Key takeaways from Supreme Court's termination of Cameco transfer pricing saga

February 26, 2021

On February 18, 2021, the Supreme Court of Canada (SCC) declined to hear the appeal of the Canada Revenue Agency (CRA) from its loss before the Federal Court of Appeal (FCA) in *Canada v. Cameco Corporation* (2020 FCA 112) (*Cameco*).[1] This exhausts the CRA's options for pursuing the re-assessment of the 2003, 2005 and 2006 taxation years of Cameco Corporation, a publicly-traded Canadian uranium miner. Logically, the same result should apply to Cameco's 2007-2014 taxation years, which were also re-assessed by the CRA on the same issue but have not yet been litigated.

Cameco was the first Canadian court case to consider the "transfer pricing recharacterizaton rule" (TPRR) in s. 247 of the *Income Tax Act* (Canada) (ITA). Cameco had created a European sales subsidiary (Salesco) which entered into certain commercial opportunities to acquire uranium from arm's length third parties. Cameco also entered into long-term contracts to sell uranium it produced to Salesco, following which the price of uranium rose significantly. As a result, profits from uranium sales by Salesco indirectly to buyers outside of Canada were realized largely in Switzerland by Salesco rather than in Canada by Cameco.

The CRA re-assessed Cameco, attributing to it all of the profits earned by Salesco. The bases for this re-assessment were that:

- Salesco was a sham that should simply be ignored; and
- Canada's transfer pricing rules in s. 247 ITA allowed the CRA to ignore the legal transactions actually entered into and instead determine the Canadian tax results based on what arm's length parties would have agreed to.

The Tax Court of Canada decisively rejected both of these arguments, finding that the taxpayer's legal transactions were exactly as they were presented as being (defeating the "sham" argument), and that Canada's transfer pricing rules in s. 247 (which are based on meeting the arm's-length standard) had been complied with in full.[2] The CRA appealed to the FCA, dropping the "sham" assertion but pursuing the transfer pricing argument. In particular, the CRA sought to apply the TPRR in s. 247(2)(b) ITA, applicable when a Canadian taxpayer (Cameco) and a non-arm's length non-resident (Salesco) participate in a transaction or a series of transactions that:

- Would not have been entered into between persons dealing at arm's length; and
- Can reasonably be considered not to have been entered into primarily for *bona fide* purposes other than to obtain a tax benefit.

The CRA asserted that the TPRR applies if Cameco (*i.e.*, the actual taxpayer in question) would not have entered into with an arm's-length party the same transaction that it entered into with its subsidiary Salesco, thereby effectively requiring each member of a multinational enterprise (MNE) to operate as if it were a completely independent entity. Cameco's interpretation of this rule was different – that the TPRR applies only where no arm's-length persons would have entered into the same transactions that occurred between Cameco and Salesco. Under Cameco's interpretation, the TPRR accepts that there are some transactions occurring within MNEs that do not occur between arm's-length parties simply because of how MNEs operate commercially (these are acceptable if priced in accordance with what arm's-length parties would pay), but allows the CRA to redetermine the tax consequences only of transactions that are "commercially irrational" (*i.e.*, arm's-length persons would never agree to them) based on the tax consequences that would occur from alternative transactions that arm's length parties would have agreed to.

The FCA categorically rejected the CRA's interpretation, on the basis that it simply was not supported by the text of the TPRR, and the results it produced did not make sense:

> *[45] If Parliament had intended that subparagraph 247(2)(b)(i) of the Act would apply if the particular taxpayer would not have entered into the particular transaction with any arm's length person, this subparagraph could have provided:*
>
> > *(b) the transaction or series*
> >
> > > *(i) would not have been entered between the participants if they had been dealing at arm's length*
>
> *[46] If the Crown's interpretation is correct, then whenever a corporation in Canada wants to carry on business in a foreign country through a foreign subsidiary, the condition in subparagraph 247(2)(b)(i) of the Act would be satisfied. Because the company wants to carry on business in that foreign country either on its own or through its own subsidiary, it would not sell its rights to carry on such business to an arm's length party.*

