Greetings from the Executive and Board of the IATJ.

The IATJ is continuing its organizing efforts towards another successful annual Assembly, this being the 7th Assembly to be held in Madrid, Spain on September 30 and October 1, 2016. Registration particulars can be found on our website, as well as information on suggested accommodations. I am sure you will find the program of interest and I solicit your early registration so that the organizers can plan accordingly.

The interest in the IATJ continues to expand. We have new members from Indonesia, Ireland, the European Union and Turkey and we welcome them in joining the Association and look forward to their active participation in its activities and most certainly their attendance at the 7th Assembly.

I attach for your information an interesting article by Ahmed Elsaghir, a Law Clerk of the Tax Court of Canada on "Transfer Pricing in Canada".

Thank you for your active and continued support for the IATJ and its efforts.

E.P. Rossiter
President

Transfer Pricing in Canada and Recent Trends

Ahmed Elsaghir

1. INTRODUCTION

[1] Transfer pricing is the setting of a price for goods or services when a resident taxpayer and a non-arm's length non-resident person enter into a transaction. Canada's transfer pricing regime is prescribed in section 247 of the *Income Tax Act* (the "ITA")[1] and related case law. As one of the worldwide leaders in transfer pricing, Canada has adopted methods that have resulted in an effective system that respects legitimate business relationships. This paper will explore transfer pricing in Canada and discuss certain trends in this area of the law over the past decade.

2. LEGISLATION

[2] The transfer pricing provisions of the ITA are found in section 247. The arm's length principle is outlined in subsection (2). This subsection states:

> **Transfer pricing adjustment**
> **247** (2) Where a taxpayer or a partnership and a non-resident person with whom the taxpayer or the partnership, or a member of the partnership, does not deal at arm's length (or a partnership of which the non-resident person is a member) are participants in a transaction or a series of transactions and
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> > (a) the terms or conditions made or imposed, in respect of the transaction or series, between any of the participants in the transaction or series differ from those that would have been made between persons dealing at arm's length, or
> >
> > (b) the transaction or series
> >
> > > (i) would not have been entered into between persons dealing at arm's length, and
> > >
> > > (ii) can reasonably be considered not to have been entered into primarily for bona fide purposes other than to obtain a tax benefit,

[1] *Income Tax Act*, RSC 1985, c 1 (5th Supp) ("ITA").

> any amounts that, but for this section and section 245, would be determined for the purposes of this Act in respect of the taxpayer or the partnership for a taxation year or fiscal period shall be adjusted (in this section referred to as an "adjustment") to the quantum or nature of the amounts that would have been determined if,
>
> > (c) where only paragraph 247(2)(a) applies, the terms and conditions made or imposed, in respect of the transaction or series, between the participants in the transaction or series had been those that would have been made between persons dealing at arm's length, or
> >
> > (d) where paragraph 247(2)(b) applies, the transaction or series entered into between the participants had been the transaction or series that would have been entered into between persons dealing at arm's length, under terms and conditions that would have been made between persons dealing at arm's length.[2]

[3] An expansive definition of 'arm's length' is found in section 251 of the ITA. Summarily, this provision states:

> **Arm's length**
> **251** (1) For the purposes of this Act,
> > (a) related persons shall be deemed not to deal with each other at arm's length;
> > […]
> > (c) in any other case, it is a question of fact whether persons not related to each other are, at a particular time, dealing with each other at arm's length.[3]

[4] An interpretation of the transfer pricing provisions has been provided by Canadian courts, particularly the Tax Court of Canada ("TCC", or the "Court"), on numerous occasions over the past decade.

3. THE MODERN ERA: CASES DECIDED ON THE MERITS

[5] Five transfer pricing cases have been decided on the merits in Canada over the past 10 years. An overview and briefing of each of these cases is outlined

[2] ITA, *ibid*, s 247(2).
[3] ITA, *ibid*, s 251.

below and consists of a summary of the facts, an explanation of the transfer price transaction, and the chosen methodologies.

4. GlaxoSmithKline Inc

[6] In *Canada v GlaxoSmithKline Inc* ("GSK"),[4] Glaxo Canada entered into a License Agreement with its parent company Glaxo USA giving Glaxo Canada the right to sell and market an anti-ulcer drug under the brand name Zantac. Glaxo Canada also entered into a Supply Agreement to purchase ranitidine, an active pharmaceutical ingredient found in Zantac, from a related supplier, Adechsa SA for a price between $1,512 and $1,651 per kilogram. At the same time, two generic pharmaceutical companies were purchasing the generic ranitidine ingredient for a price between $194 and $304 per kilogram.

[7] Glaxo Canada was assessed by the Canada Revenue Agency (the "CRA"), Canada's taxing authority, on behalf of the Minister of National Revenue (the "Minister") under the former subsection 69(2) of the ITA (now subsection 247(2)) on the basis that Glaxo Canada overpaid for the ranitidine to an extent that was beyond what would have been reasonable in the circumstances had the parties been dealing at arm's length.

