Tax Notes

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COVID-19 UPDATE

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

Federal

Bill C-20 Receives Third Reading (July 21, 2020)

The draft legislation published on July 17 (see LEGISLATION PROPOSES MAJOR CHANGES TO THE CEWS (JULY 17, 2020) below) has been introduced as Bill C-20, *An Act respecting further Covid-19 measures*. The Bill received third reading in the House of Commons on July 21 and is waiting to be passed by the Senate.

Tax Court of Canada — Fast-Track Settlement Conferences (July 21, 2020)

In order to offer parties additional avenues for resolving their appeals, the Tax Court is introducing a fast-track settlement conference process. This process will not require parties to have made a written offer of settlement. If parties wish to use the fast-track settlement conference process, they must file a joint written request with the Court. The fast-track settlement conference process will be available to parties temporarily to help alleviate the backlog caused by the Court's closure.

Federal Court and Federal Court of Appeal — Resuming In-Person Court Operations (July 17, 2020)

The Courts Administration Service issued this guide — www.fca-caf.gc.ca/fca-caf/pdf/Guide-public-version-july172020-Final.pdf — outlining the procedures for in-person court operations at the Federal Court and Federal Court of Appeal.

Financial Support for Persons With Disabilities During COVID-19 (July 20, 2020)

In June, the Government announced a series of measures to help Canadians with disabilities navigate the effects of the outbreak, including a one-time, tax-free, non-reportable payment of $600 to assist with additional expenses incurred during the pandemic. On July 20, 2020, the Government of Canada introduced Bill C-20, which would make the benefit available to more people and expand the one-time payment to include approximately 1.7 million Canadians with disabilities, who are recipients of any of

the following programs or benefits:

- A Disability Tax Credit certificate provided by the Canada Revenue Agency;
- Canada Pension Plan disability benefit or Quebec Pension Plan disability benefit; and
- Disability supports provided by Veterans Affairs Canada.

Additionally, Canadians with disabilities who are eligible for the Disability Tax Credit but have not yet applied would have a 60-day window of opportunity to do so after Royal Assent.

Seniors who are eligible for the one-time payment to persons with disabilities would receive a total of $600 in special payments. The one-time payment to persons with disabilities would be adjusted to provide a top-up for eligible seniors, including:

- $300 for Canadians who are eligible for the Old Age Security pension and who received the one-time senior's payment of $300; or
- $100 for Canadians who are eligible for the Old Age Security pension and the Guaranteed Income Supplement or Allowances and who received the one-time senior's payment of $500.

Legislation Proposes Major Changes to the CEWS (July 17, 2020)

The federal government released draft legislation that would amend the rules for the Canada Emergency Wage Subsidy ("CEWS"), following consultations with business and labour stakeholders. The proposed changes included in the draft legislative proposals would:

- Allow the extension of the CEWS until December 19, 2020, including redesigned program details until November 21, 2020.
- Make the subsidy accessible to a broader range of employers by including employers with a revenue decline of less than 30% and providing a gradually decreasing base subsidy to all qualifying employers. This would help many struggling employers with revenue loss of less than 30% get support to keep and bring back workers, while also ensuring those who have previously benefited could still qualify, even if their revenues recover and no longer meet the 30% revenue decline threshold.
- Introduce a top-up subsidy of up to an additional 25% for employers that have been most adversely affected by the pandemic. This would be particularly helpful to employers in industries that are recovering more slowly.
- Provide certainty to employers that have already made business decisions for July and August by ensuring they would not receive a subsidy rate lower than they would have had under the previous rules.

Further, the proposals address certain technical issues identified by stakeholders. These proposed changes, which would generally apply as of March 15, 2020, include:

- providing an appeal process based on the existing procedure for notices of determination that allows for an appeal to the Tax Court of Canada;
- providing continuity rules for the calculation of an employer's drop in revenues in certain circumstances where the employer purchased all or substantially all the assets used in carrying on business by the seller;
- allowing prescribed organizations that are registered charities or non-profit organizations to choose whether to include government-source revenue for the purpose of computing their reductions in qualifying revenue; and
- allowing entities that use the cash method of accounting to elect to use accrual-based accounting to compute their revenues for the purpose of the CEWS.

The government will also move forward with previously released legislative changes, including relieving changes for

calculating pre-crisis "baseline" remuneration, for corporations that have amalgamated and for eligible entities that use payroll service providers. The government will also move forward with the amendment that would align the treatment of trusts and corporations for the purposes of the CEWS.

Proposed Tax Relief for Flow-Through Share Issuers (July 10, 2020)

The federal government is proposing tax relief for junior mining companies and other flow-through share issuers. These proposed changes would provide temporary relief to these companies that are facing challenges due to the COVID-19 pandemic. Since these companies have been unable to operate and cannot incur Canadian exploration expenses in a timely manner, they may incur these expenses outside the time limits required by the rules for renouncing expenses. To help flow-through share issuers ensure that the expenses they incur can be renounced to flow-through share investors, the government is proposing to extend certain timelines under the flow-through share rules. Though draft legislation has not yet been provided, the government has briefly summarized the legislative changes it proposes to make:

- The Government proposes to extend, by 12 months, the period to incur eligible flow-through share expenses under the general rule and the look-back rule.
- The Government also proposes to apply Part XII.6 tax as if expenditures were incurred up to one year earlier than the date they were actually incurred. If amounts are not actually expended by the end of 2021 (where the agreement was entered into in 2019) or 2022 (where the agreement was entered into in 2020), the additional 10% tax under Part XII.6 would apply and the tax payable of investors would be adjusted accordingly.
- The 12-month extension would apply to agreements entered into on or after March 1, 2018, and before 2021, when using the general rule.
- The 12-month extension would apply to agreements entered into in 2019 or 2020, when using the look-back rule.
- The relief in respect of Part XII.6 tax would apply to agreements entered into in 2019 or 2020.

2020 Economic and Fiscal Snapshot (July 8, 2020)

On July 8, 2020, Federal Finance Minister Bill Morneau delivered the 2020 Economic and Fiscal Snapshot. The deficit for 2020–2021 is projected to increase to $343.2 billion — it was originally projected to be $34.4 billion. A large proportion of the deficit is from $212 billion in direct support to Canadians and businesses to help them weather the COVID-19 pandemic.

Personal income tax revenues are expected to decline to $146.3 billion in 2020–2021 from $170.9 billion in 2019–2020. Corporate income tax revenues are projected to decline to $38.3 billion in 2020–2021 from $49.2 billion in 2019–2020. Revenue from excise taxes and duties is projected to decrease to $46.4 billion in 2020–2021 from $55.6 billion in 2019–2020.

Though there are many COVID-19 response measures contributing to the deficit, the largest expenditures include:

- Canada Emergency Response Benefit ("CERB"): $80 billion;
- Canada Emergency Wage Subsidy ("CEWS"): $82.3 billion;
- Safe Restart Agreement: $14 billion; and
- Canada Emergency Business Account: $13.75 billion.

