

TAXES & WEALTH MANAGEMENT

December 2023 – Issue 16-4



PRESERVING WEALTH FOR PEOPLE AND PRIVATE COMPANIES

OUR GRATITUDE, REFLECTIONS ON THE PAST YEAR AND SEASON'S GREETINGS

Editor's Note

As the year comes to a close, we express our profound gratitude for all of the good things that we experience and share. After all, we live in a country where we are free from war and possess a democracy that is vibrant.

At *Taxes & Wealth Management*, the editorial board expresses its appreciation to all the many people that make the newsletter's publication possible.

We would not exist without the insightful and helpful articles provided by our numerous contributors! We thank you!!

This past year, our good friend and regular contributor, Nick Barisheff passed away. We noted his passing in a previous edition. Nick was a gold expert and we will miss his market insights. We also paid our respects in a recent edition of *Taxes & Wealth Management* to Henry Gluch, a unique and talented Department of Justice lawyer that specialized in Tax Litigation.

Editor-in-Chief: David W. Chodikoff, Miller Thomson LLP

Editors: Kay Leung, Torkin Manes LLP

Rahul Sharma, Fasken Martineau DuMoulin LLP

Lucinda Main, Weir Foulds LLP

David Kerzner, Kerzner Law

In This Issue

[Our Gratitude, Reflections on the Past Year and Season's Greetings](#)p. 1-2

[CTF/TCC 40th Anniversary of TCC](#).....p. 2-6

[The International Bar Association: Why it is Important](#) p. 6-7

[Strategies for Minimizing the Impact of New Alternative Minimum Tax Rules](#)p. 7-9

[Introducing a New Regular Column, "Foundation": Your Guide to Professional Success](#).....p. 9-10

[Jackson v. Rosenberg: A "Cautionary Tale" of Judicial Confusion over Joint Tenancy and the Right of Survivorship Post Pecore](#).....p. 10-16

[Yet Another Supreme Court Income Tax Case! – The Court Takes on the "Mandatory Repatriation Tax"](#).....p. 16-18

[Art & Tax](#).....p. 18-20

Behind the scenes, there are many people that make *Taxes & Wealth Management* a successful newsletter. We thank the team at Thomson Reuters, headed by our editorial team member, Bill Naskos.

As Editor-in-Chief, I am grateful for the support and work of my fellow editors: Kay, Lucy, David, Rahul and Bill. I would be remiss if I did not single out my assistant, Jenifer Graham. She helps co-ordinate it all and we are all grateful for Jenifer's good humour and diligence.

To all, and on behalf of the entire team, we wish everyone a very healthy and happy holiday season and New Year!

On behalf of the Editorial Board,

David W. Chodikoff, Editor-in-Chief of
Taxes & Wealth Management,
Partner – Miller Thomson LLP

In This Issue

[Canadian Sensitivity to the Impact of Rising Interest Rates](#)
.....p. 21-25

[Year End Tax Planning Tips](#)p. 23-25

[The Taxation of Cryptocurrencies: Membership in a DAO](#)
.....p. 25-29

CTF/TCC 40th ANNIVERSARY OF TCC

By Hon. Gerald J Rip, past Chief Justice of the Tax Court of Canada, highlights the growth of the Court and some of its challenges from its beginning to his retirement in 2015.

This year, the Tax Court of Canada celebrated its 40th year as a Canadian statutory court. This year is actually the 77th anniversary of the Tax Court if one includes three tax tribunals that preceded it since 1946, the Income Tax Appeal Board, the Tax Appeal Board in 1950 and the Tax Review Board in 1970.¹ Each tribunal was continued to its successor.

The Tax Court of Canada ("TCC" or "Court") is the continuation of the Tax Review Board ("TRB"). The latter was created in answer to a recommendation of The Royal Commission on Taxation, better known as the Carter Commission, that Parliament establish a tax

court whose members be appointed by the Minister of Justice, not the Minister of National Revenue, which was the case with the tribunals that preceded the TRB, and that it be an independent tribunal consisting of members knowledgeable in tax. However, the TRB was not what Carter recommended.

The TRB's jurisdiction to hear appeals from income tax assessments was shared with the Federal Court, Trial Division. A taxpayer had the option to go to one or the other. Appeals from the TRB were to the Federal Court's Trial Division by trial *de novo*. The sole jurisdiction of the TRB was to hear appeals from

¹ The *Income War Tax Act of 1917* contemplated *ad hoc* regional boards to hear tax disputes but the idea was

aborted. Until 1946, appeals from income tax assessments were made to the Exchequer Court of Canada.

income tax assessments and dismiss the appeal or allow the appeal by a) vacating the assessment, b) varying the assessment, or c) referring the assessment to the Minister for reconsideration and reassessment, that is, what subsection 171(1) of the *Income Tax Act* reads today.

Former Chief Justice Garon, who was then an Assistant Deputy Minister of Justice together with Wilf Lefebvre, a litigator with the Department of Justice at the time, and Hon. Lucien Cardin, the Chair of the TRB, initiated the process and worked to make a tax court out of the TRB. Hon. James Jerome, the Associate Chief Justice of The Federal Court, could have stopped the process. But he co-operated in helping achieve the goal. Finally, anyone in or out of government trying to get even a minor amendment to a statute, let alone a whole new statute, quickly comes to realize it's a long, tough, frustrating, aggravating process requiring the support of individuals in the Department of Justice and for anything affecting the *Income Tax Act*, the Department of Finance as well. The Minister of Justice, Hon Mark MacGuigan, pushed the Bill establishing the Tax Court through cabinet and Parliament.

On July 18, 1983, the *Tax Court of Canada Act* came into force continuing the TRB as the TCC. Unfortunately, the TCC was the Tax Review Board with a touch of lipstick. The jurisdiction was the same, the practices were the same, the support staff was the same, the sitting locations were the same, the judges were the same, except for two new judges, the strengths and weaknesses were the same. Appeals were still to the Federal Court, Trial Division and remained *de novo*.

The remuneration and pension of the TRB members had been regulated under public service statutes and were significantly lower than those of judges whose pay and pension were set out in the *Judges Act*. The members were now judges and their pay and benefits were now set by the *Judges Act*. All judges under the *Judges Act* receive the same pay and in the normal course the new judges ought to have received the same remuneration as other judges. However, the

government hesitated in awarding the new TCC judges a substantial increase in pay in one year. Thus, the *Judges Act* was amended to provide a phase in of their higher salaries over four years. But the former members of the TRB received all their past years' pension contributions, one member with 20 years at the TRB got back 20 years of contributions.

Notwithstanding the trial *de novo* feature of appeals and perhaps because of it, it did not prevent leading tax counsel at the time, such as Phil Vineberg, David Ward and Wolfe Goodman, from appearing before the Court. As the years went by, the TCC was getting more interesting cases turning on questions of law. The *de novo* appeal offered the advantage of seeing the McGuigan opposition's hand in real time at the TCC and if you lost and appealed, you had the opportunity to strengthen your case for the Federal Court.

Members of the TRB could be lawyers or chartered accountants. And as a result of the continuation of the TRB, the Tax Court was bequeathed a Chartered Accountant. Delmar Taylor was grandfathered to be the only sitting judge in Canada who did not have a legal background. He took pride in his position and worked trying to make up for anything he missed by not having a legal education.

The Court's only office was in Ottawa. It also had leased court rooms in Montreal and Toronto, both of which had seen better days. In Toronto, paper was hanging from walls in a dark court room. The judge's chamber was along a public corridor in the TD Centre and on more than one occasion a disgruntled taxpayer would barge into the room challenging the judge. So much for security.

Other regions of the country saw judges sit in provincial courts, if available, as well as in hotels, community centres, arenas and even in homes of taxpayers who could not make it to court. And, as an itinerant court, the TCC still sit in these places. In some cities like London, for example, appeals were heard in the same building as the tax department and during an appeal it was not unusual to hear a knock on the door

and someone asking where they could pay their tax or the location of a department official's office. Sitting in hotels or community centres could and did result in the judge sharing bathroom facilities with the parties and their lawyers. And this could cause problems when a taxpayer, for example, was using a stall and simultaneously discussing the case with the lawyer. In the midst of the conversation the judge would enter the room and be forced to make a hasty exit, hoping the judge heard nothing. Obviously not an ideal sitting location for the taxpayer, the lawyer and the Court.

Appeals at the TRB and then at the Court were not set down for any particular day. Notices of Hearing were sent out to about 25 appellants to appear for trial at 9:30 a.m. on a particular Monday. Perhaps 20 people would show up on Monday, each one expecting their appeal to be heard at 9:30 that morning. In fact, many arranged for a day off from work to attend. But what would happen was that the judge would set down trials on Monday as well as other days of the week, for example 10:00 a.m. on Monday for one appellant, 2:00p.m. that afternoon for another appellant, 9:30 a.m. Tuesday and so on. Many would complain they could not attend their appeal because they could not get another day off that week. The Court soon realized that the schedule of appeals had to be changed to provide a specific day and time for each appeal and the Notices of Hearing be revised accordingly.

Most of the judges felt that the jurisdiction bequeathed to the Court had to be extended so as to improve access to justice. One way was to show that a specialized tax court had a better grip on tax matters than a court of general jurisdiction. We worked on drafting good reasons. Judges, Judge Bonner in particular, would offer to assist new judges in their work, especially those with no tax background. The aim was to make the TCC *the* tax court in Canada. The Court tried to help taxpayers outside and inside the court room. This included the Court staff in particular. Self-represented taxpayers are often intimidated by court procedures and the aura of a court room. Court staff and judges tried to relax taxpayers and treat them with dignity. If a notice of

appeal was faulty, for example, it did not mention the taxation year or the taxpayer's address or the date of the assessment or there was a failure to file a notice of objection, the TCC employees would comfort the taxpayer offering some help where possible. Court staff did not tell taxpayers to "go back home and get things right". And in the court room, judges would explain the appeal and procedure to the lay appellant trying to ensure the appellant had more than a grasp of what an appeal entailed. These practices became known among the tax bar and the government and rewarded the TCC a reputation as a "peoples' court", something politicians would appreciate.

The court's inventory was manageable in the mid-1980s. Judges sat only 11 weeks a year, as opposed to over 20 weeks currently, giving them lots of time to research their cases and write good reasons. I doubt if in those days the Court heard an appeal where the amount of tax even approached \$1,000,000. The Court did not have any clerks to help the judges. Law clerks and additional sitting weeks came later and gradually as the Court's inventory began increasing.

There is one event in the Court's history that in retrospect I believe was quite important to the Court's growth and is ignored. That was the appointment in December 1984 of Claude Couture as Chief Judge of the Court. Claude and the Prime Minister had been law partners in Montreal. I have no doubt that he had more than a little influence in convincing the government to amend *The Tax Court Act* in 1990.

The amendments, effective January 1, 1991, finally granted the Court exclusive jurisdiction to hear appeals from income tax assessments. This was no longer shared with the Federal Court. Also, appeals from the TCC went to the Appeal Division of the Federal Court. Appeals *de novo* were no more.

The amendments also maintained the ability of low assessed taxpayers to access the Court by way of the Informal Procedure and at the same time give all taxpayers the right to appeal in a more formal and disciplined arena by way of the General Procedure.

And even before 1991, Parliament was granting jurisdiction to the Court to hear disputes under other statutes such as the *Unemployment Insurance Act* and Canada Pension Plan. January 1, 1991, was also the day the Goods and Services Tax (“GST”) entered Canada and it was the TCC that was given exclusive jurisdiction for appeals of GST assessments. Today the TCC has exclusive or shared jurisdiction to hear appeals or references in 19 statutes.

It was soon after 1983 that appeals from judgments of the Court ended up in the Supreme Court. The first cases were under the *de novo trial* route: *McClurg v. Minister of National Revenue*,² which reversed the Court and *Antosko v. Minister of National Revenue*,³ where the Court’s decision was affirmed. The first non *de novo* appeal at the Supreme Court was *Thibaudeau v. R.*,⁴ where the Court was affirmed, leading Parliament to amend the *Act*.

Notwithstanding the changes to the Court in 1991, it was still not a superior court and lacked jurisdiction in non-assessment tax matters. And even in 2003, when the Court did become a superior court, its jurisdiction was still limited by statute. For example, the Court lacks jurisdiction to the fairness provisions of both GST and the *ITA*. Taxpayers wanting a judicial review of administrative actions by the Canada Revenue Agency (“CRA”) including mandamus, certiorari and prohibition have to go to the Federal Court as do their requests for declaratory relief. And the jurisdiction to hear appeals from the CRA’s refusal to register charities or the MNR’s order cancelling charitable status belongs to the Appeal Court. The appeal process skips a trial court.

