

# Seminar Materials

## McCarthy Tétrault *Advance*<sup>TM</sup>: Recent Tax Developments

Wednesday, May 16, 2018



# Table of Contents

## McCarthy Tétrault *Advance*<sup>TM</sup> : Recent Tax Developments

Wednesday, May 16, 2018

Agenda (English) Agenda (French)	Page 3 Page 4
<b>Speaker Biographies</b>	Page 5
<b>Recent Developments in the United States</b> – George W. Craven *PowerPoint Presentation	Page 27
<b>2018 Budget Developments</b> – Fred Purkey and Marie-Soleil Landry *PowerPoint Presentation	Page 62
<b>Recent Cases</b> – John Yuan and Angelo Discepola *PowerPoint Presentation	Page 75

# Agenda

## McCarthy Tétrault *Advance*<sup>TM</sup>: Recent Tax Developments

Wednesday, May 16, 2018

TIME (EST)	TOPIC	PRESENTER(S)
11:30 – 12:00	Registration and Lunch	
12:00 – 12:05	Opening Remarks	<u>Stefanie Morand</u>
12:05 – 12:35	Recent Developments in the United States	<u>George W. Craven</u>
12:35 – 12:55	2018 Budget Developments	<u>Fred Purkey</u> <u>Marie-Soleil Landry</u>
12:55– 1:15	Recent cases	<u>John Yuan</u> <u>Angelo Discepola</u>
1:15 – 1:25	Q&A Session	
1:25 – 1:30	Closing Remarks	<u>Stefanie Morand</u>

## Download Conference Materials

To download the Recent Tax Developments materials, visit the link below or scan with your mobile phone or tablet\*:

[communications.mccarthy.ca/42/205/uploads/tax2018.pdf](http://communications.mccarthy.ca/42/205/uploads/tax2018.pdf)



\*Must have QR Scanner App

# Programme

Le programme *Progresser<sup>MC</sup>* de McCarthy Tétrault :  
Développements récents en matière de fiscalité

**Mercredi 16 mai 2018**

HEURE (HNE)	SUJET	PRÉSENTATEUR(S)
11 h 30 – 12 h	<b>Inscription et dîner</b>	
12 h – 12 h 5	<b>Mot de bienvenue</b>	<u>Stefanie Morand</u>
12 h 5 – 12 h 35	<b>Les développements récents aux États-Unis</b>	<u>George W. Craven</u>
12 h 35 – 12 h 55	<b>Développements annoncés dans le budget 2018</b>	<u>Fred Purkey</u> <u>Marie-Soleil Landry</u>
12 h 55 – 13 h 15	<b>Les décisions récentes</b>	<u>John Yuan</u> <u>Angelo Discepola</u>
13 h 15 – 13 h 25	<b>Période : questions et réponses</b>	
13 h 25 – 13 h 30	<b>Mot de la fin</b>	<u>Stefanie Morand</u>

## Téléchargez les documents de présentation

Pour télécharger les documents de la présentation sur les Développements récents en matière de fiscalité, suivez le lien ci-dessous ou utilisez le code QR\* ci-contre:

[communications.mccarthy.ca/42/205/uploads/tax2018.pdf](http://communications.mccarthy.ca/42/205/uploads/tax2018.pdf)



\*Vous devez avoir une application sur votre téléphone intelligent ou votre tablette pour lire le code QR\*

# Speaker Biographies

## McCarthy Tétrault *Advance*<sup>TM</sup>: Recent Tax Developments

Wednesday, May 16, 2018



## George W. Craven

Partner

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George Craven is highly regarded as a leading practitioner of corporate tax law and international tax planning. In the course of his practice, George advises clients across a broad spectrum of domestic and international tax issues and tax-related controversies. His particular focus involves tax issues pertinent to insurance companies (especially offshore companies), tax aspects of financing, and investments in India. *Chambers USA* 2007 notes that he is "thought by commentators to be 'a good incisive tax lawyer, and someone who quietly performs wonders for his clients in structured finance and securitizations transactions.'" Earlier (2004–2005), *Chambers* characterized George as "savvy and hands-on."

George brings comprehensive, well-informed experience to clients' service. In the area of corporate tax law, he counsels on business acquisitions and dispositions, including structured financing, and securitization transactions. He also addresses tax aspects of new financial products, such as Section 483 Notes, Liquid Yield Option Notes, and others. George's international focus includes Subpart F issues, cross-border tax arbitrage, advising on behalf of captive and offshore insurance companies, and comprehensive tax planning for offshore insurance entities.

George was designated as a leading lawyer for the 2001–present editions of *Chambers USA* and he is listed in "The Best Lawyers Annual Guide to Insurance Law" (2011). George was listed in "America's Leading Business Lawyers" (2003–2004) and named among "North America's Top Tax Advisers" by the *International Tax Review* (2000). He was the principal US tax lawyer representing Desjardins Group in its purchase of the Canadian insurance and other financial services operations from State Farm, a transaction recognized by the *International Tax Review* as Tax Deal of the Year in Financial Services in the Americas for 2014. He is widely sought as a presenter at seminars and symposia on domestic and international tax topics, and he is an active member of several influential professional associations. George is conversant in Japanese.

### Education

- Harvard Law School, JD, cum laude
- University of Notre Dame, BA, summa cum laude
- Sophia University (Tokyo, Japan)

### Admissions

- Illinois
- US Tax Court

### Activities

- American Bar Association, Section of Taxation; Financial Transactions Committee; Insurance Committee
- Japan-America Society of Chicago
- Chicago Council on Global Affairs

## News & Publications

- "Global Insurance Industry 2017 Year in Review," *Mayer Brown Newsletter*, 14 February 2018
- "The Impact of Tax Reform on Securitization and Other Financing Transactions - What You Need to Know," *Mayer Brown Legal Update*, 31 January 2018
- "The Good, the Bad and the Ugly"—Fundamental Tax Reform Is Enacted Into Law," *Mayer Brown Legal Update*, 27 December 2017
- "Senate Bill Passage Takes Tax Reform One Step Closer to Reality," *Mayer Brown Legal Update*, 7 December 2017
- "A Sisyphean Task: The House of Representatives Passes Tax Reform Legislation," *Mayer Brown Legal Update*, 20 November 2017
- "A Good Piece of Music? The Senate Releases Its "Conceptual Mark" for 2018 Tax Reform," *Mayer Brown Legal Update*, 13 November 2017
- "LB&I's "Campaign" Against Micro-Captives Takes an IRS Dirty Dozen Item to the Corporate Boardroom," *Mayer Brown Legal Update*, 20 June 2017
- "LB&I's 'Campaign' Against Micro-Captives Takes An IRS Dirty Dozen Item to the Corporate Boardroom," *Bloomberg BNA Daily Tax Report*, 16 June 2017
- "Mayer Brown advises GBGI Limited on its admission to AIM," 27 February 2017
- "Global Insurance Industry 2016 Year in Review," *Mayer Brown Newsletter*, 17 February 2017
- "Global Insurance Industry 2015 Year in Review," *Mayer Brown Newsletter*, 19 February 2016
- "A Matter of Semantics: *Validus Reinsurance* Invalidates Foreign-to-Foreign Withholding," *Mayer Brown Legal Update*, 29 June 2015
- "US Court of Appeals Effectively Kills "Cascading" Theory of Federal Excise Tax in Foreign-To-Foreign Retrocessions," *Mayer Brown Legal Update*, 27 May 2015
- "'Active Conduct' Test Key for Hedge Fund Re Tax Reform," *Trading Risk*, 15 May 2015
- "Proposed US Treasury Regulations Attempt to Distinguish "Active" Insurance Companies from Hedge Funds," *Mayer Brown Legal Update*, 27 April 2015
- "Do What I Say, Not What I Do: The US Internal Revenue Service Finalizes Changes to the Mixed Straddle Rules," *Mayer Brown Legal Update*, 21 July 2014
- "District Court Victory for *Validus Re* in Cascading FET Case Leaves Many Questions Unanswered," *Mayer Brown Legal Update*, 7 February 2014
- "Mayer Brown advises insurer Argo on £136 million cash offer for Heritage Underwriting Agency plc," 22 May 2008

## Events

- "Cross-Border Aspects and Issues Involved in Structuring and Financing Deals," Energy Tax Conference: Maximizing Value, 17-18 November 2014
- "Global Executives & Dispersed Decision-Making Authority," 2014 Organization for International Investment (OFII) Annual Tax Conference, 4-7 May 2014
- Insights For Your Strategy—What's Ahead for Insurance M&A and Corporate Finance in 2014, 8 April 2014
- Asset Manager-Sponsored Reinsurers, 23 April 2013
- "PFIC and CFC for Insurance Companies," Federal Bar Association Insurance Tax Seminar, 31 May 2012
- Insurance and Reinsurance Legal Developments: Financial Convergence & Global Regulatory Updates, 17 April 2012
- "Current Developments in Captive Insurance (including FET Changes)," Federal Bar Association Insurance Tax Seminar, 22 May 2008
- "Captive Insurance Disputes — Is an Underwriting Loss Necessary to Convince the IRS that Insurance is Present?," Federal Bar Association Insurance Tax Seminar, panel on Captives, Association and Cell Captive, 2003
- "Inversion, Section 367, Section 953(d) and Other International Tax Law Topics of Interest to US Insurers," Federal Bar Association Insurance Tax Seminar, 2001
- "Tax Aspects of Securitization of Insurance Risks," IBC Conference on Insurance Risk and Securitization, 1999

- "Offshore and Captive Insurance Issues," Tax Executive Institute Seminar, 1994
- "Hot Products and Innovative Financial Instruments," University of Chicago Federal Tax Conference, moderator and panel member, 1994

## Angelo Discepola

### Lawyer Profile



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### Biography

Angelo Discepola is an associate in our Tax Group in Montréal. His practice encompasses all aspects of domestic and international corporate income tax planning, public and private mergers and acquisitions and tax disputes. Some more notable aspects of Angelo's practice include involvement in:

- Private equity and venture capital fund formation and investor matters as well as developing remuneration strategies for fund principals;
- Structuring and financing large renewable energy projects (wind and solar) both for project developers and operators; and
- Structuring and issuing complex financial products and other capital markets matters.

