2010 TAX LAW FOR LAWYERS

National Tax Law CLE Program

INBOUND INVESTMENT – CROSS BORDER ISSUES

Working with Tax Treaties

by

Maralynne A. Monteith
WeirFoulds LLP

June 1, 2010

WHAT IS A TAX TREATY

A tax treaty is a bilateral agreement between two jurisdictions referred to as Contracting States. The formal title used for a tax treaty is an "income tax convention". An "income tax convention" typically also applies to taxes on capital but does not generally apply to commodity taxes, such as the goods and services tax.

Tax treaties are entered into by the federal government of each Contracting State. In jurisdictions where lower levels of government have the power to impose taxes, the tax treaty may not necessarily be recognized by those subordinate governments. For example, the decision in KLM Royal Dutch Airlines v. British Columbia, 1998 Carswell BC 205, [1998] 8 W.W.R. 153 confirms that provinces are not bound by the terms of Canada's tax treaties.

Therefore, when analyzing the impact of a tax treaty on a resident of a particular Contracting State, the effectiveness of a tax treaty to fulfil its objectives can be diminished by the position taken by subordinate political subdivisions which choose not to recognize some or all of the tax treaty provisions. Fortunately, in Canada, for practical purposes, the provinces for which the federal government collects income tax conform to the federal treaty network. Of the three provinces that collect their own corporate income tax - Alberta, Quebec and Ontario - Alberta has adopted the federal treaties by statute and Quebec adopts the federal treaties where income is specifically exempted by treaty. The *Ontario Corporations Tax Act* was amended for taxation years ending after June 17, 2002 to parallel Canada's tax treaties for purposes of determining whether a foreign corporation has a permanent establishment for Ontario corporate tax purposes. Prior to that amendment, Ontario had a broader definition of permanent establishment than that contained in most tax treaties with the result that foreign corporations could be subject to income tax in Ontario by virtue of a provincial permanent establishment in Ontario without being subject to federal income tax because the treaty definition of permanent establishment did not apply.

A tax treaty does not impose tax – it is a shield, not a sword.

PRINCIPAL PURPOSES

The principal purposes of a tax treaty are:

(a) to avoid double taxation and to encourage economic development; and

(b) to prevent fiscal evasion.

Avoidance of Double Taxation and Encouragement of Economic Development

One important factor that affects trade and investment between residents of two countries is the impact of each jurisdiction's taxation system on the residents of the other. Cross-border trade and investment will be discouraged if both countries impose tax on the same income without relief from the resulting double taxation. A tax treaty addresses the issue of double taxation by providing a tax sharing scheme between the two Contracting States.

In the result, a tax treaty typically includes provisions to shield residents of one Contracting State from taxes imposed by the other Contracting State. The shield can be partial, such as decreased withholding tax rates on certain types of payments (see Article X, Canada - U.S. treaty). The shield may be complete, such as the prohibition against one Contracting State taxing gains realized by a resident of the other Contracting State on the sale of certain types of moveable property (see Article XIII, Canada - U.S. treaty).

Where a Contracting State is precluded by a tax treaty provision from imposing all or part of its usual taxes, that State has effectively agreed to share its tax revenues with the other Contracting State. As discussed below, the other Contracting State will typically be obliged to provide a foreign tax credit for the taxes imposed by the first Contracting State – but for a lesser amount than would otherwise have been the case if the first Contracting State had not reduced its taxes by virtue of the tax treaty.

Where treaty provisions provide a shield from the liability for tax, the Canada Revenue Agency (the "CRA") has taken the position that some of Canada's domestic rules requiring deductions at source (e.g. Regulation 105 source deductions for services performed on site in Canada) or reporting requirements (e.g. Section 116 certificate procedures) may nevertheless apply. Therefore, a non-resident may be subject to Canadian compliance requirements even if income earned by the non-resident is exempt from Canadian income tax pursuant to a tax treaty.

Section 150 of the *Income Tax Act* provides that non-resident corporations (or partnerships with such corporate partners) carrying on business in Canada or disposing of capital property must file an annual return in Canada disclosing any claim for tax treaty protection from income tax under Part I of the *Income Tax Act*. (See T2 SCH 91E.) One of the principal aims of this reporting requirement is to capture information on non-resident corporations that carry on business in Canada but claim exemption from Canadian income tax on the basis that they have no Canadian permanent establishment. This reporting requirement is similar to one that is in place in the U.S., although the penalties for non-reporting are much greater in the U.S. than in Canada.

As a consequence of the 2008 Federal Budget, non-residents are relieved from the obligation to file Canadian income tax returns to report dispositions of taxable Canadian property, the gain from which is exempt from Canadian income tax by virtue of a tax treaty. As a consequence of the 2010 Federal Budget, compliance with s.116 is to be confined to a much narrower definition of "taxable Canadian property", the stated intention of which is to relieve most non-resident dispositions from the often onerous compliance requirements of s.116 where Canadian tax would not be exigible, including treaty-protected dispositions.

A tax treaty typically includes a mechanism for requiring one Contracting State to provide its own residents with foreign tax credit relief with respect to the taxes imposed by the other Contracting State. This mechanism allows revenues from taxes properly imposed by one Contracting State on the residents of the other Contracting State to be shared while at the same time minimizing the application of double taxation.

In Canada, the tax treaty foreign tax credit provisions are paramount to the foreign tax credit rules in the *Income Tax Act*. Therefore, Canada may be obliged to provide foreign tax credit relief under an applicable tax treaty even though its domestic rules would not provide the same relief.

Where a tax treaty is entered into between a "developed" country and a "developing" country, it is not uncommon to find extra incentives built into the treaty to encourage taxpayers in the developed country to invest in the economy of the developing country. Two of the more common incentives in these circumstances are greater than usual reductions in withholding tax rates and so called "tax sparing" provisions under which the developed country agrees to give a foreign tax credit for taxes that are deemed to be, but are not in fact, collected by the developing country.

Prevention of Fiscal Evasion

A tax treaty typically contains a series of rules which have as their principal purpose, the prevention of fiscal evasion.

Several of the treaty articles dealing with specific items of income contain provisions that are in the nature of "anti-avoidance" rules. These specific anti-avoidance rules are intended to ensure that the benefits of the treaty, such as reduced withholding tax rates, are accorded only to those persons to whom they were intended to apply. These anti-avoidance rules in the context of specific items of income are discussed in more detail below.

One of the most significant of the anti-evasion tools, particularly as information and communications systems become more sophisticated, is the exchange of information article. This article is present in virtually every tax treaty and includes provisions which provide a mechanism under which the revenue authority of each Contracting State, referred to as a Competent Authority, may access information gathered by the other Contracting State through its taxation system.

The exchange of information provisions of most tax treaties place some restrictions on the ability of a Competent Authority to access information gathered by the other Competent Authority. The Contracting State requesting information may only access the information that is available to the requested Contracting State under its domestic laws.

