Specifically, the law requires provinces and territories to implement carbon gas pricing systems by January 1, 2019, or adopt one imposed by the federal government. Three provinces — Saskatchewan (2019 DTC 5055), Ontario (2019 DTC 5090), and Alberta (2020 DTC 5025) — challenged the constitutionality of the Act by referring the legislation to their respective courts of appeal. The courts of appeal for Saskatchewan and Ontario found the Act constitutional, while the Alberta Court of Appeal found it unconstitutional. The question for the Supreme Court was whether the federal government had the authority to pass such a law that puts a price on carbon. The provinces argued they had their own climate policies, tailored to their own circumstances, and that they have jurisdiction over natural resources. The federal government argued it has the authority to address issues that are national in scope. It also maintained that the law was a backstop (or safety net) to ensure minimum carbon pricing standards across the country.

The appeals were dismissed. The majority of the Supreme Court found the Act to be constitutional. They noted global warming causes harm beyond provincial boundaries and that it is a matter of national concern under the "peace, order and good government" clause of the Constitution. The majority noted the Act would only apply where provincial or territorial pricing systems are not strict enough to reduce global warming. The majority further noted that national concern is a well-established but rarely applied doctrine of Canadian constitutional law. The application of this doctrine is strictly limited in order to maintain the autonomy of the provinces and respect the diversity of Confederation. However, the federal government has the authority to act in appropriate cases, where there is a matter of genuine national concern and the recognition of that matter is consistent with the division of powers. The Constitution divides federal and provincial powers. The majority observed that Canada, which has a federal system of governance, requires a balance between federal and provincial powers and this concept, known as federalism, is a foundational principle of Canada's Constitution. The term "carbon tax" is often used to describe the pricing of carbon emissions. However, the majority said this had nothing to do with the concept of taxation, as understood in the constitutional context. As such, they also concluded that the fuel and excess emission charges imposed by the Act were constitutionally valid regulatory charges and not taxes. The Supreme Court pointed out that all of the parties agreed that global climate change is real. It's caused by greenhouse gas emissions resulting from human activities and it poses a grave threat to the future of humanity. Justice Brown, in dissent, found that Parliament didn't have the authority to pass the legislation and found it unconstitutional. Justice Rowe, also in dissent, said the national concern doctrine refers to a residual power of last resort of Parliament; he found the Act unconstitutional. Justice Côté, dissenting in part, agreed with the majority's analysis that the subject matter of the Act could be of national concern and within Parliament's authority, but found the Act as drafted was unconstitutional.

Greenhouse Gas Pollution Pricing Act (Re)

2021 DTC 5026

Appellant entitled to Disability Tax Credits with respect to her son diagnosed with Attention Deficit Hyperactivity Disorder

This is an appeal of a determination made by the Minister disallowing the appellant's claim for a disability tax credit ("DTC") made in respect of her son, JA, for taxation years 2013–2018. JA was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and had significant behavioural difficulties. The Minister, while recognizing the seriousness of JA's medical condition, nevertheless disallowed the DTC on the basis he did not consider that JA was markedly restricted in performing the mental functions for everyday life.

The appeal was allowed. The case revolves solely on the "markedly restricted" factor. As pleaded by the appellant in

her Notice of Appeal, even with medication respecting the ADHD diagnosis, throughout the pertinent period JA was "argumentative, aggressive and angry . . .". She further pleaded in the Notice of Appeal that he "needs [his mother's] 100% assistance to help him adapt to social cues and to learn to use correctly the right behaviour in social interactions, with his sibling and peers." After considering all the evidence and jurisprudence, including the testimony of JA's mother, the Court found that the evidence established that during the pertinent period JA had substantial impairment of ability to engage in appropriate social interactions with other persons with whom he comes into contact. Per subsection 118.3(1) and paragraph 118.3(1)(*a.2*), "an individual" must have "one or more severe and prolonged impairments in . . . mental functions . . . the effects of which are such that the individual's ability to perform a single basic activity of daily living is markedly restricted . . .". A medical practitioner must so certify in prescribed form. Per paragraph 118.4(1)(*b*), "an individual's ability to perform a basic activity of daily living is markedly restricted only where all or substantially all of the time, even with therapy . . . and medication, the individual is . . . unable (or requires an inordinate amount of time) to perform a basic activity of daily living". The court found that all criteria were met. The court stated that the "adaptive functioning" statutory reference to ability regarding social interactions was particularly relevant. The judge stated that the evidence in this matter has established for him that JA during the pertinent period has had substantial impairment of ability to engage in appropriate social interactions with other persons with whom he comes into contact. They include other students, hockey players, video games players, hockey officials, coaches, his own physician, store clerks, and his same-aged sister. He is singularly argumentative, abusive, and insulting. He does not learn from or adopt his mother's constant guidance, which results in these negative scenarios being played out time and time again. Thus, and construing the statutory term "adaptive functioning" on a humane and compassionate basis as directed by jurisprudence, the judge accepted that JA was markedly restricted in respect of the adaptive functioning aspect of mental functions necessary for everyday life.

