TAXES & WEALTH MANAGEMENT

PRESERVING WEALTH FOR PEOPLE AND PRIVATE COMPANIES

SEASON'S GREETINGS

It has been another year of the COVID-19 Pandemic. And with it, we have all faced numerous challenges. But, unlike so many, we are "above ground" (as the saying goes). We have so much to be thankful for.

As the year closes, we want to express our gratitude to the many that make this publication possible. First and foremost, we are so grateful to you — our readers — for making Taxes & Wealth Management part of your regular reading routine. Thank you!

To our many contributors, we are truly grateful for your willingness to unselfishly share your time and expertise. We thank you!

We are thankful for our behind the scenes team at Thomson Reuters. Up front, we acknowledge the roles of our co-editor at Thomson Reuters, Helen Kerr and Manager of all things related to Thomson Reuters production, Alicia Bertrand.

I would be remiss if I did not give a personal shout out to my assistant, Jenifer Graham, master of organization. Thank you Jenifer!

Finally, on behalf of the entire editorial team — Dr. David Kerzner, Kay Leung, Rahul Sharma, Lucinda Main and Helen Kerr — we wish you a happy holiday season and a joyous health-filled New Year!

David

Editor-In-Chief

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IN THIS ISSUE

TAXATION OF CRYPTOCURRENCIES: COMPENSATION IN CRYPTO

By Anish Kamboj, Associate, Miller Thomson LLP, and
Justin Ng, Articling Student, Miller Thomson LLP

2021 has shown great success for cryptocurrencies. With Bitcoin and Ethereum reaching new all-time highs of $85,656.04[1] and $6,073.13 CAD respectively[2] on November 10, 2021, the currencies have exhibited a 185% and 605% growth over the last year, respectively. This continued growth indicates that awareness and adoption of digital currencies is on the rise.

Accordingly, individuals are not only purchasing cryptocurrency on their own, but they are also asking employers to compensate them in cryptocurrency. For instance, Odell Beckham Jr. recently announced that he will be receiving 100% of his recent NFL contract with the Los Angeles Rams, worth up to $4.25 million USD, in Bitcoin.[3] Other football players, such as Aaron Rodgers, have also announced that they will take a portion of their salary in Bitcoin.[4]

Certain employers have responded to the changing landscape of compensation by proactively offering to compensate their employees in cryptocurrency. In 2021 alone, Twitter, the City of Miami, the Sacramento Kings,[5] and the Canadian Elite Basketball League,[6] amongst other employers, have all started offering their employees the option to be compensated in Bitcoin.

Although mainstream adoption of cryptocurrency compensation may seem like a distant reality, prudent employers would be well-advised to develop the capacity to respond to demands for such schemes of compensation. It is essential to understand the methods through which cryptocurrency compensation can be offered, the income and payroll tax consequences, and the associated benefits to both employees and employers. This article will discuss these topics in depth.

Methods to Offer Digital Currency Compensation

Currently, there are two common ways to compensate employees and independent contractors in cryptocurrency.

One option is for employers to directly pay their employees or independent contractors in cryptocurrency. Either the full amount or a portion of their salary, wages, or other remuneration can be paid in digital assets directly to the recipients' digital wallets. In this approach, employers would purchase cryptocurrency through a cryptocurrency exchange with a corporate account. Numerous exchanges are available to Canadian businesses, including Newton, Bitbuy, Shakepay, and Coinbase. Upon purchasing cryptocurrencies from an exchange, the employer can directly transfer the amounts owing to the digital wallet addresses of their employees or independent contractors from either the exchange or their own digital wallet.