There are two principal sources of information that a Competent Authority may seek to access under the exchange of information provisions of a tax treaty: Information made available to a Competent Authority because it has been filed by a taxpayer and information that may only be obtained by an action taken by the Competent Authority, such as the use of its audit powers.

"As filed" information is readily available to be provided to a foreign Competent Authority further to an exchange of information request.

On the other hand, there was some debate regarding the powers of a Competent Authority to obtain information that would only be available to the other Competent Authority through its powers to audit or to request information.

In most tax treaties, a Competent Authority is not obliged to provide information unless that information would be available to it under its own domestic laws. (For example, in Canada, prior to the end of 2007, the *Income Tax Act* only authorized the CRA to request information from a named taxpayer "in connection with the administration and enforcement of the Act".) The one notable exception to this apparent limitation was contained in the Canada-U.S. tax treaty. There is a special provision in paragraph 2 of Article XXVII of that treaty that allows the Competent Authorities to request information from each other even though the requested Competent Authority is not currently seeking any information with respect to the particular taxpayer's liability under domestic taxation laws.

Consequently, some held the view that, absent an overriding provision such as that contained in the Canada-U.S. tax treaty, a foreign Competent Authority ought only to be able to access information on named taxpayers and then only to the extent the CRA was able to obtain that information in connection with that taxpayer's liability for taxes under the *Income Tax Act*.

In the decision of the Federal Court – Trial Division in Pacific Network Services Ltd. v. MNR, 2002 DTC 7585, the Court considered whether a foreign Competent Authority was entitled to require the CRA to use its domestic powers to obtain information for no domestic purpose but solely in response to the foreign Competent Authority's request for information. The applicable tax treaty did not have a provision similar to the Canada-U.S. tax treaty to specifically require the CRA to respond in those circumstances.

The Court concluded that the exchange of information provisions of the Canada-France tax treaty required the CRA to use its powers under the *Income Tax Act*, in this case by issuing a demand for information under section 231.2, to obtain the information requested by the French Authority. This decision of the Federal Court – Trial Division supports the proposition that the exchange of information provisions in tax treaties using the OECD Model Convention require the Competent Authorities to use the administrative measures at their disposal to respond to requests under the exchange of information article. They do not need the extra language contained in the Canada-U.S. tax treaty to authorize the exercise of those administrative information gathering procedures, even if there are no domestic taxes at issue.

Effective December 14, 2007, the provisions of section 231.2 of the *Income Tax Act* were amended to clarify that the CRA may rely on its provisions to pursue requests for information pursuant to a tax treaty. The section is to be further extended to include requests for information pursuant to a "listed international agreement", which captures the Convention on Mutual Administrative Assistance in Tax Matters (January 25, 1988) and the Canada-Mexico Exchange of Information Agreement (March 16, 1990). The provision will likely need to be further amended to extend its reach to the Tax Information Exchange Agreements that Canada is currently negotiating with certain "tax haven" jurisdictions if they are in the form of the TIEA signed with the Netherlands Antilles in 2009.

The objective of preventing fiscal evasion is given unprecedented aid where a tax treaty with Canada contains a provision that requires one Contracting State to provide comprehensive assistance to the other Contracting State in the collection of its taxes. Without such a provision, the common law principal that domestic courts may not be used to enforce the tax laws of another country would apply.

The Third Protocol to the Canada-U.S. treaty introduced a provision (Article XXVI A) under which the Competent Authority of one Contracting State will lend assistance to the other Contracting State to collect taxes. The mechanics of the provision are as follows.

Essentially once a revenue claim is no longer subject to any restrictions on collection, the Competent Authority of one Contracting State may request the Competent Authority of the other Contracting State to pursue collection action in its own jurisdiction as if the foreign revenue claim were a domestic undisputed claim.

Limitations may be placed on these assistance in collection provisions. For example, the United States will not assist Canada to collect Canadian taxes owed by U.S. citizens, and vice versa.

As a further limitation in the Canada-U.S. treaty, the tax claim must be one that has been finally determined after November 9, 1985, ie. no more than 10 years before the ratification of the Third Protocol.

Despite these limitations, the proposition that sovereign states will assist each other in the collection of taxes is extraordinary in view of the historical caselaw to the contrary. It places a powerful collection tool in the hands of the CRA and the Internal Revenue Service.

Interestingly, the collection assistance provisions can apply to all taxes imposed by the Contracting States notwithstanding the "taxes covered" article which limits the types of taxes to which the treaty applies generally.

Canada has entered into similar assistance in collection provisions in its treaty negotiations with other countries. For example, assistance in collection provisions have been added to the Canada-Netherlands Income Tax Convention pursuant to the Protocol signed August 25, 1997, to the Canada-Germany Income Tax Convention pursuant to an Agreement signed April 19, 2001 and to the Canada-Norway Income Tax Convention pursuant to an Agreement signed July 12, 2002.

INTERPRETATION OF TAX TREATIES

General

In Canada, tax treaties are paramount to our domestic law unless a domestic law is drafted to specifically override one or more treaties in the manner specified by the Supreme Court of Canada in The Queen v. Melford Developments Inc., 82 DTC 6281.

Before the Supreme Court of Canada enunciated the "object and spirit" approach to the interpretation of taxing statutes in the *Stubart* case, 84 DTC 6305, the law of Canada required that taxing statutes were to be interpreted using the "strict construction" rule.

The strict construction rule recognized that taxing statutes fall within the category of legislation that allows a government to expropriate the property of its citizens and residents. Governmental expropriation requires due process that recognizes private property rights and principles of natural justice. Thus, the strict construction doctrine imposed an obligation on the government to establish that the taxpayer fell within the four corners of the legislation before it would be allowed to interfere with the taxpayer's property.

The other side of the strict construction rule was that a taxpayer was prevented from accessing any beneficial provision in a taxing statute unless the taxpayer equally fell within the four corners of the legislation.

Tax treaties do not lend themselves to the lengthy, convoluted provisions of the kind contained in most taxing statutes. The application of a strict construction rule when interpreting a tax treaty would often defeat the principal purposes for which the treaty was enacted. The Vienna Convention on the Law of Treaties, to which Canada is a party, contains the general rules of interpretation of international conventions. Paragraph 1 of article 31 thereof reads:

> "l. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Accordingly, the interpretation approach determined to be appropriate and applicable to tax treaties under Canadian law is one that uses a liberal construction, keeping in mind the object and purpose of the tax treaty. The Tax Court of Canada decision in <u>TD Securities (USA) LLC v. The Queen</u>, 2010 TCC 186 is an example of this purposive approach to the interpretation of Canada-U.S. tax treaty in the context of limited liability companies.