Chief Justices of the Court have been seeking jurisdiction in all these areas almost forever. The anomaly that the Tax Court may not deal with such matters, judicial review in particular, results in appeals to the Supreme Court. See *Canada v. Dow Chemical Canada ULC*⁵ and *Canada (Attorney General) v. Iris Technologies Inc.*⁶ In my time at the Court, the

Canadian Bar Association and most tax practitioners had been in favour of these additions to the Court’s jurisdiction. And I doubt attitudes have changed. However, if the Tax Court gains jurisdiction in these areas, the Federal Court loses jurisdiction. And nobody likes losing anything. To paraphrase Hamlet, that’s the rub.

The Supreme Court heard the appeals of *Dow Chemical* and *Iris* in November. Hopefully, in the 40th year of the TCC, practitioners will see some clarity in this jurisdictional fog.

The Tax Court is the junior court in the Federal judicial system. Over the years it has taken advantage of its youth by looking to non-traditional sources to improve its purpose: to serve the public and pay attention to the public’s interests. The Court co-operates with the Canadian Tax Foundation and local bar associations, among others, by informing a wider circle of tax practitioners and the public of the Court’s activities and concerns. In these and other forums, the Court makes efforts to be transparent to taxpayers, their representatives and government.

Tax has an important international presence. Canada has bilateral tax treaties with over 80 countries. We are also members of the Organization for Economic Development and Co-operation (“OECD”) and the Department of Finance is often persuaded by OECD studies when preparing legislation. Influenced by common tax issues being heard internationally, judges of the Court founded and organized the International Association of Tax Judges where judges from various jurisdictions can examine, discuss and review common interests. Members include judges from the European Union, the U.K., Scandinavia, South America, Asia and Africa as well as Canada, Mexico and the U.S. Unfortunately, the Court’s technological infrastructure has not kept up to date, thus limiting the ability of the public to fully access justice. The Court’s technological infrastructure is from another generation and requires

² [1990] 3 S.C.R. 1020 (S.C.C.).

³ [1994] 2 S.C.R. 312 (S.C.C.).

⁴ [1995] 2 S.C.R. 627 (S.C.C.).

⁵ 2022 FCA 70 (F.C.A.).

⁶ 2022 FCA 101 (F.C.A.).

modernization.

The Court requires the digitalization of its current and future inventory; the Court does not have the ability to put or access information on its inventory in an efficient manner. Modern technology would allow electronic filing of documents and efficient access to court filed documents. While this would make the Court itself more efficient it would allow taxpayers living outside cities where the Court has offices to conveniently access documents at reasonable cost as contrasted to the inconvenience and cost today. As the Canadian Bar Association stated in a letter in 2016 to the then Minister of Justice supporting the initiative of the Tax Court and other courts administered by the Courts Administration Service,⁷

An updated e-court system would enhance access to justice and open the [Court] by making court records electronically accessible anywhere in Canada, to the judges on the courts, counsel, litigants and the public registry. ...

Greater access to court records would improve transparency for litigants, many of whom represent themselves, and would facilitate access to a wider range of information for counsel, allowing for more informed action.

The Tax Court will face many more and different challenges in the future. Within the next couple of years, for example, about 12 judges — 50 per cent of the judges — will be retiring or electing to be supernumerary judges. The vacancies will have to be filled quickly; the number of appeals keeps increasing. This will be a generational renewal of the court. The Court must continue to always meet challenges it confronts with the goal of serving the public's need to conveniently access justice. With the continuing interest, help and involvement of the public, tax practitioners and the government, the Tax Court will continue to serve as a beacon of court independence and provide high quality justice to all taxpayers.

This article was adapted from a presentation made by Hon. Gerald J Rip to the Canadian Tax Foundation/Tax Court of Canada Conference celebrating the 40th Anniversary of the Tax Court in Toronto on October 5 and 6, 2023.

THE INTERNATIONAL BAR ASSOCIATION: WHY IT IS IMPORTANT

By David W. Chodikoff, Certified Specialist (Taxation Law), LSO, Partner, Miller Thomson LLP, Editor-in-Chief of Taxes & Wealth Management

If you have not heard of the International Bar Association (“IBA”), you would not be alone. It is effectively an international association for lawyers, bar associates and law societies. Its present membership includes thousands of lawyers from most of the world's top law firms and approximately 190 bar associations and law societies covering more than 170 countries. The IBA's primary aim is to protect and advance the rule of law globally. It was established in 1947. It was created on the premise that an organization composed

of the world's bar associations could contribute to global stability and peace through the administration of justice.

Every year, the IBA holds an annual conference where thousands of lawyers attend. It is a week long event with sessions on a multitude of legal subjects, networking opportunities and more. This year, the annual conference was held in Paris, France.

⁷ Since 2003, the Courts Administration Service has administered the Federal Court of Appeal, Federal Court, Court Martial Appeal Court as well as the Tax Court.

Certain themes or more precisely, issues appeared to occupy the minds of many attendees. What were they? One of the standout guests speaking at the conference was Lech Walesa. Mr. Walesa won the Nobel Peace Prize in 1983 as the leader of Poland's solidarity movement. He was Poland's first democratically elected president in the post-communist era, from 1990 to 1995. Mr. Walesa stressed the importance of international co-operation and the modernization of the West's institutions to win back the trust of the younger generation. Among the many points raised by Mr. Walesa in his speech was his observation that populism has grown globally because of a lack of strong political leadership and a lack of trust of politicians, particularly among the younger generation. One of the questions from an audience member raised another key theme at the conference and that was the subject of climate change. In response to the question, Mr. Walesa called for a continental partnership to achieve global solutions to the problem as climate change was not something that an individual nation could alone solve.

There were two other major themes that appeared to dominate the attention of the attendees. First, the

impact of Artificial Intelligence and digitization on the practice of law. It has been predicted that AI will disrupt the workplace — everything from hiring to firing and anything in between. Keep in mind that it took the telephone 75 years to reach 100 million users and only 2 months for ChatGPT to reach 100 million users. Another theme was ESG. This theme was so broad and touched many areas because it depended upon the country and focus of the particular national government. Gender equality and the role of women in leadership roles, climate change and policies to promote environmental good practices, ethics, and transparency in governance were just a few of the aspects covered by the various sessions and discussions among the thousands of attendees.

Finally, one of the key benefits of the conference is the building of relationships on an international scale. The networking opportunity leads to new business opportunities. So, whether you attend to be better informed about what is happening on a global legal basis or to make connections at an international level, the annual IBA conference is truly a must attend event for firms interested in the furtherance of the IBA's goals and the business opportunities it can create.

STRATEGIES FOR MINIMIZING THE IMPACT OF NEW ALTERNATIVE MINIMUM TAX RULES

By Tina Tehranchian, MA, CFP®, CLU®, CHFC®, CIM®, MFA-P™ (Philanthropy), Senior Wealth Advisor, Assante Capital Management Ltd.

The federal Alternative Minimum Tax (AMT) is a parallel method of calculating tax on regular income for individuals that allows fewer deductions, exemptions, and tax credits to be deducted compared to the ordinary income tax rules and is meant to ensure that high-income earners pay at least a minimum amount of tax.

Under current rules, the AMT applies a flat 15% tax rate to "adjusted taxable income" above \$40,000. The taxpayer pays the AMT or regular tax, whichever is higher, but any AMT paid can be carried forward for up to seven years and

recovered to the extent that regular tax exceeds AMT in those years. This means that AMT is essentially a prepayment of tax if the individual can recover AMT paid within the 7-year period.

What Are the Proposed Changes to AMT?

The government is concerned that too many high-income individuals pay little or no income tax in a given year as a result of certain tax incentives and has therefore proposed

changes to how AMT is calculated in the 2023 federal budget.

According to the 2023 budget, effective January 1, 2024, the AMT rate will rise to 20.5%, but the exemption amount also will rise to an estimated \$173,000 for 2024, up from \$40,000 under current rules. This will mean that fewer individuals will be subject to AMT.

The proposed changes will also broaden the tax base for AMT in the following ways:

- Increasing the capital gains inclusion rate from 80% to 100% for calculation of AMT
- Decreasing the inclusion rate for capital loss carry forwards and allowable business investment losses from 80% to 50% for AMT purposes.
- Including 100% of the benefit associated with employee stock options instead of 50% under regular rules.
- Adding 30% of capital gains on donations of publicly-listed securities, which would not be subject to any tax under regular rules.
- Disallowing 50% of the following deductions:
 - o Interest and carrying charges incurred to earn property income
 - o Deduction for limited partnership losses of other years
 - o Non-capital loss carryovers
 - o Employment expenses (other than those to earn commission income)
 - o Moving expenses
 - o Childcare expenses
- Allowing only 50% of non-refundable tax credits to reduce the AMT (with certain limited exceptions).

While the majority of Canadians would not be impacted by the change in AMT rules as their personal taxes would be higher than those calculated under the AMT rules, the changes can negatively impact people who realize large capital gains such as owner managers who claim the lifetime capital gains exemption on the gain realized on the disposition of their qualifying small business corporation shares, or those who claim large tax deductions or credits. Under the new AMT rules, 2 billion more in revenue would be collected from individuals making more than \$2 million.

Who Would be Affected by the AMT Changes?

On September 7th 2023, the Office of the Parliamentary Budget Officer (PBO), announced that “More of the tax burden of the AMT is expected to shift to higher income individuals relative to the current AMT regime, with those making above \$300,000 contributing approximately 98% of the total AMT paid by individuals, and those with total incomes above \$1 million contributing approximately 70%.” The following types of individuals and entities are most likely to be negatively impacted by the new AMT rules:

Business owners

If you own a business and are planning to sell your business and realize a large capital gains as a result, you should try and do it in 2023 rather than 2024. You should consider the implications of the AMT proposals and discuss their impact on your tax planning with your tax advisor.

High Income Donors to Charities

If you are in the highest marginal tax bracket (with earned income of over \$235,675 in 2023 if you live in Ontario) and are planning to make large donations to registered charities, you should consider the impact of the AMT under the current and proposed rules. You could benefit from more favourable tax rules if you make your donation in 2023. Therefore, you may want to consider setting up a donor advised fund and making an upfront donation in 2023 and carrying it forward over the next five years to take advantage of the current AMT rules.

Trusts

AMT also applies to most types of trusts. Therefore, it is important for trustees to consult their tax advisors about the implications of the proposed measures.

Retirees Expecting Low Taxable Income

If you are a retiree and are expecting to have a low taxable income in the future, it is important that you plan to minimize the impact of AMT.

Tina Tehranchian, MA, CFP®, CLU®, CHFC®, CIM®, MFA-P™ (Philanthropy) is a FP Canada™ Fellow and a Senior Wealth

Advisor at Assante Capital Management Ltd. in Etobicoke, Ontario. She can be reached at (905) 707-5220 or through her website at www.tinatehranchian.com. Assante Capital Management Ltd. is a member of the Canadian Investor

Protection Fund and the Investment Industry Regulatory Organization of Canada. Before acting on any of the above, please make sure to see a professional advisor for individual financial advice based on your personal circumsta

INTRODUCING A NEW REGULAR COLUMN, “FOUNDATION”: YOUR GUIDE TO PROFESSIONAL SUCCESS

By George Brandon, President, LegalXcellence

Welcome to the inaugural edition of "Foundation," a regular column dedicated to helping professionals in the world of taxes and wealth management develop their books of business. In the upcoming series, we will embark on a journey through the dynamic landscape of practice expansion. Our mission is to uncover practical strategies that empower professionals to cultivate prosperous practices and establish themselves as authoritative figures in their respective domains. Whether you are a seasoned expert or just starting your career, the pursuit of expanding your client base is an ongoing adventure.

Regardless of your experience in the field, one universal truth remains clear: the importance of nurturing existing relationships and forging new connections cannot be underestimated. Amidst the bustling world of professional practice, allocating time to cultivate and establish these connections is an essential priority. Our approach in this column will be a systematic progression, starting with foundational principles and steadily advancing, step by step.

Building Your Professional Brand: Strategies for Business Development

In our rapidly evolving fields of work, standing out is a necessity, not an option. The professional landscape has evolved, and clients now seek more than just technical expertise. They desire a personalized experience delivered by a trustworthy and relatable professional. This is where the concept of your professional brand comes into play.

Your brand encompasses more than just a logo or a tagline — it encapsulates the essence of your practice, the commitment you make to your clients and the values you

uphold. Establishing a strong brand is the cornerstone of success in taxes and wealth management. In this edition, our goal is to shed light on the path forward, guiding you through the essential steps of crafting a compelling brand.

Define your Brand Identity

Begin by asking: what makes you unique? What values, skills, and qualities do you want your clients to associate with your practice? If you find it difficult answering these questions, ask a few close friends or colleagues that know you well for their thoughts. Your brand identity should seamlessly align with your professional expertise while resonating with your target audience. Authenticity is key — your brand should reflect your true self.

Identify Your Target Audience

Understanding your ideal clients is crucial. Create a vivid profile of their needs, challenges, and preferences. Tailoring your services to meet their specific demands not only captures their attention but also builds a strong emotional connection.