Angelo received a Licentiate in Law (LLL) from the University of Ottawa in 2011 (*magna cum laude*). He is a member of the Canadian Bar Association and of the Young Bar Association of Montréal. He is also member of the Canadian Tax Foundation's Young Practitioners Group and the Association de planification fiscale et financière. He has authored articles in several publications and spoken on a number of topics at various tax conferences. Angelo was called to the Québec Bar in 2012.

#### RECENT CLIENT ENGAGEMENTS

- Acting for HNZ Group Inc. in connection with its acquisition by President and CEO, Don Wall, by way of plan of arrangement and the subsequent transfer of its offshore business conducted in New Zealand, Australia, the Philippines and Papua New Guinea to PHI, Inc.
- Acting for BCE Inc. in connection with its acquisition of Alarmforce Inc. by way of plan of arrangement and the subsequent transfer of certain subscribers to TELUS Corporation

- ↪ Acting for a Canadian fund manager and its principals in connection with the formation of an open-end global agricultural fund
- ↪ Acting for a North American fund manager and its principals in connection with the formation of a \$400 million North American clean energy private equity fund
- ↪ Acting for BCE Inc. in connection with its acquisition of Manitoba Telecom Services Inc. by way of plan of arrangement and the subsequent transfer of certain wireless subscribers to TELUS Corporation
- ↪ Acting for Invenergy Wind LLC in connection with its \$2 billion sale of a portfolio of US and Canadian wind projects with a combined installed capacity of 930 MW to TerraForm Power
- ↪ Acting for National Bank of Canada in the issuance of a number of structured principal protected and non-principal protected index and equity linked notes

RECENT PUBLICATIONS:

- ↪ “A Reply to the CRA’s Classification of Florida and Delaware LLLPs and LLPs as Corporations,” *Report of the Proceedings of the Sixty-Eighth Tax Conference, 2016 Conference Report* (Toronto: Canadian Tax Foundation, 2017), 24:1-39
- ↪ “Amendments to Québec Mining Tax Act and to Refundable Tax Credit for Resources” (March 8, 2017) *Mining in the Courts Year in Review Vol. VII* (Taxnet Pro’s Corporate Tax Center)
- ↪ “The *Taxation Act* (Québec) Versus the *Income Tax Act* (Canada): A Practitioner’s Guide to Certain Key Distinctions,” *Report of the Proceedings of the Sixty-Seventh Tax Conference, 2015 Conference Report* (Toronto: Canadian Tax Foundation, 2016), 34:1-32
- ↪ “TCC Finds Post-Acquisition PUC Step-Up Planning to be Abusive: *Univar Holdco ULC v. The Queen*” (September 12, 2016) *International Tax Newsletter* (Taxnet Pro’s Corporate Tax Center)
- ↪ “FAPI and Offshore Captive Insurance Arrangements” (July 6, 2015) *International Tax Newsletter* (Taxnet Pro’s Corporate Tax Center)
- ↪ “Highlights of the Québec Government’s 2014-2015 Budget Relating to Businesses” (June 4, 2014) *Mining & Metals Newsletter* (Taxnet Pro’s Corporate Tax Center)
- ↪ “Minister Applies GAAR to Successfully Challenge Structured Liquidation” – *Descarries et al. v. The Queen*, 2014 DTC 1081 (TCC) (November 27, 2014) 2229 *Tax Topics* (CCH – Focus on Current Cases)
- ↪ “Duke of Westminster Carries the Day Before the Federal Court of Appeal” - *The Queen v. Spruce Credit Union*, 2014 DTC 5079 (FCA) (October 30, 2014) 2225 *Tax Topics* (CCH – Focus on Current Cases)
- ↪ “Federal Court of Appeal Reaffirms that Minister Cannot Appeal Her Own Assessment” – *The Queen v. Last* 2014 DTC 5077 (FCA) (October 2, 2014) 2221 *Tax Topics* (CCH – Focus on Current Cases)
- ↪ “Subsection 88(3): A policy shift?” (November 29, 2013) *International Tax Newsletter* (Taxnet Pro’s Corporate Tax Center)

- ↪ “Federal Court of Appeal Upholds Denial of Deduction for Foreign Tax Under Tower Structure” – *FLSmith v. The Queen*, 2013 DTC 5118 (FCA) (November 28, 2013) 2177 Tax Topics (CCH – Focus on Current Cases)
- ↪ “Deliberate Tax Planning Is Not the same as Abusive Tax Avoidance” - *Gwartz v. The Queen*, 2013 DTC 1122 (TCC) (August 29, 2013) 2164 Tax Topics (CCH – Focus on Current Cases)
- ↪ “Department of Finance Introduces New Foreign Affiliate Dumping Rules” (January 11, 2013) – McCarthy Tétrault Mining Prospects Blog

#### RECENT SPEAKING ENGAGEMENTS

- ↪ “Selected Administrative and Legislative Developments” Association de planification fiscale et financière (APFF), *Congrès Annuel*, Montreal, October 2017
- ↪ “Foreign Entity Classification Revisited” Canadian Tax Foundation, 68<sup>th</sup> Annual Tax Conference, Calgary, November 2016
- ↪ “Selected Administrative and Legislative Developments” Association de planification fiscale et financière (APFF), *Symposium fiscal*, North Hatley, June 2016
- ↪ “U.S. Inversion Transactions – Beyond a Change in Corporate Headquarters” Association of Corporate Counsel (Canada), Montreal, May 2016
- ↪ “Selected Administrative and Legislative Developments” Association de planification fiscale et financière (APFF), *Colloque sur la réorganisation des entreprises*, Montréal, March 2016
- ↪ “Recent Case Law and Administrative Developments” Association de planification fiscale et financière (APFF), *Colloque sur les dons planifiés*, Montréal, February 2016

# Angelo Discepola

## Profil



### TITRE

Sociétaire

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Université d'Ottawa, LL. L.,  
2011

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## Biographie

Angelo Discepola est sociétaire au sein de notre groupe du droit fiscal à Montréal. Sa pratique porte sur tous les aspects de la planification fiscale des sociétés, des fusions et acquisitions de sociétés ouvertes et fermées et des différends en matière d'impôts, au Canada comme à l'étranger, notamment dans les domaines suivants :

- ↪ Constitution de fonds de capital d'investissement et de capital de risque et questions relatives aux investisseurs, ainsi qu'à l'établissement de stratégies de rémunération pour les gestionnaires des fonds;
- ↪ Structuration et financement de projets d'énergies renouvelables (éolienne et solaire) à la fois pour les constructeurs et pour les sociétés chargées de l'exploitation;
- ↪ Structuration et émission de produits financiers complexes, et autres enjeux des marchés des capitaux.

M<sup>e</sup> Discepola a obtenu une licence en droit (LL. L.) de l'Université d'Ottawa en 2011 (avec grande distinction). Il est membre de l'Association du Barreau canadien et de l'Association du Jeune Barreau de Montréal. Il est également membre du Comité des jeunes fiscalistes de la Fondation canadienne de fiscalité, ainsi que de l'Association de planification fiscale et financière. Il a écrit des articles dans diverses publications et prononcé des allocutions sur différents sujets lors de plusieurs conférences sur la fiscalité. Il a été admis au Barreau du Québec en 2012.

### MANDATS RÉCENTS

- ↪ Représentation de HNZ Group Inc. relativement à son acquisition au moyen d'un plan d'arrangement par le président et chef de la direction, Don Wall, et au transfert subséquent de ses activités à l'étranger (Nouvelle-Zélande, Australie, Philippines et Papouasie-Nouvelle-Guinée) à PHI, Inc.;
- ↪ Représentation de BCE Inc. relativement à son acquisition au moyen d'un plan d'arrangement d'Alarmforce Inc. et au transfert subséquent de certains abonnés à TELUS Corporation;

- ↪ Représentation d'un gestionnaire de fonds canadien et de ses dirigeants relativement à la constitution d'un fonds de capital d'investissement agricole mondial à capital variable;
- ↪ Représentation d'un régime de retraite canadien relativement à son investissement dans un fonds de capital d'investissement privé spécialisé dans le secteur des services financiers;
- ↪ Représentation de BCE Inc. relativement à son acquisition au moyen d'un plan d'arrangement de Manitoba Telecom Services Inc. et au transfert subséquent de certains abonnés des services sans fil à TELUS Corporation;
- ↪ Représentation d'Invenergy LLC relativement à la vente à TerraForm Power d'un portefeuille de projets éoliens d'une puissance installée totale de 930 MW au Canada et aux États-Unis et d'une valeur de près de 2 milliards de dollars;
- ↪ Représentation de la Banque Nationale du Canada lors de l'émission d'un certain nombre de billets structurés à capital protégé et à capital non protégé liés à un indice ou à une action.

PUBLICATIONS RÉCENTES :

- ↪ « A Reply to the CRA's Classification of Florida and Delaware LLLPs and LLPs as Corporations », *Report of the Proceedings of the Sixty-Eighth Tax Conference*, rapport de la conférence de 2016 (Toronto : Fondation canadienne de fiscalité, 2017), 24:1-39
- ↪ « Amendments to Québec Mining Tax Act and to Refundable Tax Credit for Resources », *Mining in the Courts Year in Review*, vol. VII (Centre de fiscalité des sociétés, Taxnet Pro) (8 mars 2017)
- ↪ « The *Taxation Act* (Québec) Versus the *Income Tax Act* (Canada): A Practitioner's Guide to Certain Key Distinctions », *Report of the Proceedings of the Sixty-Seventh Tax Conference*, rapport de la conférence de 2015 (Toronto : Fondation canadienne de fiscalité, 2016), 34:1-32
- ↪ « TCC Finds Post-Acquisition PUC Step-Up Planning to be Abusive: *Univar Holdco ULC v. The Queen* », Bulletin de fiscalité internationale (Centre de fiscalité des sociétés, Taxnet Pro) (12 septembre 2016)
- ↪ « Le REATB et les arrangements de sociétés captives d'assurance à l'étranger », Bulletin de fiscalité internationale (Centre de fiscalité des sociétés, Taxnet Pro) (6 juillet 2015)
- ↪ « Highlights of the Québec Government's 2014-2015 Budget Relating to Businesses », *Mining & Metals Newsletter* (Centre de fiscalité des sociétés, Taxnet Pro) (4 juin 2014)
- ↪ « Minister Applies GAAR to Successfully Challenge Structured Liquidation » – *Descarries et al. v. The Queen*, 2014 DTC 1081 (TCC) pour la section « Focus on Current Cases » du bulletin « Tax Topics » de CCH, numéro 2229 (27 novembre 2014)
- ↪ « Duke of Westminster Carries the Day Before the Federal Court of Appeal » – *The Queen v. Spruce Credit Union*, 2014 DTC 5079 (FCA) pour la section « Focus on Current Cases » du bulletin « Tax Topics » de CCH, numéro 2225 (30 octobre 2014)