The snapshot did not announce any tax changes in response to the significant change in the fiscal position. However, the snapshot reiterated the government's commitment to two previously proposed tax changes.

First, as economies reopen and business activity resumes, the government will soon announce changes to the CEWS to stimulate rehiring, provide support to businesses during reopening, and help businesses adapt to the new normal. In

anticipation of this forthcoming announcement, the government has set aside additional funding as part of the 2020 Economic and Fiscal Snapshot.

Second, to encourage businesses to adopt zero-emission vehicles, the government proposes to provide a full tax write-off to business investments in: used on-road battery electric, plug-in hybrid (with a battery capacity of at least 7 kWh), or hydrogen fuel cell vehicles; and new and used fully electric or hydrogen powered rail, aerial, marine, or off-road zero-emission automotive equipment and vehicles. The full tax write-off will apply to eligible vehicles purchased on or after March 2, 2020, and will be gradually phased out beginning January 1, 2023, and ending December 31, 2027.

Tax Court of Canada Reopens (July 8, 2020)

The Tax Court of Canada reopened for the transaction of business on July 6, 2020. This includes the Court's Registry offices except for Hamilton. The Court's sittings will resume on July 20, 2020. Conference calls may resume earlier. In a Notice to the Profession and Public dated July 8, 2020, the Court provided important details that professionals should be aware of for the purposes of the reopening of the Court. For more information see the Notice at https://www.tcc-cci.gc.ca/tcc-cci/pdf/Notice%20to%20the%20Public%20and%20the%20Profession-%20July%208,%202020-EN.pdf.

Deferral Ends for GST/HST Payments and Returns (June 29, 2020)

On June 29, 2020, the CRA confirmed that it will not extend the relief that was originally announced on March 27, 2020. This relief allowed all businesses to defer, until June 30, 2020, any GST/HST payments or remittances that became owing on or after March 27, 2020, and before July 2020. Also, though the deadline to file a GST/HST return was never deferred, the CRA promised to not impose penalties where a return is filed late provided that it is filed by June 30, 2020.

Therefore, businesses must make their payments and remittances and file their returns by June 30, 2020. Interest will begin to apply to outstanding remittances and payments, and penalties will begin to apply to outstanding returns, effective July 1, 2020.

Businesses that continue to have difficulty in making a GST/HST remittance or payment or filing a GST/HST return can contact the CRA to request a cancellation or waiver of penalties and interest, and/or a flexible payment arrangement.

CECRA Extended by One Month (June 30, 2020)

The federal government announced that the Canada Emergency Commercial Rent Assistance ("CECRA") will be extended by one month to cover eligible small business rents for July. The government has agreed with all provinces and territories to implement the one-month extension.

In addition, to simplify the application process for all applicants, the government is removing the requirement to claw back insurance proceeds and provincial rent supports from the CECRA forgivable loan amount for both existing and new applicants. Existing applicants who are affected will be notified and will have any previously clawed-back amounts restored to their forgivable loan.

Relief for Registered Pension Plans and Deferred Salary Leave Plans (July 2, 2020)

The Department of Finance published draft regulations that would help employers who sponsor a Registered Pension Plan ("RPP") or salary deferral leave plan to maintain their benefit obligations. Also, where employees that participate in a salary deferral leave plan suspend their leave of absence (e.g., via a recall to essential-service work), or defer their scheduled leave for up to one year, these proposed changes would allow the employees to do so without putting their plan at risk.

More specifically, if enacted, the draft income tax regulations propose to:

- add temporary stop-the-clock rules to the conditions applicable to salary deferral leave plans for the period of March 15, 2020, to April 30, 2021;
- remove restrictions that prohibit an RPP from borrowing money;
- extend the deadline for decisions to retroactively credit pensionable service under a defined benefit plan or to make catch-up contributions to money purchase accounts;
- permit catch-up contributions to RPPs to be made in 2021 to the extent that 2020 required contributions had been reduced;
- set aside the 36-month employment condition in the definition "eligible period of reduced pay" for the purpose of using prescribed compensation to determine benefit or contribution levels; and
- allow wage rollback periods in 2020 to qualify as an eligible period of reduced pay for prescribed compensation purposes.

Federal Court Ends Suspension Period (June 25, 2020)

Having regard to the ongoing easing of COVID-19-related restrictions in Ontario, Québec, and the three territories, the Federal Court allowed the suspension period to expire on June 29, 2020. As of June 30, 2020, the Federal Court's suspension period is no longer in force anywhere in Canada. The Court will not hold hearings in Ontario, Québec, or the three territories before Monday July 27, 2020. Timelines for the filing of documents and the taking of other procedural steps in proceedings in those provinces and territories are extended to July 13, 2020.

Provincial

Alberta

Province Cuts General Corporate Tax Rate and Introduces Employment Grant (June 29, 2020)

On June 29, 2020, the Government of Alberta introduced an economic update titled *Alberta's Recovery Plan*. Though the plan mostly summarized all of the government's recent COVID-19 response measures, it also introduced a corporate tax cut and a new incentive for businesses.

First, the government is accelerating the previously announced Job Creation Tax Cut. This reduction to the general corporate tax rate to 8% (from 10%) will take effect on July 1, 2020, 1.5 years sooner than planned. The general corporate tax rate had just been reduced from 12% to 11% on July 1, 2019, and again from 11% to 10% effective January 1, 2020. The rate was planned to be further reduced to 9% effective January 1, 2021, and again to 8% on January 1, 2022.

Second, the government will introduce the new Innovation Employment Grant to companies that invest in research and development to incentivize job creation in high-growth new industries. This new program will target smaller, pre-income firms performing research and development that are not immediately benefiting from the Job Creation Tax Cut. The grant is intended to be an incentive for new start-ups to locate to Alberta and grow their businesses there.

Manitoba

Government To Expand Back to Work Wage Subsidy (July 15, 2020)

The Manitoba government is expanding its Back to Work wage subsidy program and providing additional financial support for businesses.

The enhanced Back to Work program will reimburse up to $5,000 for up to 10 new workers to a maximum of $50,000

per business, not-for-profit, or charity. Businesses that have already benefited from provincial summer wage subsidies are eligible for this new wage subsidy benefit to hire or bring back an additional 10 employees. The program will now reimburse half of all wages for those newly hired to October 31. Employers that have received financial support from other various provincial and federal programs are eligible.

The application deadline is October 1, with a deadline to submit proof of wages by January 4, 2021. Businesses can apply for the wage subsidy at https://manitoba.ca/covid19/business/btwmp.html.

Gap Protection Program Deadline Extended (July 15, 2020)

The government announced that it will extend the Manitoba Gap Protection Program deadline for applications to August 31 from July 31. Businesses that are ineligible for federal support can also apply for an immediate $6,000 under this program, which has already provided more than $45 million in COVID-19 business relief to over 7,600 employers who otherwise had no government support.