The second option available is for the employer to retain the services of a third party. This third party will receive the compensation in fiat from the employer and will convert it to the designated cryptocurrency based on the employee or independent contractor's chosen allocation. The amounts will then be transferred to their specific digital wallet addresses. Currently, companies such as BitPay, BitWage, and Bitbuy all provide these services. Although the authors of this article do not endorse any particular service in Canada, these services generally operate in the following manner to enable employers to pay their employees in cryptocurrency: the employer and its employees will create an account with the service; the employer will create a payroll account and fund the account with fiat currency or cryptocurrency; and the employee will select their desired method and allocation of payment.[7] The service will calculate the appropriate withholding and deposit the appropriate amount of cryptocurrency as wages to the employee less applicable deductions.

Although both options are frequently utilized, if a business is considering purchasing cryptocurrency for more than just its payroll needs, creating a corporate account on an exchange provides the

1 CoinGecko, "BitCoin" (November 10, 2021), online: https://www.coingecko.com/en/coins/bitcoin [*CoinGecko*].

2 *CoinGecko*, "Ethereum (ETH) Price Chart" (November 10, 2021), online: https://www.coingecko.com/en/coins/ethereum.

3 Skylar Woodhouse and Crystal Kim, "NFL's Odell Beckham Jr to Take 'New Salary' in Bitcoin" (November 22, 2021) online: *Bloomberg* https://www.bloomberg.com/news/articles/2021-11-22/football-star-odell-beckham-jr-to-take-new-salary-in-bitcoin.

4 Ryan Young, "Packers QB Aaron Rodgers will take part of his 2021 salary in Bitcoin" (November 1, 2021) online: *Yahoo! Sports* https://sports.yahoo.com/green-bay-packers-aaron-rodgers-will-take-part-of-his-2021-salary-in-bitcoin-cryptocurrency-003113595.html.

5 Hassan Aburish, Nicholas Hulse and Erica Wilson, "Cryptocurrency Clamor: Paying Employees in Bitcoin Has Reached the Mainstream" (May 3, 2021) online: *JDSupra* https://www.jdsupra.com/legalnews/cryptocurrency-clamor-paying-employees-1276795/ [*Crypto Clamor*].

6 Namcios, "Canadian Basketball League to Pay Players in Bitcoin" (June 21, 2021) online: *Nasdaq* https://www.nasdaq.com/articles/canadian-basketball-league-to-pay-players-in-bitcoin-2021-06-21.

7 Bitwage, "Bitwage for Companies" online: *Bitwage* https://www.bitwage.com/for-companies/.

flexibility to hold, trade, and make other business transfers seamlessly. Exchanges also provide supporting documentation of a user's transaction history, which can be given to accountants for tax filing purposes or uploaded to websites such as CoinTracker or Koinly. These websites allow users to calculate their tax liability arising from cryptocurrency transactions by combining transaction records from multiple trading platforms. They both generate tax reports and Schedule 3 Tax Forms to report capital gains (or losses).[8]

However, if a business is only considering purchasing cryptocurrency for its payroll needs, the use of a third party may be the preferred option. These services are dedicated to processing payroll in digital currencies and will reduce administrative hurdles.

TAX CONSEQUENCES OF CRYPTOCURRENCY AS REMUNERATION

Income Tax Considerations

(i) Employees and Independent Contractors

In Canada, many of the same rules which apply to paying wages to employees are applicable to paying remuneration to employees in cryptocurrency. From the employee's perspective, subsection 5(1) of the *Income Tax Act*[9] (the "Act") provides that a taxpayer's employment income includes "salary, wages and other remuneration, including gratuities"[10] received by the taxpayer within the relevant taxation year. This provision has been interpreted broadly so as to capture most payments made to employees by virtue of their employment status. Further, any employment income earned by the taxpayer is recognized in the year that it was received. As a result, if an employer elects to pay remuneration to an employee in cryptocurrency, the fair market value of that cryptocurrency *at the time it was received* must be included in the taxpayer's income for the relevant tax year. Accordingly, the Canada Revenue Agency (the "CRA") has taken the position that "[w]here an employee receives digital currency as payment for salary or wages, the amount (computed in Canadian dollars) will be included in the employee's income pursuant to subsection 5(1) of the Act".[11]