Craft Your Unique Value Proposition (“UVP”)

Your UVP represents the heart of your brand — it's the magnetic pull that attracts potential clients to choose you over competitors. Highlight the unique advantages you bring to the table. Whether it's your specialized niche, exceptional client relationships or innovative solutions, make your UVP shine brightly.

Consistency Across Platforms

From your website to your social media profiles, maintaining consistency in branding is essential. Maintain a cohesive visual identity, tone and messaging. This consistency enhances your brand's credibility and promotes quick recognition.

Establish Thought Leadership

Claim your role as an industry thought leader by sharing your insights and expertise. Write articles, deliver talks, and engage in discussions relevant to your field. Becoming a trusted source of knowledge elevates your brand's reputation and attracts a dedicated following.

Leverage Your Online Presence

In today's digital era, a strong online presence is indispensable. Invest in a polished website, optimize it for search engines and engage your audience on relevant social media platforms.

Remember, crafting your brand is an ongoing endeavor that requires dedication and persistent effort. It's not about short-term victories; it's about nurturing lasting relationships and solidifying your reputation as a top-notch

expert.

As you embark on this journey to build your professional brand, stay tuned for our upcoming regular editions where we will delve deeper into the intricacies of developing your business in taxes and wealth management. In our next installment, we will explore the art of networking and its pivotal role in expanding your reach. Until then, lay the foundation for your unique brand — one that charts the path to enduring success.

Stay passionate and keep forging your path in taxes and wealth management!

George Brandon is the president of LegalXcellence LLC. He is a highly experienced professional with a rich background in management, business development, marketing, and IT, spanning over three decades within the legal services sector. Additionally, he serves as a proficient business development attorney coach and a successful marketing director. George has an impressive history of guiding professionals to attain their business development objectives, showcasing expertise in this field. George can be reached at george@legalxcellence.com (323) 513-5810.

JACKSON V. ROSENBERG: A “CAUTIONARY TALE” OF JUDICIAL CONFUSION OVER JOINT TENANCY AND THE RIGHT OF SURVIVORSHIP POST *PECORE*

By Stephen Sweeney, Partner, Miller Thomson LLP, Nicole Cianci, Associate, Miller Thomson LLP, Elizabeth Gaudet, Articling Student, Miller Thomson LLP, and Jayme Millar, Articling Student, Miller Thomson LLP

A recent decision of the Ontario Superior Court of Justice in the case of *Jackson v. Rosenberg*¹ illustrates once again how lower courts in Canada continue to struggle with the concepts of joint tenancy and the right of survivorship post-the SCC's decision in *Pecore v. Pecore*.² The trial judge in *Jackson* described the case as “a cautionary tale for persons who might be tempted to use joint tenancy as an estate planning mechanism to avoid the payment of probate fees”.

This article would re-characterize the case as being a cautionary tale of judicial confusion over joint tenancy and the right of survivorship.

BACKGROUND

A summary of the facts in *Jackson* that are relevant to this article is as follows: The Applicant, Nigel Jackson, was the

¹ 2023 ONSC 4403 (Ont. S.C.J.), hereinafter referred to as “*Jackson*”.

² 2007 SCC 17 (S.C.C.), hereinafter referred to as “*Pecore*”.

common-law spouse of Bernie Taub, who died in 2010. Mr. Taub was the great-uncle of the Respondent, Lori Rosenberg. In 2005, Mr. Jackson and Mr. Taube executed mirror wills naming each other as the respective sole beneficiary of each other's estate and naming Ms. Rosenberg as their alternate beneficiary. Upon Mr. Taube's death, his will was not probated because all of his assets were jointly owned with Mr. Jackson. One of the jointly held assets of Mr. Jackson and Mr. Taube was a condominium in Toronto that they held as joint tenants. Upon Mr. Taube's death, Mr. Jackson became the sole owner of the condominium as surviving joint tenant. In 2011, Mr. Jackson sold the condominium and with the sale proceeds purchased a new home in Port Hope, Ontario (the "Port Hope property"). In 2012, Mr. Jackson transferred the Port Hope property from himself as sole owner to himself and Ms. Rosenberg as joint tenants (the "2012 Transfer"). Ms. Rosenberg made no financial contributions towards the purchase price, maintenance or upkeep of the Port Hope property and did not live there. In 2020, following a dispute between Mr. Jackson and Ms. Rosenberg, Mr. Jackson instructed his lawyer to sever the joint tenancy thereby converting the ownership interests to a tenancy in common (the "2020 Transfer").

Mr. Jackson then applied to the Court for a declaration that Ms. Rosenberg held title to the Port Hope property by way of a resulting trust for Mr. Jackson and that he had a 100% beneficial interest in the Port Hope property. Ms. Rosenberg applied for a declaration that she was the beneficial owner of the Port Hope property. Both applications dealt with the same question: did Mr. Jackson's transfer of title of the Port Hope property from himself as sole owner to himself and Ms. Rosenberg as joint tenants for no consideration, create a resulting trust in Mr. Jackson's favour, or was this transfer intended as a gift to Ms. Rosenberg?

The evidence disclosed that, at the time of the 2012 Transfer, Mr. Jackson signed an Acknowledgment and Direction including a Land Transfer Tax statement that the transfer was for nominal consideration and that the transfer was a gift. Each of Mr. Jackson and Ms. Rosenberg also signed a Direction to Mr. Jackson's lawyer that stated, "We further instruct you to effect such Transfer as a GIFT on the basis that no consideration is passing between the parties in any manner whatsoever". But later, in his Application, Mr. Jackson tendered affidavit evidence in which he stated, "It was never my intention that Lori would live with me, nor did I ever intend to give my house or any portion of my house to

Lori. It was not my intention that Lori would have any rights to my home, at least not until I passed away", and "It was never my intention to gift a portion of my Port Hope home to Lori. As I had no close family at that time, my intention was to have the property, with whatever equity was left in it, pass to Lori, my beloved partner's grand niece, without her having to pay the probate fees. This is why I added her on title, and for no other reason."

The issues raised by the case with which this article is concerned were: (1) Did the 2012 Transfer of title into joint tenancy with no consideration passing create a resulting trust in Mr. Jackson's favour?; and (2) Could Mr. Jackson sever the joint tenancy?

TRIAL COURT DECISION

The Court made the following findings:

1. Mr. Jackson's intention at the time of the 2012 Transfer was to gift the right of survivorship in the Port Hope property to Ms. Rosenberg; he did not intend to gift the Port Hope property to Ms. Rosenberg during his lifetime.
2. Mr. Jackson intended that Ms. Rosenberg hold her interest in the Port Hope property in trust for Mr. Jackson during their joint lives, but that if he predeceased Ms. Rosenberg she should take the benefit of the whole of the property.
3. Mr. Jackson could not revoke his gift of the right of survivorship to Ms. Rosenberg but, until his death, he retained all rights and interest in the Port Hope property and is free to sell or encumber the property.
4. Mr. Jackson had the right to sever the joint tenancy with the result being that each party became a tenant-in-common as to a 50% interest in the property.
5. Ms. Rosenberg holds her 50% interest in the property on a resulting trust for Mr. Jackson during his lifetime.
6. The severance of the joint tenancy eliminated Ms. Rosenberg's right of survivorship with respect to Mr. Jackson's 50% share but Mr. Jackson could not revoke the right of survivorship with respect to Ms. Rosenberg's 50% share.

ANALYSIS

With respect to the trial judge, these findings are

contrary to the evidence, mis-apply the concepts of joint tenancy and the right of survivorship and lead to the illogical conclusion that a right of survivorship can survive a severance of a joint tenancy.

The trial judge states that Mr. Jackson's intention at the time of the 2012 Transfer was to gift the right of survivorship in the Port Hope property to Ms. Rosenberg. But that is not consistent with the evidence that, at the time of the 2012 Transfer, Mr. Jackson signed a Direction to his lawyer that the transfer was a gift. There was no discussion of, and no mention of, a gift of the right of survivorship at the time of the 2012 Transfer. The trial judge attributed to Mr. Jackson an intent of which there is no evidence of its existence *at that time*. On this point the trial judge quotes with approval from *Pecore* that, "the most important evidence of intention will generally be evidence that is contemporaneous to the transfer", and, "The reason that subsequent acts and declarations have been viewed with mistrust by the courts is because a transferor could have changed his or her mind subsequent to the transfer".

Notwithstanding these cautions it appears that the trial judge gave more weight to affidavit evidence given by Mr. Jackson eight years after the 2012 Transfer than to the contemporaneous evidence. The contemporaneous evidence should have been sufficient for the trial judge to dispose of the Application in Ms. Rosenberg's favour. Clearly, at the time of the 2012 Transfer, Mr. Jackson had a firm grasp of the concept of joint tenancy. It was because he and his deceased partner, Mr. Taub, held their assets including a condominium as joint tenants that Mr. Jackson survived to the sole ownership of those assets upon Mr. Taub's death. And Mr. Jackson asserted that fact in rebuttal of Ms. Rosenberg's argument that she could have a beneficial interest in those assets because of the mutual Wills prepared by Mr. Jackson and Mr. Taub in 2005 of which she was a contingent, or remainder, beneficiary.

There was no evidence that Mr. Jackson considered, or directed his mind to, the concept of a gift of a right of survivorship until his encounter with Ms. Rosenberg's husband in 2020. In *Falsetto v. Falsetto*,³ the court found that the applicant could not have it both ways on the question of intention. In that case the court found that by

permitting title to be registered in the name of the respondent, the applicant intended to avoid a merger of title under the *Planning Act*. The court agreed that achieving that result was inconsistent with a resulting trust to the applicant. A similar argument can be made in *Jackson*: Mr. Jackson intended to avoid the estate administration tax; that result could only be achieved by creating a true joint tenancy. He cannot also be said to have intended not to create a true joint tenancy but to have created a resulting trust because the estate administration tax would then not have been avoided.

The trial judge based his determination of Mr. Jackson's intention at the time of the 2012 Transfer by framing the analysis as an inquiry not only into whether a gift was intended but also the nature of the gift. By that, one might understand the trial judge to have asked what was the subject matter of the gift. Because the trial judge found, considering the evidence as a whole, that Mr. Jackson's intention at the time of the 2012 Transfer was to gift a right of survivorship in the Port Hope property to Ms. Rosenberg, he was then required to inquire further into the equities between the parties including an analysis of whether there existed a resulting trust, whether a presumption of resulting trust was rebutted and the applicability of *Pecore* principles. Arguably, had the trial judge based his finding of intention only on the contemporaneous evidence, an analysis of resulting trusts and *Pecore* principles would not have been required.

The leading case in Canada on presumptions imposed on a supposed joint tenancy is the Supreme Court of Canada ("SCC") decision in *Pecore*. *Pecore* is important for its statements on the applicability, and rebuttal, of presumptions (of advancement and of resulting trusts) but the SCC decision also introduced a significant reinterpretation of the legal treatment and consequences of joint tenancies and the right of survivorship. That part of the SCC judgment has introduced confusion and uncertainty as lower courts struggle to apply those principles and has been the subject matter of much commentary and criticism.⁴

Prior to *Pecore*, it was understood that a transfer of property by one person into joint tenancy with another could lead to only one of two alternative legal consequences. Either:

³ 2023 ONSC 1351 (Ont. S.C.J.) ("*Falsetto*").

⁴ See for example, Michael J. Welters and Emma A. McArthur, "*Pecore's Troubles*" (2009-2010), 29 *E.T.P.J.* 139 ("*Welters and McArthur*"), and Nitikman, "The Wrong of Survivorship: A (Very Late) Comment on *Pecore v. Pecore*", 40 *Estates, Trusts and Pensions Journal*, 1, December 2020 ("*Nitikman*").

- The new joint tenant received an immediate beneficial interest in the property jointly with the transferor and the entirety of the property was owned by both parties, equally, at the same time and to the same extent. Upon the death of a joint tenant his or her interest was extinguished but the survivor continued to hold the entirety of the interest. The survivor, thus, did not acquire any greater interest since he or she already held the entirety of the interest; however, the value of the interest increased because the survivor was then the sole, and not a joint, owner.
- The new joint tenant acquired only legal title to the property but held the beneficial interest in the property on a resulting trust for the transferor. Upon the death of the transferor the whole of the beneficial interest in the property devolved to the transferor's personal representatives and became part of his or her estate. In that case, the new joint tenant/transferee could be compelled to convey the legal title to the transferor's personal representatives. Such a circumstance would not constitute a true joint tenancy because the 4 unities would not be present.

In *Pecore*, however, the SCC posited a third possible outcome, wherein the transferor placed his or her assets into a joint account with the transferee with the intention of retaining exclusive control of the account until his or her death, at which time the transferee alone would take the whole of the property through survivorship. The Court characterized this third possibility as a “gift of the right of survivorship”.

