

# THE Canadian TAXPAYER

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## COPTHORNE AND THE SUPREME COURT: DID THE COURT CROSS THE LINE?

David H. Sohmer

Brian Arnold is a frequent lecturer at CRA training sessions and his views both reflect and influence the views of the Agency. He concluded his analysis of the Supreme Court decisions in *Canada Trustco v. R.*<sup>1</sup> and *Mathew v. R.*<sup>2</sup> by stating:

The court has rendered the GAAR virtually meaningless by restricting the significance of economic substance and by elevating the necessity for certainty (or consistency), predictability, and fairness for taxpayers above the GAAR and the need to control abusive tax avoidance.<sup>3</sup>

The concern that the GAAR may be rendered meaningless was echoed by Mr. Justice LeBel speaking for a majority of the Supreme Court in *Lipson*:

Indeed, contrary to the judgments in *Canada Trustco* and *Kaulius*, my colleague Binnie J essentially guts the GAAR and reads it out of the ITA under the guise of an exercise in legal interpretation.<sup>4</sup>

1 *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 5 C.T.C. 215, 2005 D.T.C. 5523.

2 *Mathew v. R.*, 2005 SCC 55, [2005] C.T.C. 244, 2005 D.T.C. 5538.

3 Brian J. Arnold, *Confusion Worse Confounded – The Supreme Court’s GAAR Decisions*, 2006 *CTJ* 167 at p. 209.

4 *Lipson v. R.*, 2009 SCC 1, [2009] 1 C.T.C. 314, 2009 D.T.C. 5015, at para. 52.

The “exercise in legal interpretation” was a reference to Mr. Justice Binnie’s finding for the taxpayer on the ground that the Minister had not met his onus to establish abuse by identifying “with some precision the ‘object, spirit or purpose’ frustrated by the impugned series of transactions”.<sup>5</sup>

The Supreme Court in *Canada Trustco* adopted a two-step analysis in determining whether there was abuse. The first step was to identify the purpose of the relevant provisions and the second was to establish that such purpose had been frustrated. The burden was on the Minister to establish that abuse was clear and this implied that the Minister had to establish clarity at each step.

The Supreme Court in *Copthorne*<sup>6</sup> responded to the concern that placing the onus on the Minister to establish abuse with clarity would “gut” the GAAR, by removing the burden on the Minister in

5 *Ibid.*, at paras. 94 and 96.

6 *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63, 2011 Carswell Nat 5201.

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the first step of the abuse analysis.<sup>7</sup> Mr. Arnold described the result as follows:

The reasons for judgment, written by Justice Rothstein for a unanimous court, are refreshing, concise, straightforward, and comprehensive. They provide a solid platform for lower courts to continue developing the GAAR into an effective tool to protect the tax system against abusive tax avoidance; they will provide welcome encouragement to the CRA officials charged with responsibility for controlling tax avoidance; and they represent a clear signal to taxpayers and their professional advisers that the GAAR is neither a paper nor a toothless tiger.<sup>8</sup>

As a result of the *Copthorne* decision, it is arguable that the Court must now determine legislative purpose in GAAR cases in the same manner as it

<sup>7</sup> See paragraphs 69, 71 and 72. The apparent reversal of positions by the Supreme Court in so short a time frame is without precedent. It is particularly surprising in the light of the following comments by Mr. Justice Rothstein in *Copthorne*:

*Trustco* is a recent decision of this Court. Reversing a recent decision "is a step not to be lightly undertaken" (*Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 56-57, per McLachlin C.J. and LeBel J.). Before a Court will entertain reversing a recently decided decision, there must be substantial reasons to believe the precedent was wrongly decided. In this case, *Copthorne* has not met the "high threshold for reversing a precedent" (*Fraser*, at para. 60) and it is appropriate to reaffirm the *Trustco* interpretation of s. 248(10). (para. 57)