Province Suspends Commercial Evictions (June 26, 2020)

The province is introducing a temporary ban on evictions of commercial tenants during the pandemic if the landlords and tenants are eligible for CECRA but have not applied. Manitoba has received only approximately 145 applications and has paid out $1.5 million of the $64 million available.

Nunavut

Wage Increase for Essential Workers Expanded (June 29, 2020)

The Government of Nunavut is expanding its Nunavut Essential Workers Wage Premium. Under this program, employees who earn less than $25 per hour may be eligible to receive an extra top-up of up to $5 per hour. The program has been expanded to include more sectors, including essential infrastructure, transportation, food, accommodation, retail, and professional services. The full list of eligible sectors, along with the application forms and other details, will be available on the Department of Finance's website at https://gov.nu.ca/finance/information/newwp.

New Brunswick

Rebate for New Brunswickers Vacationing in the Province (July 15, 2020)

The Explore NB Travel Incentive program was created in response to the COVID-19 pandemic to stimulate the tourism industry. It will allow New Brunswick residents to apply for a 20% rebate on eligible expenses made while taking a vacation that includes a paid overnight stay in the province between July 15 and September 30.

The incentive program will also benefit the culture and heritage sectors, as some spending in these areas will be eligible for the rebate.

There are four categories of eligible expenses in New Brunswick:

- accommodations (such as hotels, motels, inns, B&Bs, and campsites);
- food and drink (such as restaurants and food trucks);
- activities (such as entrance fees to attractions, museums, art galleries, cultural events, and outdoor adventure activities); and
- travel (such as vehicle rentals, ferries, and parking).

Residents may apply for the 20% rebate on eligible expenses up to $1,000. To qualify, the applicant must:

- be a permanent resident of New Brunswick;

- have valid and detailed receipts from registered New Brunswick businesses; and
- have a paid overnight stay at a New Brunswick accommodation.

A list of eligible expenses and criteria is available online.

Applications for the Explore NB Travel Incentive Program are available online and must be submitted from October 1–30.

Changes to Essential Worker Wage Top-Up Program (July 14, 2020)

The provincial government has made amendments to the federally funded essential worker wage top-up program. The program now includes private sector home care support workers and early learning and childcare enhanced support workers who provide direct client care.

Private sector home care support workers who provided direct, in-home personal care to clients of the Department of Social Development during the period from March 19 to July 9 will be eligible to receive the benefit. The amount of the benefit is dependent on the number of hours provided to the client during the identified timeframe: $500 for hours at or above 30 hours per week; $250 for hours of at least 20 but less than 30 per week; and $100 for hours of at least 10 but less than 20 per week. The benefit will be distributed through the client who received the service to the private sector home care or family support worker.

Enhanced support workers working in early learning and childcare centres will receive monthly payments over 16 weeks of $500 a month and the first and last payments will be split to align with existing payment schedules. They will receive their top-up retroactive to May 19 and it will continue for 16 weeks. This is in recognition of their return to work when the childcare sector reopened. Employers will be reimbursed by the Department of Education and Early Childhood Development.

The following essential workers have already been eligible to receive wage top-ups through this program:

- early childhood educators in early learning and childcare facilities;
- home support workers providing direct in-person care to seniors, adults, and children;
- direct person care in group homes, community residences, special care homes, homeless shelters, and transition houses;
- domestic violence intervention workers; and
- food bank and soup kitchen workers.

Ontario

COVID-19 Legislation Enacted (July 21, 2020)

Bill 197, *COVID-19 Economic Recovery Act*, which enacts legislation to mitigate the impact of COVID-19, received Royal Assent on July 21, 2020.

Québec

Suspension of Time Limits Lifted as of September 1, 2020 (July 16, 2020)

The suspension of time limits in civil matters and penal matters will be lifted as of September 1, 2020. On March 15, 2020, an order was issued by the Chief Justice suspending civil procedure time limits and time limits pertaining to extinctive prescription and forfeiture in civil matters. In addition, on March 23, 2020, the Minister of Health and Social Services issued an order suspending certain time limits in penal matters. These measures will end on August 31, 2020. Thus, as of September 1, 2020, the time limits suspended by these orders will begin to run again for the time not yet elapsed.

Incentive Program To Retain Essential Workers To Expire (July 15, 2020)

The government announced that it will not extend the Incentive Program to Retain Essential Workers ("IPREW"). This decision is attributable to a context that is no longer the same as when the IPREW was created, on April 3, 2020. Québec is in "economic recovery" mode and most sectors have already begun to reopen.

The program covered the period from March 15 to July 4, 2020. For workers who have not been able to do so to date, it is possible to apply online on Revenu Québec's website by registering on the My Account for Individuals portal until November 15, 2020, the date on which the period of admission to this temporary program ends.

Province Proposes Numerous Tax Amendments (June 29, 2020)

The Government of Quebec announced that it plans to make several tax adjustments for individuals and businesses. These proposed changes take into account, among other things, the COVID-19 pandemic. The government also published Information Bulletin 2020-9 which discusses these changes.

Ad hoc adjustment to the small business deduction

In order to limit the impact of the suspension of corporations' activities on their eligibility for the small business deduction, where applicable, an ad hoc adjustment will be made to the calculation of remunerated hours, an eligibility criterion for this measure.

Temporary discretionary power

In order not to penalize corporations that had to temporarily cease or modify their activities because of the pandemic and that, as a result, have difficulty meeting certain sectoral parameters necessary to obtain a fiscal incentive measure, the government will grant a temporary discretionary power to the departments and agencies responsible for administering these parameters so that they may, on an exceptional basis, authorize these corporations' eligibility.

Adapting to the reality of distance learning

The tax legislation will also be amended to adapt the refundable tax credit for childcare expenses and the disability supports deduction to distance learning.

This enhancement is in response to the acceleration of the technological shift and the significant increase in distance training offered by educational institutions in an effort to comply with the health and distancing guidelines related to the COVID-19 pandemic.

Specialized nurse practitioners

Legislative amendments will allow specialized nurse practitioners ("SNPs") to issue, in the same way as physicians, a certificate for the application of certain tax credits, including the refundable tax credit for home support for seniors. SNPs will also be able to prescribe therapeutic care that is essential to the maintenance of an individual's vital functions in order to enable the individual to claim the tax credit for medical expenses or care or the tax credit for severe and prolonged impairments in mental or physical functions.

Registered retirement income fund

Information Bulletin 2020-9 also confirms the harmonization of Québec tax legislation with federal tax legislation in order to incorporate the measure allowing a 25% reduction in the required minimum withdrawal from registered retirement income funds ("RRIFs") in 2020.

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.