Apart from the general direction provided by the Vienna Convention, more specific assistance in interpreting provisions of a tax treaty may be found in the Model Income Tax Convention developed through the auspices of the Organization for Economic Co-operation and Development (OECD) and the commentary published with it. Many existing international tax treaties are based on this "OECD Model Treaty". The commentary gives the purpose of each provision and also indicates which countries have reserved a position that differs from the OECD Model Treaty position.

There is another tool which may be relevant when interpreting a tax treaty. The *Income Tax Conventions Interpretation Act* (ITCIA) is a Canadian federal statute that is intended to "fill in the blanks" where a tax treaty does not define or fully define a term. The basic premise of the ITCIA is that an undefined term (or partially undefined term) should be defined for treaty purposes with reference to the definition of that term contained at the relevant time in the *Income Tax Act*, except to the extent the treaty would otherwise require. The ITCIA has also been used as a quick and comprehensive method to override treaties where it would not be efficient to attempt to amend the entire treaty network for the desired change (see, for example, section 4.1 for the GAAR override).

The importance of the ITCIA to "fill in the gaps" is diminishing as Canada enters into more and more "modern" tax treaties that include definitions which are either complete or already encompass or default to the *Income Tax Act* definitions. However, the ITCIA does contain provisions which override tax treaties so it is a good practice to refer to the ITCIA as part of any treaty inquiry.

In the case of the Canada-U.S. treaty, there is additional interpretative assistance available in the "Technical Explanation" to the treaty prepared by the U.S. Treasury Department. Although drafted by the U.S. authorities, the Department of Finance has agreed by published News Release that the Technical Explanation reflects the appropriate interpretation and application of the treaty. The Federal Court of Appeal in Haas Estate v. The Queen, 2001 DTC 6701, however, has made it clear that the Technical Explanation must be interpreted in the context of the relevant taxation laws of each Contracting State. The Technical Explanation is not a "stand alone" document.

In addition to the "Technical Explanation", the Diplomatic Notes to the Fifth Protocol to the Canada-U.S. treaty contained in Annex B set out the understandings and interpretation of certain provisions of the treaty developed and agreed upon by the negotiators which are stated to be intended to give guidance to both taxpayers and the tax authorities of both countries in interpreting the treaty.

Annexed as Appendix A is a series of selected cases dealing with tax treaty issues.

WHEN IS A TAX TREATY RELEVANT

Where one is dealing with a resident of a country with which Canada has a tax treaty and the issue is exchange of information, collection of taxes or tax sparing, the provisions of the treaty are virtually always relevant.

Where the issue is the avoidance of double taxation, whether through rate reductions or foreign tax credits, a tax treaty is only relevant if domestic laws do not provide the desired relief. For example, there is no need to look to a tax treaty for relief if a royalty payment is exempt from withholding tax under an exception contained in the *Income Tax Act* – such as the exemption from Part XIII tax for artistic copyright royalties provided in sub-paragraph 212(1)(d)(vi) of the *Income Tax Act*.

TYPICAL TREATY FORMAT

Most of Canada's tax treaties currently in force are based on the OECD Model Treaty. For convenience, this paper will review the usual tax treaty articles in the order set out in the Canada-U.S. tax treaty currently in force as it is the treaty to which most will have reference in the course of a Canadian tax practice.

<u>Personal Scope (Article I)</u>

The personal scope article contains a short statement to the effect that the treaty is to be applicable generally only to residents of either or both the particular Contracting States.

Taxes Covered (Article II)

The taxes covered article specifies the existing and future taxes to which the treaty will apply. For example, the Canada-U.S. treaty does not apply to Canadian goods and services tax except for the articles dealing with assistance in collection and non-discrimination.

General Definitions (Article III)

The general definitions article defines certain reference terms used frequently throughout the tax treaty.

Residence (Article IV)

The residence article sets out the criteria for determining the residence of individuals, corporations and trusts and, in the case of persons resident in both Contracting States, sets out tie-breaker rules or procedures to resolve situations of dual residency.

Most modern OECD style treaties require a "resident" to be a person "liable to tax" in one of the Contracting States (excepting governments and tax exempt entities). The Supreme Court of Canada in The Queen v. Crown Forest Industries Ltd., 95 DTC 5389 has interpreted "liable to tax" to mean liable to tax on worldwide income. Consequently, residents of third party countries that are liable to tax only on income sourced in a Contracting State are not entitled to the benefit of that Contracting State's treaty network. For example, a resident of a third party state that carries on business in Canada through a permanent establishment located here is "liable" to Canadian income tax but only in respect of profits attributable to that permanent establishment – not in respect of its worldwide income. Therefore, that third party would not qualify as a "resident of Canada" for purposes of Canada's treaty network. The CRA's most recent interpretation on the issue of treaty residence is set out in their publication *Income Tax Technical News No. 35*.

The requirement that a resident must be a person that is liable to tax has caused difficulty with enterprises that are look-through entities, such as partnerships and limited liability companies ("**LLC**").

Section 6.2 of the ITCIA precludes a partnership of which a Canadian resident is a member from being treated as a resident of another Contracting State. The usual treatment in the case of partnerships is to look through to the partners until an entity is reached that meets the "resident" criteria in a particular country. It will then be that country's treaty network that will be relevant to the tax treatment of that partner. In the result, a partnership may give rise to the application of several different tax treaties.

It has been a long held position of the CRA that a partnership, rather than the partners, owns the property of the partnership. Consequently, corporate partners could not get the benefit of the lower treaty withholding tax rate on dividends paid with respect to shares owned by the partnership even though that lower rate would have been available had the corporate partner owned the shares directly. The Fifth Protocol to the Canada-U.S. treaty addresses this problem by adopting a look-through approach which will cause the partners to be treated as if the dividends were received directly.

Hybrid entities such as an LLC are also problematic for cross-border operations into Canada. The CRA has concluded that an LLC is a corporation for purposes of the application of the *Income Tax Act*. However, if the LLC is not "liable to tax" in the other Contracting State, the CRA takes the position that it is not a "resident" of that state and is not eligible to access treaty benefits. The look-through approach adopted under the Fifth Protocol to the Canada-U.S. treaty allows U.S. resident members of LLCs to be treated as if income, profits and gains are received directly so that treaty benefits are available. Of interest here is the *TD Securities* case (*supra*), where the Court held that U.S. members of an LLC were entitled to treaty benefits under the U.S. treaty even prior to the enactment of the Fifth Protocol.

The Fifth Protocol to the Canada-U.S. treaty also contains amendments to limit treaty benefits accorded to certain hybrid entities which are fiscally transparent in one of the Contracting States but not in the other. An example of a hybrid entity would be an unlimited liability company formed in Canada which is a corporation for Canadian income tax purposes but may be a look-through entity for U.S. income tax purposes. Such hybrids will be denied treaty benefits commencing January 1, 2011.

