IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *Discovery Trust v. Canada (National Revenue)*, 2015 NLTD(G)86
Date: June 18, 2015
Docket: 201201G6615

BETWEEN:

DISCOVERY TRUST (ACTING THROUGH ITS TRUSTEE ROYAL TRUST CORPORATION OF CANADA)

APPELLANT

AND:

MINISTER OF NATIONAL REVENUE

RESPONDENT

Before: Justice Carl R. Thompson

Place of Hearing: St. John's, Newfoundland and Labrador

Date(s) of Hearing: May 19, 20, 21, 22, 25, 26 and 27, 2015

Summary:

The appeal of the Minister's reassessment of provincial income tax payable for the year 2008 on the basis that the Appellant was not resident in Alberta but Newfoundland and Labrador was allowed as the Appellant established that the management and control of the Trust was exercised in Alberta.

Appearances:

Mary Paterson, Al Meghji, François Auger, Julia Wang, and Douglas B. Skinner	Appearing on behalf of the Appellant
Martin Gentile, Maeve Baird, Krista Clarke, Helen Little, and Amy E. Kendell	Appearing on behalf of the Respondent

Authorities Cited:

CASES CONSIDERED: Hickman Motors Ltd. v. Canada, [1997] 2 S.C.R. 336; **Amiante Spec Inc. v. Canada**, 2009 FCA 139; **Fundy Settlement v. Canada**, 2012 SCC 14; **Shell Canada Ltd. v. Canada**, [1999] 3 S.C.R. 622; **Commissioners of Inland Revenue v. Duke of Westminster**, [1936] AC 1 (HL)

STATUTES CONSIDERED: *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.); *Income Tax Act*, S.N.L. 2000, c. I-1.1

REASONS FOR JUDGMENT

THOMPSON, J.:

INTRODUCTION

[1] This is an appeal by Discovery Trust pursuant to section 169(1)(b) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and section 62(1) of the *Income Tax Act*, S.N.L. 2000, c. I-1.1.

BACKGROUND

[2] The appeal is from a Notice of Reassessment issued by the Minister of National Revenue on April 11, 2012 for the taxation year 2008 (the "Reassessment") of Discovery Trust's Newfoundland and Labrador tax payable under the *Income Tax Act*. In the Reassessment, the Minister assessed the Discovery Trust on the basis that Discovery Trust was a resident of Newfoundland and not Alberta and was consequently liable to pay provincial tax at a rate applicable to the income of a Trust resident in Newfoundland rather than the rate applicable to the income of a Trust resident in Alberta.

[3] In the Reassessment, the Minister assessed additional Newfoundland and Labrador tax of $8,845,191.69 and arrears interest of $1,447,861.68.

[4] Royal Trust Corporation of Canada (Royal Trust) acting as Trustee, filed and served a Notice of Objection to the Reassessment on May 14, 2012.

[5] The Notice of Appeal was filed with this Court on December 20, 2012.

LAW – BURDEN OF PROOF

[6] In **Hickman Motors Ltd. v. Canada**, [1997] 2 S.C.R. 336 L'Heureux-Dubé, J. stated at paragraphs 92, and 93 – 96 in part as follows:

> 92. It is trite law that in taxation the standard of proof is the civil balance of probabilities: Dobieco Ltd. v. Minister of National Revenue, [1966] S.C.R. 95, and that within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter: Continental Insurance Co. v. Dalton Cartage Co., [1982] 1 S.C.R. 164; Pallan v. M.N.R., 90 D.T.C. 1102 (T.C.C.), at p. 1106. The Minister, in making assessments, proceeds on assumptions (Bayridge Estates Ltd. v. M.N.R., 59 D.T.C. 1098 (Ex. Ct.), at p. 1101) and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in

the assessment (Johnston v. Minister of National Revenue, [1948] S.C.R. 486; Kennedy v. M.N.R., 73 D.T.C. 5359 (F.C.A.), at p. 5361). The initial burden is only to "demolish" the exact assumptions made by the Minister but no more: First Fund Genesis Corp. v. The Queen, 90 D.T.C. 6337 (F.C.T.D.), at p. 6340.

93. This initial onus of "demolishing" the Minister's exact assumptions is met where the appellant makes out at least a prima facie case: Kamin v. M.N.R., 93 D.T.C. 62 (T.C.C.); Goodwin v. M.N.R., 82 D.T.C. 1679 (T.R.B.). ... The law is settled that unchallenged and uncontradicted evidence "demolishes" the Minister's assumptions: see for example MacIsaac v. M.N.R., 74 D.T.C. 6380 (F.C.A.), at p. 6381; Zink v. M.N.R., 87 D.T.C. 652 (T.C.C.). ...

94. Where the Minister's assumptions have been "demolished" by the appellant, "the onus . . . shifts to the Minister to rebut the prima facie case" made out by the appellant and to prove the assumptions: Magilb Development Corp. v. The Queen, 87 D.T.C. 5012 (F.C.T.D.), at p. 5018. ...

95. Where the burden has shifted to the Minister, and the Minister adduces no evidence whatsoever, the taxpayer is entitled to succeed: see for example MacIsaac, supra, where the Federal Court of Appeal set aside the judgment of the Trial Division, on the grounds that (at p. 6381) the "evidence was not challenged or contradicted and no objection of any kind was taken thereto". See also Waxstein v. M.N.R., 80 D.T.C. 1348 (T.R.B.); Roselawn Investments Ltd. v. M.N.R., 80 D.T.C. 1271 (T.R.B.). Refer also to Zink, supra, at p. 653, where, even if the evidence contained "gaps in logic, chronology, and substance", the taxpayer's appeal was allowed as the Minister failed to present any evidence as to the source of income. ...