<sup>8</sup> Brian J. Arnold, The Arnold Report – Archive Posting 025: December 22, 2011, Canadian Tax Foundation.

must when the text is ambiguous, that is, it must divine a reasonable purpose or where there are several reasonable purposes, choose the most reasonable one. This effectively equates abuse with a failure to be reasonable. The result is that [subsection 245\(4\)](#) is conflated with [subsection 245\(5\)](#), which is precisely what Parliament refused to do when it rejected the version of the GAAR which was contained in the 1987 white paper on tax reform. The relevant provisions were as follows:<sup>9</sup>

245.(1) Notwithstanding any other provision of this Act, where a transaction is an avoidance transaction, the income, taxable income, tax payable or other amount payable of or refundable to any person under this Act shall be determined as is reasonable in the circumstances ignoring the transaction.

(2) An avoidance transaction includes:

(a) any transaction that results in a significant reduction, avoidance, deferral or refund of tax or other amounts payable under this Act, unless the transaction may reasonably be considered to have been carried out primarily for *bona fide* business purposes; or

(b) any transaction that is part of a series of transactions or events, which series results in a significant reduction, avoidance, deferral or refund of tax or other amount payable under this Act, unless the transaction may reasonably be considered to have been carried out primarily for *bona fide* business purposes.

By imposing a burden on the Crown to establish a clear legislative purpose, the Supreme Court in *Canada Trustco* acknowledged that Parliament had rejected a statutory codification of a judicial smell test and had opted for a statutory equivalent of the equitable remedy of rectification. This is confirmed by the striking similarity between the language used in rectification cases and the language used in GAAR cases:

### Rectification

In *Thomas Bates and Son Ltd. v. Wyndham's (Lingerie) Ltd.*, Brightman LJ stated:

The standard of proof required in an action of rectification to establish the common intention of the parties is, in my

<sup>9</sup> Canada, Department of Finance, Tax Reform 1987: Income Tax Reform (Ottawa), June 18, 1987), at pp. 143-144. See David H. Sohmer, "GAAR or GAAR Lite: What Did Parliament Really Really Want?", *The Canadian Taxpayer*, Vol. XXX at page 25.

view, the civil standard of balance of probability. But as the alleged common intention *ex hypothesi* contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself.<sup>10</sup>

In *Juliar v. Canada (Attorney General)*, Mr. Justice Cameron said:

A written agreement may be rectified to make it conform to the real intention of the parties when the parol evidence is so clear and convincing as to establish that a mistake was made in the instrument contrary to the agreement of the parties: *Chant v. Infinitum Growth Fund Inc.* (1986), 55 O.R. (2d) 366 (Ont. C.A.) at 369.<sup>11</sup>

In the case of *Bank of Montreal v. Vancouver Professional Soccer Ltd.*,<sup>12</sup> Madame Justice McLachlin, then sitting as a judge of the British Columbia Court of Appeal, stated as follows:

The standard of proof of these elements is a stringent one because of the danger of imposing on a party a contract which he did not make. While it may not be so high as the criminal onus of proof beyond a reasonable doubt (see *Joscelyne v. Nissen*, *supra*; *Peter Pan Drive-In Ltd. v. Flambro Realty Ltd.* (1978), 22 O.R. (2d) 291, 93 D.L.R. (3d) 221, affirmed 26 O.R. (2d) 746, 106 D.L.R. (3d) 576 (C.A.)), terms such as "certainty" (*Rose v. Pim*, *supra*) and "convincing proof" (*Jocelyne v. Nissen*) are appropriate.

In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, Mr. Justice Binnie stated:

The court's task in a rectification case is corrective, not speculative.

Some critics argue that anything more demanding than the ordinary civil standard of proof is unnecessary (e. g. Waddams, *supra* at para 343), but again the objective is to promote the utility of written agreements by closing the "floodgate" against marginal cases that dilute what are rightly seen to be demanding preconditions to rectification.<sup>13</sup>

10 [1981] 1 W.L.R. 505 at 521.