[8] Associate Chief Justice Rip (as he then was) presided over the trial and upheld the Minister's assessment except to add $25 per kilogram to the transfer price paid by the generic companies as the product provided to Glaxo Canada was granulated. In doing so, he found that he could only assess the transaction by looking at the Supply Agreement and could not factor the benefits conferred to Glaxo Canada under the License Agreement into the price. He came to this conclusion based on the Supreme Court of Canada's ("SCC") holding in *Singleton v Canada*, 2001 SCC 61, which he believed stood for the proposition that a transaction-by-transaction approach must be

[4] *Canada v GlaxoSmithKline Inc*, 2012 SCC 52, [2012] 3 SCR 3, aff'g 2010 FCA 201, rev'g 2008 TCC 324 ("GSK").

followed, and, for that reason, the two agreements must be considered independently.

[9] Under the Supply Agreement, the transfer prices for the ranitidine that Adechsa SA would charge Glaxo Canada were set using the resale-price method. The Minister and ACJ Rip employed the comparable uncontrolled price ("CUP") and cost-plus method.[5]

[10] A three judge unanimous Federal Court of Appeal ("FCA") panel overturned ACJ Rip and held that the "reasonable business person" test should be utilized and requires an "inquiry into the circumstances that an arm's length purchaser would consider relevant when deciding what price to pay."[6] For this reason, the License Agreement had to be considered.

[11] The Supreme Court of Canada affirmed the decision of the FCA and stated that if transactions other than the purchasing transaction are relevant in determining the proper transfer price, they must not be ignored. The generic comparators that were used by the Minister and ACJ Rip did not reflect the economic and business reality of Glaxo Canada as the License Agreement conferred rights and benefits on Glaxo Canada that were not available to a generic comparable.[7]

[12] Justice Rothstein, writing for a unanimous SCC, stated that a determination of what is reasonable in the circumstances had the parties been dealing at arm's length "necessarily involves consideration of all the circumstances of the

[5] This paper does not provide an explanation of the different methods of determining a transfer price. However, given that the CUP method is referred to on more than one occasion, the definition as provided by the SCC in para 22 is provided: "The CUP method compares the prices in comparable transactions between parties dealing at arm's length with the transfer prices paid by the taxpayer being reassessed. The [1995] Guidelines say this is the most direct way of determining the arm's length price."
[6] *Ibid* at paras 9, 12, 14 [citing SCR].
[7] *Ibid* at para 53.

Canadian taxpayer relevant to the price paid to the non-resident supplier."[8] As did Justice Nadon of the FCA, Justice Rothstein remitted the matter back to the TCC having regards to the impact the License Agreement had on the transfer prices paid by Glaxo Canada. The dispute was subsequently settled before it could go back in front of ACJ Rip.

5. General Electric Capital Canada Inc

[13] In *Canada v General Electric Capital Canada Inc* ("GE"),[9] GE USA provided GE Canada with an 'explicit guarantee' for its debt issuances. Between 1988 and 1995, the guarantee was provided at no cost. From the 1996 taxation year onwards, a fee of 1% of the face amount of the debt was charged. Fees totalling $135 million were paid and deducted by GE Canada. The Minister reassessed under subsection 69(2) (now paragraphs 247(2)(a) and (c)), and, in so doing, disallowed the deductions on the grounds that, in the event of a default by GE Canada, GE USA would have supported GE Canada whether a guarantee was in place or not. The Crown referred to this as 'implicit support'.

[14] The Minister assessed GE Canada on the basis that if the transaction was conducted at arm's length, GE Canada would not have paid for the guarantee as no benefit stemmed from it. Justice Robert Hogan of the TCC found that GE USA's implicit support was a relevant factor in determining the transfer price and, when doing so, the rate paid by GE Canada was appropriate.

[15] In assessing which methodology to use, both parties and the TCC judge agreed that none of the conventional methods were appropriate. Justice Hogan also rejected an insurance-based model and a credit swap model.[10] A yield approach was ultimately selected that "measured the value of the benefit provided by the explicit guarantee."[11] Using the rating system of Standard & Poor's ("S&P") and the expert evidence of a former S&P employee, Justice

[8] *Ibid* at para 44.
[9] *Canada v General Electric Capital Canada Inc*, 2010 FCA 344, aff'g 2009 TCC 563 ("GE").
[10] *Ibid* at paras 23-24 [citing FCA].
[11] *Ibid* at para 25.

Hogan found that GE Canada's credit rating without the explicit guarantee would have been in the range of BB+ to BBB-, as opposed to the AAA rating it had with the explicit guarantee.[12] For this reason the explicit guarantee provided a benefit that arm's length parties would have paid for.