- ↪ « Federal Court of Appeal Reaffirms that Minister Cannot Appeal Her Own Assessment » – *The Queen v. Last*, 2014 DTC 5077 (FCA) pour la section « Focus on Current Cases » du bulletin « Tax Topics » de CCH, numéro 2221 (2 octobre 2014)
- ↪ « Paragraphe 88(3) – Un changement de politique? », Bulletin de fiscalité internationale (Centre de fiscalité des sociétés, Taxnet Pro) (29 novembre 2013)
- ↪ « Federal Court of Appeal Upholds Denial of Deduction for Foreign Tax Under Tower Structure » – *FLSmith v. The Queen*, 2013 DTC 5118 (FCA) pour la section « Focus on Current Cases » du bulletin « Tax Topics » de CCH, numéro 2177 (28 novembre 2013)
- ↪ « Deliberate Tax Planning Is Not the same as Abusive Tax Avoidance » – *Gwartz v. The Queen*, 2013 DTC 1122 (TCC) pour la section « Focus on Current Cases » du bulletin « Tax Topics » de CCH, numéro 2164 (29 août 2013)
- ↪ « Department of Finance Introduces New Foreign Affiliate Dumping Rules » – Blogue « Mining Prospects » de McCarthy Tétrault (11 janvier 2013)

#### ALLOCUTIONS RÉCENTES

- ↪ « Interprétations techniques récentes », Association de planification fiscale et financière (APFF), Congrès annuel, Montréal, octobre 2017
- ↪ « Foreign Entity Classification Revisited », Fondation canadienne de fiscalité, 68<sup>e</sup> conférence annuelle, Calgary, novembre 2016
- ↪ « Selected Administrative and Legislative Developments », Association de planification fiscale et financière (APFF), Symposium fiscal, North Hatley, juin 2016
- ↪ « U.S. Inversion Transactions – Beyond a Change in Corporate Headquarters », Association of Corporate Counsel (Canada), Montréal, mai 2016
- ↪ « Selected Administrative and Legislative Developments », Association de planification fiscale et financière (APFF), Colloque sur la réorganisation des entreprises, Montréal, mars 2016
- ↪ « Recent Case Law and Administrative Developments », Association de planification fiscale et financière (APFF), Colloque sur les dons planifiés, Montréal, février 2016

## Marie-Soleil Landry

### Lawyer Profile



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### Biography

Marie-Soleil Landry is an associate in our Tax Group in Montréal. Her practice encompasses all aspects of tax law, with an emphasis on tax planning, international taxation and taxation of mining companies. Ms. Landry is involved in analyzing and developing complex strategies in connection with a variety of commercial transactions for clients of the firm, including public and private mergers and acquisitions and cross-border reorganizations.

In parallel to her practice, Ms. Landry is actively involved in the tax community. She has published various articles, spoken on a variety of taxation topics and assisted in writing and editing tax publications in collaboration with Thompson Carswell.

After obtaining her Bachelor of Laws from Université Laval in 2010, Ms. Landry pursued a Master's degree in taxation at the Université de Sherbrooke. She is a member of the Canadian Bar Association and the Young Bar Association of Montreal. Ms. Landry was called to the Quebec Bar in 2012.

## Marie-Soleil Landry

### Profil



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### Biographie

Marie-Soleil Landry est sociétaire au sein du groupe de droit fiscal de Montréal. Sa pratique porte sur tous les aspects du droit fiscal, notamment la planification fiscale, la fiscalité internationale et la fiscalité des sociétés minières. M<sup>e</sup> Landry participe à l'analyse et au développement de stratégies complexes dans le cadre d'opérations commerciales variées effectuées par les clients du cabinet, telles les fusions et acquisitions et les réorganisations transfrontalières, et ce, tant pour les sociétés ouvertes que fermées.

Parallèlement à sa pratique, M<sup>e</sup> Landry s'implique activement dans la communauté fiscale en publiant des articles, en donnant des conférences sur des sujets de fiscalité divers et en participant à la rédaction et la révision de publications fiscales en collaboration avec Thompson Carswell.

Après avoir obtenu un baccalauréat en droit de l'Université Laval en 2010, M<sup>e</sup> Landry a obtenu une maîtrise en fiscalité offert par l'Université de Sherbrooke. Elle est membre de l'Association du Barreau canadien et de l'Association du Jeune Barreau de Montréal. M<sup>e</sup> Landry a été admise au Barreau du Québec en 2012.

## Stefanie Morand

### Lawyer Profile



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### Biography

Stefanie Morand is a partner in our Tax Group in Toronto. She maintains an income tax planning practice, with a focus on the tax-related aspects of domestic and cross-border mergers and acquisitions (public and private), corporate finance, reorganizations, real estate transactions, structured finance and other capital markets transactions. She also frequently acts on tax structuring matters for Canadian pension plans and other tax-exempt organizations, and advises on tax aspects of business operations.

Stefanie has appeared as a lecturer at numerous conferences, seminars and courses, and has written and commented widely on income tax matters generally.

Stefanie received her combined LLB/MBA (Gold Medalist) from Osgoode Hall Law School and the Schulich School of Business in 2006, and her Hons. BA (Board of Governors Medalist) from the University of Windsor in 2002. She is the recipient of numerous awards for academic achievement, including multiple law school awards in, amongst other areas, general tax, corporate tax, trusts and estates, and the Allen S. Berg MBA/LLB Graduating Award of Excellence for the highest standing in the combined program.

She was called to the Ontario bar in 2007 and is a member of the International Fiscal Association, the Canadian Tax Foundation and the Canadian Bar Association.

#### RECENT SPEAKING ENGAGEMENTS

- “Tax Structuring Considerations for Pension Plans and their Subsidiaries” – PIAC Tax Forum (November 22, 2017)
- “Setting Up and Sustaining Business Operations in Canada: A Roadmap for Non-Residents” – 72<sup>nd</sup> Annual Conference – Tax Executives Institute, Inc. (October 23, 2017)
- “ITA 55(2) - Recent CRA Position” - MT Advance Client Seminar (May 4, 2016)

- “Interest Deductibility – Recent Developments” – MT Advance Client Seminar (May 7, 2015)
- “Non-Resident Taxation in Canada – Regulation 102/105” – Toronto Centre Tax Services Office CRA & Tax Professionals Group Seminar (February 19, 2015)
- “Is there Always Certainty for Tax Basis? – Limitations on Costs and Expenditures Pursuant to Sections 143.3 and 143.4” – *66<sup>th</sup> Annual Tax Conference* – Canadian Tax Foundation: Vancouver, British Columbia (November 30, 2014 – December 2, 2014)”
- “Tax Effective Corporate Wealth Transfers” – *2<sup>nd</sup> Tax-Effective Planning for Insurance & Investments Course* – Federated Press: Toronto, Ontario (May 29, 2013)
- “Pipeline Planning: Recent Developments” – *The 6-Minute Estates Lawyer 2013* – Law Society of Upper Canada: Toronto, Ontario (April 24, 2013)
- “Income Tax Developments in Estate Planning and Administration” – *15<sup>th</sup> Annual Estates and Trusts Summit* – Law Society of Upper Canada: Toronto, Ontario (November 15, 2012)
- “Current Issues” – *2012 Ontario Tax Conference* – Canadian Tax Foundation: Toronto, Ontario (October 29, 2012)
- “Tax Effective Corporate Wealth Transfers” – *Tax-Effective Planning for Insurance & Investments* – Federated Press: Toronto, Ontario (March 28, 2012)
- “Current Issues” – *2011 British Columbia Tax Conference* – Canadian Tax Foundation: Vancouver, British Columbia (September 26, 2011)

## RECENT PUBLICATIONS

Ms. Morand has either authored or co-authored the following:

- “Is There Always Certainty Regarding Tax Basis? Limitations on Expenditures Pursuant to Sections 143.3 and 143.4,” 2014 CTF Annual Conference Report (Vancouver: Canadian Tax Foundation, 2015), 14:1-36
- “Treaty Shopping Proposals – A Review of 2013 and 2014 Developments,” (May 8, 2014) McCarthy Tétrault International Tax Newsletter (Taxnet Pro’s Corporate Tax Centre)
- “Interest Deductibility – Has the bar been raised for share purchases? – Part I,” (May 1, 2014) 2199 Tax Topics (CCH – Lead Article) 1-6 and “Interest Deductibility – Has the bar been raised for share purchases? – Part II,” (May 8, 2014) 2200 Tax Topics (CCH – Lead Article) 1-4
- “Federal Court of Appeal Strikes Down *Inter Vivos* Surplus Strip,” (May 23, 2013) 2150 Tax Topics (CCH – Lead Article) 1-9 – reprinted in (July 2013) 222 *The Estate Planner* (CCH) 3-10
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## Fred Purkey

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**Protect your tax interests in the context of large M&As, corporate reorganizations and complex tax structuring issues. That's what Fred Purkey will do for you.**

Fred is called in on a great number of files, mostly large transactions with a lot of moving parts, employing a practical approach to solving complex problems and making timely decisions to eliminate potential delays. A partner in our National Tax Group, located in Montréal, Fred advises on the income tax issues relating to mergers and acquisitions of public and private corporations, corporate reorganizations, real estate investment trusts, pension funds, financing structures and private equity funds.

#### RELIABLE AND CREATIVE

Fred acts for large commercial real estate entities with holdings in Québec and elsewhere in Canada, as well as for international corporations doing business in Canada. He also advises Canadian companies on goods and services tax matters, and employee compensation arrangements.

Using his extensive experience in large transactions, Fred remains on top of the deal, acting as the central repository of the knowledge from the tax perspective all the way through the transaction. Clients can rely on his proven ability to solve tax issues with creative solutions to ensure a successful transaction.

#### REPRESENTATIVE EXPERIENCE

- Acted as counsel to an investment group in the acquisition of a major Canadian sports franchise. This transaction, which also included the team's playing facility and a large independent events promotion company, is considered to be among the most significant acquisitions ever completed in professional sports in North America.
- Represented a major Canadian Real Estate Investment Trust in its \$900-million unsolicited acquisition of another Real Estate Investment Trust.