11 (1999), [2000] 2 C.T.C. 464, 99 D.T.C. 5743 (Ont. S.C.J.) at para. 33, affirmed (2000), [2001] 4 C.T.C. 45, 2000 D.T.C. 6589 (Ont. C.A.), leave to appeal refused (2001), 272 N.R. 196 (note) (S.C.C.).

12 (1987), 15 B.C.L.R. (2d) 34 at pp. 36-37.

13 [2002] 1 S.C.R. 678 at paras. 31 and 42. It should be noted that in the case of *F.H. v. McDougall*, 2008 SCC 53, 297 D.L.R. (4th) 193 the Supreme Court rejected an intermediate standard of proof in civil cases. Whether or not this applies with respect to rectification, by holding that "the Minister must clearly demonstrate that the transaction is an abuse of the Act" the Supreme Court in *Copthorne* effectively rejected the *McDougall* decision as being relevant in interpreting the GAAR: *supra*, note 6 at para. 72.

## GAAR

In *OSFC Holdings Ltd. v. R.* Mr. Justice Rothstein stated:

It is also necessary to bear in mind the context in which the misuse and abuse analysis is conducted. ... This is not an exercise of trying to divine Parliament's intention by using a purposive analysis where the words used in the statute are ambiguous. Rather, it is an invoking of a policy to override the words Parliament has used. I think, therefore, that to deny a tax benefit where there has been strict compliance with the Act, on the grounds that the avoidance transaction constitutes a misuse or abuse, requires that the relevant policy be clear and unambiguous.<sup>14</sup>

In *Canada Trustco Mortgage Co. v. R.*, Chief Justice McLachlin stated:

The GAAR was enacted as a provision of last resort.<sup>15</sup>

If the existence of abusive tax avoidance is unclear, the benefit of the doubt goes to the taxpayer.

S'il n'est pas certain qu'il y a eu évitement fiscale abusif, il faut laisser le bénéfice du doute au contribuable.<sup>16</sup>

In *Copthorne Holdings Ltd. v. R.*, Mr. Justice Rothstein stated:

A court must be mindful that a decision supporting a GAAR assessment in a particular case may have implications for innumerable "everyday" transactions of taxpayers. ... Because of the potential to affect so many transactions, the court must approach a GAAR decision cautiously.<sup>17</sup>

Assuming that the removal of the burden on the Minister is irreversible, it is still open to the courts to respect the legislative rationale underlying the GAAR by framing the issue as a matter of rectification. The court should ask whether it can discern a legislative intent with sufficient clarity to justify applying the GAAR rather than asking whether the most reasonable intent discerned by it has been frustrated.

It is hoped that courts hearing GAAR cases in the future will bear in mind the following statement by Mr. Justice Iacobucci in the case of *R. v. Salituro*:

14 2001 FCA 260, [2001] 4 C.T.C. 82, 2001 D.T.C. 5471, at para. 69.

15 *Supra*, note 1 at para. 21.

16 *Supra*, note 1 at para. 66.

17 *Supra*, note 6 at para. 67.

In a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.<sup>18</sup>

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18 [1991] 3 S.C.R. 654 at page 670.

## EMPLOYMENT INSURANCE BOARD UNEMPLOYED

It seemed like a good idea at the time.

Consistent with the Conservatives' regular attacks on the huge surpluses generated by the previous governments in the collecting of E.I., a new system was put in place. The 2008 budget set out the mandate as follows:

To enhance the independence of premium rate setting and to ensure that EI premiums are used exclusively for the EI program, the Government is creating a new, independent Crown corporation, the Canada Employment Insurance Financing Board (CEIFB). It will have the following key responsibilities:

**Managing a separate bank account.** Any annual EI surpluses going forward will be held and invested until they are needed for EI program costs.