But, as *Nitikman* argues persuasively,

[T]hat is impossible! That assumes that the right of survivorship is a separate right that exists, somehow, independently of the joint tenancy, that Hughes could make a gift now of the right of survivorship to take effect at his death, even though Paula was not now a joint tenant beneficially. That would violate our historical understanding of joint tenancy. As we know from the discussion above, a right of survivorship is not a separate right at all, merely the result of the joint tenants having unity of title.

Nitikman's “discussion above” posits that a right of survivorship is not a “right” at all, in the sense of being a separate kind of property that can be gifted. Rather, it is a necessary consequence, or incident, of joint ownership. The argument is that a true joint tenancy can exist only where the “4 unities” exist (unities of title, time, interest and possession). If one or more of the 4 unities does not exist, or ceases to exist, the joint tenancy is destroyed. Prior to the death of a joint tenant the joint tenants have a unity of interest in the subject property, that is, each is the owner of the whole of the subject property. Upon the death of one of the joint tenants the survivor continues to have an interest in, or be the owner of, the whole. Nothing has changed insofar as the survivor is concerned but the interest held by the deceased joint tenant is extinguished, i.e., the interest is not capable of being devolved to his or her personal representatives. As further confirmation that a “right of survivorship” cannot be a separate kind of property that can be gifted, consider that (a) the deceased joint tenant can have no such right because his or her first death eliminates any possibility of enjoying such a right; and (b) upon a severance of a joint tenancy the consequence of survivorship of interest no longer exists but rather disappears.

If this analysis is correct, then the SCC must have been wrong in deciding *Pecore* on the basis of the existence of a gift of a right of survivorship. However, lower courts are bound by the principle of *stare decisis* to follow SCC decisions and thus have struggled to apply *Pecore* principals in a wide variety of cases, including this one. It is not surprising that a great deal of conceptual uncertainty abounds in lower court decisions given that the conceptual underpinnings of the *Pecore* decision themselves are suspect. In particular, if a transferee joint tenant is said to be a joint tenant as to the legal title to a property only but holds the beneficial interest in the property upon a resulting trust for the other, transferor, joint tenant, then the 4 unities do not exist (at a minimum there is no unity of interest), thus a true joint tenancy cannot exist, thus a right of survivorship cannot exist. How, then, can it be said that such a person, the transferee, can, by operation of law, hold the whole of the interest by survivorship when the person held no such thing during the existence of the transferor?

The trial judge quotes with approval from *Waters*⁵ the

⁵ *Mark Gillen, Lionel Smith & Donovan W.M. Waters, Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Thomson Reuters Canada, 2012) (“Waters”).

following passage, stating that the “circumstances in this case are identical” to the scenario described:

If A supplies the purchase money and conveyance is taken in the joint names of A and B, B during the joint lives will hold his interest for A; B will also hold his right of survivorship — again by way of a resulting trust — for A's estate, because that right is merely one aspect of B's interest. In other words, the starting point is that B holds all of his interest on resulting trust for A, or A's estate. However, evidence may show that, while A intended B to hold his interest for A during the joint lives, it was also A's intention that, should he (A) predecease, B should take the benefit of the property. The presumption of resulting trust would then be partially rebutted, in relation to the situation that has arisen, so that B would not hold his interest (now a sole interest and not a joint tenancy) on resulting trust. He would hold it for his own benefit.⁶

Again, presuming that *Nitikman* is correct in saying that a right of survivorship is not a right at all that can exist apart from the ongoing existence of the 4 unities required for the existence of a joint tenancy, and recognizing that in the above example A and B do not have a unity of interest, this analysis must be flawed. If that is true then what in fact is the legal consequence arising from the example? What Waters describes must be a trust because one person (A) is holding legal title for the benefit of another (B). Waters describes this as a resulting trust, which may be correct, or it might also be described as an implied trust (if there is a difference). What is the nature of the trust, and what are the rights and obligations of A and B respectively? One can argue that the example really describes a situation practitioners would recognize as being akin to an alter-ego, or self-benefit, trust that provides for a remainder beneficiary whose interest is postponed until after the death of the settlor. That is, A has settled the property upon A and B to hold in trust. The obligations of the trustees are to hold the property exclusively for the benefit of A during

⁶ Waters, at § 10.II.B.2. Footnotes omitted by the trial judge. Trial judge's emphasis included.

⁷ This is the third possibility, discussed in *Welters and McArthur*, but rejected on the basis that the SCC in *Pecore* found that no trust was created. Also, for taxation purposes, this interpretation must still mean that either the initial transfer is a taxable disposition to A at the time of the initial transfer (if the trust

A's lifetime and to deal with the property according to A's instructions. Therefore, should A so request, A and B could be compelled to sell the property and distribute the proceeds to A and for A's benefit alone. Upon A's death, B is a remainder beneficiary. Whatever interest in the property or its proceeds exist at the time of A's death is now held by B (as remaining trustee) exclusively for the benefit of B.⁷ What is perhaps unfortunate is that in quoting the above passage the trial judge latches onto the notion that a presumption of resulting trust can be “partially rebutted”, and this notion informs the trial judge's later findings.

In analyzing the nature of a right of survivorship the trial judge cites, and appears to adopt, the following passages:

Where a joint tenancy in land is concerned, on the other hand, either of the joint tenants is at liberty to sever the joint tenancy at any time — a fact that clearly undermines the notion that as a matter of law, a joint tenant receives a "full and perfect" *inter vivos* gift of the "survivorship" (and counsel for Robert contends, of the property itself). Severance, which occurs automatically upon the destruction of the four unities, ends the *jus accrescendi*, with the result that each co-owner becomes entitled to a distinct share in the land rather than an undivided interest in the whole.⁸

Of course it remains true that once a gift has been made of an interest in real property or any other type of property, the gift cannot be revoked — whether the transferee takes as a joint tenant or tenant in common. As stated by D. Smith J.A. in *Fuller v. Harper*, “The gift of a joint interest in real property is an *inter vivos* rather than a testamentary gift and cannot be retracted by the donor. It is a 'complete and perfect *inter vivos* gift' ...”⁹ The principal and distinguishing characteristic of joint tenancy is the right of survivorship, the *jus accrescendi*. When one joint tenant dies, his or her interest in the property is extinguished and passes to the surviving joint tenant(s). The right of

is not a trust described in subparagraphs 73(1.01)(c)(ii) or (iii) and to which subsection 73(1.02) applies), or that A is deemed to have disposed of the property at the time of A's death because any of paragraphs 104(4)(a), (a.1) or (a.4).

⁸ *Bergen v. Bergen*, 2013 BCCA 492 (B.C. C.A.) (“*Bergen*”). Emphasis added.

⁹ *Ibid.*

survivorship is, however, a revocable expectancy that manifests only upon success in the so-called "ultimate gamble" — survival — and then only if the joint estate has not been previously destroyed by an act of severance: *Estate of Propst*, 788 P.2d 628 at 631 (Cal. Sup. Ct. 1990). When given *inter vivos*, a gift of survivorship rights is to what is left, if anything, when the gamble is won: *Simcoff v. Simcoff*, 2009 MBCA 80 at para. 64.¹⁰

One might have expected that these passages would have pointed the trial judge in the right direction. Instead, he finds that the case at hand meets the "third scenario" in *Pecore*, adopting the following passage:

[O]ne consequence of a transfer of legal title into joint tenancy is that an immediate, *inter vivos* gift is made of the right of survivorship in property, with the donor of the gift retaining all remaining right and interest in the property during their lifetime: *Herbach v. Herbach Estate*, 2019 BCCA 370 at para. 39. These are the circumstances that have arisen in this case. Mr. Smith did not create a true joint tenancy when he gratuitously placed Ms. Kennedy on title as a joint tenant. He made an immediate *inter vivos* gift of the right of survivorship.¹¹

But, to re-quote *Nitikman*, "this is impossible!" If there was no "true" joint tenancy", i.e., the 4 unities do not exist, then there could be no survivorship and certainly no "right" of survivorship to gift.

Unfortunately, this judicial confusion over what is, and what is not, a "right of survivorship" leads, in this case to a more absurd result. Because the trial judge finds that the subject matter of the gift by Mr. Jackson to Ms. Rosenberg is a "gift of the right of survivorship", he pursues that to say that it was a completed gift that cannot be revoked. This leads him to the erroneous conclusion that, notwithstanding that Mr. Jackson was entitled to and in fact did sever the joint tenancy, the right of survivorship continued to exist as a separate kind of property interest (notwithstanding that he then later says, at para. 95, that "severance ends the right of survivorship"). The trial judge's error is then compounded when he goes on to find, at para. 97, that, "Mr. Jackson

cannot revoke the right of survivorship *with respect to Ms. Rosenberg's 50% share.*" (emphasis added). But how can that be? It is one thing for the trial judge to say that upon Mr. Jackson severing the joint tenancy (which he was legally permitted to do), he and Ms. Rosenberg became tenants-in-common with Ms. Rosenberg holding her 50% interest upon a resulting trust for Mr. Jackson. It is another to then state that, "Mr. Jackson cannot revoke the right of survivorship with respect to Ms. Rosenberg's 50% share", and thus, "When Mr. Jackson dies, Ms. Rosenberg's 50% share of whatever equity remains in the property will pass to her in accordance with the intention of the original February 29, 2012 transfer".

In summary, this case illustrates graphically the judicial confusion that abounds as lower courts continue to struggle with how to apply *Pecore*. But, "as the SCC itself has noted "*stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate.'"¹² There remains room for lower courts to approach these issues on a more principled basis and by restricting the possible outcomes flowing from transferors' intentions to what were, prior to *Pecore*, considered to be the two available alternatives. If there does exist a third alternative it cannot be a gift of a right of survivorship; but it might be an alternative that fits within recognized trust law principles.

At the time of writing, a notice of appeal has been filed in *Jackson*. One hopes that a higher court will use this as an opportunity to place property and trust law principles on a firmer footing. One might also hope that property and trust law practitioners in Ontario will be cognizant not only of the risks of using joint tenancy as an estate-planning tool but also of the dangers of not ensuring that transferors clearly understand, articulate and document their intentions.

Stephen Sweeney is a Partner in Miller Thomson LLP's Tax Practice Group. Stephen can be reached at ssweeney@millerthomson.com.

Nicole Ciani is an Associate in Miller Thomson LLP's Private Client Services Group. Nicole can be reached at nciani@millerthomson.com.

¹⁰ *Zeligs Estate v. Janes*, 2016 BCCA 280 (B.C. C.A.). Emphasis added.

¹¹ *Kennedy v. Smith*, 2022 BCSC 1622 (B.C. S.C.). Emphasis added.

¹² *Nitikman*, *Supra*, at 20. Footnotes omitted.

Elizabeth Gaudet is an Articling Student at Miller Thomson LLP. Elizabeth can be reached at egaudet@millerthomson.com.

Jayme Millar is an Articling Student at Miller Thomson LLP. Jayme can be reached at jaymillar@millerthomson.com.

YET ANOTHER SUPREME COURT INCOME TAX CASE! – THE COURT TAKES ON THE “MANDATORY REPATRIATION TAX”

By Paul Bercovici, Director of International Tax, Adeptus Accountants

Historically, the Supreme Court of the United States (the “Supreme Court” or the “Court”) has proven to be reluctant to hear income tax cases. However, following on the heels of the *Bittner* decision¹ rendered in February 2023, the Supreme Court has agreed to hear yet another federal income tax case. On June 26, 2023, the Court agreed to hear the appeal² of the United States Court of Appeals for the Ninth Circuit (hereinafter referred to as the “Ninth Circuit”) decision in *Charles G. Moore & Kathleen F. Moore v. United States of America*.³ The petitioners in the *Moore* case are challenging the constitutionality of the “mandatory repatriation tax” provided for in *Internal Revenue Code* (“IRC”) Section 965 (hereinafter referred to as the “MRT”). It is interesting to note that the Supreme Court agreed to hear the *Moore* case despite the fact that there was no “split” between Circuit Courts on the issue that is the subject matter of the appeal.

What is the MRT?

The MRT provisions were included in the *Tax Cut & Jobs Act* (“TCJA”) passed in late 2017.⁴ In a nutshell, natural persons who were 10% or more US shareholders of controlled foreign corporations (“CFCs”)⁵ were subject to federal

income tax on the higher of the CFC’s accumulated post-1986 earnings & profits (“E&P”) as of November 2, 2017 or December 31, 2017.⁶ The enactment of the MRT provisions was part of the move from a “deferral” system of income taxation to a “quasi-territorial” or “participation exemption” system.⁷ The MRT provisions were designed to establish a starting point for the application of the Global Intangible Low-Taxed Income (“GILTI”) provisions for the 2018 and subsequent tax years.