Independent contractors may also choose to receive compensation for services rendered in the form of cryptocurrency. Unlike employees, the characterization of income earned by independent contractors is characterized as being from a business or property under the Act.[12] Very generally, characterization as business income is preferable for independent contractors, as this provides a more favourable tax treatment for the deduction of expenses. More precisely, independent contractors can make certain deductions to their taxable income for business expenses incurred in the process of carrying on business that are not available to employees. A discussion of whether an individual worker is an employee or an independent contractor is beyond the scope of this article, but like any employee, independent contractors must include remuneration earned in the form of cryptocurrency into their income.

In addition, paragraph 6(1)(a) of the Act provides that "the value of board, lodging and other benefits of any kind whatever received or enjoyed by the taxpayer, or by a person who does not deal at arm's length with the taxpayer . . . *by virtue of* the taxpayer's office or employment"[13] (emphasis added) is generally included in the taxpayer's income for the year that the benefit was received. Thus, if an employer decides to confer any non-cash benefits upon an employee by virtue of the recipient's employment status (including cryptocurrency), the fair market value of the benefit must be included in the taxpayer's income and is subject to taxation. Moreover, an employer may not make "voluntary payments" to an employee to circumvent this provision of the Act. As articulated by the CRA in Income Tax Folio S3-F9-C1:

> . . . sometimes individuals receive a voluntary payment or other valuable transfer or benefit by virtue of an office or employment from an employer, or from some other person. In such cases, the amount of the payment or the value of the transfer or benefit is generally included in employment income pursuant to subsection 5(1) or paragraph 6(1)(a).[14]

When an employee eventually disposes of the cryptocurrency paid by an employer for services rendered, the income that the taxpayer receives will be characterized as either business income or a capital gain.[15] For the employee, this characterization is important because only *one-half* of a capital gain must be included in a taxpayer's income, whereas *all* business income must be included into the taxpayer's income and is subject to tax at the applicable marginal rate. The CRA has opined that the following are relevant factors to consider when determining whether a taxpayer who deals with cryptocurrency is engaged in a business:

1. The taxpayer carries on activity for commercial reasons and in a commercially viable way;
2. The taxpayer undertakes activities in a businesslike manner, which might include preparing a business plan and acquiring capital assets or inventory;
3. The taxpayer promotes a product or service;
4. The taxpayer shows that he/she/they intended to make a profit, even if he/she/they is unlikely to do so in the short term;
5. The date on which the taxpayer's alleged business activities began; and
6. The taxpayer is engaged in an adventure of concern in the nature of trade.[16]

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8 Koinly, "Bitcoin Tax Calculator for Canada" online: *Koinly* https://koinly.io/canada/; Sam Stone, "Cryptocurrency Taxes in Canada" (April 23, 2019) online: *CoinTracker* https://www.cointracker.io/blog/cryptocurrency-taxes-in-canada.

9 R.S.C. 1985, c 1 (5th Supp) ["*ITA*"].

10 *Ibid.*, at s. 5(1).

11 Canada Revenue Agency, "What You Should Know About Digital Currency" (March 17, 2015) online: *Government of Canada* https://www.canada.ca/en/revenue-agency/news/newsroom/fact-sheets/fact-sheets-2013/what-you-should-know-about-digital-currency.html.

12 *ITA*, *supra* note 9 at s. 9(1).

13 *Ibid.*, at s. 6(1)(a).

14 Canada Revenue Agency, "Income Tax Folio S3-F9-C1, Lottery Winnings, Miscellaneous Receipts, and Income (and Losses) from Crime" (July 3, 2020), online: *Government of Canada* https://www.canada.ca/en/revenue-agency/services/tax/technical-information/income-tax/income-tax-folios-index/series-3-property-investments-savings-plans/series-3-property-investments-savings-plans-folio-9-miscellaneous-payments-receipts/income-tax-folio-s3-f9-c1-lottery-winnings-miscellaneous-receipts-income-losses-crime.html.