**Implementing an improved EI premium rate-setting mechanism.** Starting in 2009, the new rate-setting mechanism will take into account any surpluses or deficits that arise on a go-forward basis, to ensure that EI revenues and expenditures break even over time. In order to provide rate stability, the maximum annual change in the premium rate set by the CEIFB will be 15 cents.

**Maintaining a cash reserve.** The Government will provide \$2 billion to establish a reserve in the CEIFB's bank account. In the event of a downturn where the projected break-even rate would result in a premium rate increase greater than the 15-cent limit, the difference would be funded from the reserve in that year, which would be replenished in subsequent years through the premium rates. In the event of an economic upturn, any surplus

beyond the desired reserve level would be used to reduce EI premiums in future years.

The CEIFB will be structured as a Crown corporation that will report to the Minister of Human Resources and Social Development. It will have an independent board of directors and be staffed with the experts needed to manage the financing of the EI program.

But the timing could not have been worse. In October 2008, the economy fell off a cliff and unemployment soared. While there was some return to "normal" in the following years, unemployment remained high, claims jumped and collections dropped.

The bottom line as reported by the CBC is that the organization simply has nothing to do.

- The government froze EI payments and then (last year) set them below the suggested limit.
- There has been no surpluses to invest.
- The cash reserve promised in the budget has never been funded.

That could all be put down to unforeseen circumstances but as anybody who has lived in Ottawa for a couple of decades knows, the fact that an agency is created is enough in itself to require financing, offices and staff, even if there is nothing much to do.

The CEIFB's published budget<sup>1</sup> for the current year includes giving everyone raises, and moving the entire agency into new offices at an expected cost of \$1.8 million. The stated purpose of the move is "to improve corporate culture". Compensation costs include stipends and expenses for the seven appointed board members, and \$244,000 for a couple of executives. The agency's executive director, retired senior public servant Phil Charko, is being paid about \$150,000 a year to work part time.

1 Budget data has been taken from the CBC story which appeared on January 18, 2012. But a detailed document can be found at the board's Web site at [http://www.ceifb-ofaec.ca/en/PDF\\_Reports/Corporate%20plan%202011-2012%20Summary.pdf](http://www.ceifb-ofaec.ca/en/PDF_Reports/Corporate%20plan%202011-2012%20Summary.pdf).

The budget provides another \$200,000 to pay an investment manager if the agency ever has any money to invest.

Another \$300,000 is budgeted for “additional corporate services such as IT management, human resources management, and translation services”. The agency has earmarked over \$250,000 to pay outside consultants, including public relations professionals to help produce the board’s annual report showing what happened to all the money. Given the public outcry over the stories, the money may ultimately be well spent in protecting the board.

It could be that the board will be eliminated in the forthcoming budget, but don’t hold your breath. It was created as an ideological statement and closing it down would highlight the fact that it was a mistake...at least in terms of the timing. When and if we get back to what is known as full employment, the board could conceivably have a role. But in the meantime, the expenditures fall into the category of regulatory waste and should be a target in a cost-cutting exercise.

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## LIBERAL PARTY CONVENTION FANS SPARKS OF REVIVAL

It has become almost trite since the last election to write off the Liberal Party as a dying relic, reduced as it is to third party status.

But for most observers, the most surprising aspect of the convention was that about 3,000 people registered and paid \$1,200 each (not to mention travel and associated costs) to attend and have a say in the issues which were in play. This single fact has to tell fair-minded observers that there still remains a lot of interest in the Liberal Party and a lot of people who are prepared to put up cold, hard cash to be involved. It was being reported that this was the largest such gathering in decades for a convention which was not electing a leader.