96. In the present case, without any evidence, both the Trial Division and the Court of Appeal purported to transform the Minister's unsubstantiated and unproven assumptions into "factual findings", thus making errors of law on the onus of proof. ... Even with "concurrent findings", unchallenged and uncontradicted evidence positively rebuts the Minister's assumptions: MacIsaac, supra. As Rip T.C.J., stated in Gelber v. M.N.R., 91 D.T.C. 1030, at p. 1033, "the [Minister] is not the arbiter of what is right or wrong in tax law". As Brulé T.C.C.J., stated in Kamin, supra, at p. 64:

- . . . the Minister should be able to rebut such [prima facie] evidence and bring forth some foundation for his assumptions.

. . .

> ▪ The Minister does not have a carte blanche in terms of setting out any assumption which suits his convenience. On being challenged by evidence in chief he must be expected to present something more concrete than a simple assumption. [Emphasis original]

[7] In **Amiante Spec Inc. v. Canada**, 2009 FCA 139 Trudel, J.A. stated at paragraphs 23 and 24:

> 23. A prima facie case is one "supported by evidence which raises such a degree of probability in its favour that it must be accepted if believed by the Court unless it is rebutted or the contrary is proved. It may be contrasted with conclusive evidence which excludes the possibility of the truth of any other conclusion than the one established by that evidence" (Stewart v. Canada, [2000] T.C.J. No. 53, paragraph 23).
>
> 24. Although it is not conclusive evidence, "the burden of proof put on the taxpayer is not to be lightly, capriciously or casually shifted", considering that "[i]t is the taxpayer's business" (Orly Automobiles Inc. v. Canada, 2005 FCA 425, paragraph 20). This Court stated that the taxpayer "knows how and why it is run in a particular fashion rather than in some other ways. He [or she] knows and possesses information that the Minister does not. He [or she] has information within his [or her] reach and under his [or her] control" (ibid.).

MINISTER'S ASSUMPTIONS OF FACT

[8] The Assumptions of Fact made by the Minister are disclosed in the Minister's Reply dated April 11, 2013 and Amended Reply dated April 13, 2015. The Assumption of Fact showing the amendments are as follows:

> *Background*
>
> a) CHC Helicopter Corporation ("CHC") was incorporated on February 18, 1987 under the *Canada Business Corporations Act*;
>
> b) Craig L. Dobbin was a founder of CHC and was a resident of the Province of Newfoundland and Labrador;

c) CHC provided helicopter transportation services to the oil and gas industry both in Canada and internationally;

d) Discovery Helicopters Inc. ("DHI") was incorporated under the *Ontario Business Corporations Act* on November 1, 2000;

e) DHI was incorporated as a holding company for Craig L. Dobbin to hold shares of CHC for the Dobbin family;

f) Keith Stanford was a friend and advisor of Craig L. Dobbin and was a resident of the Province of Newfoundland and Labrador;

g) Osler, Hoskin & Harcourt LLP was the tax representative and advisor to the Dobbin Family;

The Discovery Trust

h) The Appellant, The Discovery Trust (the "Trust") was settled by Craig L. Dobbin on October 16, 2002, in St. John's, Newfoundland and Labrador;

i) The trustees and beneficiaries of the Trust were Craig L. Dobbin's children; Joanne Frances Dobbin, Mark Douglas Dobbin, David Lawrence Dobbin, Carolyn Marie Dobbin and Craig Christopher Dobbin (the "Dobbin Children");

j) At all relevant times, the majority of the Dobbin Children, were residents of the Province of Newfoundland and Labrador;

k) On December 16, 2002, as part of an estate freeze for Craig L. Dobbin, 100 non-voting common shares of DHI were issued to the Trust in exchange for $100.00;

Transactions Affecting Discovery Trust

April 10, 2006

l) Between December 2002 and April 2006 various transactions were carried out involving DHI and other entities, for estate planning purposes for Craig L. Dobbin;

m) By documents dated On April 20, 2006, the following events took place:

i) the Deed of Settlement for the Trust was amended;

ii) the Dobbin Children resigned as trustees of the Trust;

iii) the Royal Trust Corporation of Canada ("Royal Trust") was appointed as the successor trustee of the Trust;

iv) the assets of the Trust were moved to Alberta;

v) the laws governing the Trust were changed from the Province of Newfoundland and Labrador to the laws of the Province of Alberta;

October 2006-2008

n) Between April 2006 and October 2006 further transactions involving DHI, the Trust and other entities were carried out for estate planning purposes for Craig L. Dobbin;

o) Craig L. Dobbin passed away on October 7, 2006;

p) After the passing of Craig L. Dobbin, further transactions involving DHI, the Trust and other entities were carried out in order to resolve the estate of Craig L. Dobbin and disburse the proceeds of his estate to the Dobbin Children who were the sole beneficiaries of the estate;

q) Craig L. Dobbin's son, Mark Dobbin, was named executor of the estate of Craig L. Dobbin;

r) Following the passing of Craig L. Dobbin, Mark Dobbin assumed the role of President of DHI;

s) Mark Dobbin and Keith Stanford were named as board members or held offices in the corporate entities involved in the transactions utilized in the resolution of Craig L. Dobbin's estate;

t) As board members, Mark Dobbin and/or Keith Stanford approved the transactions involving the corporate entities being utilized in the resolution of Craig L. Dobbin's estate;

u) Any transactions affecting the Trust were approved by the Dobbin Children either directly or indirectly through their advisors;

v) As a result of the transactions that took place between the time of Craig L. Dobbin's death and the beginning of 2008, the Trust held Class B Preferred Shares of DHI and Non-Voting Common Shares of DHI:

Sale of CHC

w) In February 2008 CH and First Reserve Corporation announced that an agreement had been reached for First Reserve Corporation to acquire CHC;

x) As part of the acquisition of CHD, DHI sold its shares of CHC to First Reserve Corporation;

y) On September 22, 2008 DHI distributed the proceeds of the sale of the CHC shares to the Trust through the following transactions:

   i) Redemption of the Class B Preferred Shares of DHI - $59,000,000.00;

   ii) Dividends Paid on Non-Voting Shares of DHK - $34,878,817.00; and

   iii) Dividends Paid on Non-Voting Shares of DHI (Capital Dividends) - $43,791,020.00;

z) The Trust took the position that it was a resident of the Province of Alberta and when filing the 2008 income tax return, calculated income tax on the transaction described in paragraph y) accordingly;

aa) The Dobbin Children notified Royal Trust that the capital of the Trust was to be disbursed to them;

bb) On September 22, 2008 each child received $24,061,649 from the Trust;

