

CURRENT CASES

SPEAKERS:

Al Meghji, Osler, Hoskin & Harcourt LLP, Toronto

John Sorensen, Gowling WLG (Canada) LLP, Toronto

Matt Williams, Thorsteinssons LLP, Toronto

YIN RAPPORTEUR:

Darren Joblonkay, Davies Ward Phillips & Vineberg LLP,
Toronto

MODERATOR:

Margaret Nixon, Stikeman Elliott LLP, Toronto



OUTLINE

1. GAAR

- *Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49
- *Deans Knight Income Corporation*, 2021 FCA 160 (under appeal to SCC)

2. Statutory Interpretation

- *Loblaw Financial Holdings Inc.*, 2021 SCC 51
- *Bank of Nova Scotia*, 2021 TCC 70
- Other Cases

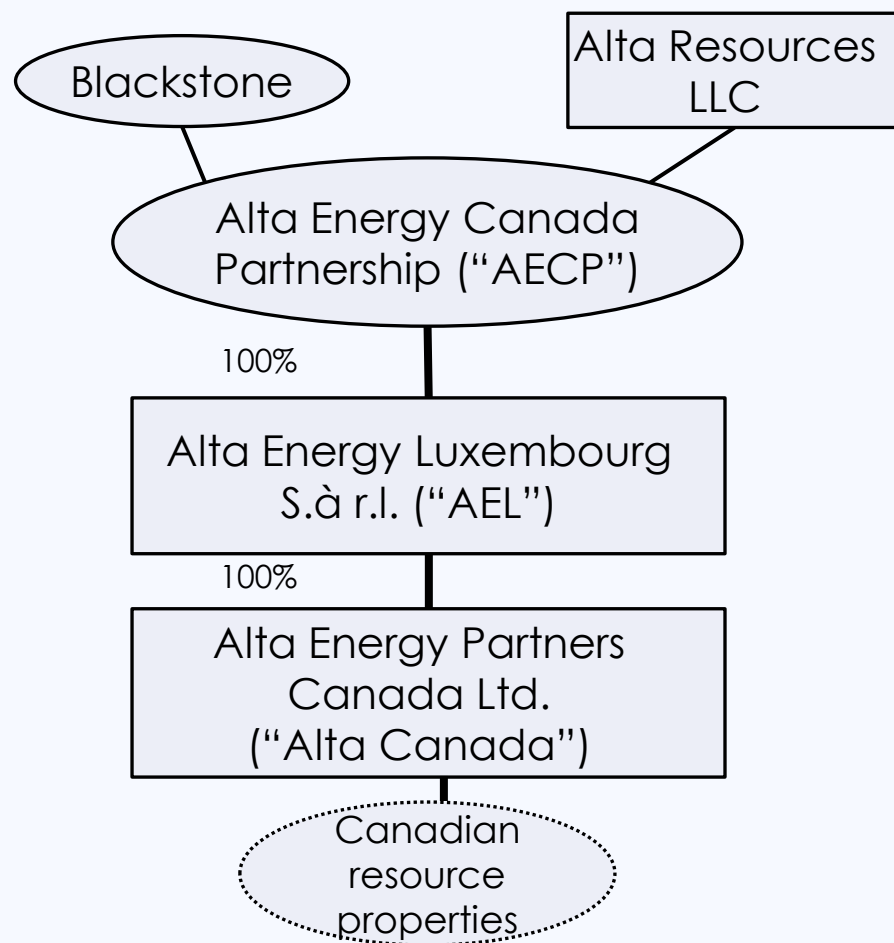
3. CRA Audit Powers

- Proposed legislative responses to recent cases
- *BMO Nesbitt Burns Inc.*, 2022 FC 157

4. Concluding Remarks

1. GAAR

Alta Energy Luxembourg S.A.R.L., 2021 SCC 49



Pre-restructuring: Alta Canada owned by Alta Energy Partners LLC (Delaware LLC owned in turn by Blackstone and Alta Resources LLC)

Restructuring (2012): AEL and AECP created; Delaware LLC sells Alta Canada shares to AEL