Canada v. Bank of Montreal, 2020 DTC 5043 (Federal Court of Appeal)

Background

In 2005, the Bank of Montreal ("BMO") wanted to lend US$1.4 billion to certain of its US subsidiaries known as the "Harris Group". In order to do so, it set up what is colloquially known as a "tower structure". A Nevada limited partnership (the "Nevada LP") was set up with BMO as the sole limited partner. BMO and the Nevada LP collectively borrowed US$1.4 billion from third parties which the Nevada LP used to subscribe for shares of a newly formed Nova Scotia unlimited liability company (the "NSULC"). The NSULC then used the funds to subscribe for shares of a newly formed Delaware limited liability company which then lent the funds to the Harris Group.

Using this structure, if the value of the Canadian dollar increased relative to the US dollar, then the value of the shares of the NSULC held by the Nevada LP would give rise to a capital loss. Subsection 112(3.1) of the *Income Tax Act* (the "ITA") provides that a corporate taxpayer's share of any partnership loss from the partnership's disposition of a share is reduced by the total of all taxable dividends received by the taxpayer on the share. Accordingly, if the foreign exchange fluctuations resulted in a capital loss on the NSULC shares, then to the extent dividends were paid by the NSULC through the Nevada LP to BMO, BMO's share of the capital loss realized on the sale of the NSULC shares by the Nevada LP would be reduced.

To avoid this result, BMO modified the structure as follows: the NSULC created a class of dividend-paying preferred shares which were acquired by the Nevada LP by way of a stock dividend on the common shares. The Nevada LP therefore held two classes of shares: high-cost base common shares and low-cost base preferred shares. Funds flowed through this modified structure and to the third-party lenders by way of interest and dividend payments to the various parties involved. Importantly, the NSULC declared and paid dividends on its preferred shares only. By the time the structure was unwound in 2010, the value of the Canadian dollar had in fact increased resulting in a capital loss on the NSULC's common shares. Since dividends were paid on the preferred shares only, the capital loss was not reduced pursuant to subsection 112(3.1).

The Minister of National Revenue reassessed BMO on the basis that GAAR should apply to bring BMO into the position it would have been in had BMO not modified the structure and the NSULC paid dividends on its common shares. That is, the capital loss realized on the disposition of the common shares of the NSULC should be reduced by the amount by which the capital loss would have been ground under subsection 112(3.1) in the original structure.

Tax Court Decision

At trial, the issue to be decided was whether BMO realized a tax benefit as a result of the modified structure. To make this determination, the Tax Court judge reviewed subsection 39(2) of the ITA. In general, subsection 39(2), as it read in 2010 at the time the structure was unwound ("Old Subsection 39(2)"), applied to deem a loss from an increase in value of the Canadian dollar relative to a foreign currency to be a capital loss resulting from the disposition of that foreign currency, rather than a disposition of any other property. If Old Subsection 39(2) applied, then BMO's share of the capital loss on the disposition of the Nevada LP's common shares of the NSULC would not be reduced under subsection 112(3.1).

The Tax Court judge undertook a textual, contextual, and purposive analysis of Old Subsection 39(2) and concluded that it must be interpreted according to what he described as the "Broad Interpretation". Under the Broad Interpretation, Old Subsection 39(2) would apply to foreign exchange gains or losses arising both from the satisfaction of obligations on capital account and the disposition of capital property. Accordingly, even if BMO had not modified its

structure to create two classes of shares of the NSULC, Old Subsection 39(2) applied to deem the loss to be a capital loss from the disposition of foreign currency rather than from the disposition of the common shares. Therefore, the Tax Court judge held that subsection 112(3.1) did not apply.

Despite his recognition of the "dangers of relying on subsequent amendments to interpret a predecessor provision" of the ITA, the Tax Court judge pointed out that the Department of Finance's ("Finance's") subsequent amendment to subsection 39(2) is consistent with his decision. In particular, the amendment and Finance's technical notes make clear that amended subsection 39(2) ("Amended Subsection 39(2)") now only applies to foreign exchange gains or losses arising from the satisfaction of obligations, and subsection 39(1) applies to dispositions of all property, including dispositions of foreign currency.

Federal Court of Appeal Decision

The Federal Court of Appeal dismissed the Crown's appeal. The applicable standard of review in this case was correctness, since the Tax Court judge did not make any findings of fact in determining whether there was a tax benefit. Rather, the existence of a tax benefit was based on the proper interpretation of Old Subsection 39(2).

Based on a textual analysis of Old Subsection 39(2), the Federal Court of Appeal determined that Old Subsection 39(2) applied both to foreign exchange gains or losses that arose on the repayment of a debt denominated in a foreign currency and on the disposition of property. The text of Old Subsection 39(2) did not specifically exclude the possibility that the disposition of property could trigger a gain or loss from foreign exchange. Further, Old Subsection 39(2) began with the phrase "[n]otwithstanding subsection (1)". Subsection 39(1) provides the meaning of capital gain and capital loss from the "disposition of any property". If Old Subsection 39(2) was intended to apply only to the repayment of obligations, then there would have been no need to include the phrase "[n]otwithstanding subsection (1)" in Old Subsection 39(2).

The Federal Court of Appeal then reviewed the context and purpose of Old Subsection 39(2) where the analysis was focused on the subsequent amendments. Old Subsection 39(2) began with the words "[n]otwithstanding subsection (1)", which meant that it applied to capital gains or capital losses to which subsection 39(1) would otherwise apply. Amended Subsection 39(2) now provides that it does not apply to "a gain or loss that would, in the absence of this subsection, be a capital gain or capital loss to which subsection (1) or (1.1) applies", which means it does not apply to gains or losses from the disposition of property, even if the gain or loss arose because of foreign exchange fluctuations.

The Federal Court of Appeal also reviewed Finance's technical notes and agreed with the Tax Court judge's conclusion: Old Subsection 39(2) applied to gains or losses from foreign exchange fluctuations, whether that gain or loss arose from the repayment of an obligation or the disposition of property, and Amended Subsection 39(2) provides that foreign exchange gains or losses, including from the disposition of foreign currency, are now to be determined exclusively under subsection 39(1). Finance's technical notes to concurrent amendments to the foreign accrual property income rules in the ITA also support this change in application of subsection 39(2). Finance's technical notes released with those amendments also refer to the fact that Amended Subsection 39(2) now only applies to foreign exchange gains or losses that arise from the repayment of an obligation.

In response to arguments made by the Crown that subsection 112(3.1) nonetheless applied to reduce the capital loss realized by the Nevada LP, the Federal Court of Appeal held that there was nothing in Old Subsection 39(2) that limited its application to section 39 of the ITA, and the deeming rule would have applied for all purposes of the ITA.

The precedential value of the Federal Court of Appeal's decision is limited in light of amendments made to the ITA. However, when it comes to applying GAAR, practitioners may still wish to refer to it for the Tax Court's and the Federal Court of Appeal's textual, contextual, and purposive analyses of the ITA, and in particular, their reliance on the technical notes published by Finance.