Management and Control of the Trust

cc) At all relevant times, the Dobbin Children, either directly or indirectly through their advisors, made all decisions concerning the management and control of the Trust;

dd) Royal Trust carried out transactions concerning the Trust, as directed by Dobbin Children, either directly or indirectly through their advisors;

ee) Investment decisions concerning the Trust were made by the Dobbin Children and relayed to Royal Trust, either directly or indirectly through their advisors;

ff) Decision concerning the distribution of the Trust capital were made by the Dobbin Children and relayed to Royal Trust, either directly or indirectly through their advisors; and

gg) Royal Trust performed administrative tasks associated with the operation of the Trust, such as signing documents, holding share certificates and making necessary deposits and withdrawals, as instructed by the Dobbin Children, either directly or indirectly through their advisors.

APPELLANT'S POSITION

[9] The Appellant alleges that the investigation supporting the reassessment was conducted through the lens of improper tax motivation in the Appellant's choices of residency and as such was erroneous at law and ought to be set aside.

[10] In the alternative, the Appellant argues that the facts disclose a *prime facie* case that demolishes the Minister's assumptions in that the Trustee held in the instrument of Trust the full authority, control and management of the Trust and that its actions in responding to requests were independently assessed by the Trustee and were consistent with the continued exercise of that authority without abrogation to the beneficiaries or any other party.

RESPONDENT'S POSITION

[11] The Respondent's position is that the Appellant's evidence supports the assumptions made by the Minister and that these assumptions must stand as unchallenged.

[12] The Respondent relies upon the assumption that the beneficiaries of the Trust not only approved the transactions affecting the Trust but made all the decisions concerning the management and control of the Trust and that Royal Trust as Trustee was directed by them, directly or indirectly, by their advisors in investment decisions in the ultimate distribution of the Trust and in the administrative tasks associated with the Trust.

[13] Alternatively, the Respondent argues that the facts supporting the Minister's position are consistent with the control and management of the Trust by the beneficiaries.

LAW – RESIDENCY

[14] Section 104(2) of the *Income Tax Act* states:

> 104(2) A trust shall, for the purposes of this Act, and without affecting the liability of the Trustee or legal representative for that person's own income tax, be deemed to be in respect of the trust property an individual, but where there is more than one trust and
>
> > (*a*) substantially all of the property of the various trusts has been received from one person, and
> >
> > (*b*) the various trusts are conditioned so that the income thereof accrues or will ultimately accrue to the same beneficiary, or group or class of beneficiaries,
>
> such of the trustees as the Minister may designate shall, for the purposes of this Act, be deemed to be in respect of all the trusts an individual whose property is the property of all the trusts and whose income is the income of all the trusts.

[15] While considered in the international context, the Supreme Court of Canada in **Fundy Settlement v. Canada**, 2012 SCC 14, (formerly **Garron Family Trust v. The Queen)**, stated at paragraphs 6 – 16:

> 6. The issue in this case is the residence of the Fundy and Summersby trusts. St. Michael says the residence of the trusts is the residence of the trustee, which is Barbados. The Minister says the trusts are resident in Canada because the central management and control of the trusts was carried out by the main beneficiaries, who were resident in Canada. On the facts as determined by Woods J., the Tax Court judge, St. Michael is resident in Barbados while the central management and control of the trusts was carried out in Canada by the main beneficiaries of the trusts.

7. As Sharlow J.A. in the Federal Court of Appeal explained, the principal basis for imposing income tax in Canada is residency (para. 52). Professor V. Krishna in The Fundamentals of Income Tax Law (2009), noted, at p. 85, that the policy reason for this is to ensure that a person who enjoys the legal, political and economic benefits of associating with Canada will pay their appropriate share for the costs of this association. For an individual, factors such as nationality, physical presence, location of family home and social connections, among others, will be considered in determining residence. While the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (the "Act"), contains certain deeming rules with respect to residency, generally residence is a question of fact.

8. While there is a dearth of judicial authority on the question of the residency of a trust, the residency of a corporation has been determined to be where its central management and control actually abides. In De Beers Consolidated Mines, Ltd. v. Howe, [1906] A.C. 455 (H.L.), Lord Loreburn stated, at p. 458:

> In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business... . [A] company resides for purposes [page524] of income tax where its real business is carried on... . I regard that as the true rule, and the real business is carried on where the central management and control actually abides.

The central management and control test for residency of a corporation has been adopted in Canada in a number of cases and is well established (see The King v. British Columbia Electric Railway Co., [1945] C.T.C. 162 (Ex. Ct.); Crossley Carpets (Canada) Ltd. v. M.N.R. (1967), 67 D.T.C. 522 (T.A.B.)).

9. In general, the central management and control of a corporation will be exercised where its board of directors exercises its responsibilities. However, as Sharlow J.A. pointed out (at para. 56), where the facts are that the central management and control is exercised by a shareholder who is resident and making decisions in another country, the corporation will be found to be resident where the shareholder resides. (See Unit Construction Co. v. Bullock, [1960] A.C. 351 (H.L.).)

10. St. Michael says that the residence of the trust must be the residence of the trustee based on two fundamental propositions. First, the trust is not a person like a corporation, so the central management and control test is inapplicable to trusts. Sharlow J.A. disposed of St. Michael's first argument summarily, as do we. While a trust is not a person at common

law, it is deemed to be an individual under the Act. Section 104(2) provides:

> A trust shall, for the purposes of this Act, and without affecting the liability of the trustee or legal representative for that person's own income tax, be deemed to be in respect of the trust property an individual ... .

We agree with the Minister that the fact that at common law a trust does not have an independent [page525] legal existence is irrelevant for the purposes of the Act.