[16] At the FCA, the pertinent issue before the court was whether the implicit support was a factor to be considered when applying the transfer pricing provisions of the ITA, "given that it arises [only] by reason of the non-arm's length relationship."[13] In dismissing the appeal, Justice Noël (presently Chief Justice of the FCA) stated that the "task in any given case is to ascertain the price that would have been paid in the same circumstances if the parties had been dealing at arm's length," and that "this involves taking into account all the circumstances which bear on the price whether they arise from the relationship or otherwise."[14] Since, in the context of the yield approach, arm's length parties would find the implicit support relevant in pricing the guarantee, the TCC was correct to consider it.

6. Alberta Printed Circuits Ltd

[17] In *Alberta Printed Circuits Ltd v The Queen* ("APC"),[15] APC manufactured computer circuit boards using the expertise of its three shareholders and directors, Mr. and Mrs. Bamber and Mr. McMuldroch. Mr. McMuldroch left APC in 1996 and incorporated a related non-resident company in Barbados named APCI that performed set-up services and software website development and maintenance for APC. The price paid by APC to APCI for the set-up services was dependent on the type and size of the circuit board but no markup was charged by APC to its customers. Furthermore, the profits of APCI went to the Bambers and Mr. McMuldroch. The Minister assessed APC under the transfer pricing provisions claiming that APC overpaid APCI for the set-up services.

[12] *Ibid* at para 29.
[13] *Ibid* at para 52.
[14] *Ibid* at para 54.
[15] *Alberta Printed Circuits Ltd v The Queen*, 2011 TCC 232 ("APC").

[18] Justice Frank Pizzitelli of the TCC went into an in-depth analysis of the CUP method using both internal and external comparators. With respect to the internal CUP, he found that using the price paid by APC's customers to APC for its services was appropriate for numerous reasons. First, APC was in effect providing set-up services to its arm's length customers notwithstanding it may have outsourced the services to APCI. Second, because APCI was providing the same services to the same arm's length customers at the same price as APC, the two entities were operating in the same economic market. Thirdly, the services provided by each entity were consistent with the expertise of the Bambers and Mr. McMuldroch. This allowed them each to focus on their core businesses. APC's profits rose significantly because of this arrangement. Fourthly, unbundling the set-up services from other services provided by APCI for the purpose of attaching a transfer price is consistent with both the OECD Guidelines and the CRA's position on the matter. In fact, it appeared to Justice Pizzitelli to be the preferred method of assessing the price. Lastly, the Crown made no attempt to use CUP and preferred the transitional net margin method ("TNMM") which was suggested to be used as a last resort. The use of an internal CUP was appropriate in the circumstances.[16]

[19] Justice Pizzitelli then used the external CUP method to test the internal CUP. Using a company named Star Electronics Corp ("Star"), he found that while the Appellant was charging $46 as the base set-up fee, Star was charging between $100 to $125. Furthermore, expert evidence showed that the fees charged by two other corporations to arm's length parties ranged from $50 to $75. In all cases, APC's price was lower and it was clear that there was no overpayment.[17]

[16] *Ibid* at paras 185-192.
[17] *Ibid* at paras 201-209.

[20] Lastly, Justice Pizzitelli stated that when looking at comparability factors, "all circumstances means "all" the circumstances an appellant finds himself in before a reasonable businessman steps into his shoes."[18]

7. McKesson Canada Corporation

[21] In *McKesson Canada Corporation v The Queen* ("McKesson"),[19] McKesson Canada entered into two agreements, a Receivables Sales Agreement ("RSA") and Servicing Agreement ("SA") with its parent, MIH. In the RSA, "MIH agreed to purchase all of McKesson Canada's eligible receivables as at that date (about $460,000,000) and committed to purchase all eligible receivables daily as they arose for the next five years."[20] It was noted that, in reality, this arrangement was a revolving credit facility. The discount rate used in the RSA was 2.206%. At the time of contracting, McKesson Canada's receivables had a default rate of 0.043% and an average payment period of 30 days. Furthermore, MIH had the right to put a defaulted receivable back to McKesson Canada for 75% of its face value or the actual amount collected on it. Lastly, MIH did not assume any of the financial risk under this group of arrangements as an indemnity agreement was subsequently entered into between MIH and MIH's parent company, MIH2.

[22] Under the SA, McKesson Canada remained responsible for servicing and collecting the receivables in accordance with the McKesson brand policies. McKesson Canada collected a fee for this service. MIH was contractually permitted to terminate its obligations under both the RSA and the SA upon the occurrence of certain events.

[23] Justice Patrick Boyle of the TCC found that the "predominant purpose and intention of McKesson Canada participating in the RSA and related transactions with the other McKesson Group members was not to access

[18] *Ibid* at para 163. Emphasis in original.
[19] *McKesson Canada Corporation v The Queen*, 2013 TCC 404 ("McKesson"). An appeal was filed on this matter; however, it was later discontinued.
[20] *Ibid* at para 21.

capital or to lay off credit risk."[21] Rather, the purpose was to reduce McKesson Canada's tax liability.