The Fifth Protocol to the Canada-U.S. treaty introduced new tie-breaker rules for corporations that would otherwise be dual residents. If the corporation was incorporated in one Contracting State and not the other, then it will be deemed to be resident in the jurisdiction of incorporation. In any other case, the Competent Authorities must settle the issue, failing which no treaty benefits will be available.

Permanent Establishment (Article V)

The permanent establishment article sets out the circumstances under which a resident of one Contracting State will be considered to have a permanent establishment in the other Contracting State. The existence of a permanent establishment in the other Contracting State is a pivotal issue. The permanent establishment rules require an additional condition to be met before a Contracting State will be allowed to impose its domestic income tax on the income of a resident of the other Contracting State.

For example, Part I of the *Income Tax Act* by its terms renders any non-resident of Canada that carries on business in Canada liable to Canadian income tax. Whether a non-resident "carries on business in Canada" for purposes of the Act is determined by reviewing the common law jurisprudence and the provisions of section 253 of the Act, which expands the common law interpretation of the term "carrying on business". Once it has been determined that a resident of a Contracting State "carries on business" in Canada, then the applicable tax treaty requires that business to be conducted through a permanent establishment located in Canada before Canada will be permitted to apply income tax under Part I of the Act to a treaty resident. Thus, while selling products to

Canadian residents constitutes carrying on business in Canada for purposes of the Act, unless the selling is conducted by the treaty resident through a permanent establishment located in Canada, the relevant tax treaty would shield the profits from those sales from Canadian income tax.

New rules introduced pursuant to the Fifth Protocol to the Canada-U.S. treaty now cause there to be a permanent establishment in the context of services performed by an enterprise (including an independent contractor) of one Contracting State, on site in the other Contracting State. A permanent establishment is deemed to exist: 1) if the services are performed by an individual present in the other state for a period of 183 days or more in any 12 month period and income derived for those services represents more than 50% of the gross active business revenues of the enterprise; or 2) if the services are provided in the other state for an aggregate of 183 days or more in any 12 month period with respect to the same or connected project for customers resident in or with a permanent establishment in the other state in respect of which the services are provided. This is a significant change from the provisions that govern the taxation of services common to other treaties.

Income From Immoveable Property (Article VI)

The immoveable property article provides rules which set out the extent to which each Contacting State will be able to tax income and gains from the alienation of immoveable property located within its jurisdiction. The term "immoveable property" is broader than just real estate and includes resource property.

Business Profits (Article VII)

This is the most frequently relied upon article for residents of one Contracting State carrying on business in the other Contracting State. This article sets out the circumstances under which income earned by a resident of one Contracting State in a cross-border business will be subject to the taxes of the Contracting State in which the business is conducted.

As referenced above in the discussion concerning the permanent establishment article, the business profits article provides a shield which prevents a resident of one Contracting State from being taxed by the other State on business profits unless that business is conducted through a permanent establishment located in the other State. It is a subordinate article since it does not apply to items of income that are specifically dealt with in other articles (e.g. dividends, interest and royalties) unless that income is "effectively connected" with a permanent establishment. Where that effective connection is present, then the specific income article usually reverts paramountcy back to the business profits article and confirms the right of taxation to the Contracting State in which the permanent establishment is located. For example, where a U.S. resident carries on business in Canada through a permanent establishment located here and that permanent establishment receives royalties in respect of rights or property effectively connected with it, those royalties would be subject to income tax under Part I of the *Income Tax Act* (rather than Part XIII withholding tax) – paragraph 5 of Article XI of the U.S. treaty reverts back to Article VII in these circumstances.

Transportation (Article VIII)

The transportation article sets out the rules that govern which of the Contracting States has the power to tax residents engaged in certain forms of transportation services. In most cases, the transportation article is restricted to international shipping and air transport. As between contiguous countries, such as Canada and the United States, the transportation article also deals with cross-border truck and rail transportation. The transportation article often sets out rules to deal with the taxation of profits earned by a resident of one Contracting State from leasing transportation equipment to a resident of the other Contracting State.

Related Persons (Article IX)

The related persons, sometimes called associated enterprises, article is essentially an anti-avoidance provision. It contains a general set of rules which allows the Contracting States to impose arm's length criteria on related persons in determining items such as income, deductions, allowances, credits, losses and taxes. The article also sets out the circumstances under which persons will be considered related or associated.

Dividends (Article X)

The dividends article includes provisions to avoid double taxation and provisions that are anti-avoidance rules.

The issue of double taxation may arise where a resident of one Contracting State receives dividends paid by a resident of the other Contracting State.

Dividends are one of the types of income that Canada taxes on the basis of source, regardless of the residence of the recipient. If a Canadian resident corporation pays a dividend to a non-resident, then Canada imposes tax under Part XIII of the *Income Tax Act* in the form of non-resident withholding tax. The rate of tax under Part XIII of the *Income Tax Act* is set at 25%. Tax treaties almost always reduce the domestic rate of withholding tax imposed on dividends under the local law of each Contracting State. It is not uncommon to see a two-tiered rate provided for by Canada under its tax treaties. The general Canadian withholding tax rate for dividends is reduced to 15% under most treaties. Typically, corporations that have beneficial ownership of a certain specified percentage of voting stock of the company paying the dividends (usually 10% or more) enjoy a lower withholding tax rate of 10%.

In its February 1992 federal budget, the government announced its intention to reduce the withholding tax rate for "direct dividends", ie. those received by corporations owning minimum specified percentages (usually 10%) of voting stock, to 5% in future treaty negotiations. This budget initiative can be seen in the Third Protocol to the Canada-U.S. treaty where the dividend withholding tax rate for corporations holding at least 10% of voting stock was reduced to 5%.

As Canada renegotiates its existing treaty network, the relevant inter-corporate dividend withholding tax rate is being reduced to the 5% rate, accordingly.

The dividend article also contains a series of rules that determine when the dividend article is to apply. Only dividends that are "beneficially owned" by a resident of one of the Contracting States and paid by a resident of the other Contracting State may enjoy the lower rates of withholding tax set out in the dividend article. Consequently, dividends paid to an agent resident in a Contracting State, such as a financial institution, do not benefit from the reduced withholding tax rates under the tax treaty with that Contracting State unless the underlying owners of the dividends are also resident in that Contracting State. The underlying owners, if properly identified, would have to rely on the benefits of the tax treaty of their own countries, if applicable.

Further, as discussed above under the business profits article, there is a rule to ensure that dividends which are "effectively connected" with a business conducted through a permanent establishment located in the country of the payor are excluded from the dividend article. These effectively connected dividends are subject to the rules under either the business profits or the independent personal services articles, as applicable. Both of these articles allow Canada to impose Part I income tax rather than Part XIII withholding tax on the dividends. This is consistent with the scheme of the treaty which permits each Contracting State to impose its domestic income tax regime on profits that are reasonably attributable to a permanent establishment located in the State.