11. St. Michael's second argument is that the Act links a trust to the trustee and therefore the residence of the trust must be the residence of the trustee. It bases this argument on s. 104(1), which provides:

> In this Act, a reference to a trust or estate ... shall, unless the context otherwise requires, be read to include a reference to the trustee, executor, administrator, liquidator of a succession, heir or other legal representative having ownership or control of the trust property ... .

The Federal Court of Appeal found that the linkage in s. 104(1) was for the purposes of solving "the practical problems of tax administration that would necessarily arise when it was determined that trusts were to be taxed despite the absence of legal personality" (para. 64). However, this did not mean that in all cases, the residence of the trust must be the residence of the trustee.

12. St. Michael argues that s. 104(1) links the trustee to the trust for all attributes of a trust, including residency. However, although the subsection provides that a reference to a trust in the Act shall be read to include a reference to a trustee, St. Michael points to no provision that would link the trust and the trustee for purposes of determining the residency of the trust. The link that St. Michael asserts is not a principle of general application to trusts for all purposes, and there is nothing in the context of s. 104(1) that would suggest that there be a legal rule requiring that the residence of a trust must be the residence of the trustee.

13. On the contrary, s. 2(1) is the basic charging provision of the Act, and its reference to a "person" must be read as a reference to the taxpayer whose taxable income is being subjected to income tax. This is the trust, not the trustee. This follows from s. 104(2), which [page526] separates the trust from the trustee in respect of trust property.

14. On the other hand, there are many similarities between a trust and corporation that would, in our view, justify application of the central management and control test in determining the residence of a trust, just as it is used in determining the residence of a corporation. Some of these similarities include:

(1) Both hold assets that are required to be managed;

(2) Both involve the acquisition and disposition of assets;

(3) Both may require the management of a business;

(4) Both require banking and financial arrangements;

(5) Both may require the instruction or advice of lawyers, accountants and other advisors; and

(6) Both may distribute income, corporations by way of dividends and trusts by distributions.

As Woods J. noted: "The function of each is, at a basic level, the management of property" (para. 159).

15. As with corporations, residence of a trust should be determined by the principle that a trust resides for the purposes of the Act where "its real business is carried on" (De Beers, at p. 458), which is where the central management and control of the trust actually takes place. As indicated, the Tax Court judge found as a fact that the main beneficiaries exercised the central management and control of the trusts in Canada. She found that St. Michael had only a limited role -- to provide administrative services -- and little or no responsibility beyond that (paras. 189-90). Therefore, on this test, the trusts must be found to be resident in [page527] Canada. This is not to say that the residence of a trust can never be the residence of the trustee. The residence of the trustee will also be the residence of the trust where the trustee carries out the central management and control of the trust, and these duties are performed where the trustee is resident. These, however, were not the facts in this case.

16. We agree with Woods J. that adopting a similar test for trusts and corporations promotes "the important principles of consistency, predictability and fairness in the application of tax law" (para. 160). As she noted, if there were to be a totally different test for trusts than for corporations, there should be good reasons for it. No such reasons were offered here.

BASIS FOR APPELLANT'S IMPROPER MOTIVE ALLEGATION

[16] It is upon the emphasis of the residency motive as outlined by the Position Paper that the Appellant alleges that the lens through which this investigation took place and the conclusion reached was one of tax avoidance motive of taxpayer action and as such, absent action by the Minister under the GAAR provisions of the *Income Tax Act* of Canada, the investigation and reassessment is wrong as a matter of law.

[17] The law supporting such an allegation is enunciated in the case of **Shell Canada Ltd. v. Canada**, [1999] 3 S.C.R. 622 when the Minister reassessed Shell for deductions it made under then section 20(1)(c)(i) of the *Income Tax Act* for interest on money it borrowed through the use of New Zealand currency, then having very low comparative international dollar value, to purchase US dollars at the then high interest rate the New Zealand currency carried.

[18] The issue arising as characterized by McLachlin, J. (as she then was) was whether or not taxpayers were disentitled from relying on section 20(1)(c)(i) if the transaction was structured by the desire to minimize tax payable.

[19] McLachlin, J. wrote at paragraph 38 – 40:

> 38. Furthermore, these submissions arise from a fundamental misapprehension of the scope of s. 20(1)(c)(i) and the principles against which it should be interpreted. Both the Minister and the Federal Court of Appeal seem to suggest that s. 20(1)(c)(i) invites a wide examination of what Linden J.A. referred to (at para. 44) as the "economic realities" of a taxpayer's situation. Underlying this argument appears to be the view that taxpayers are somehow disentitled from relying on s. 20(1)(c)(i) if the structure of the transaction was determined by a desire to minimize the amount of tax payable.
>
> 39. This Court has repeatedly held that courts must be sensitive to the economic realities of a particular transaction, rather than being bound to what first appears to be its legal form: Bronfman Trust, supra, at pp. 52-53, per Dickson C.J.; Tennant, supra, at para. 26, per Iacobucci J. But

> there are at least two caveats to this rule. First, this Court has never held that the economic realities of a situation can be used to recharacterize a taxpayer's bona fide legal relationships. To the contrary, we have held that, absent a specific provision of the Act to the contrary or a finding that they are a sham, the taxpayer's legal relationships must be respected in tax cases. Recharacterization is only permissible if the label attached by the taxpayer to the particular transaction does not properly reflect its actual legal effect: Continental Bank Leasing Corp. v. Canada, [1998] 2 S.C.R. 298, at para. 21, per Bastarache J.
>
> 40. Second, it is well established in this Court's tax jurisprudence that a searching inquiry for either the "economic realities" of a particular transaction [page642] or the general object and spirit of the provision at issue can never supplant a court's duty to apply an unambiguous provision of the Act to a taxpayer's transaction. Where the provision at issue is clear and unambiguous, its terms must simply be applied: Continental Bank, supra, at para. 51, per Bastarache J.; Tennant, supra, at para. 16, per Iacobucci J.; Canada v. Antosko, [1994] 2 S.C.R. 312, at pp. 326-27 and 330, per Iacobucci J.; Friesen v. Canada, [1995] 3 S.C.R. 103, at para. 11, per Major J.; Alberta (Treasury Branches) v. M.N.R., [1996] 1 S.C.R. 963, at para. 15, per Cory J.