[24] Justice Boyle did not select any of the traditional pricing methodologies. Instead, he used an 'other method', namely, the discount rate formula as calculated by Toronto Dominion Securities Inc in the RSA but made amendments to certain terms and conditions where necessary to have it conform to the arm's length standard.[22] He found that he was able to do this as "it is clear from the provisions of section 247 that under subparagraphs [*sic*] (*a*) and (*c*) the Court is not limited to making adjustments with respect to the quantum of an amount in a term or condition that incorporates an amount."[23] After completing this exercise, the appropriate discount rate range was found to be between 0.959% and 1.17%. McKesson Canada's discount rate fell outside of this range.[24]

[25] McKesson Canada appealed Justice Boyle's decision. This appeal was subsequently discontinued.

8. Marzen Artistic Aluminum Ltd

[26] In *Marzen Artistic Aluminum Ltd v Canada* ("Marzen"),[25] Marzen was a Canadian company that manufactured and sold window products in Canada. Marzen had historically attempted to sell its window products in the USA through a related company named Starline Windows Inc ("SWI") but was unable to penetrate the market. In response to this, a wholly-owned Barbados based subsidiary named Starline International Inc ("SII") was incorporated. Marzen and SII entered into a Marketing and Sales Service Agreement ("MSSA") wherein Marzen paid SII for services in the nature of sales, marketing, and support in the USA. The managing director of SII was Mr.

[21] *Ibid* at para 274.
[22] *Ibid* at paras 145, 270.
[23] *Ibid* at para 126.
[24] *Ibid* at para 352.
[25] *Marzen Artistic Aluminum Ltd v Canada*, 2016 FCA 34, aff'g 2014 TCC 194 ("Marzen").

Csumrik, a Barbados resident in the business of establishing international corporations in Barbados and providing them with management services.

[27] After receiving the funds from Marzen, SII in turn paid a significantly lower amount to SWI in exchange for SWI seconding its employees to SII. The difference retained by SII from the two amounts was used to pay tax-free dividends out of its exempt surplus to Marzen. Furthermore, Marzen deducted the fees it paid to SII. The Minister assessed Marzen under the transfer pricing provisions and also imposed a penalty under subsection 247(3) on the basis that SII did not provide any service of value besides reselling SWI's services.[26]

[28] Justice Georgette Sheridan of the TCC rejected Marzen's chosen methodology (TNMM) as it was premised on treating SII and SWI as one amalgamated entity providing services to Marzen.[27] She also found that SII was "essentially an empty shell with no personnel, no assets and no risk."[28] Furthermore, she rejected Marzen's assertion that Mr. Csumrik made significant contributions in developing, marketing, or managing SWI's operations.[29] In utilizing the CUP method, Justice Sheridan accepted the Minister's assumption of fact that the fee paid by SII to SWI was an arm's length amount. For this reason, the fee paid to Mr. Csumrik by SII was an appropriate CUP with the small exception that US$32,500 was to be added for two of the taxation years.[30]

[29] Justice Scott of the FCA dismissed Marzen's appeal and found that it was open to the TCC to "identify the transaction under review as the MSSA between SII and the appellant."[31] Marzen argued that Justice Sheridan failed

[26] The penalty analysis is discussed later in this paper.
[27] Marzen, *supra* note 26 at paras 26-27 [citing FCA].
[28] *Ibid* at para 23.
[29] *Ibid* at para 24.
[30] *Ibid* at para 29.
[31] *Ibid* at para 52.

to consider the value with respect to services provided through the seconded employees; however, the FCA stated that Marzen had failed to challenge the Minister's assumption at trial.[32]

9. DISCUSSION

[30] Canada's transfer pricing regime has evolved significantly from the TCC decision in GSK. At that time, the issue of transfer pricing had rarely been decided by the courts on the merits. Fast forward to 2016, and the Court regularly considers transfer pricing trials and motions.

[31] The last decade has seen numerous trends arise. These trends have been influenced by both domestic and international factors such as case law and the Organization for Economic Co-operation and Development ("OECD"). This paper identifies three trends: increasing amounts of litigation (with three sub-trends), low success on appeal, and increasing success by the Crown.

[32] While it can be difficult to pinpoint developments using exacting science and point to a body of evidence in support of any given proposition, trends can still be identified and a reasonable explanation provided as to its occurrence. After all, as endorsed by Justice Marshall Rothstein in GSK, "transfer pricing is not an exact science."[33]

10. Trend One: Increased Litigation Post-GSK

[33] Fourteen transfer pricing disputes were filed with the TCC and the Federal Court Trial Division ("FCTD") prior to the TCC's decision in GSK.[34] Of these fourteen, twelve were settled;[35] one led to the FCA's decision in *Indalex v*

[32] *Ibid* at para 53.
[33] GSK, *supra* note 5 at para 61.
[34] Of these disputes, two occurred in the late 1980s, two in the 1990s, and the remainder in the 2000s.
[35] François Vincent, *Transfer Pricing in Canada* (Toronto: Carswell, 2015) at 136.