Much of the focus was on the race between Sheila Copps and Mike Crawley for the role of

party president. One person we spoke to suggested that this job is unimportant and asked whether we knew who the president of the Conservative Party of Canada is.<sup>1</sup> But the party president of the government party has little or no actual power, being essentially a senator in waiting. The party president of a third place party swings weight behind the scenes.<sup>2</sup>

The race between Copps and Crawley was also seen by many as a youth versus experience ballot and a Chrétien (Copps) versus Martin surrogate fight. In the event, Crawley came out ahead by a minuscule 26 votes, reportedly pushed over the top by the very large contingent of younger voters.<sup>3</sup>

What may ultimately turn out to be the big gamble for the party was the decision to allow non-party members who identify themselves as “supporters” to vote in the next leadership convention. This is a dramatic change which is designed to make it easy for those who are interested but who don’t want to become members to be involved. It also means in practical terms that the “insiders” will have less clout when it comes to electing the next Liberal leader.

While the change seems dramatic, it doesn’t likely carry much of a risk. In the United States it is easy for citizens to self-identify with parties without becoming members and to have a vote in the primaries. Similarly, in the recent Alberta PC leadership vote which essentially was a vote for the Premier, anybody could join the party and get a vote up to voting day which could have led to significant manipulation. But the evidence is that this did not happen.

While it is very early days, the fact is that the Liberals have two goals. Ostensibly the main one is to form the government next time around. But the second and more realistic one is to overtake the NDP and to regain official opposition status.

Thus the fact that Lise St-Denis, the MP for Saint-Maurice–Champlain, defected to the Liberals from

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1 It took an Internet search to come up with the name of John Walsh.  
2 See for example Brian Topp of the NDP.  
3 It did not pass without notice that every living former Liberal Prime Minister was in attendance...except Jean Chrétien...who is on record as favouring a merger with the NDP.

the NDP a few days before the Convention was given a high profile, as was she. One seat more, even from Quebec, is not a huge thing but it has the pundits wondering whether this is the canary in the coal mine for the Quebec NDP caucus or whether it is simply a one-off event which ultimately signifies nothing much beyond an electoral footnote.

For the Liberals, this was the first truly heartening event since the election. For those who are of a nostalgic turn of mind, they would like to think that the meeting was akin to the Kingston Conference of 1960 which was the first step to the Liberal return to power after the devastating (to them) Diefenbaker sweep of 1958. That conference was about policy renewal and was ultimately a triumph. We don't see this Ottawa meeting as being of the same calibre...but it is a first step on the road back for the party. What steps follow will remain to be seen over the next year or so.

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## FEDS AND BRITISH COLUMBIA MAKE HST REPAYMENT DEAL

British Columbia Finance Minister Kevin Falcon has unveiled the details of the repayment deal by which the province will reimburse the federal government for the advances made to implement the HST.

Under the new agreement, the province will have five years to repay in full the transition funding, and Canada has agreed to waive any interest charges over this period. While the province has always acknowledged its responsibility for the repayment of the federal transition funding, the actual timing of when that repayment was to occur remained something for B.C. and Canada to further discuss.

The extended repayment schedule will save the province debt interest costs that would otherwise have been incurred had the province had to pay back the full amount right away, money that can instead go toward protecting core B.C. services.

On the other hand, the full cost of the \$1.6-billion repayment will still be booked in the provincial government's 2011-12 fiscal year, but the province will instead be able to flow the cash over the coming five years.

This would seem to be the penultimate chapter in an exercise of fiscal prudence promoted by the feds and ultimately rejected by the public. The final step will be the actual unwinding of the tax.

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## ADDITIONAL COMMONS SEATS LIKELY ASSURED FOR NEXT ELECTION

After two earlier false starts impeded by its minority status, the Conservative government has finally come up with a (supposedly) final expansion of the House of Commons.

Ontario will get 15 new seats, British Columbia and Alberta six each and Quebec three in the latest and probably final attempt by the Harper government to reconfigure the House of Commons in favour of the fast-growing provinces.