[20] McLachlin, J.A. commented on the obligation of the Court and the Minister to abide by the simple direction of the *Act*, refrain from inferences of intention not expressly stated by Parliament and maintain economic certainty for all taxpayers. She stated as follows at paragraphs 45 – 46:

> 45. However, this Court has made it clear in more recent decisions that, absent a specific provision to the contrary, it is not the courts' role to prevent taxpayers from relying on the sophisticated structure of their transactions, arranged in such a way that the particular provisions of the Act are met, on the basis that it would be inequitable to those taxpayers who have not chosen to structure their transactions that way. This issue was specifically addressed by this Court in Duha Printers (Western) Ltd. v. Canada, [1998] 1 S.C.R. 795, at para. 88, per Iacobucci J. See also Neuman v. M.N.R., [1998] 1 S.C.R. 770, at para. 63, per Iacobucci J. The courts' role is to interpret and apply the Act as it was adopted by Parliament. Obiter statements in earlier cases that might be said to support a broader and less certain interpretive principle have therefore been overtaken by our developing tax jurisprudence. Unless the Act provides otherwise, a taxpayer is entitled to be taxed based on what it actually did, not based on

> what it could have done, and certainly not based on what a less sophisticated taxpayer might have done.
>
> 46. Inquiring into the "economic realities" of a particular situation, instead of simply applying clear and unambiguous provisions of the Act to the taxpayer's legal transactions, has an unfortunate practical effect. This approach wrongly invites a rule that where there are two ways to structure a transaction with the same economic effect, the court must have regard only to the one without tax advantages. With respect, this approach fails to give appropriate weight to the jurisprudence of this Court providing that, in the absence of a specific statutory bar to the contrary, taxpayers are entitled to structure their affairs in a manner that reduces the tax payable: Stubart, supra, at p. 540, per Wilson J., and at p. 557, per Estey J.; Hickman Motors Ltd. v. Canada, [1997] 2 S.C.R. 336, at para. 8, per McLachlin J.; Duha, supra, at para. 88, per Iacobucci J.; Neuman, supra, at para. 63, per Iacobucci J. An unrestricted application of an [page645] "economic effects" approach does indirectly what this Court has consistently held Parliament did not intend the Act to do directly.

[21] The Minister does not take objection to the principles of law above referenced. The Minister does take objection to this reassessment having taken place in breach of those principles as alleged by the Appellant.

[22] Consequently, in my view, in order to assess the allegations of the Appellant it is necessary to view the impugned transactions by which control and management was viewed and by which the Position Paper reached its conclusions and the reassessment effected. This too will serve to have addressed the alternative positions of the parties as noted.

[23] I will return then to this issue following a review of the transactions grounding the reassessment and the findings and assumptions of control and management by the Minister.

REASSESSMENT: THE OVERVIEW AND FINAL CONCLUSIONS

[24] Ms. Salimah Jina conducted the investigation that resulted in the 2008 reassessment of Discovery Trust. Her findings and assumptions are contained in the Position Paper which supported the reassessment.

[25] In the opening of this Position Paper Ms. Jina states as follows at page 1:

> After reviewing all information provided during the audit of Discovery Trust it is our position that the residency of the trust remains where it was created, in Newfoundland. This is where the decisions were made by the "Dobbin Children" either directly or indirectly thru their representatives, Osler Hoskin & Harcourt LLP and/or Keith Stanford. The main purpose for the Calgary office of Royal Trust being appointed as the 'substitute trustee' was so the trust could obtain tax benefits associated with being resident in Alberta. The only function(s) that Royal Trust engaged in for Discovery Trust was administrative in nature and mostly limited to the signing of documents, upon instruction from the representatives of Discovery Trust.

[26] In her final conclusions she writes at page 46:

> In conclusion,
>
> [1] The central mind and management of Discovery Trust, and all material transactions with respect to the trust were directed by persons residing in Newfoundland, the Dobbin Children.
>
> [2] The Alberta office of Royal Trust was appointed as trustee solely in an attempt to migrate the situ of the trust from Newfoundland to Alberta for tax benefits. As a result, we have concluded that the residence of Discovery Trust remains in Newfoundland and is therefore subject to federal and Newfoundland provincial tax.

[27] Ms. Jina examined what she considered to be the material transactions upon which she based the above conclusions.

REASSESSMENT: TRANSACTIONS REQUIRING TRUSTEE APPROVAL

[28] There are six transactions in which the Trustee was called upon to act as a shareholder of Discovery Helicopters Inc. ("DHI"). These involved corporate transactions involving DHI. These were subject of the investigation.

(i) May 2006 Corporate Relocation

[29] In May of 2006 DHI moved from Ontario to Alberta. It was continued under both provincial corporate legislative regimes in Alberta. Shareholder approval by the Trustee was required.

(ii) October 2006 CLD Trust Liquidation

[30] In October of 2006 CLD Trust held 100 non-voting shares in DHI. Upon the late Mr. Dobbin's death these shares went to the estate and would effectively have been transferred directly into the individual names of the beneficiaries. The beneficiaries preferred these go into the Trust. This required shareholder approval.

(iii) December 2006 Articles

[31] In December of 2006 DHI prepared Articles of Amendment to have its Class B preferred shares rank in priority to its Class A preferred requiring approval by the Trustee.

(iv) July 2008 Articles

[32] In July of 2008 DHI again prepared Articles of Amendment to effect a split of its shares requiring shareholders' approval.

(v) 2008 Amalgamation

[33] In 2008 DHI prepared Articles of Amalgamation with other related corporations requiring shareholder approval.