Canada (“Indalex”);[36] and one led to the TCC decision of Justice Donald Bowman (later Chief Justice) in *Safety Boss v The Queen*.[37]

[34] Post-GSK, nineteen disputes have been settled or withdrawn (twenty-one including GSK itself and possibly McKesson)[38] and four have been decided on the merits. These disputes predominantly involve corporations in the natural resources and financial services industries.

[35] However, cases decided on the merits are only one side of the transfer pricing coin. On the other is the barrage of motions brought in the discovery stage asking the Court to strike pleadings, compel answers on examination, and compel production of documents. In fact, the TCC procedure landscape is quietly being developed with the findings made in these cases.

[36] This raises the question of what, at least in part, has turned the tide in favour of proceeding to litigation.

[37] The following provides possible explanations as to what may be responsible for this shift: developments at the OECD and its influence on the taxpayer and CRA; imposition of the transfer pricing penalty; and pleadings in the alternative.

1. The OECD

[38] In 2010, the OECD published transfer pricing guidelines (the “Guidelines” or “2010 Guidelines”) and in 2015, published its Base Erosion & Profit Shifting (“BEPS”) Final Reports.

[36] *Indalex Ltd v Canada*, [1988] 1 CTC 60, 88 DTC 6053 (FCA) (“Indalex”). The FCTD undertook a comparable analysis to determine a reasonable price in the circumstances consistent with the wording of former subsection 69(2). This decision, with a few modifications, was upheld by the FCA.

[37] *Safety Boss v The Queen*, [2000] 3 CTC 2497, 2000 DTC 1767 (TCC).

[38] Cases that have been settled or withdrawn can be found in *Transfer Pricing in Canada*, *supra* note 36; Cases also include Terasen International Inc; National Bank of Canada; Clearwater Sea Foods.

[39] The comments made by the OECD have likely led to both the taxpayer and the CRA being more confident in their approach.

[40] For example, chapter II of the 2010 Guidelines states that the pricing methodology should be the "most appropriate to the circumstances of the case."[39] Inherently, this statement may give parties more confidence when choosing a pricing method as it may be easier to justify their position. Contrast this to the 1995 guidelines which gave preference to the CUP method. ACJ Rip in GSK and Justice Pizzitelli in APC endorsed this approach. Under the old guidelines, a party who did not conform to CUP may feel less confident taking their dispute to court.

[41] The CRA has taken a more proactive approach to transfer pricing as a result of the Guidelines. This is illustrated with the role of the Transfer Pricing Review Committee ("TPRC") and the publishing of Transfer Pricing Memoranda ("TPM").[40]

[42] The CRA currently has fourteen published TPMs, six of which have been published since 2012. Current TPM topics include the role of multiple year data, requests for contemporaneous documentation, and referrals to the TPRC. With respect to the TPRC, penalty cases and re-characterisation cases under paragraph 247(2)(b) are currently referred to the committee. Documentation and re-characterisation was discussed in the 2010 Guidelines and the BEPS 2015 Final Reports.

[43] The CRA's more proactive approach is also leading to more audits and reassessments. As stated by the authors in *Transfer Pricing & Tax*

[39] Organization for Economic Co-operation and Development, *2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, Chapter II "Transfer Pricing Methods" at 59.
[40] For example, see Canada Revenue Agency, Transfer Pricing Memorandum, TPM-14, "2010 Update of the OECD Transfer Pricing Guidelines" (31 October 2012).

Avoidance,[41] "the CRA has placed an increased emphasis on transfer pricing examinations" and has been increasing the amount of audits.[42] Furthermore, as speculated in response to the BEPS 2015 Final Reports, "tax practitioners have said they anticipate more aggressive audits around the world as countries implement the OECD's recommendations—and a huge increase in double tax disputes as a result."[43]

2. Transfer Pricing Penalty

[44] The increasing use of the transfer pricing penalty may also be responsible for a growing amount of litigation.

[45] One method in which penalties are imposed in transfer pricing disputes is under subsection 247(3).[44] Summarily, a 10% penalty is imposed if the transfer pricing adjustment exceeds the lesser of 10% of gross revenue and $5 million. It is "intended to be a compliance penalty, focusing on the efforts made by the taxpayer to determine and use arm's length prices."[45]

[46] An exception exists where the taxpayer "made reasonable efforts to determine arm's length transfer prices."[46] A taxpayer is deemed to not have made reasonable efforts where contemporaneous documentation under subsection 247(4) is not kept and provided to the Minister on request.