Democratic Reform Minister Tim Uppal introduced the *Fair Representation Act*<sup>1</sup> in late October in Brampton West, the most populous riding in Canada, more than four times the size of some of the smallest...a venue designed to highlight the disjuncture between population and electoral districts.

Because smaller provinces that have more seats than their populations warrant are protected constitutionally and legislatively from losing seats, the Conservatives have been forced to settle the problem of under-representation by the growing provinces by enlarging the House, which will expand to 338 from 308 seats.

The enlarged House will increase the cost of holding a general election by \$11.5 million, and increase the budget for operating the House by \$14.8 million annually.

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1 Bill C-20. Royal Assent December 16, 2011, now S.C. 2011, c. 26.

This third attempt seeks to prevent Quebec from dropping below its proper level of representation based on population, while still improving the standings of the three growing provinces in the House.

The difference between this and previous bills is that the Conservatives were able to use the power of their majority to get it passed. The Liberals and NDP have called for more study and for guarantees to preserve Quebec's level of representation in the House at current levels. However, to ensure the bill is law in time for the next election, the Harper government used closure to shut down opposition debate.

Of course, the allocation of new seats by province is only one step in the process. The next part, redrawing boundaries within the provinces to accommodate the extra seats will ultimately be crucial. The main issue will, as usual, be the extent to which redistribution enhances urban ridings where most of the population growth has taken place, effectively diminishing the clout of rural areas.<sup>2</sup> And one has to be cognizant of the fact that in the past several elections, the Conservatives have fared less well than other parties in the urban centres. Thus, the new allocation of seats will be done against a backdrop of political realities.

<sup>2</sup> Of course, in Alberta this manifests itself primarily in the percentage of votes rather than in opposition seats.

## CRA LOOKING AT PRIVATE GOLF CLUBS

We have heard from a number of sources that the CRA has started to audit some non-profit golf courses to determine whether they have become taxable because of commercial activity. In one case we know of, the issue was whether green fees paid by non-members threatened the non-profit status. The answer to the question is always fact-based but it seems distinctly possible that if non-member green fees are substantial, it can be argued that there is a profit-making motive which might cost the golf club its non-profit, tax-exempt status.

We recently read a [CRA letter](#)<sup>1</sup> which dealt with a different issue but also one where a non-profit might have tax liability for at least a part of its income.

The statutory basis is this:

Generally, [paragraph 149\(1\)\(l\)](#) of the Act provides an exemption from Part I tax for a club, society or association that is not a charity and that is organized and operated exclusively for social welfare, civic improvement, pleasure or recreation, or any other purpose except profit. However, when the main purpose of an organization is to provide dining, recreational or sporting facilities for its members, subsection 149(5) of the Act applies and an inter vivos trust is deemed to have been created. The property of the organization is deemed to be the property of the trust, and in accordance with [paragraph 149\(5\)\(e\)](#) of the Act, tax is payable by the trust on its property income and certain capital gains. There is a general deduction of \$2,000 available in computing the taxable income of the trust.

Income from property generally includes interest, dividends, rents and royalties. Interest income earned by an organization to which subsection 149(5) of the Act applies (a "club"), from the investment of surplus funds, is income from property for the purpose of subsection 149(5), regardless of whether the surplus funds result from temporary operating surpluses or an accumulation of funds for a long-term project.

In this case, the issue was whether interest earned on overdue accounts was taxable under [subsection 149\(5\)](#) of the Act when earned by a golf course that is exempt from tax pursuant to [paragraph 149\(1\)\(l\)](#) of the Act. In the letter the CRA cited two quotes from the Federal Court of Appeal.<sup>2</sup>

[15] Parliament has taken care to ensure that clubs ... unlike other non-profit organizations, are taxed on all their income from property and therefore, it is plain, on all their interest income...

[16] ... There is no reason to believe that Parliament used the words "income from property" in any non-traditional sense. Nor is there any reason to believe that Parliament, in enacting legislation of such general scope with regard to clubs which it knows cannot carry on activities primarily aimed at making a profit, was concerned with the manner in which the income would be produced. Interest income is taxable regardless of the activities of the clubs that give rise to its production...