15 Canada Revenue Agency, "Guide for cryptocurrency users and tax professionals" online: *Government of Canada* https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/digital-currency/cryptocurrency-guide.html (last modified June 26, 2021).

16 *Ibid.*

The Act also defines the term "business" to include "an adventure or concern in the nature of trade."[17] Courts have held that an "adventure or concern in the nature of trade" may include an isolated transaction (that lacks the frequency or system of trade) in which the taxpayer buys property with the intention of selling it at a profit, and subsequently sells it (usually at a profit, but sometimes at a loss).[18] Although a taxpayer who enters into an isolated transaction will not be considered a trader, if the transaction was intended to yield a profit and was not undertaken as an investment, the transaction would likely be considered to be in the nature of business.[19]

Employees who receive cryptocurrency as remuneration should aim for capital gains treatment by avoiding characterization as business income. Each individual's particular circumstances will vary, but in general, taxpayers should limit the number of transactions pertaining to their cryptocurrency holdings, avoid engaging in cryptocurrency trading, and hold their cryptoassets for a prolonged period of time so as to be characterized as an investment. If an employee's income derived from cryptocurrency is considered a capital gain, then whenever the employee eventually disposes of the cryptocurrency, he or she will realize a capital gain or a capital loss which will depend on the fair market value at the time of the disposition less the adjusted cost basis of the cryptocurrency.[20] However, as discussed above, the initial fair market value of any cryptocurrency paid to an employee by an employer must be included in income the year that such cryptocurrency was received.

(ii) Employers

From the employer's perspective, if it elects to pay its employees in cryptocurrency, it is still responsible for withholding and remitting an appropriate amount of source deductions to the Receiver General in respect of employment income.[21] In general, these amounts will include income tax withholding, contributions to the Canada Pension Plan and employment insurance unless a relevant exception applies. As a result, it is imperative that employers ensure that they calculate the correct fair market value of any cryptocurrency paid as remuneration to its employees in order to ensure that proper remittances are made to the CRA. An employer who fails to comply with the withholding and remittance requirements under the Act may be held liable for the employee's Canadian tax and any applicable penalties.[22]

Payments and Remittances to Non-Residents

A Canadian employer may wish to make payments to non-resident employees with cryptocurrency. In general, there is no provision under the Act which would prevent a Canadian-resident business from distributing employment income to a non-resident. However, employers should be cognizant of certain tax consequences which may apply when paying non-resident employees. More precisely, paragraph 153(1)(a) of the Act[23] and section 102 of the *Income Tax Regulations* (the "Regulations")[24] impose a withholding and remittance requirement on amounts paid to both a resident employee and a non-resident employee who performs employment duties *inside* Canada. Moreover, if a non-resident individual (who is not an employee) renders services in Canada, paragraph 153(1)(g) of the Act[25] and subsection 105(1) of the Regulations[26] operate in conjunction to require the payor to withhold tax on fees, commissions, and other amounts paid to non-residents of Canada. Currently, the rate of withholding for these individuals is 15% of the gross amount paid.[27] Therefore, if a Canadian employer elects to pay its non-resident employees or non-resident individuals who are not employees (such as independent contractors) in cryptocurrency for services rendered in Canada, it must withhold proper amounts and make appropriate remittances to the CRA.