The MRT was a “one-time tax” and was payable irrespective of whether such income had, in fact, been distributed to the shareholder. The MRT applied in either the 2017 or 2018 tax year, depending upon whether the CFC was a calendar year or fiscal year taxpayer. The portion of accumulated post-1986 E&P that was allocable to a US shareholder’s “aggregate foreign cash position”⁸ was taxed at an effective federal tax rate of 15.5% and the portion of accumulated post-1986 E&P that was allocable to all other assets was taxed at an effective federal tax rate of 8.0%.⁹ The reduced effective tax rates were achieved through the application of certain “deduction equivalent” amounts. For these purposes, a CFC’s “cash position” includes cash held by the CFC, the net accounts receivable of the CFC and certain

¹ See the June 2023 edition of *Taxes & Wealth Management* for my article on the *Bittner* case.

² Docket. No. 22-800.

³ 36 F.4th 930 (9th Cir., 2022). On appeal from a decision of the U.S. District Court for the Western District of Washington. The District Court decision is unreported but is available at 2020 WL 6799022 (W.D. Wash. Nov. 19, 2020).

⁴ See IRC Section 965.

⁵ The MRT provisions also apply to certain US shareholders of CFCs that are not natural persons.

⁶ The reference to the two different dates in 2017 was done in an attempt to prevent the creation and implementation of certain “tax avoidance” strategies between the date that the TCJA was enacted and December 31, 2017.

⁷ Prior to the enactment of the MRT and the GILTI provisions, US shareholders of CFCs were generally subject to US federal income tax only upon distribution of a CFC’s E&P. There were certain exceptions to this rule, the primary one being the current taxation of Subpart F income (generally “passive income”) of the CFC.

⁸ IRC Section 965(c)(3).

⁹ IRC Section 965(c)(1) & (2).

liquid investments and short-term obligations held by the CFC.¹⁰

Recognizing that the tax payable by the application of the MRT provisions was, in effect, a tax payable on income which the shareholder had yet to receive, the MRT provisions permitted affected taxpayers to elect to pay their MRT liability in eight annual installments.¹¹

Case Background

For several years, Charles and Kathleen Moore (hereinafter referred to as the “Taxpayers”) had been greater than 10% shareholders in an Indian corporation. The Indian corporation was a CFC. The Indian corporation was created as part of an effort to assist subsistence farmers in India. As of December 31, 2017, the Indian corporation had accumulated post-1986 E&P of approximately \$508,000.

The Taxpayers had never received any actual distributions from the Indian corporation but were faced with a 2017 tax bill of approximately \$15,000 due to the application of IRC Section 965.

The Ninth Circuit Decision

The US District Court for the Western District of Washington granted the government’s motion to dismiss the Taxpayers’ complaint.¹²

The issue in *Moore* basically resolves itself into whether the 16th Amendment to the Constitution authorizes Congress to tax unrealized sums without apportionment among the states.

Without getting into the “nitty-gritty” of the respective majority of *amicus curiae* briefs submitted to the Court appear to support the position advocated by the Taxpayers.

arguments of the Taxpayers and of the government, the gist of the Taxpayers’ argument was that the MRT was unconstitutional because it was a “direct tax” that had not been apportioned between the states and that they had never received or “realized” the amounts upon which they were being taxed under IRC Section 965.

In contrast, the gist of the government’s argument was that whether a taxpayer has actually “realized” income does not determine whether a tax is constitutional. In support of its position, the government referred to a number of existing tax provisions that tax income that has yet to be received or realized.¹³

The Ninth Circuit affirmed the decision of the US District Court for the Western District of Washington and denied the Taxpayers’ motion for a rehearing of the case.¹⁴ In finding for the government and holding that the Taxpayers were subject to the MRT, the Ninth Circuit found that there was no constitutional requirement that income taxed by the federal government must first be received or “realized” by a taxpayer.¹⁵ In other words, the Ninth Circuit held that the Constitution does not prohibit a corporation’s income from being attributed to its shareholders on a pro-rata basis (and thereby becoming subject to current taxation in the hands of the shareholders). The Ninth Circuit also noted that a finding that the MRT was unconstitutional could result in a shareholders’ “windfall” in the form of accumulated post-1986 E&P earned through November 2 or December 31, 2017¹⁶ potentially never being taxed in the hands of the shareholders of the CFC.

Future Proceedings in the Supreme Court

Through October 23, 2023, a significant number of *amicus curiae* briefs¹⁷ have been submitted to the Court. The vast Argument before the justices of the Court is scheduled for December 5, 2023. A decision is expected sometime after

¹⁰ IRC Section 965(c)(3)(B).

¹¹ IRC Section 965(h).

¹² See footnote 3.

¹³ For example, the Subpart F provisions which generally subject US shareholders to current taxation on undistributed “passive income” of CFCs and the inclusion of income by application of the GILTI provisions of IRC Section 951A.

¹⁴ *Moore v. United States*, 53 F.4th 507 (9th Cir., 2022). The decision to deny a rehearing of the case was by a 5-4 majority.

¹⁵ In support of its finding that the MRT was constitutional, the Ninth Circuit made specific reference to prior authorities that had upheld the constitutionality of the Subpart F provisions of the IRC.

¹⁶ That is, before the GILTI provisions took effect on January 1, 2018.

¹⁷ An *amicus curiae* brief is a legal brief submitted to an appellate court by a person or group who is not a party to the particular case but who has an interest in its outcome. *Amicus curiae* briefs generally advocate for a particular position and are submitted in an attempt to influence the decision of the appellate court.

May 2024.

Potential Ramifications of the Court's Decision for Taxpayers

There has been a great deal of speculation in the “tax press” regarding the potential far-reaching impact of a finding by the Supreme Court that the MRT is, in fact, unconstitutional. There appear to be three possible outcomes at the Supreme Court:

1. An outright ruling in favor of the government that the imposition of the MRT is constitutional;
2. A “narrow” ruling in favor of the Taxpayers (e.g., a ruling that IRC Section 965 should not apply to minority shareholders of CFCs who do not have the ability to compel the CFC to distribute its E&P to the shareholders of the CFC); or
3. A “broad” ruling that the MRT is “flat-out” unconstitutional.

Certain commentators have speculated that a “broad” determination by the Supreme Court that the MRT is “flat-out” unconstitutional could call into question certain other income imputation or accelerated income recognition provisions that are currently features of the tax law and that have been referred to earlier in this article. For example, a “broad” decision in favor of the Taxpayers could call into question the continued validity of the Subpart F and the

GILTI provisions.

Summary

It was almost inevitable that some taxpayer would challenge the validity of the MRT by seeking judicial review as to its constitutionality. It is extremely interesting to note that the Supreme Court, despite its historical aversion to hear income tax cases, decided to hear the *Moore* case despite there being no “split” between Circuit Courts on the issue in question. Clearly, the Court concluded that that the *Moore* case raised a significant enough issue to justify it agreeing to hear the case. As noted by several commentators, the ultimate decision of the Court could have a far-reaching and very significant impact on certain current provisions of the tax law. There is all kinds of speculation as to how the Court will ultimately rule.

Time will tell as to how the Supreme Court will decide the *Moore* case. The author will update this article subsequent to the release of the Court's decision, which is expected sometime after May 2024.

Paul Bercovici is the Director of International Tax at Adeptus Accountants. Mr. Bercovici can be reached at pbercovici@adeptuscpas.com.

ART & TAX

By Mikayla Ozga, Junior Policy Analyst, Global Affairs Canada

The art market is lucrative, private, transnational and highly profitable. Opacity with little regulatory oversight, few applicable anti-money laundering policies, and anonymity for buyers, sellers and their intermediaries appeals to sophisticated fraudsters, launderers, and tax evaders. Money laundering through art is on the rise, particularly for tax evasion purposes. There are numerous cases of high value art being used as a tool in tax evasion schemes around the world, as well as in Canada. By examining how the art market and tax evasion intersect in Canada, practitioners

can gain a more robust understanding of this emerging area of white collar crime. This article is focused on how money laundering through art is used in Canadian tax evasion schemes, and how freeports enable this form of crime internationally.

Art markets increasingly offer incentives for wealthy individuals to engage with the art world — legally and

illegally.¹ Because art lacks clear value, the variables that should dictate the worth of artwork have been justified by aesthetic beauty and cultural or historical significance.² However, this began to change following 2008 when wealth advisors began suggesting their clients use art as an investment tool to diversify their finances.³ The 2014 Deloitte Art and Finance Report noted that upwards of 76% of fine art buyers purchase pieces for the purpose of investment.⁴ This has meant that art is treated like a commodity but remains regulated like it is an asset. The current state of the art market is thus a lucrative, anonymous, and profitable sector, making it optimal for criminal misuse.

Tax evasion through high value art purchases is not a victimless crime, it withholds money from governments, ruins the reputation of the art industry, and makes fine art less accessible to the public. For a market as profitable as the high end art industry, evasions of taxes results in incalculable losses to the economy. The Pandora Papers released by the International Consortium of Investigative Journalists revealed over 1,600 pieces of art “secretly traded” through shell and front companies. One case revealed by the Panama Papers is that of Harald Joachim Von Der Goltz.⁵ His accountants and lawyer at Panama-based Mossack Fonseca advised him to use his high value artwork as a tax evasion tool. Though this is a global phenomenon recently gaining academic and legislative attention, Canada is not immune to art-based tax evasion schemes. Next, this article will explore two Canadian

examples of art-based money laundering and tax evasion operations.

One case from Larouche, Quebec, was coined an “art-flipping scheme” by the CRA, where artwork was sold to individuals who proceeded to donate the artwork to the municipality of Larouche in the Saguenay region.⁶ The artists would over-inflate the cost of the sale on the tax receipts and then the artwork is donated to the charity at the gauged price. The organization, in this case the municipality of Larouche, would issue tax receipts at the inflated value allowing the donors to pay taxes far beyond the original investment. This scheme stole money from a municipality under the guise of charity. The leader of the scheme was eventually found guilty of tax evasion in a Quebec court in 2012 and ordered to pay a \$840,000 fine.⁷

Another example of tax evasion and art sales nexus in Canada is that of Marc Dreier, a former American lawyer who attempted to defraud the Ontario Teachers’ Pension Plan (“OTTP”). Dreier pitched a phony investment deal to the Ontario Teachers’ Pension Plan, while then stealing the identity of an OTTP lawyer to secure a \$50 million investment from Hedge Fund giant Fortress.⁸ To keep his Ponzi scheme afloat, Dreier used his \$33 million dollar art collection as collateral to secure the flow of funds to other investment firms. Thankfully, Dreier was arrested in Toronto in 2008 for defrauding over \$700 million from US and Canadian firms. His \$33 million art collection was used as

¹ P. Gerstenblith, “The Licit and Illicit Trade in Antiquities” *It’s Legal But It Ain’t Right: Harmful Social Consequences of Lega Industries* (Passos, N & Goodwin, N (Ed.) (Ann Arbor, MI: University of Michigan Press, 2004) pp. 138-140.

² T. Burrough T. “US and EU Efforts to Combat International Money Laundering in the Art Market are no Masterpiece” (2019) *Vanderbilt Journal of International Law* 52 (4) 1061-1096, online: <https://scholarship.law.vanderbilt.edu/vjtl/vol52/iss4/6>.

³ A. Baranello, “Money Laundering and the Art Market: Closing the Regulatory Gap”(2021) *Seton Hall Journal of Legislation and Public Policy* 45 (3) 695-737, online: <https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1195&context=shlj>.

⁴ Art & Finance Report 2014, (Deloitte, 2014), online: <https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/artandfinance/lu-en-artandfinancereport-08092014.pdf>.

⁵ W. Fitzgibbon, “First US taxpayer sentenced to prison for crimes revealed by Panama Papers” *International Consortium of Investigative Journalists* (2020), online: <https://www.icij.org/investigations/panama-papers/first-us-taxpayer-sentenced-to-prison-for-crimes-revealed-by-panama-papers/>.

⁶ CRA press release, “Art donation scheme in Larouche: Claude Simard guilty of tax evasion,” *Canadian Charity Law*, online: https://www.canadiancharitylaw.ca/blog/cra_press_release_art-donation_scheme_in_larouche_claude_simard_guilty_of_t/.

