

4. The recognized privilege to expel a member is generally characterized as disciplinary or remedial in relation to the conduct of a member. A decision of this nature by the Senate requires a simple majority.

5. Seats have been declared vacant in the past by application of subsection 31(1) of the *Constitution Act, 1867* for non-attendance for two consecutive sessions. It is well-established in law that the Senate has the exclusive jurisdiction to decide whether the seat of a Senator should be declared vacant.

6. A court's review of Senate action is limited to establishing the existence and scope of a privilege; once established, the court cannot extend its review to the exercise of the privilege. [Our emphasis.]

7. The Senate considered whether it had the power to expel in the case of former Senator Thompson in 1998, but made no final determination.

8. Section 31 of the *Constitution Act, 1867* is a constitutional edict that dictates those situations where a seat must be declared vacant when a Senator no longer meets the qualification requirements. It is not, however, an exhaustive list of circumstances where a seat can be declared vacant by the Senate.

9. The power to expel is separate and distinct from the purpose of section 31 of the *Constitution Act, 1867* both in its legal source and its characteristics.

We should note that despite this opinion, there were many lawyers and senators who had doubts about the ability of the Senate to expel one of its own.

Obviously it remains to be seen whether the Senate's purported power to expel will be tested in the future. But from our perspective, the issue of the legalities is most interesting and we thought we'd share the conclusions with our readers.

Safe Income: Fact or Fiction? (and why the answer matters)

David H. Sohmer

The *Income Tax Act* ("ITA") was amended in 2016 to provide that an inter-corporate dividend received after April 20, 2015 can be taxable as a capital gain where the purpose of the dividend is "to effect a significant

reduction in the fair market value of any share" and "the amount of the dividend exceeds the amount of the income earned or realized by any corporation after 1971 . . . that could reasonably be considered to contribute to the capital gain that could be realized on a disposition at fair market value . . . of the share on which the dividend is received". (ITA section 55(2.1).)

The effect of the amendment is to place all inter-corporate dividends which are not regular recurring annual dividends in the CRA's gun sight. The issue of "safe income" is accordingly no longer an exotic or aggressive tax planning issue but one which must be routinely addressed. The extent of the burden placed on taxpayers is indicated in the following statements by the CRA at a TEI-CRA Liaison Meeting on November 15, 2016:

The onus is on the taxpayer to provide support for the calculation of safe income that can reasonably be viewed as contributing to the capital gain on a share. The CRA expects the supporting documentation to be organized as an accumulation of year-by-year computations. Safe income has to be determined following the requirements of paragraphs 55(5)(b) and (c) (starting with net income for income tax purposes) and adjusted to reflect the portion of the safe income that can reasonably be considered to contribute to the capital gain on a share.

. . . the CRA will attempt, in regards to available resources, to provide the requested documentation. However, the CRA is not under the obligation of providing such documents and it is not in a position to provide assurances that these requests will be actioned in all cases.¹

In addition to placing what in many cases may be an impossible burden on the taxpayer, the CRA's position may be wrong in law. The Minister, in making assessments, proceeds on assumptions of fact and the onus is on the taxpayer to prove on a balance of probabilities that the assumptions are not true. The assumptions of fact must be "precise and accurate so the taxpayer knows exactly the case it has to meet".² Where the ITA does not require supporting documentation, credible oral evidence from a taxpayer is sufficient notwithstanding the absence of the

¹ CRA Views 2016-0672321C6, "Guidance on determination of safe income," November 15, 2016.

² *Gerbro Holdings Co. v. R.*, 2016 TCC 173 under heading 5.1, para. 66.

records.³ There is, however, no obligation to disprove assumptions of law or of mixed fact and law, nor is there any obligation on the Court to extract the factual components from assumptions of mixed fact and law.⁴ The distinctions between questions of fact, questions of law and questions of mixed law and fact have been described as follows:

Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact.⁵

Since "income" is an artificial concept, what constitutes "income" is a question of law as is what constitutes "safe income". Similarly, the amount of safe income which can reasonably be considered to contribute to a capital gain is also a question of law. What transactions actually took place is a question of fact and whether what actually took place satisfies the legal test for capital gain treatment is a question of mixed law and fact.

Where the Minister's assumptions have been "demolished" by the taxpayer making out a *prima facie* case, the onus shifts to the Minister to rebut the *prima facie* case. "Where the burden has shifted to the Minister and the Minister adduces no evidence whatsoever, the taxpayer is entitled to succeed.... even if the evidence adduced by the taxpayer contained "gaps in logic, chronology and substance".⁶ Where "the taxpayer's evidence is challenged, the Minister must be

³ *Hickman Motors Ltd. v. R.*, [1997] 2 S.C.R. 336 at para. 87.

⁴ *RMM Canadian Enterprises Inc. v. R.*, [1997] 3 C.T.C. 2300, 97 D.T.C. 302 (T.C.C.) — "Assumptions are assumptions of fact. Legal conclusions from assumed, proved or admitted facts are matters of law for the court and not subject to the rules of onus. . . .Wherever the onus lies I must deal with the facts before me and reach a conclusion on the applicable law in the context of the issues raised in the pleadings." (paras. 13 and 15.) See also *Gerbro Holdings Co. v. R.*, *supra* note 2 at para. 68. While questions of law are resolved by the Court, both parties will of course attempt to convince the Court that their interpretation is the correct one. The Court may even disagree with both interpretations; see for example the decision of Mr. Justice Rothstein in *Lipson v. R.*, 2009 SCC 1, [2009] 1 C.T.C. 314.

