



## Canadian Tax & Legal Alert

Supreme Court of Canada dismisses the Canada Revenue Agency's application for leave to appeal in the *Cameco Corporation* ongoing tax dispute

February 24, 2021

### **The Supreme Court of Canada decision on the application for leave to appeal**

The country's highest tribunal has refused to hear the Canada Revenue Agency's (CRA) appeal of the Federal Court of Appeal (FCA) decision which upheld the Tax Court's ruling that Cameco's transactions with its Swiss subsidiary were based on arm's length terms and conditions and, therefore, compliant with Canada's transfer pricing rules.

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The Supreme Court of Canada (SCC) released its decision on the CRA's application for leave to appeal on February 18, 2021 and, as with most applications for leave to appeal, the Court did not give reasons for dismissing the CRA's application.

The SCC hears a select number of cases each year and generally leave to appeal is granted by the Court only where cases involve a question of significant public importance, or if it raises an important issue of law, or both law and fact, that warrants consideration by the Court.

## The Federal Court of Appeal decision

The FCA dealt with the interpretation of paragraphs 247(2)(b) and (d) of the Income Tax Act, generally referred to as the "recharacterization provision", and specifically whether the provision could be used by the Minister of National Revenue (Minister) to reallocate all of the profits of a foreign subsidiary of a Canadian corporation to its Canadian parent corporation (Cameco). The recharacterization provision is only applicable if the transaction(s) would not have been entered into by persons dealing at arm's length and were not entered into primarily for bona fide purposes other than to obtain a tax benefit.

At the FCA, the Crown argued that the recharacterization provision is applicable if, **taking into account the specific circumstances of the taxpayer** in question, that taxpayer would not have entered into the transactions with an arm's length person. The FCA rejected the Crown's position on the recharacterization provision, concluding that the provision is only applicable if the transaction(s) would not have been entered into by **any** persons dealing at arm's length and the actual structure practically impedes the tax administration from determining an appropriate transfer price. If the transaction(s) would have been entered into by **any** arm's length persons, according to the lower courts, the only issue to consider is the appropriate pricing for that transaction.

## CRA application for leave to appeal to the SCC

In its application for leave to appeal, the CRA's arguments included, but were not limited to, the following:

- The FCA analysis failed to read the provision in its proper context harmoniously with the intention of parliament and has narrowed the application beyond what was intended.
- The decision has severely hindered the Minister's ability to apply the recharacterization provision for its intended use which was to protect Canada's tax base from erosion caused by profit shifting.
- The economic impact to Canadians is significant as the CRA estimates there are \$11.84 billion of adjustments in taxable income over the past 3 years involving transfer pricing provisions that will be put at risk.
- Under the FCA analysis, the recharacterization provision is unworkable, at odds with the Organization for Economic Co-operation and Development (OECD) arm's length standard and puts Canada offside with its international commitments as a member of the OECD.
- Legislative amendments would not solve the problem.

Now that the SCC has refused to hear the CRA's appeal, it would seem to be settled that the recharacterization provision cannot be applied where it can be

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demonstrated that **any** arm's length parties would have entered into the transaction.

## **How can Deloitte help you?**

Deloitte's Transfer Pricing professionals can help you understand how this decision and the lower-level court cases may affect your business.

If you have any questions on any of the above, please reach out to your Deloitte representative or any of the individuals noted on this alert.

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