- No capital gain realized; FMV = ACB

2013: Alta Canada shares sold to Chevron Canada

- ~\$380 million capital gain; AEL relied on Treaty

CRA: general anti-avoidance rule (GAAR) allows Canada to tax capital gain despite Article 13(4)(a) of the Treaty

- Lost at trial and appeal

Alta Energy Luxembourg S.A.R.L., 2021 SCC 49

Majority:

- “The principles of predictability, certainty, and fairness and respect for the right of taxpayers to legitimate tax minimization are the bedrock of tax law”
- GAAR does not apply (no misuse/abuse); capital gain not taxable in Canada
- Depth of AEL’s economic ties to Luxembourg are not relevant
- Policy of specific treaty provision at issue is clear from text (supported by context and purpose): to encourage foreign investment in Canada
- Dual nature of treaties as both statutory and contractual
- Deliberate choice not to limit treaty benefits to certain corporations using measures suggested by OECD that would have applied to AEL
 - “The GAAR was enacted to catch unforeseen tax strategies”

Alta Energy Luxembourg S.A.R.L., 2021 SCC 49

Dissent:

- “Multinational companies exploiting gaps and mismatches in international tax rules erode domestic tax bases and cost countries an estimated US\$100 to US\$240 billion in lost revenue annually”
- Treaty shopping is abusive where there is an absence of a “genuine economic connection with the state of residence”
- Purpose of all relevant articles read together “is to assign taxing rights to the state with the closest economic connection to the taxpayer’s income”
 - Majority: that is a purpose in the Treaty, but the business property exemption specifically at issue here has a different purpose

Deans Knight Income Corporation, 2021 FCA 160

Novel question: Is object, spirit & purpose of acquisition-of-control element in s. 111(5) fully reflected in text of provision? If yes, GAAR inapplicable

Novel answer: control test means “**actual**” control rather than *de jure* or *de facto*

Leave granted March 10, 2022

Forbes (eventually renamed Deans Knight) had \$90M of non-capital losses & other deductions (Tax Attributes)

Matco offered plan to monetize Tax Attributes by way of Investment Agreement, with imposition of terms & plan for future Corporate Opportunity – but no acquisition of *de jure* control

Deans Knight

FCA: considered only whether abuse of s. 111(5) under GAAR

Statutory limitations on losses after acquisition of control specific, but not complete or comprehensive scheme

Historic justification

- 1963 Ministerial pronouncement

- 1988 GAAR commentary

Deans Knight

Object, Spirit & Purpose

Actual control (by way of *de jure* control or otherwise) supplants effective control

Loss restrictions not comprehensive scheme reflected in text of provisions

Transactions Frustrated Purpose

Investment Agreement gave Matco “actual control” over taxpayer & “corporate opportunity”, which would not realistically be rejected

Deans Knight

Comments on Outcome

Justification for break with *Duha Printers*

FCA approach invitation to SCC to revisit control

Questions to consider

2. STATUTORY INTERPRETATION

Loblaw Financial Holdings Inc., 2021 SCC 51

Loblaw Financial incorporated Barbados subsidiary in 1992, renamed Glenhuron Bank & regulated by Central Bank of Barbados & under local law

Activities within definition of “international banking business”

From 1992 to 2000, Loblaw Group members **contributed capital** & interest-free **debt** to Glenhuron, including around \$500M from Loblaw Financial

Glenhuron’s activities made up of: (1) trading short term debt securities; (2) asset management (for fees); (3) intercorporate loans; (4) independent operator loans; (5) interest rate and cross-currency swaps; & (6) equity forwards

Loblaw Financial

FAPI includes *inter alia* income from property which encompasses CFA's income from **investment business**

Investment business defined broadly & includes business carried on by affiliate, principal purpose of which to derive income from property (interest, dividends, rents, royalties or similar/substitutes), subject to exceptions

Case concerned whether “**financial institution**” (FI) **exception** in s. 95(1) definition of “investment business” met

Loblaw Financial

FI exception

1. **Type of FI** – CFA carries on business as foreign bank, trust co., credit union, insurer, or trader/dealer in securities/commodities
2. **Oversight by regulatory body** – CFA regulated under foreign law
3. **Threshold level of activity** – CFA employs more than five full-time employees or equivalent in active conduct of business
4. **Arm's length requirement** – CFA business not conducted principally with persons with whom CFA does not deal at arm's length