<sup>1</sup> [CRA Views 2011-0409901E5](#), "Interest earned by non-profit organization," September 22, 2011.

<sup>2</sup> [Elm Ridge Country Club Inc. v. R. \(1998\)](#), [1999] 3 C.T.C. 163, 99 D.T.C. 5127 (Fed. C.A.).

The CRA, based on those quotes said:

In our opinion, the jurisprudence supports the view that, for the purpose of subsection 149(5) of the Act, interest income of a club generally cannot be divided into property income and business income. The difference between the rental income described in IT-83R3 and the interest income on an overdue account is that the rental income is derived directly from one of the main activities of a club (i.e., providing certain facilities), while the interest income is not. In our view, consistent with the scheme of the Act and the related jurisprudence, interest income earned by a club, irrespective of source, is income from property for the purpose of subsection 149(5).

In another letter dealing with a golf club,<sup>3</sup> the issue was whether the gain on the sale of land was taxable or not.

Subparagraph 149(5)(e)(ii) of the Act contains an exception with respect to capital gains arising from the disposition of property that was used exclusively for and directly in the course of providing dining, recreation and sporting facilities to the members of the organization. Based on the facts that you have provided to us, the land disposed of by the Corporation was not used by the Corporation exclusively for and directly in the course of providing dining, recreation and sporting facilities to its members. Consequently, we agree with your view that the capital gain arising from the disposition of this land was taxable. This is consistent with our past views regarding similar situations.

Those who are involved in operating non-profit golf courses should be aware that there seems to be renewed interest by the CRA in these operations... with a view to finding that they are either taxable or that some of the income may be subject to the special tax regime. We'd be interested in hearing from any readers who have had recent contact with the CRA with regard to the taxation of golf courses or other sporting clubs which would include, for example, curling and tennis clubs which operate as non-profits.

<sup>3</sup> CRA Views [2011-041552117](#), "Subparagraph 149(5)(e)(ii)", September 14, 2011.

## DOES THIS TAX CREDIT MEET THE SMELL TEST?

We have been known from time to time to comment adversely on some of the tax credits

implemented and proposed by the Harper government.

But we were surprised (perhaps because of our urban orientation) to find a Manitoba Tax Credit for "Odour Control". It turns out that while the credit is available to individuals, each one must be carrying on the business of farming as a sole proprietor or as a general partner in a partnership that is carrying on the business of farming in Manitoba, and had incurred the expenditures in 2011. CRA Form T4164 states:

The credits you earned in the year are used to reduce your Manitoba tax payable for that year. Any unused amount can be refunded, up to an amount equal to your net property tax. Net property tax is the portion of property tax paid in Manitoba that applies to farmland used in the business of farming minus any related property tax refund or rebate or other government assistance received or receivable.

### Part I – Eligible Expenditures

Eligible expenditures refers to the capital cost of a depreciable capital property (e.g. straw cannons, sewage lagoon covers and seals, biofiltering units, storage tanks or containers, spraying equipment for aerobic or anaerobic treatment of organic waste, soil injectors attached to manure spreaders) acquired under the following conditions:

- it was acquired by you or your partnership primarily for the purpose of preventing, significantly reducing or eliminating odour that arises from organic waste used or created in the course of farming business in Manitoba;
- the property became available for use by your farming business in the tax year;
- the property was not used or acquired for any use by anyone before it was acquired by you or your partnership; and
- it is prescribed by regulation, or is declared by the provincial Minister, to be a qualifying property.

We've no doubt that the tax credit is designed to help curb a social and environmental "evil" and is probably very useful in that regard.

While we try to keep on top of the multitudinous tax credits available at the provincial level, this is not always possible. Readers may have some suggestions for credits which are available which meet the smell test of usefulness.