Jungen v. The Queen

2021 DTC 1016

Court of Appeal for Saskatchewan hears appeals of decisions relating to universal life insurance policies

This Saskatchewan Court of Appeal decision addresses appeals and cross-appeals related decisions of the Court of Queen's Bench, providing interpretation of a universal life insurance policy ("ULP") and of the *Saskatchewan Insurance Amendment Regulations* (the "2018 Regulation"). The Queen's Bench judge heard the applications consecutively and rendered three separate but similar decisions: (1) *Ituna Investment LP v. Industrial Alliance Insurance and Financial Services Inc.*, 2019 DTC 5048 (SKQB); (2) *Mosten Investment LP v. The Manufacturers Life Insurance Company o/a Manulife Financial*, 2019 DTC 5049 (SKQB); and (3) *Atwater Investment LP v. BMO Life Assurance Company*, 2019 DTC 5050 (SKQB). In each, the judge dismissed the insured's application for declaratory relief because the declarations sought were not supported on his interpretation of the insurer's ULP. The judge also interpreted the 2018 Regulation as having "only prospective effect", from which it may be inferred that the judge found the 2018 Regulation did not interfere with the insured's rights under a contract for life insurance that had been entered into prior to its enactment. Each appellant appealed against the interpretation of their ULP and each respondent cross-appealed against the interpretation of the 2018 Regulation. The primary issue relates to whether the judge erred when he found that the ULPs did not "provide for unlimited stand-alone investment opportunities within a side account". In their applications, the Appellants asked the judge to declare that they had a contractual right to invest unlimited amounts within a side account. The Respondents argued the ULPs ought to be interpreted as establishing a contractual limit on the amount that may be invested or held in a side account. The judge found the ULPs did not "provide for unlimited stand-alone investment opportunities" within a side account. The various issues raised in the appeals all relate to whether the judge erred in that regard.

The *Mosten* Appeal (CACV3407) and the *Atwater* Appeal (CACV3408) were allowed. The *Ituna* Appeal (CACV3409) is dismissed. The cross-appeals in CACV3407, CACV3408, and CACV3409 are allowed. A ULP is a contract for life insurance that allows the insured to take advantage of accrual-tax exemption provisions under the *Income Tax Act* and related Regulations ("Tax Rules"). Typically, an insured obtains a tax advantage on investment income by means of an account where the return on investment is exempt from accrual tax, provided sums in the account do not exceed certain limits (exempt account). Separately, the insurer may receive, hold, and invest sums on behalf of an insured in an account that is not exempt from accrual tax (side account). The amount an insured may invest within an exempt

account is limited by the Tax Rules, which is not the case within a side account. The dispute is whether there is a contractual limit on the amount an insured may invest in a side account. The lower Court judge found that the ULPs did not "provide for unlimited stand-alone investment opportunities" within a side account. The issue is whether the judge erred in that regard. The Queen's Bench judge denied the relief sought by the appellants by declining jurisdiction insofar as it related to matters that required the interpretation of the Tax Rules or their application in a context necessary to grant the declaratory relief sought. He felt the matter should be deferred to the Tax Court of Canada. The Appellate Court agreed. He also ruled that the Applications were premature because the issues raised had not been tested with the Canada Revenue Agency ("CRA"). Again, the Federal Court agreed. Accordingly, there was no basis to interfere with the judge's decision not to grant the relief sought. With respect to contract interpretation issues, the Appellate Court ruled that it was unable to conclude, based on the contract as a whole, that the meaning of the word premium was limited to payments for the present and future cost of insurance. However, the Appellate Court disagreed with the Queen's Bench judge's interpretation of "premium" and "payment of premium". In the Appellate Court's view, the word premium simply meant an amount paid by the insured to the insurer. Based on the above and its thorough analysis, the Federal Court ruled that the *Mosten* Appeal (CACV3407) and the *Atwater* Appeal (CACV3408) were allowed, setting aside the judge's interpretations of the ULPs and the judge's costs orders. As to the principal issue, the Federal Court found that the ULPs do not set a limit on the amount an insured may invest in the side account. The Queen's Bench judge's interpretation of the 2018 Regulation is varied. The Federal Court found that the Regulations applied to all licensed insurers in respect of all contracts for life insurance that are not variable insurance contracts. As the parties to the *Mosten* Appeal and the *Atwater* Appeal have each met with mixed success in these matters, the Appellate Court made no order as to costs in the Appellate Court or in the Court of Queen's Bench. On the other hand, it ordered Ituna to pay Industrial Alliance's taxable costs in the *Ituna* Appeal and at the Court of Queen's Bench.

Mosten Investment v. Manulife Financial

2021 DTC 5022

Relevance, not reliance, deciding factor regarding disclosure

The applicants were members of LTI, a general partnership. Another general partnership, known as CTR, was established by LTI and two other entities. CTR and LTI engaged in foreign currency forward ("FCF") contracts with ODL, a brokerage based in London, UK. The Minister asserted that CTR and LTI's FCF contracts were sham agreements. Concurrently with the audit leading to the appealed reassessments, the CRA was looking into the activities of ODL, including questioning officials at ODL's UK office. The applicants lodged four appeals relating to the reassessments issued against them. Following discoveries, the applicants moved for an order that the Crown must answer eight discovery examination questions it had declined to answer (or failed to answer to the applicants' satisfaction).

The motion was partially allowed. The overarching principle is that questions on discovery examination must be relevant in respect of some matter expressed in either party's pleadings. At discovery, relevance should be broadly and liberally construed and its threshold should be lower than at trial, but without allowing it to enter the realm of a fishing expedition. Everything is relevant that may directly or indirectly assist the party seeking the discovery to maintain its case or combat that of its adversary. In many cases, the Crown argued the material was not considered by the auditor and therefore refused to answer the question or provide the requested materials. The Court ordered the Crown to answer seven of the eight questions. What is pertinent is what is in Her Majesty's — not the auditor's — possession, authority, or control that relates to any of the matters in issue. Otherwise acceptable discovery questions should be answered unless evidence makes apparent that the work to generate the answer clearly would be excessive. The idea that disclosure should start and end with the auditor's work is unfounded, both legally and sensibly. Relevance, not reliance, is the deciding factor with respect to disclosure.

Thompson Bros. (Constr.) Ltd. v. The Queen

2021 DTC 1015

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