treaty relief may be available if part XIII tax was paid to an LLC before February 1, 2009 and a refund application was made before the expiration of the limitation period in subsection 227(6).

In 2013, CGI engaged the mutual agreement procedure (MAP) between the competent authorities (essentially, this meant the CRA and the IRS: the MAP process does not include the taxpayer). During the process, the CRA advised the IRS of its position, including its concern that the CGI corporate reorganization involved a tax-avoidance scheme. The IRS confirmed that the dividend was not "fully and comprehensively" taxed in the United States (a distinguishing fact from *TD Securities*), and the interposition of the Nova Scotia ULC between CGI and a related company in Mexico could not be explained. In 2015, CGI was advised that the competent authorities could not reach an agreement.

Several issues were before the FC. In brief, the court concluded that (1) it had jurisdiction to hear the matter; (2) the minister had made a reviewable decision; (3) the standard of review was reasonableness, and the minister's decision was reasonable; (4) CGI was not denied procedural fairness; and (5) the remedy of mandamus was inappropriate. The court's reasoning is set out below.

On the jurisdictional question, the minister argued that the FC lacked jurisdiction because the MAP process involved negotiation with another government, which was solely within the Crown's prerogative over foreign affairs. However, the FC said that it had previously considered treaty issues and that FCA jurisprudence supports the conclusion that administrative actions, including MAP processes, are subject to review. However, on such a review, the court must be sufficiently deferential to the Crown and its prerogative powers over foreign affairs.

CGI argued that the CRA's decision was reviewable to the extent that the CRA decided not to issue a refund because *TD Securities* was distinguishable. The FC concluded that there was a "decision" by the CRA and that that decision properly supported the basis for the judicial review: although CGI did not receive a letter from the CRA denying the refund, CRA correspondence with CGI confirmed that the CRA made a decision that brought the MAP process to an end without any resulting tax relief for CGI.

The FC reviewed the decision on a deferential reasonableness standard, because the decision was fact-based and discretionary, and the minister is entitled to deference in the MAP context. Thus, the FC said that it would intervene only if the CRA decision fell outside the range of possible and acceptable outcomes that were defensible on the facts and law. The FC said that the CRA determined that the facts and circumstances for CGI were different from the facts in *TD Securities* and that tax avoidance may have been a factor; moreover, the CRA was not satisfied that the dividend was fully and comprehensively taxed in the United States. As a consequence, the factors considered in *TD Securities* were not met by CGI. The CRA reached its decision on the basis of information provided by CGI and of consultations with the IRS; the result was a set of conclusions that were within a range of possible outcomes under the MAP process. Thus, the CRA acted reasonably and did not commit a reviewable error.

On the procedural fairness argument, the FC noted that procedural fairness had not been pleaded. However, information to support that argument was not previously available because the MAP process is not open to taxpayers. Thus, that argument was considered even though it was not pleaded. According to the FC, one determines procedural fairness by taking into account all of the facts and circumstances. In the circumstances, the CRA was obliged to deal fairly with CGI, and it did so: the refund application was based on *TD Securities*; the issues of full and comprehensive taxation and tax avoidance were set out in that judgment; the CRA notified CGI that *TD Securities* was distinguishable; CGI was given opportunity to provide further submissions to the CRA; and the CRA specifically addressed all of the taxation and avoidance issues.

The FC also considered CGI's request for a granting of mandamus (a remedy that compels a public body to do or not do something as required by law) to compel the CRA to assess so as to initiate the assessment litigation process that leads to a TCC appeal. However, a granting of mandamus would override Parliament's statutory two-year limitation period for refund applications. In addition, although subsection 227(10.1) allows the minister discretion to assess in CGI's circumstances, CGI could not demonstrate that the minister refused to assess: CGI filed an application for judicial review mere days after it requested an assessment.

In my view, *CGI* further illustrates the significant difficulties that taxpayers face when challenging ministerial decisions, and it shows that those difficulties are greater where MAP processes are concerned. It is helpful that the FC concluded that it had jurisdiction and that the minister's decision was reviewable; however, the deference shown to the CRA in this context calls into question whether future applications of this kind will be worthwhile. However, perhaps the final chapter has not yet been written. At the time this article was written, the appeal period had not elapsed.