Most dividend articles contain a rule which prohibits a Contracting State from imposing tax on a dividend paid by a resident of the other Contracting State unless the recipient of the dividend is resident in the first State or is effectively connected with a business conducted through a permanent establishment located in the first State. This prevents Canada from attempting to tax a dividend paid by a treaty resident to residents of third party states even if the profits from which the dividend is paid arise from income earned in Canada.

The dividend article preserves the right of each Contracting State to impose branch tax on the profits reasonably attributable to permanent establishments located in the State. Canadian branch tax is structured to impose a tax on Canadian business profits of a branch that are not reinvested in Canada. In the absence of a branch tax, non-residents of Canada who operate through a branch would obtain an undue tax advantage over non-residents who form a Canadian resident subsidiary to carry on activities. Essentially, branch tax recognizes that funds earned in Canada can be "repatriated" within the foreign corporation without the application of conventional withholding tax that would ordinarily apply to inter-corporate cross-border dividends. To provide a roughly equivalent tax, the same tax rate as the Part XIII tax that would apply to an inter-corporate dividend is applied to the branch profits that are not reinvested in Canada.

Again, the rate of branch tax is typically reduced from Canada's domestic withholding tax rate of 25% to a lower rate, usually the same rate as would apply to inter-corporate dividends (ie. for a branch of a U.S. resident corporation, the rate would be 5%). In addition, it is not unusual for the Contracting States to provide for an arbitrary flat exemption from branch tax to encourage start up operations. For example, in the Canada-U.S. treaty, the first $500,000 CDN or USD equivalent of branch profits are exempt from branch tax.

The article also provides a definition of "dividend". In most of Canada's tax treaties negotiated on the basis of the OECD Model Treaty, the dividend definition will include conventional dividends as well as income that is subjected to the same tax treatment as dividends under the domestic taxation laws of the particular Contracting State. For example, in the Canada-U.S. treaty, amounts that are "deemed" to be dividends under the *Income Tax Act* fall within the treaty definition. Therefore, stock dividends which are included in the definition of "dividend" in subsection 248(1) of the *Income Tax Act* and amounts such as taxable appropriations under subsection 15(1) of the *Income Tax Act* which are deemed by paragraph 214(3)(a) to be dividends when the recipient is a non-resident, are subject to the dividend article in most of Canada's tax treaties.

Interest (Article XI)

The interest article sets out the circumstances under which interest arising in one Contracting State and paid to a resident of the other Contracting State may be taxed. The article contains an extended definition of "interest" which, in treaties based on the OECD Model Treaty, includes income assimilated to interest under the domestic taxation laws of the particular Contracting State.

If withholding tax is applicable, the rate is generally reduced where the beneficial owner of the interest is a resident of the other Contracting State. Canada typically reduces its withholding tax on interest from 25% to 15%, 10% or 0%.

In addition, the interest article usually contains a series of special withholding tax exemptions which preclude a Contracting State from imposing withholding tax on interest. These exemptions usually include interest on government debt and trade debt incurred in connection with the purchase of goods and services.

If an interest payment relates to a debt-claim that is effectively connected with a business conducted through a permanent establishment of the recipient located in the State of residence of the payor, then it is excluded from the interest article. "Effectively connected" interest is subject to the rules under either the business profits or the independent personal services articles, as applicable. In the result, Canada is permitted to impose Part I income tax rather than Part XIII withholding tax to such interest. As previously discussed, such treatment is consistent with the scheme of the treaty which allows each Contracting State to impose tax on profits that are attributable to businesses carried on through permanent establishments located in that State.

A Contracting State is not permitted to tax interest that is paid by residents of the other Contracting State unless the interest arises in the first State, is effectively connected with a business conducted through a permanent establishment located in that first State, or is paid to a resident of that first State. Consequently, this provision limits the right of

Canada to tax interest payments made by residents of another Contracting State to residents of third party states even if the profits from which the interest is paid arise from income earned in Canada.

The interest article contains a sourcing rule to ensure that interest paid to a resident of one Contracting State that is "borne by" a permanent establishment located in a third party State is deemed to arise in that third party State. This effectively ensures that such interest is not subject to tax in the Contracting State of the payor because its source is in the third party State where the permanent establishment is located. The reference to "borne by" generally means deductible to it in computing the income of the permanent establishment under the laws of the third party State where the permanent establishment is located.

The interest article contains an anti-avoidance rule that restricts the application of its provisions, including any reduction to domestic withholding tax rates, in the event excessive interest is paid as a result of a special relationship between the payor and recipient or some other persons. Under this provision, the interest article applies only to the amount of interest that would have been paid absent that special relationship.

Effective January 1, 2008, Canadian withholding tax on interest paid to a non-resident on arm's length debt was for the most part eliminated by an amendment to Part XIII of the *Income Tax Act*. Generally, recipients of interest that is not "participating debt interest" paid from an arm's length Canadian resident will no longer have to look to the provisions of a tax treaty for relief from Canadian withholding tax.

Under the Fifth Protocol to the Canada-U.S. treaty, withholding tax on interest payments will be eliminated (withholding tax on interest on non-arm's length debt is to be phased out over a three year period, commencing 2009) subject only to certain limited exceptions which are set out in paragraph 6 of the interest article, as amended.

<u>Royalties (Article XII)</u>

The royalties article sets out the circumstances under which royalties arising in one Contracting State and paid to a resident of the other Contracting State may be taxed. The article contains an extended definition of "royalties" which often differs from the definition used for withholding tax purposes under Part XIII of the *Income Tax Act*. This is important to emphasize since the definition in the treaty takes precedence over the definition used in Canada's domestic taxation laws.

The rate of withholding tax on royalties paid by a resident of one Contracting State is generally reduced where the beneficial owner of the royalties is a resident of the other Contracting State. Canada typically reduces its withholding tax on royalties from 25% to 10% or 0%.

In the federal budget of 1992, Canada announced its intention to reduce the withholding tax applicable to certain know-how, patents and computer software royalties to 0% in future treaty negotiations. This budget initiative can be seen in the Third Protocol to the Canada-U.S. treaty where the withholding tax rate applicable to such royalties was reduced to 0%.

In addition, the royalties article typically contains a special withholding tax exemption which precludes a Contracting State from imposing withholding tax on copyright royalties and other like payments in respect of literary, dramatic, musical or artistic works. This exemption typically does not apply to royalties in respect of motion pictures, video or television.

If a royalty is effectively connected with a business conducted through a permanent establishment of the recipient located in the State of residence of the payor, then it is excluded from the royalties article. "Effectively connected" royalties are subject to the rules under either the business profits or the independent personal services articles, as applicable. In the result, Canada is permitted to impose Part I income tax rather than Part XIII withholding tax to such royalties, consistent with the scheme of the treaty.