— *Paige Donnelly*

Ludmer v. Attorney General of Canada, 2020 DTC 5055 (Quebec Court of Appeal)

The taxpayers were individuals who held their investments through various non-resident investment entities. In the late 90s, the taxpayers reorganized their investments in anticipation of the newly announced foreign investment entity rules in the *Income Tax Act* (Canada) (the "ITA").

Following the reorganizations, the Canada Revenue Agency ("CRA") began an audit of the taxpayers and the non-resident investment entities controlled by them. The audits resulted in assessments of several millions of dollars, which were challenged at the Tax Court of Canada before the Crown withdrew.

The taxpayers brought an action in the Québec Superior Court, arguing that the CRA's conduct during the audits was unreasonable to the point of being abusive. For instance, the taxpayers alleged that the CRA decided on a particular tax result for the taxpayers and "bullied" its way to getting it. In particular, the CRA sought a technical interpretation on the application of a regulation to the taxpayers (Regulation 7000), in support of its assessing position of the taxpayers, that was contrary to the CRA's historical positions (the "First Interpretation"). When the First Interpretation came back unfavourably for the CRA, it sought a second interpretation (the "Second Interpretation"). The Second Interpretation supported the CRA's assessing position of the taxpayers, but was inconsistent with the First Interpretation and the CRA's established treatment and application of Regulation 7000. However, the CRA did not make the Second Interpretation publicly available, contrary to its well-established policy and practice. The taxpayers claimed that this and other conduct adversely affected their investments, caused them to incur unnecessary professional fees, and resulted in a loss of interest on the amounts paid to the CRA while the assessments were in dispute.

The taxpayers also claimed punitive damages that were attributed to the CRA's conduct. The total damages and compensation payments sought from the CRA were in excess of $117 million.

At trial, the judge concluded that the CRA committed a number of faults in the conduct of the audits, such as:

(i) taking an unreasonable position in the final determination of the tax payable, including withholding interpretations of tax rulings different from its previous and subsequent positions;

(ii) failing to apply or misapplying its own policies in converting foreign currency for purposes of imposing tax;

(iii) failing to give five days' notice before issuing reassessments, despite a promise to the taxpayers to the contrary, which deprived the taxpayers of the opportunity to apply to the Federal Court for orders prohibiting the reassessments;

(iv) erroneously mentioning to the Bermuda tax authorities during a request for information that there was an ongoing criminal tax investigation with respect to the taxpayers;

(v) proposing a settlement of the taxpayer's appeals that contained onerous conditions for the taxpayers when the CRA knew that it would ultimately be abandoning those positions; and

(vi) unduly blocking and delaying Access to Information requests, which resulted in delays of several years in the delivery of relevant documents that would explain the CRA's assessing positions, resulting in significant and unnecessary effort, delay, and expense for the taxpayers.

Despite these findings, the trial judge rejected the taxpayers' arguments that the CRA's faults were committed deliberately with the intent to harm the taxpayers and bring about the end of their investment business, or with the aim of some CRA employees obtaining higher bonuses that were related to the collection of all or part of the assessed amounts.

The trial judge ordered the CRA to pay an amount to the taxpayers for the loss of interest on the mandatory payments that they were obliged to pay as a result of the reassessments. He also allowed a portion of the professional fees claimed by the taxpayers to the extent that such fees would not have been incurred absent the CRA's faults.

However, the trial judge declined to award any of the other compensatory or punitive amounts sought by the taxpayers. In total, the trial judge ordered an award of $4,844,658, although an amount in excess of $117 million was sought by the taxpayers. The Crown appealed the trial judge's finding of fault on the part of the CRA, while the taxpayers appealed the trial judge's decisions to deny the compensatory and punitive amounts sought by the taxpayers.

The Appeal

On appeal, the Quebec Court of Appeal (the "Court of Appeal") framed the issues under two categories:

(1) Did the trial judge err in finding fault on the part of the CRA (referred to in this article and in the decision as the "Incidental Appeal")?

(2) Did the trial judge err in denying the compensation and damage payments sought by the taxpayers (the "Principal Appeal")?

The Incidental Appeal

The issue under the Incidental Appeal was whether the inconsistent treatment of the taxpayers was unreasonable, which constituted fault on the part of the CRA. In particular, the issue was whether the CRA's actions related to its inconsistent interpretation and application of Regulation 7000 to the taxpayers were unreasonable.

In this regard, the Court of Appeal agreed with the trial judge's determination of the standard of conduct applicable to the CRA in carrying out a tax audit:

- The CRA must act reasonably in the conduct of an audit. The *Taxpayer Bill of Rights* helps define what a reasonable auditor would do.
- Negligence is sufficient to establish fault.
- It is not necessary to prove that the CRA acted maliciously with a view to hurting the taxpayers. Intentional conduct will be necessary for punitive damages.
- The CRA can be wrong without being at fault — the CRA does not commit a fault if it reasonably takes a position that turns out to be wrong.
- To the extent that the CRA has certain powers under the ITA, it must exercise those powers reasonably and not in an abusive fashion.

The Court of Appeal found that the trial judge did not establish unreasonable conduct on the part of the CRA based on the fact that there were differences of opinion within the CRA on the proper interpretation or application of Regulation 7000. On the contrary, the trial judge had noted that the CRA has the right to be wrong as long as it acts reasonably. Rather, the trial judge found that it was the manner in which the CRA conducted itself in relation to the audit of the taxpayers, in light of its inconsistent interpretations and positions on Regulation 7000 and its own policies, which was unreasonable. In particular, the CRA sought to apply a position solely to the taxpayers, while declining to apply this position to other taxpayers with similar facts. Moreover, contrary to its own policies and procedures, the CRA did not publicize the Second Interpretation that it adopted in assessing the taxpayers when it was clearly a position that was inconsistent with the First Interpretation and the CRA's established treatment of Regulation 7000. All of this led the judge to the conclusion that the result sought by those leading the assessments was dictated by unreasonable conduct. Accordingly, the Court of Appeal did not find an error on the part of the trial judge.

The Principal Appeal

In regard to the Principal Appeal, the Court of Appeal considered each of the categories of compensatory and punitive amounts sought by the taxpayers:

(A) Denial of Punitive Damages

The Court of Appeal confirmed the trial judge's findings that the conduct of the CRA in performing the audits, responding to access to information requests, issuing the assessments, and finally, the manner of resolving the assessments was abusive and constitutive of fault. However, the Court of Appeal held that wrongful, even reckless or negligent conduct, is not sufficient to justify the imposition of punitive damages. Rather, an award of punitive damages must involve intentional conduct and an unlawful deprivation of property — neither of which was present here. Accordingly, there was no reason to interfere with the trial judge's decision.

(B) Denial of Full Compensation for Professional Fees

The trial judge had awarded the taxpayers one-third of their professional fees, less certain deductions, based on a systematic review of the professional costs incurred by the taxpayers. The Court of Appeal confirmed that the award of fees is based on an exercise of discretion and an appreciation of the facts, which merits a high degree of deference. In the present case, there was no overriding or palpable error that warranted intervention by the Court of Appeal.