- Represented a prominent real estate group in its negotiated takeover bid of a large Real Estate Investment Trust for approximately \$119 million. The transaction culminated in the client's graduation from the TSX Venture Exchange to the Toronto Stock Exchange. This bid defeated an unsolicited takeover bid from one of the client's key competitors.
- Represented a prominent real estate group in its tax-deferred conversion from a mutual fund corporation into a real estate investment trust, and its internal reorganization to simplify its structure.
- Represented a major Real Estate Investment Trust in the \$1.527-billion acquisition of a portfolio of 11 shopping centres, three office properties and one industrial property from a multinational real estate corporation.
- Represented a high-profile electronics retailer in its acquisition of a corporation which operated competing chains, in a transaction valued at approximately US\$286 million.
- Represented a large manufacturing company in its acquisition of one of Canada's leading manufacturer and marketers of cleaning products.
- Represented a global digital business solutions agency in its acquisition of all the outstanding shares of a multinational digital services company headquartered in Toronto.
- Represented a large family-owned tape manufacturer in its acquisition by a TSX-listed packaging and adhesives company.
- Represented a leading manufacturer and distributor of home healthcare and medical professional products, in the sale of one of its brand portfolios consisting of mobility and bathroom safety products.
- Represented a Canadian stock exchange in its \$1.1 billion merger with another Canadian stock exchange.
- Represented the issuer on a global offering of \$5 billion of senior notes.
- Represented the issuer on an offering of \$2 billion of senior notes.
- Represented the underwriters on a \$260 million bought deal offering from a Canadian airline.
- Represented a Canadian real estate investment trust in its \$700 million purchase of a real estate portfolio.
- Acted for a publicly-listed optical company in its \$120 million acquisition of a chain of retail optical outlets across Québec, British Columbia, Alberta, Ontario and New Brunswick.

Fred writes widely on tax issues, and lends his expertise to panels at national and international tax conferences. He has lectured on taxation at McGill University Faculty of Law, and on the taxation of real estate in the McGill University Graduate Diploma in Taxation program.

Fred completed the Canadian Institute of Chartered Accountants, In-Depth Tax Course, Levels I, II & III, and is a Trust and Estate Practitioner (TEP). He received his Common and Civil Law (BCL/LLB) degrees from McGill University in 1996 and was called to the bar of Québec in 1998. Previously, he received an MA in Political Science from Yonsei University, South Korea (1990), and a BA in International Relations from Acadia University (1988).

#### AWARDS & RANKINGS

##### **The Canadian Legal Lexpert Directory**

Leading lawyer, corporate tax

# Fred Purkey

## Profil



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**Protéger vos intérêts fiscaux dans le contexte d'importantes fusions et acquisitions, de restructurations d'entreprises et de questions complexes de structuration fiscale. C'est ce que Fred Purkey fera pour vous.**

Fred participe à un grand nombre de dossiers, principalement des opérations d'envergure comportant de multiples aspects variables. Il applique son approche pratique à la résolution d'enjeux complexes et ses décisions prises au moment opportun évitent les retards potentiels. En poste à Montréal, Fred est associé au sein de notre groupe national du droit fiscal. Il conseille les clients sur les questions d'impôt sur le revenu liées aux fusions et acquisitions de sociétés ouvertes et fermées, aux restructurations d'entreprises, aux fiducies de placement immobilier, aux caisses de retraite, aux structures de financement et aux fonds de capital d'investissement privé.

### DÉTERMINÉ ET CRÉATIF

Fred représente d'importantes entités de l'immobilier commercial ayant des immeubles au Québec et ailleurs au Canada, de même que des sociétés internationales faisant affaire au Canada. Il conseille également des sociétés canadiennes en matière de taxe sur les produits et services et de régimes de rémunération des employés.

Grâce à sa vaste expérience des opérations d'envergure, Fred maîtrise tous les angles de la transaction et agit comme centre de connaissances fiscales tout au long de l'opération. Les clients peuvent se fier à sa capacité établie de résoudre les questions fiscales au moyen de solutions créatives qui favorisent la réussite d'une opération.

### MANDATS REPRÉSENTATIFS

- ↪ A conseillé un groupe d'investissement dans l'acquisition d'une grande franchise sportive canadienne. Cette opération, qui englobait également les installations sportives de l'équipe et une importante société indépendante de promotion d'événements, est considérée comme l'une des acquisitions les plus importantes réalisées dans le sport professionnel en Amérique du Nord.
- ↪ A représenté un important fonds de placement immobilier canadien dans le cadre d'une acquisition non sollicitée d'un autre fonds de placement immobilier pour 900 millions de dollars.

- ↪ A représenté un éminent groupe immobilier dans le cadre de son offre publique d'achat négociée visant une importante fiducie de placement immobilier pour environ 119 millions de dollars. L'opération a abouti au passage du client de la Bourse de croissance TSX à la Bourse de Toronto. Cette offre l'a emporté sur une offre publique d'achat non sollicitée par un concurrent principal du client.
- ↪ A représenté un éminent groupe immobilier dans le cadre de sa conversion avec report d'impôt de société de placement à capital variable à une fiducie de placement immobilier et de sa restructuration interne en vue de la simplification de sa structure.
- ↪ A représenté un important fonds de placement immobilier relativement à l'acquisition, au montant de 1,527 milliard de dollars, d'un portefeuille composé de 11 centres commerciaux, de trois tours de bureaux et d'un immeuble industriel auprès d'une société immobilière multinationale.
- ↪ A représenté un détaillant de produits électroniques réputé lors de son acquisition de l'exploitant de chaînes de magasins concurrentes, dans le cadre d'une opération évaluée à environ 286 millions de dollars US.
- ↪ A représenté une grande entreprise manufacturière dans son acquisition d'un important fabricant et commerçant de produits de nettoyage au Canada.
- ↪ A représenté une agence mondiale centrée sur la transformation numérique des entreprises quant à son acquisition de toutes les actions en circulation d'une société multinationale de services numériques ayant son siège à Toronto.
- ↪ A représenté une importante entreprise familiale de fabrication de rubans auto-adhésifs lors de son acquisition par un fabricant de plastique polyoléfinique spécialisé et de produits d'emballage inscrit à la cote de la TSX.
- ↪ A représenté un important fabricant et distributeur de produits de soins à domicile et de produits médicaux professionnels, lors de la vente de l'un de ses portefeuilles de marque englobant des produits de mobilité et de sécurité dans la salle de bains.
- ↪ A représenté une bourse canadienne dans le cadre d'une fusion de 1,1 milliard de dollars avec une autre bourse canadienne.
- ↪ A représenté l'émetteur dans le cadre d'une offre globale de 5 milliards de dollars de billets de premier rang.
- ↪ A représenté l'émetteur dans le cadre d'une émission de billets de premier rang de 2 milliards de dollars.
- ↪ A représenté les preneurs fermes dans le cadre d'une offre de prise ferme de 260 millions de dollars d'une compagnie aérienne canadienne.
- ↪ A représenté une fiducie de placement immobilier canadienne dans le cadre de l'achat d'un portefeuille immobilier de 700 millions de dollars.
- ↪ A représenté une société d'optique cotée en bourse dans le cadre de l'acquisition de 120 millions de dollars d'une chaîne de points de vente au détail au Québec, en Colombie-Britannique, en Alberta, en Ontario et au Nouveau-Brunswick.

Fred rédige régulièrement des articles sur des questions fiscales et fait bénéficier de son expertise des groupes d'experts lors de conférences fiscales nationales et internationales. Il a donné des cours sur la fiscalité à la Faculté de droit de l'Université McGill et sur l'imposition des biens immobiliers dans le cadre du programme de fiscalité du diplôme de deuxième cycle de l'Université McGill.

Fred a suivi le Cours fondamental d'impôt, niveaux I, II et III, de l'Institut canadien des comptables agréés et est un praticien en fiducies et successions. Il a reçu ses diplômes en common law et en droit civil (B.C.L./LL. B.) de l'Université McGill en 1996 et été admis au Barreau du Québec en 1998. Auparavant, il avait obtenu une maîtrise ès arts en sciences politiques de l'Université Yonsei, Corée du Sud (1990), et un baccalauréat ès arts en relations internationales de l'Université Acadia (1988).

#### PRIX ET DISTINCTIONS

##### **The Canadian Legal Lexpert Directory**

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### Biography

John Yuan is a partner in our Tax Group in Toronto. His practice covers all areas of income taxation, with an emphasis on tax disputes and transfer pricing.

Mr. Yuan is recognized as a leading lawyer in tax in the current edition of the International Tax Review's *Indirect Tax Leaders* guide.

He is the co-editor of the Focus on Current Cases feature of *CCH Tax Topics*.

Mr. Yuan is a member of the Professional Engineers of Ontario.

He received his B.A.Sc. (Mech. Eng.) from the University of Toronto in 1987 and his LLB from the University of Windsor in 1993. Mr. Yuan was called to the Ontario bar in 1995.