[41] David W Chodikoff, *Transfer Pricing & Tax Avoidance*, 1st ed (London: European Lawyer Reference, 2014).
[42] *Transfer Pricing & Tax Avoidance*, *ibid* at 94.
[43] Kevin Bell, Rick Mitchell & Alex Parker, Bloomberg BNA Highlights, "Final BEPS Reports Herald Broad Changes to Global Tax System" (5 October 2015).
[44] ITA, *supra* note 2, s 247(3). Penalties in transfer pricing disputes are not exclusively imposed under this provision of the ITA.
[45] Alfred Zorzi & Al Rizzuto, "The Rise and Dominance of Transfer Pricing in Canada" (2013) 61: Special Supplement, Canadian Tax Journal, 415.
[46] ITA, *supra* note 2, s 247(3)(a)(ii)(B)-(iii)(B).

[47] The CRA has been placing an emphasis on documentation requirements and "increased auditing/penalization for transfer pricing."[47]

[48] While it is difficult to gauge the impact the penalty is having on the resolution of cases, it is possible that it could be acting as a roadblock. Currently, before a transfer pricing penalty is imposed, it is referred to the Transfer Pricing Review Committee.

[49] In Marzen,[48] subsections 247(3) and (4) were analyzed by the courts for the first time. Justice Sheridan found that the taxpayer had failed to provide the Minister with the proper documentation to fulfil the statutory requirements of subsection 247(4). Consequently, Marzen was deemed to have not made reasonable efforts to determine an arm's length price and was liable to penalties under subsection 247(3).[49]

3. Pleadings and Pleading in the Alternative

[50] In *AgraCity Ltd v Canada*,[50] the issue before the FCA was whether the Crown can have inconsistent pleadings with respect to related appeals before the TCC. The FCA held that the Crown could plead facts in the AgraCity appeal that were inconsistent with facts pled in the related appeal of SaskCo.[51]

[51] Furthermore, the court was asked whether the Crown could plead both paragraphs 247(2)(a), (c) and, in the alternative, also plead paragraphs 247(2)(b), (d), the re-characterisation provisions. While the TCC judge initially struck out the pleadings relating to paragraphs 247(2)(a), (c), the FCA reversed this decision.[52]

[47] *Transfer Pricing & Tax Avoidance*, *supra* note 43 at 94.
[48] Marzen, *supra* note 26.
[49] *Ibid* at para 231 [citing TCC].
[50] *AgraCity Ltd v Canada*, 2015 FCA 288.
[51] *Ibid* at paras 19-20.
[52] *Ibid* at paras 34-35.

[52] Perhaps influenced by this decision, the Crown plead both 247(b) and (d) and (a) and (c) in the alternative in its reply to the notice of appeal of Silver Wheaton Corp. With respect to other matters currently before the Court, the Crown is pleading in the alternative in the appeals of Burlington Resources Finance Company, Conoco Funding Company, and Cameco Corporation.

[53] Lastly, flexibility is found in the courts general unwillingness to strike pleadings, particularly without giving the party the opportunity to file amended documents.[53]

[54] It is clear that transfer pricing disputes are increasingly before the courts. It is no secret that considerable court and government resources are being allocated to properly deal with these transfer pricing disputes. The 2016 Government of Canada Federal Budget released on March 22, 2016 proposes to invest $444 million over five years in the CRA to combat tax avoidance. This will be done by "hiring additional auditors and specialists; developing robust business intelligence infrastructure; increasing verification activities; and improving the quality of investigative work that targets criminal tax evaders."[54]

11. Trend Two: Failure at the Appeal Stage

[55] Post-GSK, little to no success has been had on appeal from a transfer pricing decision of the TCC. In GE, Justice Noël of the FCA dismissed the appeal of the Crown in its entirety. In Marzen, Justice Scott of the FCA dismissed the appeal of Marzen in its entirety.

[56] The trend with respect to reported motions does not vary greatly over the past few years. In AgraCity, AgraCity's appeal was dismissed in full and the

[53] See *AgraCity Ltd*, *ibid*; *Burlington Resources Finance Company v The Queen*, 2013 TCC 231; *Cameco Corporation v Canada*, 2015 FCA 143.
[54] Government of Canada, *Federal Budget 2016*, 22 March 2016 at 216.

Crown's cross-appeal was permitted in part without costs. In *Cameco Corporation v Canada*,[55] Cameco's appeal from a decision dismissing their motion to strike certain portions of the Crown's pleadings and compel the Crown's nominee to answer questions on discovery was allowed in part. Due to the mixed success by both parties, no award of costs was granted. In *Canadian Imperial Bank of Commerce v Canada*,[56] the FCA heard three appeals from an interlocutory order of ACJ Rossiter (now Chief Justice). Justice Sharlow allowed the taxpayer's appeal but dismissed the Crown's two appeals. In McKesson,[57] the FCA permitted the appellant to amend its pleadings in light of Justice Boyle's decision to recuse himself from further proceedings.