⁷ *Ibid.*

⁸ J. Wingrove, “Freed in Canada, U.S. lawyer charged with ‘stunning’ fraud at home”, *The Globe and Mail* (2008), online: <https://www.theglobeandmail.com/report-on-business/freed-in-canada-us-lawyer-charged-with-stunning-fraud-at-home/article1067224/>.

restitution; however, it was only a drop in a bucket compared to the amount of money he stole.⁹

Money laundering through art can take many forms. In some criminal schemes, it may look like buying art with illicit funds to disguise the source of income. Others may choose to store art in freeports, such as in Geneva, Luxembourg or Singapore. Freeports are exclusive economic zones, meaning goods can be stored without customs or duties fees, allowing the ultra rich to hide their assets tax free.¹⁰ No restrictions are placed on what can be stored in these heavily insured and highly secured freeports, which enables art connoisseurs to store their art tax free for an unlimited amount of time. Capital gains tax on art is traditionally activated once an asset is either sold or gifted, and storage of artwork in freeports prevents capital gains tax from triggering. Artwork within freeports is also exempt from import taxes, sales taxes and VAT even if the jurisdiction the freeport is located within charges these fees. Freeports are a legal loophole for money laundering and tax evasion and are perfectly suited for art investors to watch their assets increase in value tax free.¹¹

The most prominent case of tax evasion through freeports is the Bouvier Affair, which is a series of international lawsuits between an art transporter and his clients. Yves Bouvier owned Natural Le Coultre which is a transportation and storage facility for precious goods and work of art around the world. He is known as the “king of freeports”, as there were up to 120,000 pieces of artwork stored in his facilities between Europe and Asia at one point.¹² He was accused of

evading more than 100 million Euros in taxes in relation to cross-border art dealings and was sued by numerous clients for overcharging on artwork he sold. Yves Bouvier was sued by a Canadian collector, Lorette Shefner, who alleges she was convinced to sell a painting far below market price (Justia US Law, 2017).¹³ Later, Bouvier sold the painting to the National Gallery of Art in Washington DC for a significantly higher price. Not only do freeports allow customers to avoid paying taxes to national jurisdictions, it can cause financial loss for private citizens who are swindled by the promise of tax-free storage opportunities.

Tax lawyers are in a uniquely powerful position; they can advise everyday people and the ultra wealthy how to best protect their funds, either legally or illegally. Tax lawyers can either encourage this activity or alert relevant authorities of any financial wrongdoing. Even though there are less newsworthy occurrences of Canadians engaging in tax evasion through art transactions, it doesn't mean that it doesn't exist, merely it is clandestine. Tax lawyers must be aware that this iteration of white collar crime is prevalent, global and difficult to detect. By engaging in conversation about the intersection of tax evasion and the art market, Canadian tax lawyers can be better prepared to spot the legal loopholes and incentives that encourage financial crime in the art market.

Mikayla Ozga is a Junior Policy Analyst with Global Affairs Canada. Mikayla can be reached at MikaylaOzga@cmail.carleton.ca.

⁹ *Ibid.*

¹⁰ P.M. Gilmour, “Freeports: Innovative trading hubs or centres for money laundering and tax evasion?” (2022) *Journal of Money Laundering Control* 25 (1) 63-71, online: <https://doi.org/10.1108/JMLC-01-2021-0002>.

¹¹ *Ibid.*

¹² L. Auge, “The Last of da Vinci's Secrets: From King Louis XII to Freeport King Yves Bouvier” *EU Reporter* (2018), online:

https://www.eureporter.co/world/2018/09/21/the-last-of-da-vincis-secrets-from-king-louis-xii-to-freeport-king-yves-bouvier/#google_vignette.

¹³ “Estate of Lorette Jolles Shefner v. Galerie Jacques de la Beraudiere” (2017) *Justia US Law*, online: <https://law.justia.com/cases/new-york/appellate-division-first-department/2017/3766-112525-11.html>.

CANADIAN SENSITIVITY TO THE IMPACT OF RISING INTEREST RATES

By *Levon Barker, Portfolio Manager, Cumberland Private Wealth Management*

Higher interest rates are working to slow inflation in both Canada and the United States. But Canada’s higher sensitivity to rates caused the Bank of Canada to pause hiking early in 2023 while its US counterpart, the Federal

Reserve, kept hiking through the spring and summer. The Bank of Canada ended up raising again in June and July, but kept its policy rate at 5.25%, lower than the U.S.’s 5.5%.

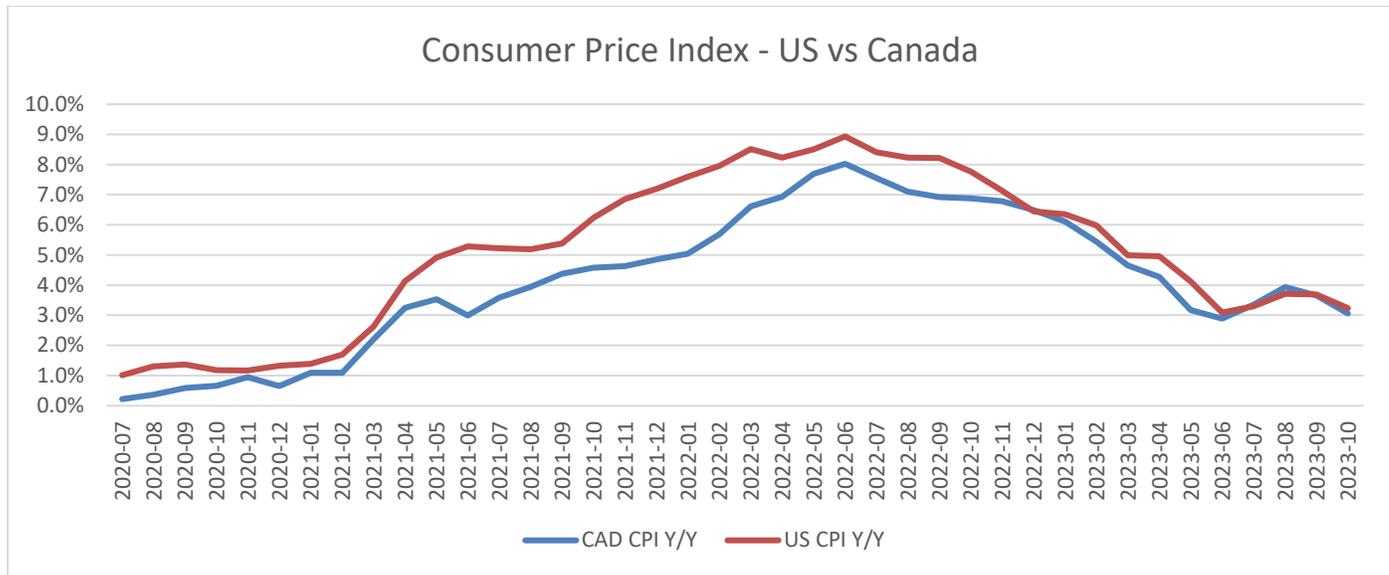


Figure 1 Consumer Price Index for US and Canada. Source: Bank of Canada, Federal Reserve

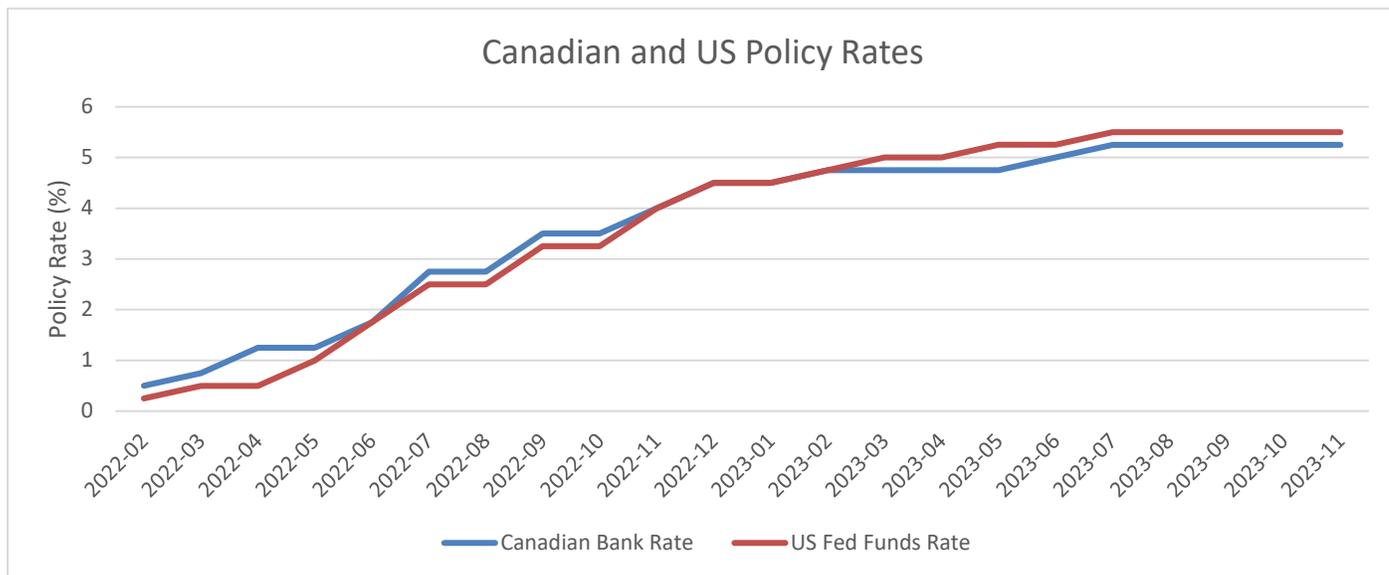


Figure 2 US and Canadian Policy Rates. Source: Bank of Canada, Federal Reserve

Interest rates are biting more in Canada largely because of shorter mortgage terms in Canada compared to the United States. In the United States, most mortgages are written with 30-year terms with a fixed rate. Most of the mortgage stock is from 2022 and prior when interest rates were much lower. In Canada, most mortgage terms are for five years with approximately a quarter of them at a variable rate. About 40% of mortgages have renewed since the Bank of

Canada started raising rates. Another 45% of mortgages will be renewed in 2024 and 2025. The effective mortgage rate paid by all Canadian households has risen from 2.6% to roughly 4.3%. Fixed rate mortgages that are renewing today are paying 7%. If rates stay at current levels, the overall effective rate will advance to almost 5.5%.

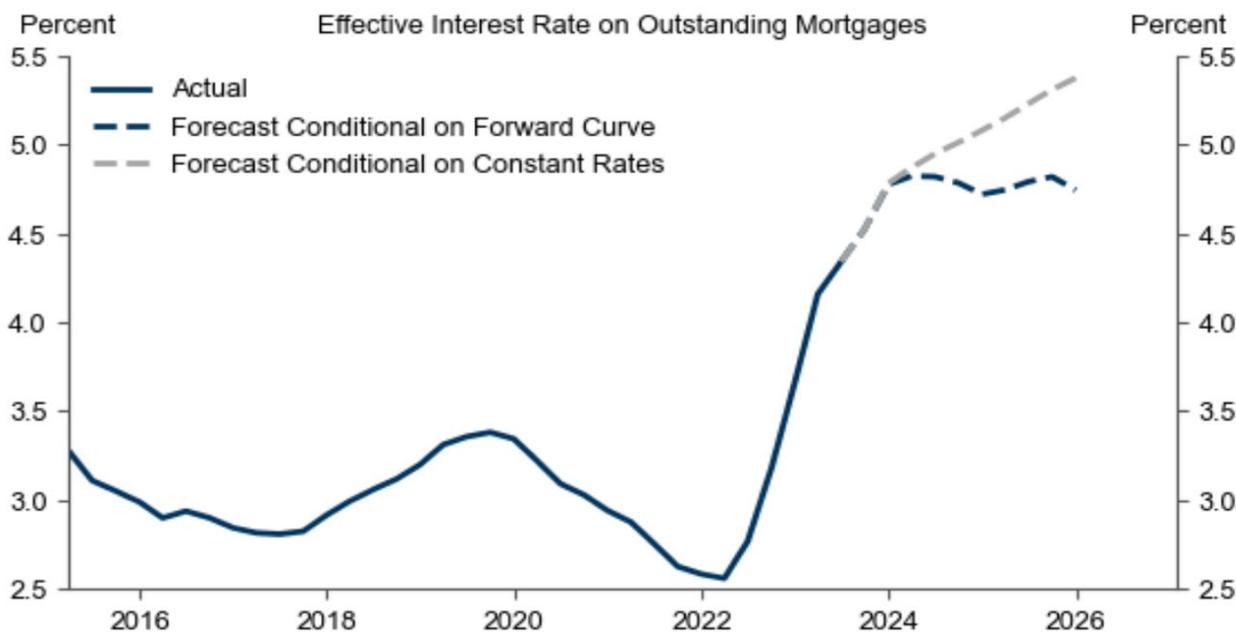


Figure 3 Effective Interest Rate on all outstanding Canadian mortgages. Source: Statistics Canada, Bank of Canada, Haver Analytics, Goldman Sachs Global Investment Research

In addition to being more exposed to shorter terms and variable rates, Canadians have higher debt loads than Americans. Canada’s household debt to disposable income ratio is 160% compared to America’s 83%. The Canadian consumer is much more sensitive to rising interest rates.

The stress on the consumer is starting to show up in the Canadian Banks. For example, the gross impaired loan ratio — the ratio of impaired loans to total loans — has started to move higher after two years of declines. At just under ~47 bps (0.47%), it is still lower than pre-pandemic levels of between 50-60bps. Despite much higher mortgage payments, mortgage delinquencies are still at record lows. So far, the rise in impairments is attributed to personal loans, credit cards and small business.