# The Tax Cuts and Jobs Act

## The Impact of Recent Us Tax Law Reform

May 16, 2018

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# Topics to be Covered

- High Level Effect on M&A
- Significant Changes to Tax Rates
- Immediate Expensing of “Qualified Property”
- Limitation on Deductibility of Net Interest Expense
- Disqualified Expenses Paid in Hybrid Transactions or to Hybrid Entities
- Limits of Deductibility of NOLs
- Deemed Repatriation
- Shift to Territorial System
- Cocktail Party Provisions: “GILTI”, “FDII” and “BEAT”
- Changes to CFC Attribution Rules
- Other Relevant Changes

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# HIGH LEVEL EFFECT ON M&A



# High Level Effect on M&A

- Little Change to Tax Free Deals
- Likely Increase in Number of Taxable Deals
- Increased Pressure from Buyers for Asset Deals (Including 338 and 336)
- Less Pressure to Invert
- Choice of Entity Questions
- Limitation on Leverage

Source: CN & CP Annual Reports, Various Years

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# SIGNIFICANT CHANGES TO TAX RATES



# Significant Changes to Tax Rates

- Individual top rate reduced to 37% (from 39.6%) - expires after Dec. 31, 2025.
- Corporate tax rate reduced to 21% (from 35%)
  - Corporate AMT eliminated
  - Reduction in tax rates automatically reduces the value of tax assets (e.g., deferred tax assets for transaction expenses or NOLs) and liabilities impacting financial statements
  - Free cash flow may improve as a result of lower rate
- Several tax preferences are eliminated (e.g., Section 199 domestic production deduction)
- 20% deduction for REIT dividends received by U.S. individuals

Source: CN & CP Annual Reports, Various Years

# Significant Changes to Tax Rates

- Passthrough entities may qualify for income tax deduction of 20% of “qualified business income” resulting in effective federal tax rate of 29.6% for top bracket individual
  - Changes in tax rates may affect the use of the corporate form vs. the partnership form because business income earned by individuals in the top bracket through a partnership may be taxed at a lower effective fed income tax rate (29.6%) than income earned through a corp (36.8%)
  - However, the corporate form also allows for deferral (i.e., 21% tax on earnings until dividends are paid)
- No change in withholding tax rates for amounts paid to foreign persons
- **Impact on Deals:**
  - May increase willingness of corporate sellers to do taxable deal because tax cost is reduced (note no change to non-corporate sellers)
  - Has no effect on rollovers

Source: CN & CP Annual Reports, Various Years

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# IMMEDIATE EXPENSING OF “QUALIFIED PROPERTY”



# Immediate Expensing of “Qualified Property”

- Immediate expensing of full cost of “qualified property” (i.e., depreciable tangible property including used property and does not include shares in corporations, real estate, or intangibles such as goodwill or IP) acquired and placed into service before Jan. 1, 2023 (subject to a related party / anti-churning rule)
- For property placed in service in 2023 onwards, immediate expensing is also permitted but the percentage of cost that is immediately deductible steps down annually (20%/year) until it is phased out completely for property placed in service after 2026 (or 2027 for certain property with longer production periods)

# Immediate Expensing – Impact on Deals

- Incentivizes purchasing assets eligible for immediate expensing before 2028 and its application to new *and used* items creates incentive to make Section 338 or 336 elections in eligible stock acquisitions, or structure transactions as asset sales or deemed asset sales
- Increased tax benefit from asset and deemed asset deals
  - Note that corporate level tax cost to sellers in asset deals remains, albeit at a 21% federal corporate rate rather than 35%
  - Increased pressure on allocations by buyers

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# LIMITATION ON DEDUCTIBILITY OF NET INTEREST EXPENSE



# Limitation on Deductibility of Net Interest Expense

- For tax years beginning after Dec. 31, 2017, the TCJA imposes a new limit on nearly all net “business interest” expense deductions (no longer limited to related party loans)
  - Net Business Interest Expense Deduction = “business interest expense” (i.e., interest paid or accrued on indebtedness properly allocable to a trade or business) – “business interest income”
  - *Note:* “business interest” includes OID
- Every business, regardless of its form, is generally subject to a disallowance of a deduction for net interest expense in excess of 30% of the business’s “adjusted taxable income” (ATI)
  - For purposes of this limitation, ATI is determined in a manner similar to EBITDA for taxable years 2018 through 2021
  - Beginning in 2022, ATI is determined in a manner similar to EBIT
- Limitation applied on an entity by entity basis but, expectation is guidance to treat a U.S. consolidated group as a single entity

# Limitation on Deductibility of Net Interest Expense

- **Disallowed Interest Deductions**
  - carried forward indefinitely and treated as interest in later taxable years
  - carryovers included in “pre-change loss” for Sec. 382 “change of ownership”
- **Exempt Businesses**
  - Certain taxpayers with average annual gross receipts for the 3-tax year period ending with the prior year not in excess of \$25MM
  - Certain regulated public utilities and electric cooperatives
  - Businesses providing for floor plan financing (i.e., financing for the acquisition of motor vehicles, boats or farm machinery for sale or lease and secured by such inventory)
  - Certain real property businesses can elect out of the provision if they use ADS to depreciate applicable real property used in a trade or business
  - Certain farming businesses can elect out if they use ADS to depreciate any property used in the farming business with a recovery period of 10 years or more

# Impact on Deals

- Particularly in 2022 and later years, there may be little capacity for interest deductions, due to the change from EBITDA to EBIT. The change from EBITDA to EBIT would apply to all debt instruments that exist at that time (i.e., no grandfathering); therefore, U.S. borrowers should consider the switch to EBIT in examining their debt profile
- May raise the cost of financings for higher-leveraged companies, including capital intensive companies, recently acquired companies and companies in a growth mode funded by debt. Combined with the reduced U.S. corporate tax rate of 21%, there may be less incentive to allocate significant debt to the U.S. in a multinational structure
- This change may also encourage acquisitions of tangible assets eligible for 100% expensing (described above) in taxable years before 2022, to accelerate depreciation deductions into earlier years and increase capacity for interest expense deductions in 2022 onwards
- The rule may make alternative financing arrangements more attractive (e.g. offshore financing, preferred equity, operating leases)

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# DISQUALIFIED EXPENSES PAID IN HYBRID TRANSACTIONS OR TO HYBRID ENTITIES

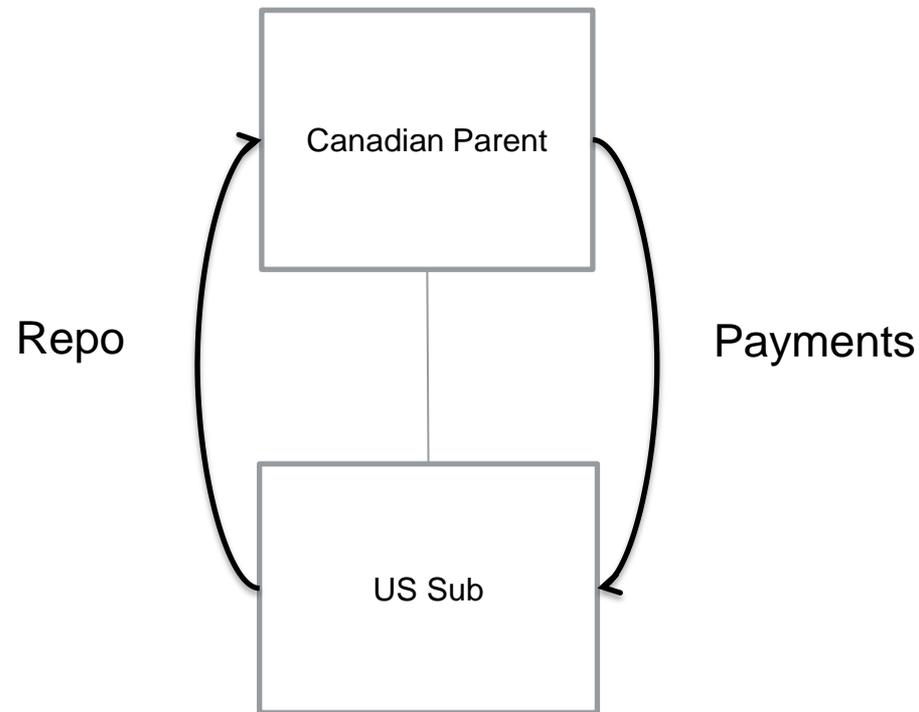


# Disqualified Expenses Paid in Hybrid Transactions or to Hybrid Entities

- No deduction for any “disqualified related party amount” paid or accrued pursuant to a “hybrid transaction” **or** by, or to, a “hybrid entity”
- A “disqualified related party amount” is any interest or royalty paid or accrued to a foreign related party (other than amounts included in the gross income of a U.S. shareholder under Subpart F) to the extent that, under the laws of such party’s country of residence, the related party either has no corresponding income inclusion or is allowed a deduction for a corresponding amount
- A “hybrid transaction” is any transaction where one or more payments are treated as interest or royalties for U.S. tax purposes but not so under the tax laws of the recipient’s country
- A “hybrid entity” is treated as fiscally transparent for U.S. tax purposes but not for foreign tax purposes or vice versa

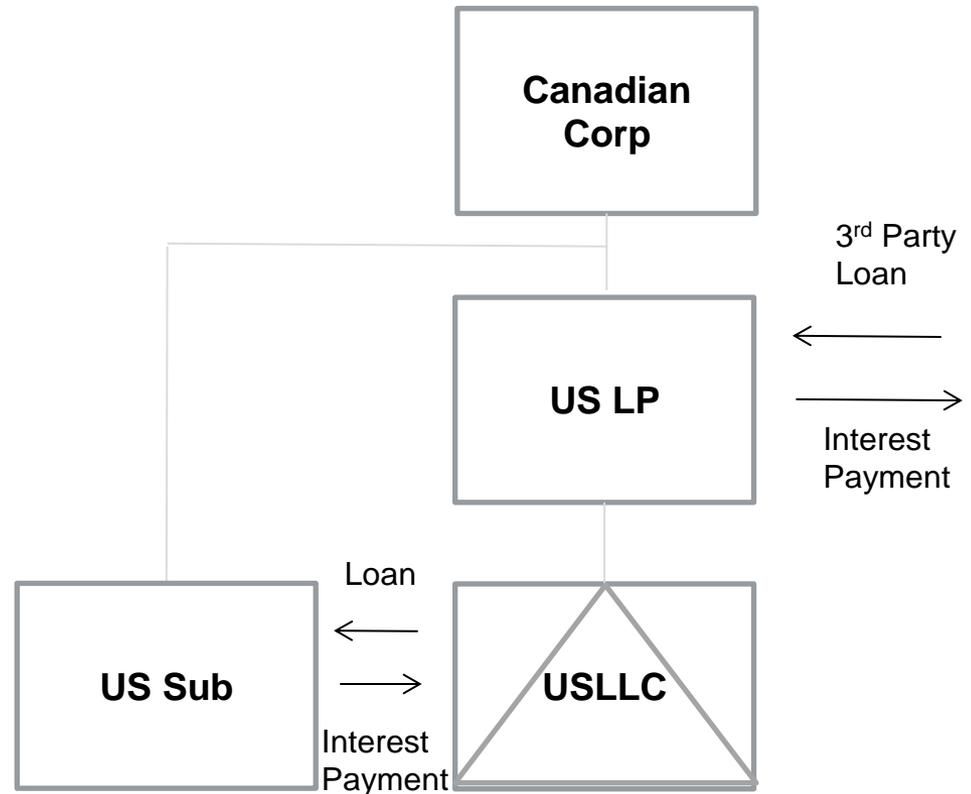
# Hybrids – Impact on Deals

- Cross border Repo Transactions
  - US Sub sells shares of its sub to Canadian Parent subject to fixed price repurchase obligation (“Repo”)
  - Shares subject to repo pay dividends
- US Sub treats payments as deductible payments of interest to Canadian Parent
- Canadian Parent treats payments as exempt dividends on shares subject to the Repo