TRUSTEE APPROVAL ABOVE (i) – (v) TRANSACTIONS - CONSIDERATIONS AND CONCLUSIONS

[34] All of the above noted transactions required shareholder approval. Consequently, the Trustee or shareholder is engaged to consider and if appropriate, asked to give approval. In each case, the record discloses that Royal Trust required a request detailing the specific transaction, reviewed the Trust document to ensure that the proposed approval was within its authority and then considered whether there were any negative consequences for the beneficiaries. That may appear on the record as routine and passive but it was required and was completed prudently. In the case of the amendment to the ranking of the class A and B preferred shares, (transaction (iii) above), the Trustee found the amendments requiring approval had reversed the priority in error and awaited its correction. In the case of the amalgamation, (transaction (v) above), the Trustee required the request for encroachment be amended so as not to suggest any encroachment upon the shares.

[35] The general corporate reorganization in October of 2006 was another material transaction in Ms. Jina's view by which another trust, the CLD Alberta Trust was liquidated (transaction (ii) above). It required shareholder approval. On the record, this transaction, by its nature, followed upon the death of the late Craig L. Dobbin. Ms. Jina noted this as a pre-ordained transaction. As part of that liquidation, the value of the estate's ownership in CLD Alberta Trust attributable to

the children flowed to the Trust and the children received common shares in DHI. As a result, the children chose to hold that interest in the estate in Discovery Trust rather than in their names personally. They had personal reasons for this. The record confirms that Royal Trust was asked by Osler to advise in advance if they had a problem with the transaction. No control management issue appears to have been delegated here or assumed by a third party. Osler apparently is acting in a corporate role. The children here act independently in forwarding a further asset to the Trustee. Their decision as prospective owners of that asset to deliver it to the Trustee and the Trustee's decision to receive it cannot be seen as at variance with or derogating from the Trustee's exercise of independent authority.

[36] As to the share split (transaction (iv) above), Ms. Jina acknowledges that, while she described it as a material transaction, she does not see any deficiency in Royal Trust's position and accepted that it originated as a corporate transaction.

(vi) 2007 Pipeline and Bump

[37] In 2007 a transaction was executed to ensure a double taxation did not occur upon the deemed disposition of the late Mr. Dobbin's shares in DHI on his death and again upon any subsequent sale. It is termed a Pipeline and Bump transaction.

TRUSTEE APPROVAL ABOVE (vi) TRANSACTION - CONSIDERATIONS AND CONCLUSIONS

[38] Ms. Jina was of the view that Royal Trust did not appear to do much in this transaction though she recognized that one of the Trustees had spoken to someone in its own tax department. Notably, she acknowledged that she did not know the role that Mr. Auger of Osler had played in this transaction. Notably as well, she acknowledged that, while she had read and researched extensively the role of a Trustee and the Trustee's fiduciary duty, she would not know the level of scrutiny that a Trustee would be expected to exercise.

[39] On the record before me it does appear that Mr. Kaye, a trustee of the Trust for Royal Trust, did insure that a tax review of the transactions took place and obtained confirmation from Mr. Ron Anderson of the Royal Trust Tax Department that, while he could not be sure of the tax savings to be expected, in Mr. Anderson's opinion there appeared to be no adverse impact from the transaction.

[40] As noted, Ms. Jina is not sure of the role of Osler. Their position is important to understand in the context of drawing conclusions as to the source of the exercise of authority. On the face of this record, while Osler proposed the original Trust Indenture and concluded its settlement, that transaction was clearly separate from this reorganization by which Osler was engaged corporately. The transactions involved were corporate affecting shareholders and ultimate distributions and resulting in values being attributed to classes of shares. Ms. Jina acknowledged it was a transaction having a positive tax advantage and permitted by legislation.

TRUSTEE APPROVAL (i) – (vi) TRANSACTIONS - FINAL CONCLUSIONS

[41] Again, the ultimate role of the Trustees' action here is to determine if the transaction is of benefit to the beneficiaries. On cross-examination Ms. Jina appears to attribute to the notion of consent a submission by the Trustee to the will or direction of another. There is no question that consents from parties having a corporate interest are common. These did not suggest delegation of authority. Independence of the Trustee is maintained by its review of the transaction, acquiring explanation sufficient that an informed decision can be made, ensuring the decision has no negative consequence and is in the best interests of the beneficiaries. In these consent requests the record disclosed the Royal Trust carried out this independent function as Trustee.

REASSESSMENT: TRANSACTIONS ENGAGING MANAGEMENT AND CONTROL - CONSIDERATIONS AND CONCLUSIONS

[42] There are six material transactions more apparently engaging management and control by the Trustee. These as well were subject of and significant to the investigation.

(i) January 2007 David Dobbin

[43] In January of 2007 one of the beneficiaries of the trust, Mr. David Dobbin began negotiations for a private business loan. In the process of this negotiation Royal Trust was asked if the Trustee would guarantee the loan. Royal Trust declined, one stated reason being the impact any such contingent liability might have upon all the beneficiaries each entitled only to an equal distribution which could have been negatively affected if a call on the guarantee had occurred. There does not appear on the record any basis upon which it could be concluded that this beneficiary request, not favourably viewed by the Trustee and ultimately never concluded, could serve to demonstrate any control by a beneficiary or third party upon the Trust.

(ii) Sale Canadian Helicopter Corporation Shares

[44] One of, if not the most significant transaction which drew the attention of Ms. Jina in her investigation was the actual sale of Canadian Helicopter Corporation ("CHC") in 2008 resulting in the movement of proceeds of sale through to DHI and then, as prescribed in the estate plan to the Trust for distribution to the beneficiaries.

[45] It appears that the investigation saw the documentation by which this flow of funds was engaged as effectively diminishing the Trustee's authority. By it the beneficiaries were called upon to execute an Encroachment on Capital. By its nomenclature this document appears aggressive in nature. By its terms it is in

effect a request for the money by the beneficiaries when received by the Trustee on return of the shares. It is not unusual that the Trustee should require a written request to formally indicate the beneficiaries' desire to take the funds out of the Trust nor for the Trustee to have it in hand on disposition of cash to the beneficiary. Neither would appear to conflict with the independent engagement of the Trustee's authority and the exercise of its obligations.