(C) Denial of Compensation for Payments Made Following Reassessment

The corporations controlled by the taxpayers were "large corporations" within the meaning of section 225.1 of the ITA and were therefore obliged to pay one-half of the assessed tax. The taxpayers chose, however, to pay the full amount, although not required to by law. The trial judge denied an award of lost interest on this voluntary payment, on the basis that because the taxpayers had plead in very strong language that the position taken by the CRA on the reassessments was unreasonable, there was no reason to make a voluntary payment, because there was no risk that the taxpayers would be ordered to pay the reassessments. Although the Court of Appeal expressed some doubt with this reasoning, it did not find that the trial judge had committed an error by declining to award damages for the additional interest on the voluntary payments. The Court of Appeal's view was that there was no legal obligation by the taxpayer to pay; the payment was a strategic decision that it carried out. Since this decision was not related to the CRA's faulty conduct, there was no error on the part of the trial judge in denying the compensation payment that justified the Court of Appeal's intervention.

(D) Denial of Compensation for Lost Payments

At trial, the judge declined to award compensation for a loss of payments that the taxpayers argued would have been received by one of its non-resident investment entities but for the CRA's faulty conduct. The Court of Appeal did not find an overriding or palpable error in the trial judge's determination that any loss of business suffered by the non-resident investment entity was not caused by the CRA's actions. In particular, the Court of Appeal agreed with the trial judge that the facts indicated that for years there had already been a trend of outflows of investor funds from such non-resident investment entity, which was not caused by the CRA's actions. As such, there was no basis to overturn the trial judge's decision.

Closing Thoughts

This was a difficult appeal for the taxpayer, as appeals that relate to some exercise of a trial judge's discretion will always be uphill battles. Since the determination of the damages and compensatory payments were questions of mixed fact and law, the trial judge would have been owed considerable deference and would have had to make an overriding and palpable error for the Court of Appeal to intervene. This would only occur if the trial judge seriously misapprehended the facts or law or misapplied them in rendering his decisions. Moreover, unless an overriding and palpable error was present, an appellate court would have no basis to adjust the quantum of damages and compensatory payments that were awarded, as this would be tantamount to re-weighing the trial judge's evidence and replacing his decision with the Court of Appeal's.

— *Jacob Yau*

MacDonald v. Canada, 2020 DTC 5027 (Supreme Court of Canada)

Background

As part of the acquisition of his brokerage firm in 1988 by the Bank of Nova Scotia ("BNS"), Mr. MacDonald ("MacDonald") acquired 183,333 shares of BNS. In 1997, shortly after he left BNS to start his own company, the Toronto-Dominion Bank ("TD Bank") offered him a credit facility for up to $10.5 million (the "Credit Facility"). The terms of the Credit Facility required MacDonald to:

(1) enter into a securities pledge agreement (the "Pledge Agreement") pursuant to which he pledged 165,000 (or 90%) of his BNS shares as partial security for the Credit Facility; and

(2) enter into a forward contract (the "Forward Contract") with TD Securities Inc. ("TDSI").

Under the terms of the Forward Contract, MacDonald would make cash settlement payments to TDSI if the price of the 165,000 BNS shares underlying the contract increased, and would receive cash settlement payments from TDSI if the price of the BNS shares decreased. Any payments received by MacDonald under the Forward Contract were assigned to TD Bank, which required the Forward Contract to remain in place during the term of the loan under the Credit Facility.

While the Forward Contract was outstanding, the price of the BNS shares increased and so MacDonald made approximately $10 million in cash settlement payments to TDSI. In each of his 2004, 2005, and 2006 taxation years (the years the cash settlement payments were made), MacDonald deducted the cash settlement payments from his income as losses, taking the position that the Forward Contract was entered into for speculative purposes. The Minister of National Revenue reassessed MacDonald on the basis that the Forward Contract was a hedge of MacDonald's BNS shares, which he held on capital account, and accordingly the losses were capital losses.

Judicial History

Tax Court Decision

At trial, the Tax Court judge's adopted approach to analyzing the issue was two-fold: first, the Tax Court judge had to determine whether MacDonald entered into the Forward Contract as an adventure or concern in the nature of trade. If so, the Tax Court judge then had to determine whether the Forward Contract was considered a hedge of a capital asset, namely, MacDonald's BNS shares.

After reviewing jurisprudence on the nature of isolated transactions, the Tax Court judge determined that one of the most important factors in determining whether an isolated transaction is an adventure or concern in the nature of trade is the taxpayer's intention. The Tax Court judge accepted MacDonald's evidence that his intention was to profit on the anticipated decline in the value of his BNS shares resulting from the negative impact of certain worldwide financial events and found that this subjective intention was supported by the surrounding facts and circumstances. The Tax Court judge also found it relevant that the Forward Contract could only be cash settled. Generally, property that does not have an investment return to a taxpayer is more likely to be speculative. In order to earn a return from the Forward Contract, MacDonald had to "deal with the Forward Contract" as contemplated by subsection 9(3) of the *Income Tax Act*. Finally, since MacDonald never intended on selling his BNS shares, he was not exposed to any upcoming transactional risk that needed to be, or could be, hedged. As a result, the Tax Court judge determined that the Forward Contract was an adventure or concern in the nature of trade.

The Tax Court judge's next step was to determine whether the Forward Contract was a hedge of a capital asset. The Tax Court judge found that the Forward Contract was not a hedge of a capital asset on the basis that MacDonald did not have a clear intention to hedge and there was insufficient linkage between the Forward Contract and his BNS shares. The Forward Contract was not a same asset hedge of the BNS shares since the BNS shares were only the "Reference Asset" (the asset used to determine the value of and payments made pursuant to a forward contract)

and not the "Delivery Asset" (the asset used to satisfy the parties' obligations under a forward contract). Referring again to MacDonald's intention to hold his BNS shares for the very long term, the Tax Court judge found that he was not exposed to any risk in price fluctuations. Finally, the cash settlement payments arose at a different time from MacDonald's realized gain on his BNS shares. As a result, there was no linkage in terms of quantum and timing between the Forward Contract and the BNS shares. Finding no intent to hedge and no linkage, the Tax Court judge concluded that the Forward Contract was for speculation and the cash settlement payments made thereon were on income account.

Federal Court of Appeal Decision

The Federal Court of Appeal unanimously reversed the Tax Court judge's decision. The Federal Court of Appeal first addressed the issue with the Tax Court judge's adopted approach. It was not necessary to determine whether the Forward Contract was an adventure or concern in the nature of trade, and the only determination to be made was whether the Forward Contract was a hedge. The Federal Court of Appeal determined that a forward contract will be a hedge if it neutralizes or mitigates risk to which the underlying asset is exposed. MacDonald's ownership of the BNS shares exposed him to market fluctuation risk which was neutralized by the Forward Contract — if the price of the BNS shares fell, MacDonald was entitled to receive cash settlement payments. Further, it was wrong for the Tax Court judge to place any weight on MacDonald's intentions since intent to hedge is not a condition precedent for hedging. A taxpayer only needs to understand the nature of the contract being entered into, and in this case, MacDonald was fully aware of the hedging effect the Forward Contract would have on his BNS shares.