[57] A possible explanation for the lack of success on the merits is grounded in the standard of review. Questions of fact and mixed fact and law are assessed on a standard of palpable and overriding error while questions of law are assessed on a standard of correctness. By their very nature, transfer pricing disputes are heavily fact driven. As stated by Justice Scott, "as any transfer pricing analysis is fact driven, the appellant needed to point to an error the Judge made in the assessment of the facts leading to that determination."[58] Perhaps now that the law surrounding transfer pricing has been moulded, it leaves little hope to litigants who are not successful at the first instance.

12. Trend Three: Recent Crown Success

[58] While the Crown boasted early success in Indalex and at the trial level in GSK, it proceeded to experience what could constitute a 'loss' at the FCA and SCC in GSK; the TCC and FCA in GE; and the TCC in APC. These 'losses' came at a time when former subsection 69(2) was being phased out and subsection 247(2) was being interpreted by the courts for the first time.

[55] *Cameco Corporation v Canada*, 2015 FCA 143.
[56] *Canadian Imperial Bank of Commerce v Canada*, 2013 FCA 122.
[57] *McKesson Canada Corporation v Canada*, 2014 FCA 290.
[58] Marzen, *supra* note 26, para 52.

[59] However, the taxpayer would soon learn that its days of success were perhaps numbered. McKesson saw the taxpayer's appeal dismissed in full while in Marzen, despite the appeal being allowed in part, the taxpayer obtained a fraction of what they had asked the court and even had costs awarded against them. This was upheld on appeal.

[60] This is to be considered alongside what may be viewed as the Crown's recent success on reported motions. For example, in AgraCity the taxpayer's motion to strike parts of the Crowns pleadings was dismissed by the FCA. In *Canadian Imperial Bank of Commerce v The Queen*,[59] Chief Justice Eugene Rossiter largely accepted the Crown's motion to compel answers on examination and opined that the motion seemed "to be the result of obstruction by CIBC when it comes to the discovery process."

[61] In fact, looking at motions in transfer pricing disputes decided from 2013 onwards, four could be viewed as successes for the Crown,[60] while only two as a success for the taxpayer.[61] One other could be fairly viewed as a split result.[62]

13. CONCLUSION

[62] Canada has established an effective and fair transfer pricing system. It ensures that tax avoidance is being prevented while also respecting legitimate business transactions between non-arm's length parties.

[63] Recently, certain trends have arisen. These include an increased amount of litigation as a result of the OECD's influence on the CRA, the transfer pricing

[59] *Canadian Imperial Bank of Commerce v The Queen*, 2015 TCC 280 at para 362 ("CIBC").
[60] *Burlington Resources Finance Company v The Queen*, 2013 TCC 231; *Cameco Corporation v The Queen*, 2014 TCC 45; *Canadian Imperial Bank of Commerce v The Queen*, 2015 TCC 280; *AgraCity Ltd v Canada*, 2015 FCA 288.
[61] *Burlington Resources Finance Company v The Queen*, 2015 TCC 71; *Canadian Imperial Bank of Commerce v Canada*, 2013 FCA 122.
[62] *Cameco Corporation v Canada*, 2015 FCA 143, rev'g (in part) 2014 TCC 367.

penalty, and increased pleading in the alternative. Further trends are a decreased amount of success on appeal from the TCC due to the law in Canada becoming more thorough and refined, and a general increase in success for the Crown.

14. BIBLIOGRAPHY

Legislation

15. *Income Tax Act*, RSC 1985, c 1 (5th Supp).

Case Law

1. *AgraCity Ltd v Canada*, 2015 FCA 288.
2. *Alberta Printed Circuits Ltd v The Queen*, 2011 TCC 232.
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4. *Burlington Resources Finance Company v The Queen*, 2015 TCC 71.
5. *Cameco Corporation v The Queen*, 2014 TCC 45.
6. *Cameco Corporation v Canada*, 2015 FCA 143, rev'g (in part) 2014 TCC 367.
7. *Canada v General Electric Capital Canada Inc*, 2010 FCA 344, aff'g 2009 TCC 563.
8. *Canada v GlaxoSmithKline Inc*, 2012 SCC 52, [2012] 3 SCR 3, aff'g 2010 FCA 201, rev'g 2008 TCC 324.
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11. *Indalex Ltd v Canada*, [1988] 1 CTC 60, 88 DTC 6053 (FCA).
12. *Marzen Artistic Aluminum Ltd v Canada*, 2016 FCA 34, aff'g 2014 TCC 194.
13. *McKesson Canada Corporation v The Queen*, 2013 TCC 404.
14. *McKesson Canada Corporation v Canada*, 2014 FCA 290.
15. *Safety Boss v The Queen*, [2000] 3 CTC 2497, 2000 DTC 1767 (TCC).