(iii) Income Tax Liability Holdback, and (iv) Return of Common Shares

[46] As a result of the sale of CHC Helicopters and the distribution of funds by the Trustee to the beneficiaries, two consequent issues arose which also drew Ms. Jina's attention and her concern for the exercise of independent Trustee authority. One was income tax liability in the Trust and the other a decision to return the non-voting common shares in the Trust to the Trustee. Firstly, there would be income taxes exigible on the funds in the Trust. Royal Trust, as Trustee wanted initially a 25% holdback. The beneficiaries wanted no holdback but acknowledged the taxes had to be paid and deducted. Royal Trust's holdback requirement exceeded the estimated tax liability. Royal Trust acquiesced to the beneficiaries' request by holding back the estimate of tax only and by the beneficiaries executing and delivering a Release, Discharge and Indemnity in favour of Royal Trust.

[47] There are differences of view here as between the Trustee and the beneficiaries. However, each view is being expressed and advanced for singular benefit in the case of the beneficiaries and for protection in the case of the Trustee. In my view, each can co-exist, even be in conflict as independent positions, without engaging a diminution of the Trustee's authority. Counsel for the Minister candidly agreed on oral submission in discussion with me that this transaction did not engage an issue of Trustee authority.

[48] Secondly, after the common shares held in the Trust, having paid up value of $100.00, were returned by the Trustee to counsel for CHC Helicopters and DHI as part of the closing of the sale of CHC Helicopters Inc., it was decided by the beneficiaries that, rather than wind up the trust, they would continue it and so it became necessary to return the common shares to the Trust.

[49] This gave concern to the Trustees as the shares they were asked to take return of had only been valued at $100.00 and they questioned the practicality of Royal Trust holding such nominal value when Trustee fees and expenses would not be secured in the Trust. It was not an attractive proposition to Royal Trust.

[50] Ultimately, counsel for CHC Helicopters and DHI confirmed that these common shares would now hold an approximate value of $30,000,000. In the end, the shares were returned to the Trust.

[51] Of significant concern to the investigation supporting this reassessment was the use of the words "changed their instructions" being attributed to the beneficiaries in the recitals of the documentation evidencing this common share return to the Trustee.

[52] In oral submission I discussed with counsel the status of the common shares at the time of the taking of the decision to return them. It became apparent that, because the shares were out of the Trustee's hands and yet had not been returned to the corporation for cancellation, the legal interest in the shares at the relevant time had to have resided in the beneficiaries. Consequently, the attribution of the words "change their instructions" by Osler to the beneficiaries to return the shares to the Trust was consistent with that analysis. As a result, no feature affecting the independent authority of the Trustee was engaged by that direction. Effectively, it was the only operative manner of having the shares placed back in the Trust.

[53] Of concurrent concern on this issue to Ms. Jina was the apparent lack of knowledge of the Trustee of the value of the 100 common shares. At one time it is $100.00 and then at another $30,000,000.00. In this regard, it has to be considered that the Trustee is holding shares in a privately held holding company which takes value from the market view of the operating entity CHC Helicopters and the manner in which that corporation and its shareholders choose to distribute its value. The operational knowledge of CHC is not in the Trustee's possession or control. While the Trustee may be criticized for not having recorded changed values or sought this information, this feature cannot support a delegation of authority in the Trust. I have noted that, reasonably, the Trustee's attraction to

value was engaged when it had to consider the request in the common share return. I cannot attribute a consequence going to delegation of authority or infringement of Trustee's authority by this issue.

(v) Investment after payment - Holdback Investment

[54] Of further concern to the investigation supporting the reassessment was the exchange which occurred between the Trustee and Keith Stanford as to whether the holdback in Trust to cover taxes should be invested in Treasury Bills (T-Bills) or a combination of Bank Advances (BA's) and T-Bills, the latter appearing to be a better return option on 30 day deposits at the time. This discussion appears to have been engaged by the Trustee consistent with an earlier understanding given by the Trustee to the beneficiaries that when the holdback was effected it would be placed in T-Bills only.

[55] Ms. Jina considered this to be an unusual exercise in delegation of Trustee prerogative and authority especially where the investment was of limited risk and duration.

[56] Mr. Troup, one of the three Trustees of the Trust for Royal Trust explained this should be placed in the context of the Trustee and client relationship and, as such, as simply a preferred way of doing business in extending courtesy to the client beneficiaries.

[57] I accept the view that the risk is minimal and the duration short. However, I do also note that this is the first time as between the Trustee and the beneficiaries that cash is on deposit in the Trust. In my view, raising the proposed intended disposition of that cash which then resides in the Trust to cover the tax liability ought not to attract consideration of the Trustees election to consult with a client beneficiary as an abdication or delegation of its authority or responsibility under the Trust. It is prudent for the Trustee to engage this discussion with the beneficiaries, particularly when the Trustee has, for the first time, control over the choice of investment for return to the beneficiary.

[58] Again, the Trustee continued to hold the prerogative to make the investment.

(vi) Keith Stanford - Drafts 2008 T3

[59] The investigation also noted that in 2008 Keith Stanford for the first time drafted the Income Tax Return for delivery to Osler and the Trustee. In the end, this document was filed without amendment. Formerly, Royal Trust had done so and it was considered a Trustee responsibility. This is the tax year which required the reporting by CHC Helicopters and related corporations and interests to the Canada Revenue Agency of one significant transaction. That transaction, the sale of CHC Helicopters, engaged the process by which these associated entities received or paid proceeds from such sale. Accordingly, it is not unusual that the reporting to the Canada Revenue Agency should be consistent and have the coordinated transactions considered for drafting of that reporting at one source, the source of the corporate sale.

[60] In this case, I do note that Royal Trust did engage its internal tax advisor to review the draft T3.

[61] I see no interference with Royal Trust's authority in this event.