Loblaw Financial

Tax Court: FI exception inapplicable – flunked arm’s length requirement based on **Barbadian** definition of “international banking business”

Federal Court of Appeal: applied usual definition of business – activities that occupy time, attention & labour for purpose of earning profit; hence only Glenhuron’s income-earning activities should be considered

Most lucrative business was conducted with arm’s length persons, thus Loblaw Financial fit within FI exception

Supreme Court: “The dispute in this case comes down to the meaning of the phrase ‘**business conducted principally with**’ within the arm’s length requirement, and specifically whether **providing corporate capital** and **exercising corporate oversight** amount to conducting business with a foreign affiliate.”

Loblaw Financial

Raising capital necessary to any business, to **enable** business **to be conducted**;
but contributing capital is **not conducting** said business

Corporate oversight **not** conducting business

Glenhuron's most lucrative activities generated 86% of income from dealings with
arms' length parties, thus critical criterion met

But what's **really** interesting about *Loblaw Financial*?

Loblaw Financial

Pendulum of statutory interpretation

Permutations of modern rule

TCP

Both cited in *Loblaw Financial*

Where the rubber hits the road is in determining the relative weight to be afforded to the text, context and purpose

Where the words of a statute are “precise and unequivocal”, their ordinary meaning will play a dominant role

In the taxation context, a “unified textual, contextual and purposive” approach continues to apply

Loblaw Financial

In applying this unified approach, however, the particularity and detail of many tax provisions along with the *Duke of Westminster* principle ... lead us to focus carefully on the text and context in assessing the broader purpose of the scheme

This approach is particularly apposite in this case, where the provision at issue is part of the highly detailed and precise FAPI regime. If taxpayers are to act with any degree of certainty under such a regime, then full effect should be given to Parliament's precise and unequivocal words

Bank of Nova Scotia, 2021 TCC 70

Losses carried back & **interest** under s. 162(7): when does interest clock stop?

2015 audit: proposed 2006 adjustment & request to carry back loss from 2008

162(7)(a) establishes interest on tax payable, ignoring deduction/reduction

162(7)(b) deemed payment date – 30 days after later of four possible dates

(ii) the day on which the taxpayer's ... return of income for that subsequent taxation year was filed (in this case 2008)

(iv) where, **as a consequence** of a request in writing, the Minister reassessed the taxpayer's tax for the year to take into account the deduction or exclusion, the day on which the request was made (in this case 2015?)

Other Statutory Interpretation Cases

- *Robillard*, 2022 CCI 17
- *Canadian Imperial Bank of Commerce*, 2021 TCC 71 (under appeal)
- *Canada North Group Inc.*, 2021 SCC 30

3. CRA AUDIT POWERS

Proposed Legislative Responses to Recent Cases

- *Cameco Corporation*, 2019 FCA 67
 - proposed amendments to para. 231.1(1)(c) – requirement to answer all proper questions
- *BP Canada Energy Company*, 2017 FCA 61
 - proposed s. 237.5 - reportable uncertain tax treatments
 - proposed s. 237.4 – notifiable transactions
 - proposed amendments to s. 237.3 – reportable transactions

How will the courts react to these amendments?

BMO NESBITT BURNS INC., 2022 FC 157

Minister seeks production of unredacted Master Summary Pricing Model (MSPM).

BMONB argues MSPM constitutes tax accrual working papers (TAWPs) and that legal advice is revealed by what is being computed and how.

Federal Court on Privilege: “The MSPM reflects the operational implementation, outcome or end product of legal advice provided.” An end product is not privileged unless it discloses the “very legal advice” provided. BMONB has not established that the MSPM would disclose the legal advice provided.

BMO NESBITT BURNS INC., 2022 FC 157

OTHER ARGUMENTS:

1. Too late because audit is over? No time limit on use of section 231.1.
2. Although MSPM is to some extent a TAWP, it is relevant to a specific item under audit and does not impose an obligation to self-audit.
3. Tax Court Rules do not assist in the interpretation of the scope of the Minister's powers under section 231.1 of the *Income Tax Act*.

4. CONCLUDING REMARKS

Q&A