Supreme Court of Canada Decision

In an 8–1 decision, the Supreme Court of Canada agreed with the Federal Court of Appeal's decision. Writing for the majority, Justice Abella reviewed jurisprudence on whether certain derivative contracts are hedging instruments or not. She found that the characterization of a derivative contract as a hedge turns on its purpose, which is determined primarily by the extent to which there is a linkage between the derivative contract and an underlying asset, liability, or transaction that exposes the taxpayer to a particular financial risk. The more effective the derivative contract is at neutralizing or mitigating the identified financial risk, and the more closely connected the derivative contract is to the asset, liability, or transaction purportedly hedged, the stronger the inference that the derivative contract is a hedge. Perfect linkage, both in terms of quantum and timing, is not required. The method of settlement of the contract — whether by cash settlement payments or physical delivery of the underlying asset — is also not determinative.

On this basis, Justice Abella found that the Forward Contract's near perfect neutralization of price fluctuations in MacDonald's BNS shares indicated a linkage between them. Further, Justice Abella stated that, from TD Bank's perspective, the Forward Contract resulted in a perfect hedge of TD Bank's collateral under the Pledge Agreement and was further evidence of the linkage between the Forward Contract and the BNS shares.

Notwithstanding the Tax Court judge's acceptance of MacDonald's evidence that his intention was to speculate, the Supreme Court stated that "subjective manifestations of purpose may sometimes be relevant" but the taxpayer's conduct is generally more revealing than "*ex post facto* declarations" of the taxpayer. This line of thinking is generally consistent with case law where courts have had to determine whether certain property of a taxpayer is capital property or inventory. However, in the case of derivative contracts, the Supreme Court's decision seems to demonstrate that the ultimate economic outcome of the taxpayer and other parties is relevant as well. Whether MacDonald intended to or not, the Forward Contract had the effect of almost perfectly neutralizing his exposure to market price fluctuations in his BNS shares. TD Bank similarly was "perfectly protected from market fluctuations".

While the Supreme Court's decision clarifies the relevancy of intention in determining the characterization of derivative contracts and a test that is based on the taxpayer's ultimate economic reality, questions still remain as to the extent to which there will be sufficient linkage between a derivative contract and some underlying asset, liability, or risk. In dissent, Justice Côté discusses the uncertainty that will arise if the test articulated by the majority is focused on risk

mitigation. A forward contract, for example, that shorts shares of one bank would effectively mitigate a taxpayer's risk of owning shares of another bank since bank stocks are highly correlated. The test set out by the majority would lead to the conclusion that such a forward contract is a hedge, notwithstanding the taxpayer's intention. Similarly, a taxpayer who actively trades put options and holds the underlying shares as capital property will have temporarily hedged its position many times over the course of its trades. Notwithstanding that taxpayers who actively trade financial assets generally do so on income account, the fact that the options hedged the taxpayer's ownership risk of the underlying shares could lead to the conclusion that there is sufficient linkage such that any gains or losses on the options were on capital account.

— *Paige Donnelly*

Roofmart Ontario Inc. v. Minister of National Revenue, 2020 DTC 5046 (Federal Court of Appeal)

Facts

As part of a CRA project to target unreported and underreported economic activity in the construction industry, the Minister applied for and obtained an "unnamed persons requirement" ("UPR"), a tool which allows the Minister to require a third party to disclose information relating to an unnamed person or group of persons. In order to obtain a UPR, the Minister is required under subsection 231.2(3) of the *Income Tax Act* (Canada) (the "ITA") to make an application to a judge of the Federal Court, who may grant the UPR if two conditions have been satisfied:

(1) the person or group of persons whose information is sought from the third party is ascertainable, and

(2) the UPR is made to verify compliance by the person or persons in the group with any duty or obligation under the ITA.

The UPR was sought in relation to Roofmart Ontario Inc. ("Roofmart"), one of the largest suppliers of roofing and building materials in Ontario, which was selected for the UPR due to the size of its business, its clientele, and its geographic location. The UPR required Roofmart to disclose certain information about its customers, including their business and legal names, contact information, business numbers, transaction histories, and bank account information. Roofmart was only required to disclose information about customers whose total annual purchases exceeded $20,000 within a particular two-year period, or $10,000 within a particular six-month period.

The Federal Court granted the UPR. In regard to the first requirement, the judge concluded that the persons targeted by the UPR application were ascertainable since the total annual purchase requirement was sufficient to establish the targeted group of contractors and their identities. As for the second requirement, the judge was satisfied that the Minister was seeking information to verify the unnamed persons' compliance with the ITA. The judge rejected Roofmart's argument that the Minister must be currently engaged in an audit of the targeted group of unnamed persons to succeed in obtaining the UPR, relying on the FCA decision *Canada (National Revenue) v. Greater Montréal Real Estate Board*,[1] which held that the verification requirement under paragraph 231.2(3)(*b*) could include a "tax audit project" that did not involve an existing audit of particular individuals.

The Appeal

On appeal before the Federal Court of Appeal (the "FCA"), Roofmart made three arguments:

(1) the application by the Minister was *ultra vires* because it was not brought by an authorized delegate of the Minister in accordance with the ITA;

(2) the Federal Court erred in applying the conditions required to be satisfied under subsection 231.2(3); and

(3) the Federal Court applied an incorrect burden of proof in considering the Minister's UPR application.

[1] 2008 DTC 6420 (FCA).

Ultra Vires Argument

Subsection 220(2.01) of the ITA grants the Minister the authority to delegate the exercise of her powers to an officer or a class of officers. In practice, the CRA maintains a list of positions who have delegated authority to exercise the Minister's powers under various provisions of the ITA. Roofmart argued that the application for a UPR under subsection 231.2(3) was brought by an individual at the CRA who did not have such delegated authority, and therefore it was not the "Minister" who brought the UPR application. In particular, the individual was the CRA official who swore the affidavit in support of the UPR application. The FCA rejected this argument, concluding that the application was brought by the Minister of National Revenue, not the individual CRA officer, and that Roofmart conflated the identity of the person bringing the UPR application with the person who swore the affidavit in support of such application. The FCA also rejected Roofmart's argument that the UPR application was *ultra vires* because the Department of Justice did not have the Minister's authority or instruction to bring the UPR application. The FCA confirmed that once retained, counsel has all the authority — apparent, ostensible, and implied — to take all necessary steps and actions in litigation on behalf of its client,[2] and that there was nothing in the record that even remotely justified Roofmart's argument that the Department of Justice did not act with the Minister's instructions.