The royalties article contains a sourcing rule to ensure that royalties paid to a resident of one Contracting State that is "borne by" a permanent establishment located in a third party State is deemed to arise in that third party State even if the owner of the permanent establishment is a resident of the other Contracting State. This effectively ensures that such royalties are not subject to tax in the Contracting State of the payor because their source is in the third party State where the permanent establishment is located. The reference to "borne by" generally means deductible to it in computing the income of the permanent establishment under the laws of the third party State where the permanent establishment is located.

A Contracting State is not permitted to tax royalties that are paid by residents of the other Contracting State unless the royalties arise in the first State, are effectively connected with a business conducted through a permanent establishment located in that first State, or are paid to a resident of that first State. Consequently, this provision limits the right of Canada to tax royalty payments made by residents of another Contracting State to residents of third party states.

The royalties article contains an anti-avoidance rule that restricts the application of its provisions, including any reduction to domestic withholding tax rates, in the event excessive royalties are paid as a result of a special relationship between the payor and recipient or some other persons. Under this provision, the royalties article applies only to the amount that would have been paid absent that special relationship.

Gains (Article XIII)

The gains article sets out the general rules governing the taxation of gains realized on the disposition of real property and personal property owned by residents of one Contracting State that may be taxed in accordance with the domestic taxation laws of the other

Contracting State. The term "gains" is not defined. It includes capital gains and gains on income accounts. The gains article is general in scope. Therefore, based on ordinary statutory interpretation conventions, it does not apply to gains incurred on the disposition of types of property that are dealt with in other more specific articles of the treaty. For example, gains from the disposition of intangible property that are contingent on productivity or use are included in the definition of "royalties" and so their tax treatment is governed by the royalties article.

Typically, the gains article contains a provision under which each Contracting State reserves the right to tax gains realized on the disposition of real property located in that State. "Real property" is usually defined broadly. It includes shares of corporations and interest in partnerships and trusts that derive their value principally (i.e. more than 50%) from real property, in addition to directly held real estate and natural resources items.

Under the Canada-U.S. treaty, for gains that accrue after April 26, 1995, each Contracting State retains the exclusive right to tax its residents on the sale of shares of corporations that derive their value principally from real or resource property located in the other State provided the corporation is not resident in that other State. As a consequence, Canadian residents investing in U.S. real estate through Canadian corporations will be subject only to Canadian tax when they sell their shares, and vice versa for U.S. residents.

The gains article may also contain provisions that are aimed at preventing double taxation when a disposition of property under the laws of one Contracting State would be subject to a tax deferral, but would be subject to immediate taxation under the laws of the other. To facilitate cross-border transfers of property, these provisions permit either the taxpayer or the Competent Authorities to agree to permit matching tax results in both jurisdictions. Paragraph 7 and 8 of Article XIII of the Canada-U.S. treaty illustrates this mechanism.

The gains article may also contain provisions affecting emigrating individuals which may preserve taxation rights for the Contracting State from which emigration occurs or relieve double taxation for pre-emigration gains accrued on property held by an emigrating individual. Paragraph 5 of Article XIII of the Canada-U.S. treaty, as amended by the Fifth Protocol, deals with these issues.

Independent Personal Services (Article XIV)

Similar in concept to the business article, the independent personal services article generally restricts the right of one Contracting State to tax income from individual independent contractors resident in the other Contracting State. Unless specifically dealt with in other treaty articles, income of an independent contractor resident in one Contracting State must be reasonably attributable to a permanent establishment or a fixed base located in the other Contracting State to be taxable there.

As will be apparent from the dependent personal services article, an individual resident in one Contracting State is afforded greater protection from taxation in the other Contracting State for services performed there if the individual qualifies as an independent contractor rather than a dependent contractor/employee.

Consequent to the changes to the definition of permanent establishment relative to services, the independent services article has been deleted from the Canada-U.S. treaty pursuant to the Fifth Protocol. Individuals previously governed by this article in the Canada-U.S. treaty will now be governed by the provisions of the business profits article.

Dependent Personal Services (Article XV)

The dependent personal services article deals with income from employment of a resident of one Contracting State earned in the other Contracting State. Subject to special rules set out in the pensions and annuities, government service and artists and athletes articles, the dependent services article provides that employment income must be earned in the other Contracting State in order to be taxed by that State.

In addition, the dependent personal services article provides limitations on the degree to which employment income may be taxed by the Contracting State in which the employment is exercised. If the employment income of a treaty resident earned in the other Contracting State does not exceed a specified amount in a calendar year, then that State is precluded from taxing the employment income. In the case of the Canada-U.S. treaty, this *de minimus* amount is $10,000 based on the currency of the State in which the employment is exercised.

If the employment income earned by a resident of one Contracting State in the other State is more than the specified *de minimis* amount, the State in which the employment is exercised is still not permitted to tax unless certain criteria are met. In the case of the Canada-U.S. treaty, the individual has to either be present in the other Contracting State for more than 183 days <u>or</u> the remuneration must be paid by or on behalf of a person resident in, or borne by a permanent establishment located in, the State where the employment is exercised.

Pursuant to the Fifth Protocol, this article in the Canada-U.S. treaty now clarifies the taxation of cross-border stock options.

A further provision typically precludes one Contracting State from imposing tax on certain employment income earned in cross-border transportation industries by residents of the other Contracting State. Employment regularly exercised in more than one State on a ship, aircraft, motor vehicle or train operated by a person resident in the same Contracting State as the employee may not be taxed by the other Contracting State.

<u>Artists and Athletes (Article XVI)</u>

The artists and athletes article provides special rules to deal with entertainers and athletes who are resident in one Contracting State but perform in the other. These rules apply even if the entertainer or athlete interposes another entity to receive income, such as a management company. This article generally takes precedence over the provisions of the business profits, independent and dependent personal services or income from employment articles.

Withholding of Taxes in Respect of Personal Services (Article XVII)

The source deductions article is usually intended to relieve a taxpayer from being subjected to the source deductions of both of the Contracting States, which could obviously create a serious cash flow issue if not properly addressed. The protection from double source deductions is not always provided for, as may be seen in the Canada-U.S. treaty where, pursuant to the Fifth Protocol, this article has been deleted.

Pensions and Annuities (Article XVIII)

The pensions and annuities article sets out the rules which limit the ability of a Contracting State in which a pension or annuity arises to tax those amounts which are beneficially owned by a resident of the other Contracting State. This article also typically governs the taxation of spousal and child support payments and, in the case of the Canada-U.S. treaty, extends to benefits under social security legislation. As a result of the December 16, 1997 amendment to this article, social security benefits no longer attract withholding tax but are taxed solely in the recipient's country of residence.

Substantial amendments to this article in the Canada-U.S. treaty have been made pursuant to the Fifth Protocol to facilitate the movement of employees between the two countries. These amendments address the treatment of contributions to and benefits from qualifying retirement plans where the plan is in one country and the employee in the other.