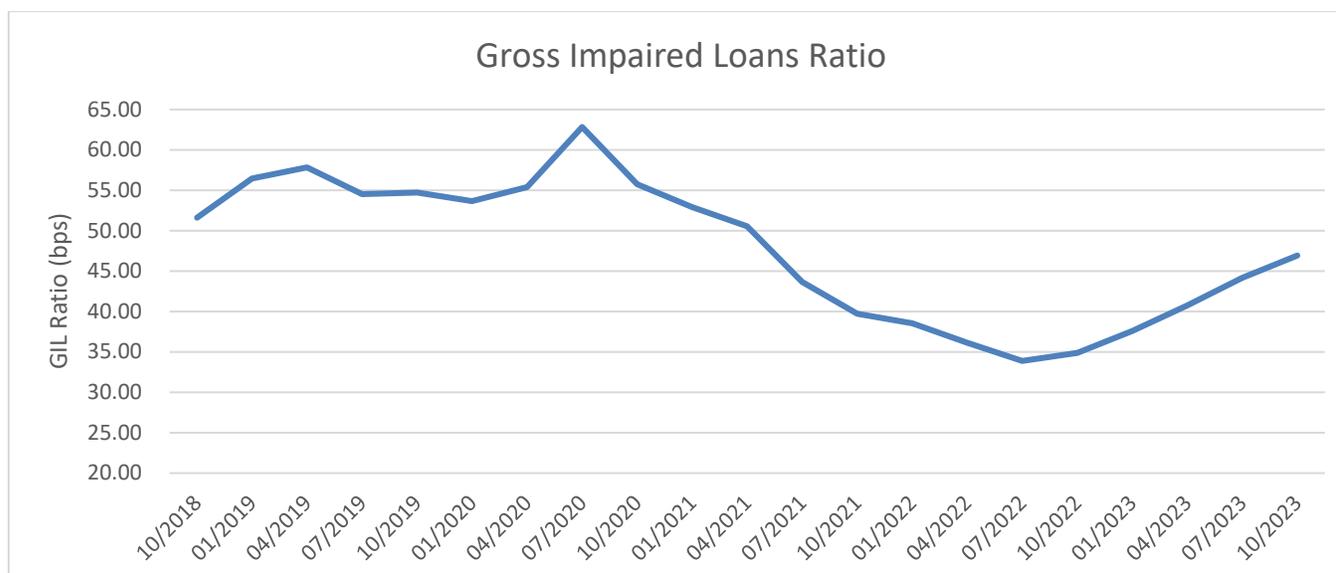


Figure 4 Gross Impaired Loan Ratio of BMO, BNS, RY, TD, and CM; Source: Company Reports

Although higher interest rates are being felt more strongly in Canada, interest rate swaps are implying slightly more rate cuts in the US relative to Canada. US interest rate swaps have 4.7 rate cuts priced to the end of 2024, with a terminal fed rate of 4.15% from 5.5% today. In Canada, interest rates futures imply only 4.5 cuts, taking the Bank Rate to 3.9% from 5.25% today. However, given the higher

sensitivity to interest rates in Canada, I would expect the Bank of Canada to have to cut rates sooner and with more velocity relative to the Federal Reserve.

Levon Barker JD, CFA, is a Portfolio Manager at Cumberland Private Wealth Management Inc. Levon can be reached at 416.929.1090 or by email at levonb@cpwm.ca

YEAR END TAX PLANNING TIPS

By Tina Tehranchian, MA, CFP®, CLU®, CHFC®, CIM®, MFA-P™ (Philanthropy), Senior Wealth Advisor, Assante Capital Management Ltd.

With this being the final quarter of 2023, you should ensure that you implement any measures that can help reduce your 2023 taxes before the end of the year.

The following are some strategies that you may want to consider.

Make Charitable Donations

You have to make your charitable donations before December 31, 2023, to qualify for a charitable donation tax credit in the current calendar year.

If you own stocks and bonds and other publicly listed

securities with significant accrued capital gains, you should consider gifting them to a charity as the favourable tax treatment can shave thousands of dollars off the tax bill for you or your estate.

If you transfer publicly listed securities or mutual funds to a registered charity or registered private foundation, the capital gains on those securities will not be subject to tax. In addition, you will still be eligible to receive a charitable donation tax credit based on the fair market value of the securities at the time of transfer to the charity. The new AMT rules proposed in the 2023 federal budget would reduce the benefits of large charitable donations for high income earners so you may want to maximize your

donations in 2023 to benefit from the current rules. You would be able to carry forward your donations and use them in the next five calendar years to optimize your tax savings.

If you really like the securities that you want to donate and would like to have them as part of your portfolio, you can always purchase them back by using the cash you had earmarked for giving to charity. By donating the securities in kind and using cash to purchase them back you will eliminate the capital gains on the shares that you donate and will bump up the cost base of your securities so when you sell them in the future or on your death there would be less capital gains tax payable.

If you acquire stocks with your employee stock options, you can also donate your stock options to a charity. By doing so, not only will the capital gains not be taxable, but your employment benefit that is included in your taxable income is eliminated as well.

You should note that if you acquired flow-through shares on or after March 22, 2011, a capital gain will be realized when donating them to a charity and the above rules will not apply.

Do Tax Loss Selling

Tax-loss selling is a strategy that helps you reduce your tax bill. If you own shares that have dropped in value since you bought them, you can sell those shares, realize your capital loss and use it to offset any capital gains you may have. You must first apply the loss against capital gains that was realized in the current year. If you have offset all the capital gains realized in the current year and still have excess net losses, then you can carry them back up to three years to offset capital gains that were realized in the past three years or you can carry them forward indefinitely to offset capital gains in future years. Losses inside your registered accounts, such as RRSP, LIRA or TFSA accounts are not eligible for tax loss selling and cannot be used to offset capital gains. Only losses incurred on your non-registered assets (such as non-registered investment accounts or investment real estate) qualify for tax loss selling.

If you want the capital loss to count in the current year, the trade has to settle on or before Dec. 31, 2023. Because the settlement date is two business days after the trade date, and because Christmas Day and Boxing Day are statutory holidays, the last day for tax-loss selling of Canadian stocks

this year is December 27. If you sell after that date, the loss will be recorded for tax purposes in the following year. Given the fact that our office is closed between Christmas and New Year, to ensure that your order is executed in 2023, you should aim to do your tax loss selling by December 22, 2023 at the latest.

If you attempt to do tax loss selling, you should be wary of superficial losses. If you sell a stock and repurchase it within 30 days (before or after the sale date), the Canada Revenue Agency considers it a "superficial loss" and you won't be able to use it to offset capital gains. According to the CRA you cannot claim a tax loss if you, or someone affiliated with you, maintains control of the shares. Therefore, you cannot avoid the superficial loss rule by repurchasing the same stock in a different account such as an RRSP or tax-free savings account (TFSA), or by having your spouse — or a corporation controlled by you or your spouse — repurchase it. The easiest solution is to wait 30 days before repurchasing the same stock.

The new Alternative Minimum Tax Rules proposed in the 2023 budget that are supposed to come into effect on January 1, 2024, will negatively impact the benefits of tax loss selling by decreasing the inclusion rate for capital loss carry forwards and allowable business investment losses from 80% to 50% for AMT purposes. Therefore, if you are in the highest marginal tax bracket then it would be to your benefit to realize and use your capital losses in 2023. However, if you do not want to lose exposure to a certain industry in the meantime, then you could purchase another stock in the same industry or purchase an ETF or mutual fund that holds stocks in that industry, and that way you can maintain your exposure to that industry during the 30 days that the superficial loss rules apply.

Invest in Flow-through Limited Partnerships

Certain flow-through limited partnership investments allow you to deduct the full amount of your investment against your income. However, these investments usually lack liquidity in the first 18 to 24 months and there are risks involved. Therefore, you should ensure that they are appropriate for your risk tolerance level and investment time horizon and discuss them with your tax and investment advisors. These types of investments are usually offered during short windows a couple of times each year so if you need to invest in one make sure you let your advisor know

so you do not miss the chance to make your investment in 2023.

Renovate Your Property

If you are a senior or are supporting a senior, you should try and pay your home renovation expenses before the end of 2023. If the renovation costs are incurred to create a secondary unit that allows you to live with a qualifying relative, you may qualify for the multigenerational home renovation tax credit (“MHRTC”), which is offered on up to \$50,000 of the costs and can save you as much as \$7,500 in taxes. You can also claim the home accessibility tax credit (“HATC”) on up to \$20,000 of renos, and save up to \$3,000 in taxes in cases where you incurred the costs to allow you to more easily gain access to, or become more mobile within, your home.

Take Advantage of Bill C-208 Planning

In June 2021, new tax rules were introduced to make it easier for families to complete intergenerational business transfers using Bill C-208. These rules provided an opportunity for surplus stripping which allowed the owners to strip funds out of a corporation at capital gains tax rates rather than dividend rates, without a genuine transfer of a business between family members. The 2023 federal budget closes this opportunity effective January 1, 2024. There is still time to take advantage of the current rules and access funds in a corporation at capital gains rates so make sure

you talk to your tax advisor about this before the end of 2023.

Open a First Home Savings Account (“FHSA”)

If you are a Canadian resident who is 18 years or older and qualify as a first-time home buyer, then you are eligible for setting up a First Home Savings Account (“FHSA”). This is a registered plan that allows you to save money to help purchase a home. You can contribute a maximum of \$8,000 each year, and up to \$40,000 during your lifetime, and can deduct your contributions against your income. However, while with RRSP contributions you have until the end of February of 2024 to make your contributions for the 2023 tax year, with FHSA accounts you do not have this option. If you want to be able to deduct your contribution to your FHSA account from your 2023 income, then you need to make the contribution before the end of 2023.

Tina Tehranchian, MA, CFP®, CLU®, CHFC®, CIM®, MFA-P™ (Philanthropy) is a FP Canada™ Fellow and a Senior Wealth Advisor at Assante Capital Management Ltd. in Etobicoke, Ontario. She can be reached at (905) 707-5220 or through her website at www.tinatehranchian.com. Assante Capital Management Ltd. is a member of the Canadian Investor Protection Fund and the Investment Industry Regulatory Organization of Canada. Before acting on any of the above, please make sure to see a professional advisor for individual financial advice based on your personal circumstances.

THE TAXATION OF CRYPTOCURRENCIES: MEMBERSHIP IN A DAO

By Anish Kamboj, Associate, Miller Thomson LLP, and Raffaella Garofalo, Articling Student, Miller Thomson

Decentralized Autonomous Organizations (“DAOs”) continue to grow in popularity and provide utility to their members. As of May 2023, there were approximately 13,000 DAOs with a collective total treasury of almost \$32 billion.¹ However, the uncertainty in the tax treatment of DAOs and the activities of

their members persists. This article will examine the Canadian tax consequences of DAOs, with particular emphasis on the activities of individual DAO members (hereinafter referred to as “Members”).

¹ All amounts referenced in this article are in Canadian dollars; EY Global, “How to navigate tax and legal complexity associated with DAOs” (August 2, 2023), online:

https://www.ey.com/en_gl/tax/how-to-navigate-tax-and-legal-complexity-associated-with-daos.

DAOs are entities operating without a traditional hierarchal structure or centralized leadership. Decision-making and governance is determined democratically by token holders. The more tokens a Member has, the more impact their vote has on a decision. The decisions made by the Members are automatically implemented by smart contracts which operate on a set of rules programmed by a core team of developers who create the DAO.

DAOs can be for-profit or non-profit entities. There are various categories of DAOs, including:

- Protocol DAOs;
- Investment DAOs;
- SubDAOs;
- Service DAOs;
- Social DAOs; and
- Philanthropy DAOs;

In Canada, there is no legal structure that precisely captures all the characteristics of a DAO. Depending on specific activities of the DAO, it may be a corporation, joint venture or even a partnership or trust as a flow-through entity. Internationally, there is no common approach to the classification of a DAO. Some U.S. states (including Vermont, Wyoming and Tennessee) recently enacted legislation to allow DAOs to register as a customized limited liability company,² while other jurisdictions, such as the Cayman Islands, have incorporated DAOs as foundation companies.³ To achieve legal certainty and limit the liability of Members, a DAO should be carefully “wrapped” or registered as a traditional legal entity. The taxation of the DAO will depend on its business structure and the activities it undertakes. While the following analysis

² See the following for discussion on the state-level legislation in the United States allowing DAOs to register as modified limited liability companies: DeFi Education Fund, “DAO Legislation at the State-Level: Overview” (January 30, 2023), online: <https://www.defieducationfund.org/post/dao-legislation-at-the-state-level-a-brief-overview>. Wyoming and Tennessee have both enacted legislation creating DAO-specific LLCs, while Vermont has allowed DAOs to register as blockchain-based LLCs.

³ See the following for discussion on the use of the Cayman Islands’ Foundation Company structure for DAOs: Carey Olsen, “Cayman Islands Foundation Companies for DAOs, Defi and NFTs” (April 6, 2022), online: <https://www.careyolsen.com/briefings/cayman-islands-foundation-companies-daos-defi-and-nfts>. Like a traditional corporation, the foundation company has a separate legal personality and limited liability, affording DAOs abilities such as being able to execute contracts. The foundation company may

focuses on the activities of Members, we will elaborate on the taxation of a DAO itself in a later article.