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Ontario (not Alberta) Resident Trust

On October 14, 2016, the Ontario Superior Court of Justice concluded that the two trusts in *The Herman Grad 2000 Family Trust* (2016 ONSC 2402) and *The Marya Grad Spousal Trust* (2016 ONSC 2407)—which filed for income tax purposes as Alberta-resident trusts—were in fact resident in Ontario and not Alberta for their 2006 to 2009 taxation years. The Ontario minister said that the trusts were residents of Ontario and thus subject to Ontario provincial income tax. Alberta's income tax rate at the time in issue was lower than Ontario's, and the family trust was liable to pay $4.7 million more in income tax as an Ontario resident than it would have paid as an Alberta resident. The spousal trust was liable to pay $2.8 million more in income tax as an Ontario resident.

Herman Grad is a resident of Ontario and was an Ontario resident when the trusts were settled in 2000, in Ontario, by a silver coin from the family accountant. The initial trustees were all individuals resident in Ontario. In January 2006, the family trust deed was amended to give the trustees the power to "delegate management and authority to discretionary managers of investment funds as the Trustees determine appropriate," and it specified that "such delegation does not require the Trustees to implement a written plan or strategy as contemplated by the Trustee Act." In September 2016, the deed was further amended to give Grad the power to remove and replace the trustees of the family trust at any time, for any reason he deemed sufficient.

On September 15, 2006, the initial trustees resigned; on the same day, Sian Matthews and John C. Armstrong, lawyers with Bennett Jones LLP in Calgary, were appointed by Grad as the new trustees of the family trust. At all relevant times, Matthews and Armstrong were residents of Alberta.

Grad settled the spousal trust in 2006, and he was the protector of the trust, too. The deed to the spousal trust provided that the protector was entitled at any time to remove any trustee, upon giving the trustee notice in writing, for any reason he deemed sufficient. Matthews and Armstrong were the trustees not only of the family trust but of the spousal trust.

The court relied on the SCC decision in *Fundy Settlement* (2012 SCC 14), which affirmed the FCA decision in *St. Michael Trust Corp*. (2010 FCA 309) that courts should "undertake a fact driven analysis with a view to determining the place where the central management and control of the trust is actually exercised." The ONSC said in *Herman Grad*:

> This analysis requires the Court to examine who, in reality, exercised the powers and discretions vested in the trustee by the trust deed and where that person resides. The relevant powers and discretions are those regarding the management and control of the trust property, as opposed to more incidental, administrative decisions. If it is established that management and control over the trust property is, in fact, exercised by someone other than the trustee, the trust will be resident where the actual decision-maker resides.

Tax practitioners are familiar with these principles. However, these decisions demonstrate how difficult it can be to ensure that decision-making powers stay out of the hands of a wealth creator who is reluctant to give up control. On the facts, the trust planners carefully selected two lawyers to act as trustees. And yet the plan fell apart, because the complicated and somewhat tortuous facts—the decision is 46 pages long, most of it devoted to a dissection of the facts—show that Grad continued to exercise control of the trust. For example, when one of his daughters sought more information about the family trust, the trustees were immediately cautioned by the Grad group's chief financial officer (CFO) not to divulge that information to any of Grad's children. The trustees said that they called Grad to inform him that they could not comply with the request. However, one trustee said that she "had to walk a fine line between discharging her responsibilities as a trustee and wanting to satisfy Grad": she authorized the CFO to release information on the trust and its assets to the daughter.

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Revenu Québec Certification and Tax Evasion

For several years, in order to offset significant tax revenue losses, Quebec has asked Revenu Québec to fight the underground economy and tax evasion. Revenu Québec has developed tools to achieve this objective, such as sales-recording modules in the restaurant and bar industry, and a certificate of compliance for public contracts. Following the success of that compliance certificate, Quebec has expanded it to apply to the personnel placement or temporary help contract and to the private construction contract.

From March 1, 2016, a personnel placement agency and its client are subject to the new certification rules if each has a PE in Quebec and they enter into a personnel placement or temporary help contract for workers (such as seasonal staff) to fill temporary workforce needs. The new rules apply regardless of where the services are delivered. Similar requirements apply to a subcontractor and a contractor that hold an RBQ licence (a licence to perform construction work in Quebec under the Building Act) if each has a PE in Quebec and they enter into a construction contract to be carried out in Quebec for which the person carrying on the construction work needs to hold an RBQ licence. A compliance certificate from Revenu Québec is required when the total value of all contracts concluded after February 29, 2016 between two affected parties is at least $25,000 before taxes. When this threshold is reached—and it is a lifetime threshold—a certificate must be obtained for each subsequent contract between the parties, regardless of the contract's value.

A person can be (1) both a contractor and a subcontractor at the same time or (2) both a personnel placement agency and a client of a personnel placement agency at the same time. For example, a contractor may subcontract a service to a subcontractor for a given project, who may in turn subcontract the service to a second subcontractor. The person who performs