Fundamentally, the CRA's interpretation failed because it started from a flawed understanding of what s. 247 is trying to accomplish. Canada's transfer pricing rules were never intended to force MNEs to conduct themselves as a series of standalone entities with no common strategy or synergies. To the contrary, the ITA accepts that parent companies provide strategic direction to subsidiaries in other countries and often use foreign subsidiaries to carry on business outside of Canada rather than doing so directly. This is evidenced by provisions in Canada's controlled foreign corporation (CFC) rules that:

- Explicitly facilitate using foreign sales subsidiaries to sell to non-Canadians goods or services that would otherwise be sold by the Canadian parent itself; and
- Reduce or eliminate Canadian taxes on foreign-source business income earned by foreign subsidiaries relative to the Canadian tax that would apply to the same

income if earned directly by the Canadian parent carrying on business itself in the same foreign countries.

The CRA was never able to explain to the courts why it is that the TPRR should be interpreted in a way entirely contrary to those elements of Canada's CFC rules, and as a result it is not surprising that the taxpayer prevailed.

The key takeaways from the *Cameco* saga are as follows:

- The TPRR applies only in the very limited circumstances of "commercial irrationality," where no arm's-length parties would have agreed to the transactions actually entered into between the Canadian taxpayer and its non-arm's-length non-resident counterparty;
- S. 247 does not (and is not intended to) prevent MNEs from organizing their activities in a way different from what would be found in entirely arm's-length circumstances (*e.g.*, centralizing services into a group service provider, allocating business opportunities to specific MNE group members where logical to do so, etc.), so long as these situations are priced in accordance with the arm's-length standard. Put another way, the objective of s. 247 is limited to ensuring that Canadian MNE group members do not pay too much for goods and services they obtain from, or receive too little for, goods and services they sell to, non-arm's length non-residents;
- Canadian tax law as currently enacted simply does not support the CRA's continuing application of the TPRR in non-exceptional cases.[3] In the past few years the CRA has been very aggressive in seeking to apply the TPRR, including as a counter to hybrid financing arrangements it finds objectionable;[4]
- In particular, the CRA's cancellation[5] of its primary statement of administrative guidance on Canada's transfer pricing rules (Information Circular IC 87-2R), ostensibly on the basis that its description of when the TPRR may be applied is too limited, would seem misplaced;
- Canada's courts will continue to apply the ITA based on the actual legal rights and obligations taxpayers create through their documentation and actions,[6] other than in certain exceptional situations prescribed in the ITA (such as the general-anti-avoidance rule (GAAR) in s. 245 ITA) or established in the jurisprudence (*e.g.*, "sham"); and
- As a result, the gulf will continue to grow between Canadian tax law and economics-over-legal substance doctrines (*e.g.*, "accurate delineation") found in OECD initiatives such as the 2017 OECD Transfer Pricing Guidelines, the latter having the status of a mere interpretative aid that cannot prevail over legislative enactments such as the ITA.

For further information, please contact our Tax Disputes & Litigation team.

[1] There is no automatic right of appeal to the SCC in tax cases: the SCC chooses whether or not to hear appeals.

[2] For a detailed discussion of this decision, see Suarez, "The Cameco Transfer Pricing Decision: A Victory for the Rule of Law and the Canadian Taxpayer," *Tax Notes International*, November 26, 2018, p. 877, available on Business Tax Canada website.

[3] See statements made by the CRA on February 3, 2021 at a Canadian Tax Foundation transfer pricing conference.

[4] See Suarez, "Transfer Pricing in Canada," *Tax Notes International*, December 2, 2019, p. 781 at p. 789, available at Business Tax Canada.

[5] See CRA Notice to Tax Professionals dated February 26, 2020.

[6] This was described by the SCC in *Jean Coutu Group Inc. v. Canada,* 2016 DTC 5134, para. 41, as "one of the fundamental principles of [the Canadian] tax system: that tax consequences flow from the legal relationships or transactions established by taxpayers."

By

Steve Suarez

Expertise

Tax Disputes & Litigation, Tax

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal
1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written

permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.