Government Services (Article XIX)

Except in the case of pensions and income earned in connection with a trade or business arising in the other Contracting State, the government services article generally preserves to each sovereign Contracting State the sole right to tax the remuneration paid to its own government employees.

Students (Article XX)

The students article generally prevents a Contracting State from taxing maintenance, education and training payments made to students that are attending school in that State provided they were resident in the other Contracting State immediately before they took up full time education or training. The Fifth Protocol to the Canada-U.S. treaty now limits the relief afforded to apprentices and business trainees to one year.

Exempt Organizations (Article XXI)

The exempt organizations article provides a series of rules which limit the ability of one Contracting State to tax organizations that are exempt from tax under the domestic taxation laws of the other Contracting State.

Pursuant to the Fifth Protocol to the Canada-U.S. treaty, the exemption from tax on interest and dividends has been broadened for funds that earn income exclusively for the benefit of delineated tax exempt entities.

Other Income (Article XXII)

The other income article generally provides that items of income not mentioned in the treaty and derived by a resident of one Contracting State either cannot be taxed by the other Contracting State (see Article 20A of the Canada-UK treaty) or cannot be taxed by the other Contracting State unless that income arises in the other Contracting State (see Article XXII of the Canada-U.S. treaty). Canada taxes its residents on their worldwide income. This article limits the other Contracting State's ability to impose tax on a Canadian resident to income properly sourced in the other State.

The Fifth Protocol to the Canada-U.S. treaty adds a provision to the other income article to provide that cross-border guarantee fees may only be taxed in the Contracting State in which the recipient is resident unless attributable to a permanent establishment in the other Contracting State.

Capital (Article XXIII)

The capital article specifies the circumstances under which the capital of a resident of one Contracting State may be taxed by the other Contracting State.

Elimination of Double Taxation (Article XXIV)

The elimination of double taxation article provides the general rules which require one Contracting State to provide its own residents with tax relief to recognize the impact of tax imposed by the other Contracting State.

As a general matter, the elimination of double taxation article is a tax sharing provision under which the Contracting States divide up tax revenues to avoid double taxation of their resident taxpayers.

In the case of tax treaties with developing countries, this is typically the article where the "tax sparing" provisions are found.

Non-discrimination (Article XXV)

The non-discrimination article is intended to level the playing field between the residents of each Contracting State when subject to the domestic tax laws of the other Contracting State. Its provisions generally prohibit a Contracting State from discriminating in its taxation laws against nationals of the other Contracting State. The non-discrimination article can be quite elaborate, as is the case in the Canada-U.S. treaty where certain items have been carved out of the general non-discrimination rules. As a consequence of the Third Protocol to the Canada-U.S. treaty, this article was made applicable to all taxes imposed by Canada and the U.S.

Mutual Agreement Procedure (Article XXVI)

A tax treaty does not deal in specific terms with all the circumstances in which a resident of one Contracting State may be subject to double taxation due to the application of tax by both Contracting States. Therefore, the mutual agreement procedure article provides a mechanism to permit a resident of a Contracting State to request the Competent Authorities of both States to endeavour to resolve by negotiation and mutual agreement double taxation problems not otherwise specifically addressed in the treaty. This is the article which authorizes transfer pricing disputes to be brought to the Competent Authorities for resolution.

On December 8, 2005, Canada and the U.S. entered into a Memorandum of Understanding regarding Factual Disagreements under the Mutual Agreement Procedure. The MOU provides for an independent review process for resolving those disagreements. It does not extend to disagreements regarding interpretation of treaty provisions or situations where the taxpayer is not cooperating in providing information or data requested by either Competent Authority.

Pursuant to the Fifth Protocol to the Canada-U.S. treaty, if the Competent Authorities are unable to come to a complete agreement, then mandatory arbitration will be required in the circumstances set out in paragraph 6 of the mutual agreement procedure article. The Diplomatic Notes in Annex A to the Convention set out the rules and procedures for such arbitrations.

Assistance in Collection (Article XXVI A)

As discussed above, the assistance in collection article in the Canada-U.S. treaty was the first of its kind in the Canadian tax treaty network. Subject to certain limitations, it allows each of the Contracting States to access the domestic collection system of the other, including its courts. This article extends to provincial income taxes, CPP contributions, EI premiums, GST and HST collected by the CRA.

Exchange of Information (Article XXVII)

As previously discussed, the exchange of information article provides the Competent Authorities of the Contracting States with a mechanism to share information both spontaneously and on request. The Contracting State receiving the exchanged information is generally required to keep it subject to the same secrecy as its own domestic tax information.

Under the Fifth Protocol to the Canada-U.S. treaty, the exchange of information powers have been enhanced to permit officials of the one State to enter the other to interview or review books and records (with the consent of the examinee). It also provides that a state may not withhold information on the basis that it is held by a financial institution, nominee, agent or fiduciary or relates to ownership interests in a person.

Diplomatic Agents and Consular Officers (Article XXVIII)

The diplomatic article generally preserves the protection of international law and diplomatic immunity for sovereign state representatives.

Miscellaneous Rules (Article XXIX)

The miscellaneous rules article may contain some very important provisions and it is a good practice to check this article whenever reference is made to a particular treaty for the first time. For example, the miscellaneous rules article in the Canada-U.S. treaty contains the provisions that permit the U.S. to continue to tax its citizens, former citizens or former long-term residents even though they have become resident in Canada. It also contains provisions which may be accessed in certain circumstances to alleviate the mismatch in the taxation treatment of Canadian resident shareholders of U.S. S corporations.

An S corporation is a look-through entity for U.S. income tax purposes so that the shareholders are liable for tax on profits earned by the S corporation. For Canadian income tax purposes, the shareholders would not be taxed until they receive actual distributions from the S corporation. Paragraph 5 of the miscellaneous rules article in the U.S. treaty allows the Canadian shareholder to access tax treatment in Canada that effectively mirrors the U.S. tax treatment.

Limitations on Benefits (Article XXIX A)

Canada has in the past not relied on a limitations on benefits article to deny treaty benefits to persons who were not intended to benefit – often referred to as "treaty shopping". Rather, Canada relied on its ability to use the general anti-avoidance rule in the *Income Tax Act* to prevent abuses. Consequently, before the Fifth Protocol to the Canada-U.S. treaty, the limitation on benefits article did not govern Canada.

The Federal Court of Appeal in The Queen v. MIL (Investments) S.A., 2007 DTC 5437 declined to apply the general anti-avoidance rule in what the CRA argued was a treaty shopping situation. This may have been the inspiration for the change to the limitations on benefits article in the Fifth Protocol to the Canada-U.S. treaty. The Fifth Protocol extends the limitation on benefits article to provide a comprehensive set of rules that will now apply to both Canada and the U.S. It is now necessary to examine this article to determine the circumstances under which Canada will extend or deny treaty benefits contemplated by the Canada-U.S. treaty. The MIL Investments decision has now been effectively reversed by an amendment to the ITCIA which extends the GAAR to tax treaties. The limitations on benefits provisions in the Canada-U.S. treaty have proven problematic and generated a multitude of interpretation requests. Hopefully, the ITCIA amendment will discourage Canada from adopting more limitations on benefits articles as it negotiates future changes to, or new, treaties.