# Hybrids – Impact on Deals

- Tower Structures for Financing
  - Typical Structure involves US Sub (corporation for US tax purposes) paying interest to US LLC (pass-through for US tax purposes)
  - US LLC then distributes cash to US LP (a corporation for US tax purposes) to pay interest to 3<sup>rd</sup> party lender
- Results in US deduction in US Sub and Canadian deduction for Canadian Corp



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# LIMITS ON DEDUCTIBILITY OF NOLS



# Limits of Deductibility of NOLs

- Beginning in tax years after 12/31/2017 NOLs can be used to offset a maximum of 80% of a company's taxable income
- Unused NOLs carried forward indefinitely but, no carrybacks
- New limits apply to NOLs that arise in taxable years ending after Dec. 31, 2017.
  - Therefore, new rules apply to some 2017 NOLs for non-calendar year taxpayers.
  - Historic NOLs not subject to 80% limitation, but still subject to 20-year carry-forward limitation
- Impact on Deals:
  - Consider taxable income and ability to utilize losses with new constraints
  - In addition to 382 ownership change limits (i.e. loss streaming), new limits may impact value of DTAs

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# DEEMED REPATRIATION



# Deemed Repatriation

- One-time inclusion that could generate significant phantom taxable income for 2017
- For tax year 2017, if a foreign corporation is either a CFC or has at least one 10%-U.S. shareholder that is a corporation, any 10%-U.S. shareholder of such foreign corporation (as determined on Dec. 31, 2017) is required to include in income its proportionate share of the foreign corporation's undistributed earnings
- Repatriation Tax Rate for 10% corporate shareholders:
  - 8% for earnings invested in tangible assets
  - 15.5% for cash

# Deemed Repatriation

- Tax can be paid over 8 years but there are triggers to accelerate the payment:
  - failure to timely pay any required installment,
  - a liquidation or sale of substantially all the assets of (including in a Title 11 bankruptcy or similar case), or
  - a cessation of business by the company or similar circumstance
- Acceleration will not apply to the sale of substantially all the assets if the buyer enters into an agreement with IRS under which the buyer is liable for the remaining installments due in the same manner as if the buyer were the taxpayer

# Deemed Repatriation – Impact on Deals

- Could free up significant cash for acquisitions, share buybacks, debt repayment, etc.
- Could result in U.S. corporations holding less cash outside the U.S.
- Repatriation tax liability is significant due diligence consideration
- Will need to be addressed in tax provisions of purchase agreements

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# SHIFT TO TERRITORIAL SYSTEM



# Shift to Territorial System

- Participation exemption / Dividends Received Deduction:
  - Generally, dividends paid by a foreign subsidiary to a U.S. corporation that owns 10% of the equity (by vote or value) of such foreign subsidiary are exempt from tax, if
    - (1) the dividends are attributable to such subsidiary's non-U.S. earnings, and
    - (2) the equity has been held for at least 1 year
  - Exemption does not apply to:
    - Dividends that are deductible by the foreign sub ("hybrid dividends"); or
    - Foreign corporations that are PFICs.
- Only available to U.S. corporate shareholders
- A U.S. S-corp that owns 10% or more of the stock of a foreign corp appears eligible for the participation exemption

# Shift to Territorial System

- Exempt dividends reduce the U.S. corporate shareholder's basis in the foreign sub, reducing the ability to claim losses on a future sale of the foreign sub stock
- Note, however, GILTI regime (discussed below) limits the full benefit of the participation exemption
- Beware: Section 956 is not eliminated so still cannot pledge stock of foreign subsidiaries
- **Impact on Deals:**
  - May reduce cost of “Trapped Cash”
  - May affect valuation of foreign companies

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# COCKTAIL PARTY PROVISIONS: “GILTI,” “FDII” AND “BEAT”



# GILTI and FDII

- A new category called “global intangible low-taxed income” (GILTI) has been added that will sunset in 2025.
- Generally, GILTI is the income from the performance of services or sales of property to non-U.S. customers. The GILTI tax penalizes domestic corporations that earn income from such activities through offshore subsidiaries and that otherwise avoid U.S. tax
- The GILTI tax imposes a minimum U.S. tax at an effective rate of 10.5% on the non-routine portion of such income, and permits a foreign tax credit for only 80% of the foreign taxes paid to the non-U.S. jurisdiction. The 10.5% increases to 13.125% starting Jan. 1, 2026 for corporate investors (and usual rates, max. of 37%, for individual investors). Calculation depends on tax basis so U.S. treatment of foreign deals relevant.
- A U.S. corporation’s “foreign-derived intangible income” (FDII) is taxed at 13.125% (increases to 16.41% for 2026 onwards) and may encourage retaining IP onshore or even incentivize bringing some offshore IP back to the U.S. (but FDII’s favorable tax rate applies not only to income generated by intangible property, but also to services income or sales income)

# Base Erosion Anti-Abuse Tax (“BEAT”)

- The BEAT is a minimum tax on corporations’ taxable income :
  - 5% for a taxable year beginning in 2018
  - 10% for taxable years beginning after Dec. 31, 2018 and before Jan. 1, 2026, and
  - 12.5% in a taxable year beginning after 2025
- The BEAT effectively compares the corporation’s regular tax liability to the minimum tax on the corporation’s income calculated without taking deductible payments to non-U.S. affiliates into account. If the minimum tax amount is larger, then the BEAT is owed in lieu of regular tax
- The BEAT affects U.S. corporations with average annual gross receipts of at least \$500 million for the last 3 years
- The purpose of the BEAT is to protect the U.S. tax base, particularly in light of the switch to a modified territorial system
- Effect on Deals. Creates additional limit on use of intercompany debt.

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# CHANGES TO CFC ATTRIBUTION RULES



# Changes to CFC Attribution Rules

- Definition of “U.S. Shareholder” expanded to any U.S. person who owns 10% of voting **or value** of a foreign corporation
- Attribution rules expanded to allow downward attribution from foreign person to U.S. persons.
  - Even if <50% of a foreign corporation’s equity is owned, directly or indirectly, by U.S. shareholders, the foreign corporation may be treated as a CFC under the new downward attribution rules (especially if such foreign corporation is affiliated with another U.S. corporation)
  - U.S. investors who directly or indirectly own or invest in  $\geq 10\%$  of the equity of a foreign corporation that is not a CFC under current law could become liable for tax on subpart F income and GILTI
- **Impact on Deals:**
  - Continued sensitivity around CFC qualification for 10% shareholders (deemed income inclusions)
  - Deal structuring to minimize deemed income inclusions still required

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# OTHER RELEVANT CHANGES



# Other Relevant Changes

- Sales by foreign persons of interests in partnerships are now subject to tax. To enforce this rule a new withholding tax regime is imposed similar to FIRPTA. This will affect documentation for sales of partnership interests
- No more deduction for 50% of entertainment, amusement, or recreation expenses directly related to or associated with the active conduct of a trade or business or a facility used in connection with such activity
- New rules for like-kind exchanges are much narrower. Like-kind exchanges only apply to real property now

For more information visit our **U.S. Tax Reform Roadmap** at  
[www.mayerbrown.com/experience/us-tax-reform-roadmap/](http://www.mayerbrown.com/experience/us-tax-reform-roadmap/)



# Federal Budget 2018 McCarthy Tétrault's Analysis

May 16, 2018

Fred Purkey  
Marie-Soleil Landry



*“With this budget, built by and for all Canadians, we are tackling the challenge of equality head-on—asking tough questions, and beginning to provide solutions.”*

Bill Morneau, Minister of Finance

## Business Tax Measures

- Enactment of the income splitting prohibition rules.
- Substantial pullback on the passive income proposals of 2017.
- Overturn of the *Green* decision regarding limited partnership losses rules for tiered partnerships.

## International Tax Measures

- Extension of cross-border surplus stripping rule to partnerships and trusts .
- Foreign affiliate amendments to shutdown “tracking arrangements.”
- Extended reassessment periods for certain non-resident taxpayers.

## Measure:

- On December 13, 2017, the Government released draft legislation to address the Government's concerns relating to such planning.
- The draft legislation provides rules to, very generally, prevent income sprinkling with related individuals who are not actively involved in the business.
- In Budget 2018, the Government confirmed its intention to implement such measures as they were announced.

## Takeaways:

- The draft legislation will be effective as of January 1, 2018.
- While income splitting planning opportunities may still exist, they will generally involve substantial reassessment risks.

## Measure:

- Budget 2018 proposes to phase out access to the “small business deduction” (“**SBD**”) for CCPCs (together with associated corporations) that have significant passive investment income.
- Very generally, the business limit will be reduced progressively by \$5 for every \$1 of investment income earned in excess of \$50,000.

## Takeaways:

- This change will be effective for taxation years beginning after 2018.
- The business limit will be nil once a CCPC earns \$150,000 of investment income.
- This measure has no impact on corporations that earn business income that is not eligible for the small business deduction (e.g., corporations having aggregate taxable capital employed in Canada of at least \$15 million).

## Measure:

- Budget 2018 proposes, very generally, that the RDTOH on investment income earned by a private corporation will only be refunded if the corporation pays a non-eligible dividend (which is taxed at a higher effective rate in the hand of an individual).
- Upon payment of a non-eligible dividend, a refund is first to be claimed against the non-eligible RDTOH account (the current RDTOH).
- Upon payment of an eligible dividend, a refund may only be claimed against the eligible RDTOH account (the “new” RDTOH account).

## Takeaways:

- These measures will be effective for taxation years beginning after 2018.
- Essentially, this change will further delay the timing of the refund of any RDTOH paid on investment income OR will require the acceleration of the payment of the additional tax on non-eligible dividend by the shareholder.
- Private corporations are still subject to a lower taxation rate on business income. Therefore, private corporations will have more after-tax capital to invest than an individual earning the same business income.