⁵ *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 1997 CarswellNat 368 at para. 35.

⁶ *Supra* note 3 at para. 95.

expected to present something more concrete than a simple assumption".⁷

What lessons can be drawn from the case law?

Firstly, the amount of safe income that can reasonably be viewed as contributing to the capital gain on a share is a question of law or a question of mixed law and fact and may not be pleaded as an assumption and need not be rebutted.

Secondly, it is incumbent on the Minister to make precise and accurate assumptions of the facts which "provide the support for the calculation of safe income that can reasonably be viewed as contributing to the capital gain on a share". It is doubtful whether the Minister can be sufficiently precise and accurate without access to tax returns, assessments and re-assessments (or appropriate circumstantial evidence).

The bottom line is that the CRA may be shooting itself in the foot by refusing to produce the documentation in its possession.⁸

David H. Sohmer, a frequent contributor to The Canadian Taxpayer, is a shareholder of Spiegel Sohmer Inc., a Montreal law firm, and can be reached at dhsohmer@spiegelsohmer.com.

⁷ McMechan and Bourgard, *Tax Court Practice*, pp. 4-499 – 4-500, summarizing the *Hickman* case.

⁸ How safe income should be quantified when some tax returns are not available is an issue which remains unresolved.

Relief for Snowbirds May Be in the Works

Canadians who have the affluence continue to flock across the southern border in search of warmer weather and while some have been deterred by the low Canadian dollar, the numbers who fly south, generally known as snowbirds, continues to be high.¹

Most tax advisers and presumably regular snowbirds are cognizant of a major tax pitfall.

¹ For the full story, see the CBC article online at <http://www.cbc.ca/news/politics/canadian-snowbirds-8-months-1.4011788>.

Under current U.S. law, if a snowbird spends more than 182 days in the U.S. they are considered a resident and are subject to U.S. taxes on their worldwide income. Even worse, prolonged, unauthorized stays beyond six months could result in an outright travel ban for up to 10 years. Counting the days in the U.S. is crucial.

To complicate matters, many snowbirds aren't aware they risk losing their provincial health coverage if they spend long periods of time outside the country, and it can take months to have coverage restored when they return. There is a patchwork of policies throughout Canada as residents of some provinces have much less freedom to travel than some of their fellow residents.

As a result of concerted lobbying efforts by the Canadian Snowbirds Association over the last five years, British Columbia, Manitoba, Alberta, New Brunswick, Nova Scotia, Northwest Territories and Saskatchewan have all amended their policies to allow residents to be temporarily absent for up to seven months, while still retaining their health coverage.

Ontarians, too, can keep their health benefits and be out of the province for up to 212 days (roughly seven months) in any 12-month period while Nunavut and Yukon are comparatively lax and have no residency requirements. Newfoundland and Labrador requires its residents live in the province for just four months of the year, while in Quebec and P.E.I. a person has to be present for six months plus one day to maintain their coverage.

But the good news (perhaps, ultimately) is that there is a bipartisan bill currently before Congress that would allow Canadians and Canadians only over the age of 55 to stay south of the border for up to eight months of the year, provided they own a home or have signed a rental agreement for the duration of their stay.

The legislation, if passed, would exempt these Canadian residents from filing U.S. taxes despite the

longer stay, as they would still be considered "non-resident aliens" by the Internal Revenue Service.

The motivations are largely economic for the Congressmen backing the bill officially titled "Promoting Tourism to Enhance our Economy Act" and they have framed the loosened visitor restrictions as a no-brainer because of the expected financial windfalls for Sun Belt states.

"Increased tourism from Canada will spur job growth in towns across the United States," Democratic Congressman Albio Sires said after introducing the bill in February. "Allowing our neighbours to spend more time to enjoy what our country has to offer will help small businesses and expand the economy."

"This contributes a great deal to the economy in Florida," Republican Congressman Ted Yoho, who represents northern stretches of the Sunshine State, added. "Canada is one of America's closest allies and her citizens contribute millions of dollars to the U.S. economy. This bill will provide an incentive for additional tourism from Canada in the future and will strengthen the bond between our two nations."

We understand that a separate and similarly worded bill introduced by Republican Congresswoman Elise Stefanik last fall, calls for the creation of a snowbird visa, to "support many small businesses, grow jobs, and foster an even closer relationship," with Canada, she said. (Stefanik's bill has a lower age requirement of just 50 and older.)

If the bill becomes law, which is never a certainty under the U.S. system, tax life will become somewhat easier for the vast majority of snowbirds. It makes one wonder what the tax status is of such high-profile denizens of the U.S. such as Brian Mulroney and Kevin O'Leary. But we suspect that both these fellows are rich enough to have planned their way around the problems which the "little guys" have to worry about.