Ascertainable Group

The FCA also rejected Roofmart's argument that the Federal Court erred in applying the proper legal test under subsection 231.2(3). It found that the Federal Court was satisfied that the unnamed persons subject to the UPR were ascertainable based on the evidence that the total annual purchase requirement was sufficient to establish a particular target group of residential and commercial contractors among Roofmart's customers. The FCA noted that the validity of the UPR was not affected merely because it targeted an unspecified number or large number of accounts, or that significant financial information could be obtained as a result of the UPR.

Verification of Compliance

Roofmart argued that the words "verify compliance" in paragraph 231.2(3)(*b*) required the Minister to demonstrate that a tax audit was underway and conducted in good faith, which was not satisfied in the present case. The FCA rejected this argument on the basis that it was inconsistent with its decision in *Canada (National Revenue) v. Greater Montréal Real Estate Board*,[3] in which the FCA held that the Minister does not need to establish that there is a pending or existing tax audit of a particular individual to satisfy subsection 231.2(3). Further, the FCA concluded that the Federal Court judge was satisfied with the evidence to establish that the information sought would assist in verifying compliance with the ITA, and as such, the Federal Court did not make a palpable and overriding error that could be overturned by the FCA.

Standard of Proof

Lastly, the FCA considered Roofmart's argument that the Federal Court did not apply the correct standard of proof in considering the Minister's UPR application. Roofmart argued that a higher duty, one of absolute candour and full disclosure, was required to fully justify granting a UPR. In dismissing this argument, the FCA noted that Roofmart relied on outdated jurisprudence that was applicable when UPR applications were made on an *ex parte* basis, which warranted a higher standard of disclosure. Subsection 231.2(3) was amended in 2013 when the *ex parte* authorizations were removed. In the present case, Roofmart had prior notice of the Minister's intention to seek a UPR, had the opportunity to comment on the draft UPR order, and was represented by counsel on the return of the application in the Federal Court.

Finally, the FCA noted that the Federal Court judge has discretion in whether to grant a UPR under subsection 231.2(3), and that the case law was clear that when an appellate court was faced with the exercise of discretion by a judge

[2] *Sourani v. Canada*, 2001 FCA 185.

[3] *Supra* note 1.

that it "must be cautious in intervening, doing so only where it is established that the discretion was exercised in an abusive, unreasonable or non-judicial manner".[4] The FCA dismissed Roofmart's appeal.

Closing Thoughts

The *Roofmart* decision confirms that whether the requirements of subsection 231.2(3) have been met may vary greatly from one judge to the next. Here, the FCA did not interfere with the Federal Court's determination that a total annual purchase amount of $20,000 over a two-year period or an amount of $10,000 over a six-month period was a sufficient threshold in establishing an ascertainable group, even though it is not apparent that there was a rationale for selecting these particular amounts. This can be contrasted with the *Hydro-Québec v. Minister of National Revenue* decision,[5] in which the Federal Court found that there was not an ascertainable group on a UPR application that was circumscribed only by a qualitative description of the intended unnamed persons, rather than by a monetary or numeric amount. In some ways, this suggests that any numeric figure selected by the Minister to limit the number of unnamed persons in its UPR application might be arbitrary — so long as the figure reduces the potential group of affected unnamed persons to a more palatable number, a judge may be more inclined to grant the UPR, even if this number has no direct bearing to the tax project related to the UPR application.

— *Jacob Yau*

RECENT CASES

90% of cost of space trip paid for by taxpayer's corporation constituted a shareholder's benefit

The taxpayer controlled a group of corporations that operated the Cirque du Soleil. He took a trip to the International Space Station paid for by one of the Cirque du Soleil corporations. The Minister included in the taxpayer's income the cost of the space trip as a shareholder benefit. On appeal the taxpayer argued that the space trip was a promotional activity that did not give rise to a shareholder's benefit. In dismissing his appeal, the Tax Court of Canada found that the value of the benefit received by the taxpayer was 90% of the cost of the space trip (2018 DTC 1132). The taxpayer further appealed to the Federal Court of Appeal.

The taxpayer's appeal was dismissed. The Tax Court determined that the purpose of the taxpayer's trip to space was overwhelmingly personal. It was open to the Tax Court to make the findings that it did, based on all the evidence tendered. In conclusion, the taxpayer failed to demolish the Minister's assumptions in this case. The Minister's assessment was affirmed accordingly.

Laliberté v. The Queen

2020 DTC 5052

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[4] *Rona Inc. v. Minister of National Revenue*, 2017 GTC 1010 (FCA), citing *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26.

[5] 2018 DTC 5096 (FC).

Corporate shares sold by corporate taxpayer to purchaser of one of its divisions not capital property

The corporate taxpayer was a paper products manufacturer with five divisions, including its Tissue Division. The taxpayer agreed to sell its Tissue Division to Cascades Canada. The agreement contemplated that: (a) the taxpayer would sell a list of assets (the "Purchased Assets") to Cascades Canada; (b) prior to closing, the taxpayer would transfer certain assets to a new corporation, 722, in exchange for shares of that corporation; and (c) the taxpayer would transfer its shares of 722 to Cascades Canada. In due course, the Purchased Assets and the shares of 722 were sold by the taxpayer to Cascades Canada. The taxpayer treated the gain on the sale of the shares of 722 to Cascades Canada as a capital gain, but the Minister, relying on section 54.2 of the *Income Tax Act* (the "Act"), treated that gain as an income gain. The Minister found that the requirements of section 54.2 of the Act were not satisfied, so that, in his view, the shares of 722 were not deemed under that section to be capital property of the taxpayer. (Section 54.2 provides that where a person has disposed of property consisting of all or substantially all of the assets used in an active business carried on by that person to a corporation for consideration that included shares of the corporation, those shares shall be deemed to be capital property of the person.) In dismissing the taxpayer's appeal (2018 DTC 1133), the Tax Court of Canada identified four issues: (1) Was the taxpayer's Tissue Division a business? (2) If so, what were the assets of that business? (3) Which of the Tissue Division's assets were transferred to 722? (4) Did the transferred assets represent all or substantially all of the assets used in this business? Following the dismissal of its appeal, the taxpayer further appealed to the Federal Court of Appeal.

The taxpayer's appeal was dismissed. The Federal Court of Appeal concluded, in essence, that: (a) the Tax Court judge dismissed the taxpayer's appeal based on his findings (which were unfavourable to the taxpayer) on each of the foregoing four issues; and (b) in particular, the Tax Court judge was correct in finding that conveying 68% of the assets used in the taxpayer's Tissue Division to 722 would not satisfy the requirement in section 54.2 that all or substantially all of the assets of the Tissue Division be conveyed to Cascades Canada. The Minister's assessment was affirmed accordingly.

Atlantic Packaging v. The Queen

2020 DTC 5047

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