## Prior Developments:

- In May 2017, the Federal Court of Appeal released its decision in *Green v. The Queen*, 2017 FCA 107 (“**Green**”) regarding the interpretation of the at-risk rules in the context of tiered partnerships.
- Before this decision, the CRA’s position was that limited partnership losses incurred by a lower-tier partnership (i.e., losses in excess of the top-tier partnership’s at-risk amount in the lower-tier partnership) in a tiered arrangement were never deductible by any taxpayer.
- The Federal Court of Appeal however held that the at-risk rules did not apply for lower-tier partnerships as the top tier partnership is not a taxpayer that is required to compute amounts under the provisions that are referred to in the at-risk rules.

## Measure:

- Budget 2018 proposes to amend the ITA to reflect the CRA policy to apply the at-risk rules to limited partners that are themselves partnerships.
- A partnership that is a limited partner will only be permitted to allocate losses from the lower tier partnership to its members to the extent that the upper tier partnership has an at-risk amount in its investment in the lower tier partnership.
- Any "limited partnership loss" of the upper tier partnership cannot be carried forward but will be reflected in the adjusted cost base of the upper tier partnership in its interest in the lower tier partnership.

## Takeaways:

- These measures will apply to taxation years that end on or after February 27, 2018.
- However, this measure will impact losses incurred prior to Budget Day in that they will not be able to be carried forward to a taxation year that ends on or after February 27, 2018.

## Surplus Stripping Rules – Pre-Budget 2018:

- Anti-avoidance rules exist to prevent a non-resident shareholder from entering into certain non-arm's length transactions that extract (on a tax-free basis) the surplus of the Canadian corporation in excess of its PUC.
- The specific anti-avoidance rule in section 212.1 only applies where shares of a corporation resident in Canada are transferred to a “purchaser corporation.”
- This rule does not apply in circumstances where interests in other intermediaries, such as partnerships or trusts, are transferred by the non-resident person, even if such intermediaries derive a substantial portion of their value from the ownership of shares of a Canadian corporation.
- As a result, a non-resident person can transfer an interest in a partnership, which holds shares of a Canadian corporation, to a non-arm's length Canadian company and arguably achieve a result which section 212.1 is designed to prevent.

## Budget 2018's Measure:

- Budget 2018 proposes to amend section 212.1 to add a comprehensive “look-through” rule for partnerships and trusts.
- In essence, this rule will allocate the assets, liabilities and transactions of a partnership or trust to its members or beneficiaries, based on the fair market value of their interests.
- As a consequence, a transfer by a non-resident person of an interest in a partnership which holds shares of a Canadian company will be treated, for purposes of section 212.1, as if the non-resident transferred the shares of the Canadian company directly.

## Takeaways:

- This proposal will apply to transactions that occur on or after February 27, 2018.
- This rule will apply for the purpose of the cross-border anti-surplus stripping rule and the corporate immigration rule.
- No detailed legislative amendments were yet proposed.

# Foreign Affiliates – Investment Businesses 46

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## FAPI Rules – Pre-Budget 2018:

- Canadian taxpayers are taxed on the foreign accrual property income (“**FAPI**”) when earned by a “controlled foreign affiliate”. Investment income generally constitutes FAPI.
- An investment business does not include certain businesses if the foreign affiliate employs more than five employees full time in the active conduct of that business (generally referred to as the “six employee test”).
- Certain taxpayers, whose foreign activities would not normally warrant more than five full time employees, aggregated their interests with taxpayers in similar circumstances to meet such test.
- Furthermore, controlled foreign affiliate status was avoided by having a group of taxpayers sufficiently large so that no one taxpayer, or the taxpayer together with the other relevant persons for such definition, would control the foreign affiliate.

# Foreign Affiliates – Investment Businesses 47

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## Budget 2018's Measure:

- Budget 2018 proposes to introduce a rule for the purposes of the investment business definition so that, where income attributable to specific activities accrues to the benefit of a specific taxpayer under what the Department of Finance has called a “tracking arrangement”, those activities will be deemed to be a separate businesses.
- Budget 2018 also proposes to deem a foreign affiliate of a taxpayer to be a controlled foreign affiliate of the taxpayer if FAPI attributable to activities of the foreign affiliate accrues to the benefit of the taxpayer under a “tracking arrangement.”

## Takeaways:

- Each separate business of the foreign affiliate will need to satisfy the test in order for such foreign affiliate's income to be excluded from FAPI.
- These measures are intended to apply to taxation years of a taxpayer's foreign affiliate that begin on or after February 27, 2018.

## Reassessment Period – Pre-Budget 2018:

- For most taxpayers with foreign affiliates, the CRA generally had four years to reassess the taxpayer its initial assessment.

## Budget 2018's Measure:

- Budget 2018 proposes to extend the reassessment period by three years, or six years in certain circumstances, in respect of income arising in connection with a foreign affiliate of the taxpayer.
- This measure will apply to taxation years of a taxpayer that begin on or after February 27, 2018.

## Recent Cases

# GAAR Update & Developments in Tax Disputes

May 16, 2018

John Yuan

Angelo Discepola



# Recent GAAR Cases

## A. Taxpayer Wins (2)

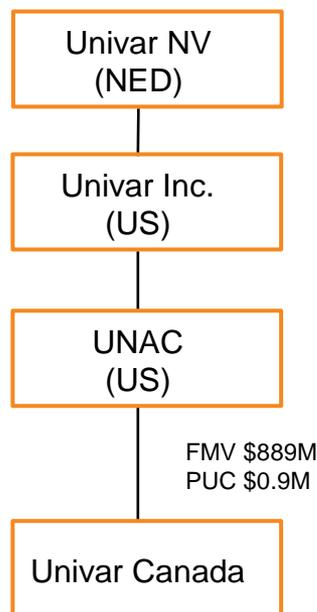
	Decision	Date	Appeal Status
1	<i>Univar Holdco Canada ULC v. The Queen</i> , 2017 FCA 207	October 13, 2017	None.
2	<i>Cassan v. The Queen</i> , 2017 TCC 174	September 8, 2017	Appeal filed on October 10, 2017.

## B. Crown Wins (5)

	Decision	Date	Appeal Status
1	<i>Fiducie financière Satoma c. Canada</i> , 2018 FCA 74	April 10, 2018	No application filed; deadline is June 11, 2018.
2	<i>Canada v. Oxford Properties Group Inc.</i> , 2018 FCA 30	February 1, 2018	Application for leave filed on April 3, 2018.
3	<i>Gervais v. Canada</i> , 2018 FCA 3	January 9, 2018	None.
4	<i>Birchcliff Energy Ltd. v. The Queen</i> , 2017 TCC 234	November 24, 2017	Appeal filed on November 30, 2017.
5	<i>2763478 Canada Inc. c. La Reine</i> , 2017 TCC 98	June 1, 2017	Appeal filed on August 30, 2017.

# Univar Holdco Canada ULC v. The Queen, 2017 FCA 207

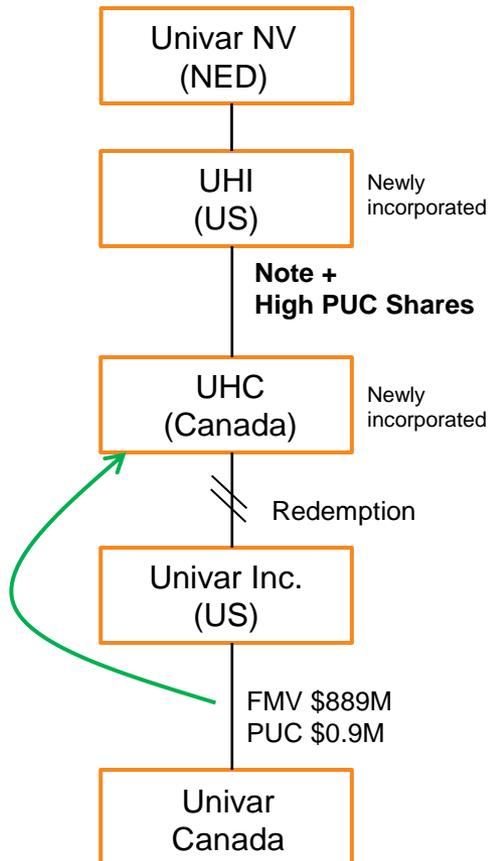
## Pre-Transaction Structure



- Univar Canada has low paid-up capital and high fair market value.
- Univar NV is to be acquired by an arm's length party.
- Surpluses in Univar Canada could not be accessed on a tax-free basis.
  - Subsection 212.1(1) prevents the extraction of corporate surplus on a tax-free basis by transferring shares of a Canadian corporation to another Canadian corporation in a non arm's length context.
  - Exception existed in former 212.1(4) where shares transferred to controlling corporation.

# Univar Holdco Canada ULC v. The Queen, 2017 FCA 207

## Transactions



- Through a series of transactions, UHC (appellant) is inserted between UHI and Univar Inc.
- The shares of Univar Canada are distributed to UHC (on a treaty exempt basis) in satisfaction of a redemption of the shares of Univar Inc.
  - The exception in former subsection 212.1(4) applies on the transfer of the Univar Canada shares to UHC because Univar Inc. was controlled by UHC.
- The series of transactions resulted in high paid-up capital shares of UHC and a cross-border note from UHC to UHI equal to the fair market value of the Univar Canada shares.
- Univar Canada surpluses could be distributed to UHC by way of tax-free intercorporate dividends and up to UHI by way of returns of capital without Canadian attracting withholding tax.

# *Univar Holdco Canada ULC v. The Queen, 2017 FCA 207*

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Issue: Did the transactions constitute a misuse and abuse of section 212.1 under the GAAR?

## FCA Decision:

- Transactions did not frustrate the purpose of section 212.1
  - Alternative transactions would have allowed for access to Univar Canada's surplus without engaging section 212.1 (i.e., using a freshly-capitalized Canadian Acquireco to effect an acquisition of the shares from UNAC).
  - Purpose of section 212.1 was not to prevent extraction of surplus by an arm's length purchaser.

*"[...] A non-resident person could provide funds to the Canadian purchaser to fund the purchase price for the shares and following the closing use the surplus in the Canadian corporation that was acquired to repay that non-resident person the funds that were advanced. Thus, in my view, the purpose of section 212.1 of the ITA was not to prevent the removal from Canada, by an arm's length purchaser of a Canadian corporation, of any surplus that such Canadian corporation had accumulated prior to the acquisition of control."*

# *Univar Holdco Canada ULC v. The Queen, 2017 FCA 207*

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## FCA Decision cont'd:

- 2016 amendments to section 212.1 could not have been used to support a finding that the avoidance transactions were abusive.