MOTIVE AS BASIS FOR REASSESSMENT - CONSIDERATION AND CONCLUSIONS

[62] I will now return to the question of whether motive for the investigation was inherent in the outcome of the reassessment.

[63] The Minister takes the position that the actions by which the authority of the Trustee was seen to have been infringed upon and by which the Minister concluded residences were all tainted by the priority to attract Alberta tax in that the Trust was artificially attempting to be seen as resident in Alberta.

[64] Having reviewed the impugned transactions and reached the conclusions I have outlined in respect of them, I return to the opening overview and conclusions of the Position Paper at page one. The opening position, the concluding overview is simply and singularly expressed to be that the purpose (motivation) in appointing Royal Trust was to obtain tax benefits under Alberta residency.

[65] In the context of the review I have concluded that I incline to the view that this overview predominates the process by which the investigation is engaged and completed.

[66] The conclusions at page 47 are two. The first is that the Dobbin children directed all material transactions. The second is a finding of an improper attempt to migrate the situs of the Trust to Alberta for tax benefits.

[67] In my view, the second conclusion ought to have been irrelevant to the investigation. The Minister would concede that a structure seeking to minimize tax is, as in this case, permitted.

[68] Notably, Ms. Jina did on cross-examination offer that it was more of a feature present in the separate bases of the transactions she reviewed and the transactions themselves were the significant bases upon which the conclusions of exercises of authority other than in Alberta was determined.

[69] There is no question that the investigation was detailed. Documentation was effectively scrutinized as was appropriate. Notwithstanding, I do not have confidence that the discernment of the information by which the inferences were made supporting the Minister's position were not impacted by the overreaching negative view of the motive for minimization of tax. I have to conclude that improper motive entered the discernment process and compromised in an apparent manner the integrity of an independent rationale for the findings upon which the reassessment could be based.

THE TRUST

General Consideration and Conclusions

[70] It is clear that the Settlor, Craig L. Dobbin, intended by the instrument of Trust that the residency of the Trust be Alberta. As well as the Trustee, Royal Trust understood, and as the Trust's instrument itself declared, the residency of Alberta would serve to attract tax at the Alberta rates. It is accepted that a taxpayer has the right to order its affairs as it sees fit to minimize tax payable (**Commissioners of Inland Revenue v. Duke of Westminster**, [1936] AC 1 (HL).

[71] It is also clear that the law firm of Osler prepared the Trust Instrument for the Settlor. It is clear that two estate tax freezes served to give value to the Trust from the Settlor. These two freezes again were prepared by the law firm of Osler.

[72] It is also clear that the Estate Plan and the Trust were prepared with a view to the disposition of CHC Corporation after the Settlor's death and the movement of the value of the shares held by DHI through the Trust to its beneficiaries. Again, as noted, this was prepared by the law firm of Osler.

[73] It is clear that following the Settlor's death and the sale of CHC Helicopters, Osler prepared the documentation. Notably, the procedure followed by Osler to effect the transfer of funds to the Trust and its beneficiaries was mandated by the provisions of the Trust.

[74] It is also clear that the beneficiaries had not participated in the preparation of the Trust. Nor had they participated in the completion of the various processes by which the Trust received its interest and value and the proceeds of ultimate disposition of that interest and value.

[75] It is clear that Keith Stanford, but for the preparation of a draft Income Tax Statement for the tax year 2008, did not originate or direct the process by which the Settlor created the Trust nor did the law firm of Osler which gave effect to its provisions in the plan previously established.

[76] Mr. Stanford however did have an understanding of the legal process from a business perspective sufficient to explain to the beneficiaries the nature of the documents to which each subscribed in the transactions by which Royal Trust came be to Trustee, the estate freezes completed and the transfer of funds on sale of CHC Helicopters Inc. effected.

[77] As I have noted, the Trust, the estate freezes and the ultimate value attributed to the Trust and paid out originated in the Settlor. It was the Settlor who caused Osler in Montreal and Calgary to act as it did in completing the Trust instrument. The true source for the standing of the Trust and its sole mandate was in the Settlor.

[78] I cannot conclude that the amended stated residence of this Trust as Alberta has been altered by the facts. There is no substantial decision by which control can be said to have moved to another party other than is found in compliance with that amended Trust document.

[79] Royal Trust succeeded as a Trustee of that instrument and as legal representative complied with its provisions, confirmed that the documentation prepare by Osler conformed to the Trust, received the funds from the sale of CHC Helicopters Inc. in 2008, as the only party legally entitled, received and paid the funds to the beneficiaries, subject to holdback, as was its legal obligation.

[80] From the time of the appointment of Royal Trust in 2006 by the late Craig L. Dobbin when his health issues appear to have required more detailed planning of his estate, including the appointment of a professional Trustee to replace his own children who were until then both Trustees and beneficiaries, and the choice of Alberta residence, the privately held corporate shares resided in the Trust until the

sale of CHC took place. Nothing unusual took place until, as planned, the privately held shares were converted to cash after that sale in 2008.

[81] For the foregoing reasons I have concluded that the assumptions of the Minister that the beneficiaries directly or indirectly managed or controlled this Trust at the relevant times has been displaced by the evidence. Further, the evidence does not support that management and control directly or indirectly being in the beneficiaries.

[82] I conclude the residence of the Trust not to have changed from the residence of choice, Alberta.

[83] For all of the foregoing reasons, the Appeal is allowed.

FINAL ORDER

[84] Accordingly an Order will issue as follows:

1) It is declared that the residency of the Appellant for the taxation year 2008 is the Province of Alberta;

2) It is ordered that the Respondent reassess the Appellant for the taxation year 2008 as resident of the Province of Alberta, the tax payable to be reduced by $8,845,191.69 tax plus $1,447,861.68 interest on arrears, and

   a) Refund any overpayment of tax for the year 2008 with interest thereon to the Appellant; and

b) Pay the Appellant its cost for two counsel pursuant to Column III of the scale.

CARL R. THOMPSON
Justice