MAM/mm

APPENDIX A

LIST OF SELECTED CASES DEALING WITH INCOME TAX TREATIES

TD Securities (USA) LLC v. The Queen, 2010 TCC 186
(LLC entitled to treaty benefits, US treaty prior to the Fifth Protocol)

RCI Trust (Trustee of) v. MNR, 2009 CarswellNat 4386, 2010 DTC 6575 (FCA, leave to appeal to SCC filed)
(interaction of s. 116 and Barbados treaty)

Garron Family Trust v. The Queen , 2009 CarswellNat 2600, 2009 TCC 450, 2009 DTC 1568 (TCC under appeal)
(interaction of domestic law on residence of trust and Barbados treaty)

Lingle v. The Queen, 2009 CarswellNat 4382, 2009 TCC 435, 2009 DTC 1705
(interpretation of "habitual abode", US treaty)

The Queen v. Prévost Car Inc., A-252-08, 2009 FCA 57
(determination of "beneficial owner" of dividends, Netherlands treaty)

American Income Life Insurance Co. v. The Queen , 2008 DTC 3631
(presence of agents in Canada not permanent establishment of US insurance company, U.S. treaty)

Blauer v. The Queen, 2008 DTC 2409
(taxation of wage loss replacement benefits and disability pension, Israel treaty)

CanWest Mediaworks Inc. v. The Queen, 2008 DTC 6070
(limitation period in tax treaty did not override FAPI reassessment, Barbados treaty)

The Queen v MIL (Investments) S.A., 2007 DTC 5037
(application of GAAR to tax treaties-not applicable where no Canadian tax avoided, Luxembourg treaty)

Allchin v The Queen, 2005 DTC 603
(analysis of tie-breaker rules for individual residence in U.S. treaty)

Beame v. The Queen, 2004 DTC 6102
(calculation of capital gains, principles of treaty interpretation, Vienna Convention, U.K. treaty)

European Marine Contractors Ltd. v. Canada *(Customs and Revenue Agency)*, 2004 DTC 6070
(requirement to provide foreign based information, impact of U.K. treaty)

Pacific Network Services Ltd. v. M.N.R., 2002 DTC 7585
(scope of exchange of information provisions under the French treaty and OECD Model Convention)

Wolf L. v. The Queen, 2002 DTC 6853
(whether an individual was an employee or independent contractor for purposes of the U.S. treaty)

Wang v. The Queen, 2001 DTC 433 (informal procedure)
(application for Canadian citizenship did not preclude individual from being resident of China under the China treaty)

Haas Estate v. The Queen, 2001 DTC 6701, 1999 DTC 1294
(meaning of "gain" for purposes of U.S. treaty and consideration of the Technical Explanation to the U.S. treaty)

Neil Barry McFayden v. The Queen, 2000 DTC 2473
(extensive discussion of domestic and treaty residency rules)

Khabibulin v. The Queen, 2000 DTC 1426
(application of USSR treaty to signing bonus paid to USSR resident by Canadian resident)

Gordon M. Sumner and Roxanne Music Inc. v. The Queen, 2000 DTC 1667
(Sting and treatment of foreign entertainers under U.S. tax treaty)

Specialty Manufacturing Ltd. v. The Queen, 1999 DTC 5222
(application of tax treaty to non-arm's length transactions)

William A. Dudney v. The Queen, 99 DTC 147 upheld FCA 2000 DTC 6169 leave to appeal to SCC dismissed(meaning of "fixed base" under U.S. treaty, Note – Fifth protocol overrides this case)

CUDD Pressure Control Inc. v. The Queen, 1999 Carswell National 1933 (affirming 95 DTC 559) (non-deductibility of notional expenses of permanent establishment)

KLM Royal Dutch Airlines v. British Columbia, 1998 Carswell BC 205, [1998] 8 W.W.R. 153
(Canadian federal treaties do not bind provinces)

Hausmann Estate v. The Queen, 1998 Carswell National 904
(taxation of pension income received by Canadian resident, Belgium treaty)

Charles E. Shultz v. The Queen, [1996] E.T.C. 631
(taxation of cross-border employment income, U.S. treaty)

Bedard et al. v. The Queen, [1996] E.T.C. 572
(U.S. private pensions not treaty exempt)

Helmut Swantje v. The Queen, 96 DTC 6310
(treaty exempt pension income still relevant for old age claw-back)

The Queen v. Crown Forest Industries Limited, 95 DTC 5389
(interpretation of treaties, meaning of "resident" eligible for treaty benefits)

Thomas G. Andison v. Minister of National Revenue, 95 DTC 5058
(Competent Authority exchange of information procedures)

Hans Hilscher v. The Queen, 95 DTC 6
(use of exchange of information provisions in Germany treaty)

Ramada Ontario Limited, (Formerly Ramada Inns (Ontario) Ltd.) v. The Queen, 94 DTC 1071
(US treaty does not prevent application of thin capitalization rules)

Qing Gang K. Li v. The Queen, 94 DTC 6059
(effect on treaty benefits of non-resident requesting landed immigrant status)

Estate of the Late Isaac Kaplan v. Her Majesty the Queen, 94 DTC 1816
(taxation of gains under Article XIII(9) of U.S. treaty)

Utah Mines Limited v. The Queen, 91 DTC 5245
(interaction of domestic tax legislation amendments and U.S. treaty)

The Estate of Donald A. Scott v. The Queen, 88 DTC 6012
(taxation of U.S.-Canada cross-border commuted annuity)

Frank L. Burnet, Executor of the Estate of Jeannette Bell Kelley, Deceased v. M.N.R., 87 DTC 160 (U.S. treaty inapplicable to protect indirect economic gains of beneficiaries of estate)

Murray Fiebert v. M.N.R., 86 DTC 1017
(meaning of permanent establishment)

Canada-Israel Development Ltd. v. The Minister of National Revenue, 85 DTC 718
(interaction of foreign affiliate rules and Israel treaty)

The Estate of the late John N. Gladden v. Her Majesty the Queen, 85 DTC 5188
(principles of treaty interpretation)

Dorothy E. Croft v. M.N.R., 85 DTC 95
(foreign tax credit of U.S. citizen resident in Canada-U.S. treaty does not assist)

William C. Krafve v. M.N.R., 84 DTC 1002
(gain on gift not protected under U.S treaty)

The Queen v. Melford Developments Inc., 82 DTC 6281
(circumstances under which domestic law can override treaty – note - Income Tax Conventions Interpretations Act an example)