*“In the case before us the amendments were enacted approximately 9 years after the transactions were completed. In my view, the transactions did not clearly frustrate the object, spirit and purpose of section 212.1 of the ITA as it was written in 2007 [...]”*

- Minister did not clearly demonstrate that avoidance transaction was abusive.

# *Birchcliff Energy Ltd. v. The Queen*, 2017 TCC 234

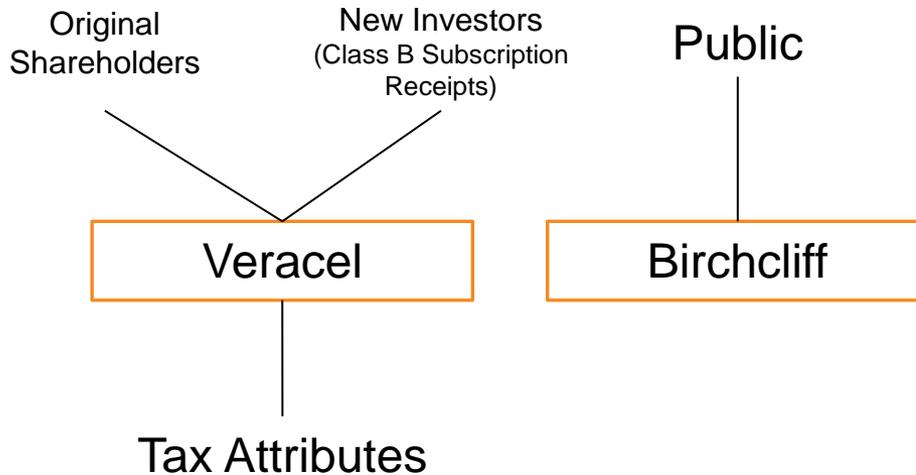
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## Facts:

- Birchcliff Energy Ltd.
  - Public company
  - Entered into an agreement to acquire Devon oil & gas assets
  - Required financing for the acquisition (debt and equity)
- Veracel Inc.
  - Private corporation
  - Had ceased carrying on business
  - Had unused tax attributes
  - Vehicle used for equity financing of acquisition of Devon oil & gas assets

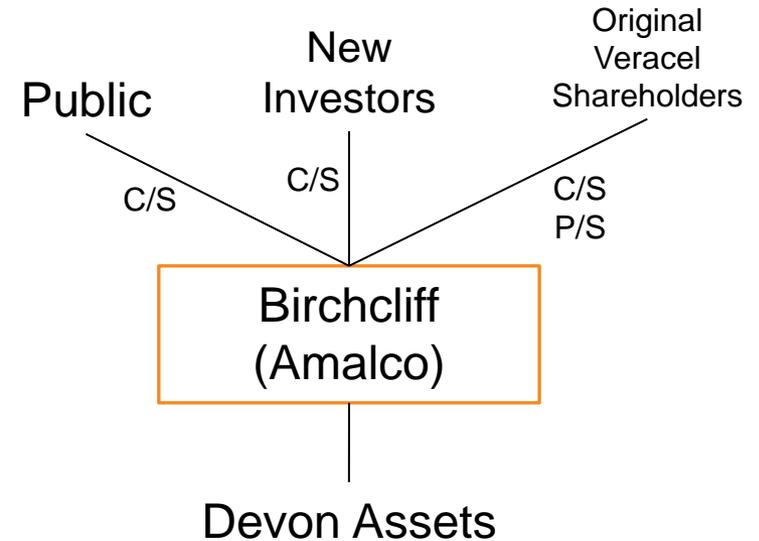
# Birchcliff Energy Ltd. v. The Queen, 2017 TCC 234

## Pre-Amalgamation Structure



\*Subscription Receipts were exchanged for Class B Common Shares of Veracel, which were then exchanged for Common Shares of Birchcliff Amalco

## Post-Amalgamation Structure



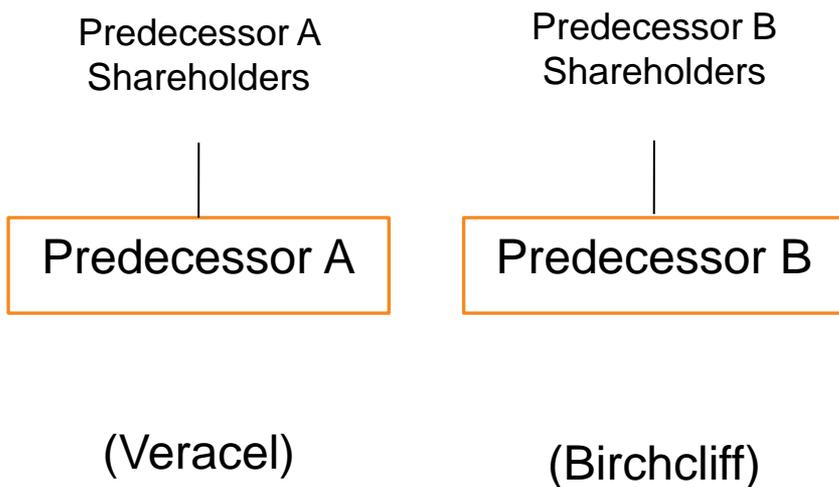
\*Only 3 of the original Veracel shareholders elected to receive Preferred Shares of Birchcliff which were redeemable following closing

\*\*New Investors and Original Veracel Shareholders received Shares of Amalco which gave them a majority voting interest in Amalco.

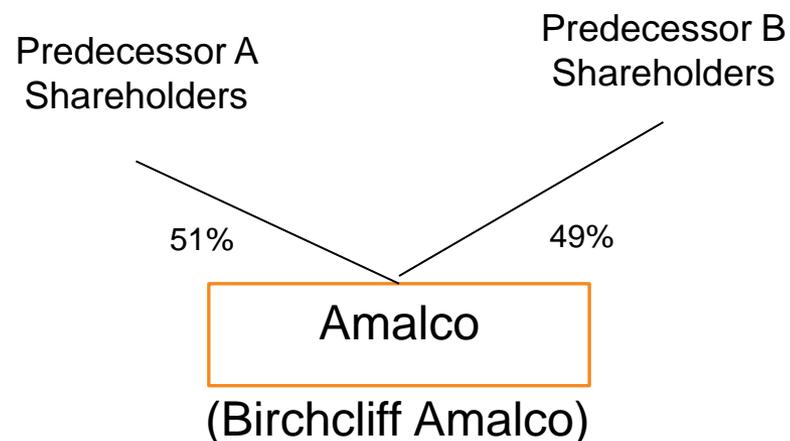
# Birchcliff Energy Ltd. v. The Queen, 2017 TCC 234

## 256(7)(b)(iii)(B)

### Pre-Amalgamation Structure



### Post-Amalgamation Structure



\*Because the Predecessor A Shareholders (which together constitute the hypothetical shareholder under 256(7)(b)(iii)(B)) received shares entitling them to a majority voting interest in Amalco, control of Predecessor A is deemed not to occur immediately before the amalgamation

# *Birchcliff Energy Ltd. v. The Queen*, 2017 TCC 234

Issue 1: Was the issuance of the Class B shares a sham, such that they should be ignored in applying 256(7)(b)(iii)(B)?

## TCC Decision – Issue 1:

- There was no sham because there was no element of deceit.

*“The two predecessor corporations told the Court of Queen's Bench what they would do and proceeded to do it. That is not hidden.*

*[...] I am satisfied that the paperwork was done to reflect the issuance of the Class B shares [...]*”

Issue 2: Did the Class B shareholders acquire control of Veracel immediately before the amalgamation?

## TCC Decision – Issue 2:

- The Class B shareholders were in no way linked so as to make them a group of persons with control of Veracel. The voting proxy granted only assisted in implementing the plan of arrangement, not changing the direction of Veracel.

# *Birchcliff Energy Ltd. v. The Queen*, 2017 TCC 234

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Issue 3: Does GAAR apply to deny the Veracel losses used by Amalco?

## TCC Decision – Issue 3:

- *Tax benefit* – Tax benefit is an “extremely wide” concept. The ability for Amalco to use the losses of its predecessor Veracel is a tax benefit that arises from the transactions in issue.
- *Avoidance transaction* – It is clear that the series of transactions was not undertaken primarily for purposes other than to obtain the tax benefit.

*“Veracel wanted to monetize its tax attributes; Birchcliff wanted to obtain those attributes. All the rest was done to accomplish those objectives.”*

# *Birchcliff Energy Ltd. v. The Queen*, 2017 TCC 234

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## TCC Decision 3 cont'd:

- *Misuse or Abuse*

- The statutory provision shows that the policy underlying the provision is that the “minority” predecessor will lose its tax attributes on amalgamation.
- The “seeding” of Class B shareholders of Veracel constitutes a manipulation of the shareholdings of a predecessor contrary to the object of the rules in subsection 256(7).

*“It would be contrary to the policy of the provision to take account of the Class B shares where the existence of the shares is an ephemeral one at the time of the amalgamation and where the very existence of those shares is predicated on the amalgamation itself occurring. [...]”*

# Developments in Tax Disputes

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CRA access to tax accrual working papers not unfettered

- *BP Canada Energy Company*, 2017 FCA 61

Taxpayer right to assert common interest privilege against CRA demand

- *IGGillis Holdings Inc.*, 2018 FCA 51

# Developments in Tax Disputes

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CRA's right to interview employees of taxpayer's business not unlimited

- *Cameco Corporation*, 2017 FC 763

Minister's right to demand documents restricted by settlement covering the relevant issue

- *Rosenberg*, 2016 FC 1376

# Developments in Tax Disputes

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Minister required to produce documents pertaining to review of other taxpayers under coordinated audit

- *Paletta*, 2017 TCC 233

Extent to which reassessment waiver can be invalidated by CRA coercion

- *Radelet*, 2017 TCC 159

# Developments in Tax Disputes

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Review of considerations relevant to granting of confidentiality order covering litigation

- *Pakzad*, 2017 TCC 83

CRA successfully sued for malicious prosecution

- *Samaroo*, 2018 BCPC 324

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# Questions



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