Taxable Events for Individual DAO Members⁴ –

The activities of individual Members may be taxable events under the *Income Tax Act* (Canada) (the “ITA”) for Canadian residents.⁵ The following table summarizes possible taxable events and the likely income tax implications:⁶

Taxable Event	Potential Canadian Income Tax Treatment
Purchasing DAO Tokens or an NFT with fiat for membership	Not taxable
Purchasing DAO Tokens or NFTs with cryptocurrency for membership	Capital gains treatment or business income treatment
Selling DAO Tokens	Capital gains treatment or business income treatment
Receiving profit distributions	Business income treatment
Receiving rewards from staking DAO tokens	Capital gains treatment or business income treatment
Receiving unsolicited airdrops or gifts of DAO tokens	Not taxable
Receiving multiple airdrops or gifts of DAO tokens	Business income treatment

also be an appealing option for DAOs as the structure can function without shareholders, making it ownerless, and powers can be wielded by persons other than directors.

⁴ The analysis in this article only applies to individual DAO members. It does not apply to flow-through entities such as trusts or partnerships. These entities will have different tax treatment as members of DAOs.

⁵ If the DAO is established in a foreign jurisdiction, there may be additional foreign tax considerations that have not been contemplated by this article.

⁶ The authors are attempting to highlight the likely income tax treatment for each of these activities that a Member may undertake. Depending on the specific circumstances of the Member, the applicable income tax treatment may vary. This article does not consider the excise tax considerations for each of these activities.

Selling DAO tokens received via unsolicited airdrops or gifts	Capital gains treatment or business income treatment
Gifting DAO tokens to non arm's length persons	Capital gains treatment or business income treatment

Two common tax treatments of the income from these events are capital gains treatment and business income treatment.

According to the Canada Revenue Agency (the "CRA"), a capital gain exists when you sell, or are considered to have sold, a capital property for more than the total of its adjusted cost base ("ACB") and the outlays and expenses incurred to sell the property.⁷ A capital loss exists when you sell, or are considered to have sold, a capital property for less than the total of its adjusted cost base and the outlays and expenses incurred to sell the property.⁸

A taxpayer realizes business income rather than a capital gain when deemed to have earned income from a "profession, calling, trade or undertaking of any kind whatever" or an "adventure or concern in the nature of trade".⁹

In general, consistent and sustained activities undertaken with a view to profit will be labelled as a "business" activity within the meaning of the ITA. However, an "adventure or concern in the nature of trade" may still be captured by an isolated transaction in which a taxpayer makes a single, speculative purchase and ultimately sells the property.¹⁰ Under these circumstances, as long as the transaction was intended to yield a profit, the transaction would likely be considered to be in the nature of business.¹¹

⁷ *Income Tax Act*, R.S.C., 1985, c 1 (5th Supp), ss. 39(1)(a) and 40(1)(a) [ITA]; Canada Revenue Agency, "T4037 Capital Gains 2021" at "Definitions" (January 18, 2022), online: <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/t4037/capital-gains.html>.

⁸ ITA, *supra* note 7, ss. 39(1)(b) and 40(1)(b); Canada Revenue Agency, "T4037 Capital Gains 2021" at "Definitions" (January 18, 2022), online: <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/t4037/capital-gains.html>.

⁹ ITA, *supra* note 7, s. 248(1).

¹⁰ Jinyan Li et al, "Principles of Canadian Income Tax Law", 9th Edition, (Thomson Reuters: Toronto, 2020), citing to: *Minister of National Revenue v. Taylor*, [1956] C.T.C. 189, 56 D.T.C. 1125 (Can.

There is a litany of case law which discusses whether income should be characterized as received on account of business or capital; however, the following is a list of factors which the CRA considers indicative of carrying on a business:

1. the taxpayer carries on the activity for commercial reasons and in a commercially viable way;
2. the taxpayer undertakes activities in a businesslike manner, which might include preparing a business plan and acquiring capital assets or inventory;
3. the taxpayer promotes a product or service;
4. the taxpayer's conduct shows that they intend to make a profit, even if they are unlikely to do so in the short term; and
5. the taxpayer is engaged in an adventure or concern in the nature of trade.¹²

The CRA has further opined that the most relevant factor it will consider when distinguishing between business and capital gains treatment is the intention of the taxpayer.¹³ Ultimately, whether a DAO-related taxable event will receive capital gains treatment or business income treatment, among other possibilities, will depend on the circumstances at play. Notably, one-half of a capital gain must be included in a taxpayer's income. Furthermore, one half of a capital loss (referred to as the allowable capital loss) may be deducted from capital gains. Capital losses may generally only be offset by capital gains, not other income. If the taxpayer does not have any capital gains against which to offset capital losses, the taxpayer can carry the net capital losses forward indefinitely, or alternatively, can carry the losses back for any of its preceding three years.¹⁴ Conversely, *all* business income

Ex. Ct.) and *No. 476 v. Minister of National Revenue*, [1960] C.T.C. 384, 60 D.T.C. 1270 (S.C.C.).

¹¹ *Ibid.*

¹² Canada Revenue Agency, "Guide for cryptocurrency users and tax professionals" (June 26, 2021), online: <https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/digital-currency/cryptocurrency-guide.html> [*Crypto Guide*].

¹³ Canada Revenue Agency, Interpretation Bulletin IT-459, "Adventure or Concern in the Nature of Trade" (September 8, 1980), online: <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/it459/archived-adventure-concern-nature-trade.html> [IT-459].

¹⁴ *Crypto Guide*, *supra* note 12.

must be included in the taxpayer's income and is subject to tax at the applicable marginal rate.¹⁵

Analysis of Taxable Events

DAOs may require the purchase of DAO Tokens or an NFT to join the DAO. Purchasing DAO Tokens or NFTs with fiat is not a taxable event. However, purchasing tokens or an NFT for membership with cryptocurrency is a taxable event which will ordinarily attract capital gains treatment, as the taxpayer will have disposed of the cryptocurrency used to buy the tokens or NFT for proceeds equal to the purchase price. The individual will realize a capital gain upon disposition of their cryptocurrency if the proceeds of the disposition are in excess of the ACB.¹⁶ Purchasing tokens or an NFT membership with cryptocurrency may result in business income treatment as well if the proceeds of disposition on the purchase are deemed to have been earned from a "profession, calling, trade or undertaking of any kind whatever" or an "adventure or concern in the nature of trade", per the analysis above.¹⁷

Selling DAO tokens for other cryptocurrency or fiat will be subject to either capital gains tax or business income tax depending on the nature of the Member's activity. Holding tokens long-term may help in classifying the proceeds from their sale as a capital gain or capital loss, whereas holding tokens for short periods and selling them frequently may reflect an intention to profit, classifying the proceeds as business income.¹⁸

Profit distributions through the receipt of additional tokens to Members could be business income.¹⁹ Members could be rewarded for their participation and contribution to the DAO which may include setting up the DAO, improving the DAO's code and assisting with the administration of the DAO.

¹⁵ *ITA*, *supra* note 7, ss. 38(a) and 9(1); See our previous article on the Taxation of NFTs titled "Taxation of Cryptocurrencies: The Current Utility of NFTs and their Practical Future Use Cases" for a more detailed analysis of capital gains treatment and business income treatment.

¹⁶ *ITA*, *supra* note 7, ss. 39(1)(a) and 40(1)(a).

¹⁷ *Ibid*, s. 248(1).

¹⁸ *IT-459*, *supra* note 13; *Happy Valley Farms Ltd. v. Minister of National Revenue*, [1986] 2 C.T.C. 259, [1986] F.C.J. No. 465 (Fed. T.D.) at para. 14; Canada Revenue Agency, "Income Tax Audit Manual Chapter 29" (July 2020), online: <https://www.canada.ca/en/revenue-agency/services/tax/technical-information/income-tax-audit-manual-domestic-compliance-programs-branch-dcpb-29.html>.

Rewards from DAOs can include staking rewards, airdrops or unsolicited gifts.

The receipt of rewards from staking DAO tokens would generally be taxed as business income, just as the traditional staking of cryptocurrencies.²⁰ The CRA has not released clear guidance on the tax treatment of staking, however, it has released guidance on the tax treatment of cryptocurrency mining. The CRA has stated that the income tax treatment of mining will depend on whether the mining activities are a personal activity/hobby or business activity. To note, the CRA maintains that a hobby pursued in a businesslike manner may still be taxed as business income.²¹ If the CRA's mining guidance applies to staking, there is a possibility to argue that a Member's staking is a personal activity or hobby rather than a business activity, giving rise to a capital gain.²² Ultimately, the CRA has not issued clear direction on the matter, and may argue in an audit that staking activity is business income.

Receiving airdrops or gifts of DAO tokens can result in varying tax treatment. The receipt of unsolicited airdrops or gifts of DAO tokens, granted that the taxpayer does not intend to carry on the activity for profit, should not be considered a source of income; it could arguably be considered a personal endeavour and not a taxable event.²³ However, receiving multiple airdrops or "gifts" may be considered business income.²⁴ The receipt of multiple DAO tokens in this manner could constitute a pursuit of profit and thus be considered a source of income.²⁵

Similarly, proceeds from the sale or trade of gifted or airdropped tokens (including gifts to a person with whom a Member is at arm's length²⁶) may be subject to capital gains tax or business income treatment, depending on whether the

¹⁹ *ITA*, *supra* note 7, ss. 9(1) and 248(1).

²⁰ *ITA*, *supra* note 7, ss. 9(1) and 248(1); Michelle Legge, "Crypto Tax Canada: Ultimate Guide 2023" (April 12, 2023), online: <https://koinly.io/guides/crypto-tax-canada/> [*Koinly*].

²¹ *Crypto Guide*, *supra* note 12.

²² *Ibid*.

²³ *ITA*, *supra* note 7, s. 3; *Stewart v. R.*, 2002 SCC 46 (S.C.C.) at paras. 48-60 [*Stewart*].

²⁴ *ITA*, *supra* note 7, ss. 9(1) and 248(1).

²⁵ *Stewart*, *supra* note 26 at paras. 48-60.

²⁶ *ITA*, *supra* note 7, s. 69(1). An individual may be subject to capital gains tax when gifting a token to another person with whom they do not deal at arm's length by operation of subsection

activity is for a pursuit of profit and accordingly a source of income.²⁷

Although regulators have yet to release clear guidance on the taxability of DAOs and the activities of Members, the authors have presented their view of the likely taxable nature of these activities. It is important to proactively consider your crypto activity. Maintaining records and working with a tax professional will help avoid negative tax consequences.

Our team of lawyers and the accountants we work with are experienced in crypto audits. If you need assistance with your

cryptocurrency-tax concerns, please contact a member of the Miller Thomson LLP Corporate Tax team.

Anish Kamboj is an Associate in Miller Thomson LLP's Tax Group. Anish can be reached at akamboj@millerthomson.com.

Raffaella Garofalo is an Articling Student at Miller Thomson LLP. Raffaella can be reached at rgarofalo@millerthomson.com.

69(1) of the Act. Subsection 69(1) will deem the donor of the token to have disposed of it for proceeds equal to its fair market value on the date of the gift. In sum, subsection 69(1) requires that a donor recognize a gain upon gifting a token for tax purposes where the fair market value of the token exceeds its ACB on the date of the gift, even where no consideration was received by the donor. When such a gift is completed, the donee of the token will

generally not be subject to tax on the gift, and the donee's new ACB will be equal to the fair market value of the token at the time of the gift.

²⁷ *Ibid*, ss. 39(1)(a) and 40(1)(a); *Koinly*, *supra* note 21; *Stewart*, *supra* note 26 at paras. 48- 60.

One Corporate Plaza, 2075 Kennedy Road,
Toronto, Ontario M1T 3V4
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
Fax 1-416-298-5082 (Toronto)
Fax 1-877-750-9041 (Toll Free Canada Only)
Email CustomerSupport.LegalTaxCanada@TR.com
store.thomsonreuters.ca

© 2023 Thomson Reuters Canada Limited

NOTICE AND DISCLAIMER: All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior written consent of the publisher (Thomson Reuters Canada, a division of Thomson Reuters Canada Limited).

Thomson Reuters Canada and all persons involved in the preparation and sale of this publication disclaim any warranty as to accuracy or currency of the publication. This publication is provided on the understanding and basis that none of Thomson Reuters Canada, the author/s or other persons involved in the creation of this publication shall be responsible for the accuracy or currency of the contents, or for the results of any action taken on the basis of the information contained in this publication, or for any errors or omissions contained herein.

No one involved in this publication is attempting herein to render legal, accounting or other professional advice. If legal advice or other expert assistance is required, the services of a competent professional should be sought. The analysis contained herein