Textbooks, Journal Articles, and Other Documents

1. Alfred Zorzi & Al Rizzuto, "The Rise and Dominance of Transfer Pricing in Canada" (2013) 61: Special Supplement, *Canadian Tax Journal*, 415.
2. Canada Revenue Agency, Transfer Pricing Memorandum, TPM-14, "2010 Update of the OECD Transfer Pricing Guidelines" (31 October 2012).
3. David W Chodikoff, *Transfer Pricing & Tax Avoidance*, 1st ed (London: European Lawyer Reference, 2014).
4. François Vincent, *Transfer Pricing in Canada* (Toronto: Carswell, 2015).
5. Government of Canada, *Federal Budget 2016*, 22 March 2016.
6. Kevin Bell, Rick Mitchell & Alex Parker, Bloomberg BNA Highlights, "Final BEPS Reports Herald Broad Changes to Global Tax System" (5 October 2015).
7. Organization for Economic Co-operation and Development, *2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, Chapter II Transfer Pricing Methods.

1 April 2016

IATJ 7th Assembly
30 September/1 October, 2016

Madrid, Spain

AGENDA

Thursday, 29 September 2016

18:00 p.m. to 20:00 p.m.	Meeting of the Executive and Board Directors *Tribunal Supremo* *(Plaza de la Villa de París, s/n.28071 Madrid)*

Friday, 30 September 2016

Tribunal Supremo
(Plaza de la Villa de París, s/n.28071 Madrid)

8:00 a.m. to 9:00 a.m.	**Registration**
9:00 a.m. to 9:05 a.m.	**Welcome by Eugene Rossiter** President IATJ
9:05 a.m. to 9:10 a.m.	**Welcome by Luis María Diez Picazo Giménez** President Administrative Division Spanish Supreme Court
9:10 a.m. to 9:15 a.m.	**Presentation Agenda by Wim Wijnen** Chairman PPC
9:15 a.m. to 10:30 a.m.	**Substantive Session on OECD and BEPS (General)** **Chair:** Philippe Martin (France) **Guest speakers:** Jacques Sasseville (OECD) and Andrew Dawson (OECD) **Panel:** Tony Pagone (Australia) John Owen (Canada)
10:30 a.m. to 10:45 a.m.	Health Break
10:45 a.m. to 12:00 a.m.	**Substantive Session on OECD and BEPS** Continued

12:00 p.m. to 13:30 p.m.	Lunch
13:30 p.m. to 15:00 p.m. **in**	**Substantive Session on Case Load Control Tax Matters** **Chair:** Peter Wattel (Netherlands) **Panel:** Vineet Kothari (India) Anette Kugelmueller-Pugh (Germany) Eugene Rossiter (Canada) Salome Zimmerman (Switzerland)
15:00 p.m. to 15:15 p.m.	Health Break– coffee/tea
15:15 p.m. to 17:00 p.m.	**Substantive Session on Tax Procedures in Spain** **Chair:** Manuel Garzon (Spain) **Panel:** Raúl C. Cancio Fernández (Spain) María Luisa López-Yuste Padial (Spain)
	Reception

Saturday, 1 October 2016

Tribunal Supremo
(Plaza de la Villa de París, s/n.28071 Madrid)

09:00 a.m. to 10:30 a.m.	**Substantive Session on Recent Case Law (General)** **Chair:** Randall Bocock (Canada) **Panel:** [4 cases to be selected]
10:30 a.m. to 10:45 a.m.	Health Break– coffee/tea
10:45 a.m. to 11:30 a.m.	**Substantive Session on Recent Case Law (VAT)** **Chair:** Lars Dobratz (German) **Panel:** [2 cases to be selected] Csilla Andrea Heinemann (Hungary) Mikko Pikkujämsä (Finland)

11:30 p.m. to 12:30 p.m.	**Substantive Session on Human Rights and Taxation** **Chair:** Juliane Kokott (Germany) **Panel:** Michael Beusch (Switzerland) Emmanuelle Cortot-Boucher (France) Jennifer Davies (Australia) Clement Endresen (Norway) Manuel Hallivis Pelayo (Mexico) Wouter van Nispen (Netherlands) Peter Panuthos (United States) Bernard Peeters (Belgium)
12:30 p.m. to 14:00 p.m.	Lunch
14:00 p.m. to 15:30 p.m.	**Substantive Session on Human Rights and Taxation** Continued
15:30 p.m. to 15:45 p.m.	Health Break– coffee/tea
15:45 p.m. to 16:00 p.m.	**Exotic topic** Raúl C. Cancio Fernández (Spain)
16:00 p.m. to 16:30 p.m.	IATJ Business Meeting
	Closing Dinner

Sunday, 2 September 2016

Business :

09:00-11:00:	Meeting of the Executive and Board Directors

Permanent Program Committee
Randall Bocock (CAN)
Manuel Garzon (SPA)
Friederike Grube (GER)
Manuel Hallivis Pelayo (MEX)
Philippe Martin (FRA)
Wim Wijnen (NL)