In general, the tax consequences of paying non-resident employees with cryptocurrency depend largely on whether an applicable treaty exists between Canada and the country in which the non-resident employee resides. For instance, the *Convention Between Canada and the United States of America With Respect to Taxes on Income and on Capital*, as amended (the "Canada-U.S. Treaty") provides that any remuneration in excess of $10,000 Canadian dollars paid to a non-resident for services rendered in Canada will be subject to Canadian taxation.[28] Additionally, if payment is made by or on behalf of a person resident in Canada to a non-resident employee who provides services in Canada, that non-resident employee will be subject to Canadian income tax.[29]

Accordingly, the taxation regime of cryptocurrency for Canadian resident taxpayers described above will apply to non-resident Americans providing services in Canada pursuant to the Canada-U.S. Treaty. Subsection 200(1) of the Regulations[30] imposes an obligation on a Canadian employer to provide a T4 slip annually to an employee captured by paragraph 153(1)(a), and to file a T4 information return annually to the CRA outlining the employee's income and applicable deductions.

BENEFITS AND DRAWBACKS OF PAYING CRYPTOCURRENCY AS REMUNERATION

Employer Benefits/ Perspective

At a time where many industries have faced increased voluntary unemployment, there is certainly a need for employers to differentiate themselves to attract and retain talent. Accordingly, employers offering compensation through cryptocurrencies have a comparative advantage when hiring and retaining the best and brightest talent. Such employers may be able to represent themselves as forward-thinking by being an early adopter of this method of compensation.

17 *ITA*, *supra* note 9 at s. 248(1).
18 Jinyan Li et al., "Principles of Canadian Income Tax Law", 9th Edition, (Thomson Reuters: Toronto), citing to: *MNR v. Taylor*, [1956] CTC 189, 56 DTC 1125 (Can. Ex. Ct.) and *Regal Heights v. MNR*, [1960] CTC 384, 60 DTC 1270 (SCC).
19 *Ibid.*
20 *ITA, supra* note 9 at s. 39(1).
21 *Ibid.*, at s. 153(1)(a).
22 *Ibid.*, at s. 227.8.
23 *Ibid.*
24 *Income Tax Regulations*, CRC, c. 945 at s. 102 [*ITA Regs*].
25 *ITA*, *supra* note 9 at s. 153(1)(g).
26 *ITA* Regs, *supra* note 24 at s. 105(1).
27 *Ibid.*
28 *Convention Between Canada and the United States of America With Respect to Taxes on Income and on Capital*, (September 26, 1980), online: *Government of Canada* https://www.canada.ca/en/department-finance/programs/tax-policy/tax-treaties/country/united-states-america-convention-consolidated-1980-1983-1984-1995-1997.html (Entered into force 16 August 1984) at art. XV, s. 2(a) [*Canada-U.S. Treaty*].
29 *Ibid.*, at art XV, s. 2(b).
30 *ITA* Regs, *supra* note 24 at s. 200(1).

Employers also benefit from streamlined cross-border payments to remote or international contractors.[31] Payments to any digital wallet, whether foreign or local, can be completed in as little as a few minutes. When compared with wire transfers, digital currency payments are 96% faster, as wire transfer payments generally take between one to five days.[32] Moreover, as cryptocurrencies operate on the Blockchain, there is always a transparent and verifiable ledger available. These payments can be made at any time of day, without the need to make transfers through a bank, and at a fraction of the cost of the typical international payments[33] with no immediate impact from international currency exchange rates on employees.

Employer Drawbacks

The volatility of cryptocurrency may discourage employers from paying their employees' wages in cryptocurrency. Rapid fluctuations in the market are fairly common and may add an element of unwanted unpredictability for employers who purchase their own cryptocurrencies to pay to their employees as wages. For instance, the value of Bitcoin dropped from approximately $74,000 CAD on April 1, 2021 to below $42,000 CAD only two months later, before rebounding in November 2021 to a new all-time-high of $85,656.04 CAD.[34] To mitigate the risk stemming from this volatility, employers could retain the services of a company to pay the cryptocurrency directly to their employees.

Thus, employers would also be well-advised to ensure that their employees are aware that they could suffer a dramatic loss in value when receiving cryptocurrency as wages as a result of the current volatility of cryptocurrency. Proper education of the volatility of cryptocurrency is imperative to provide both employees and candidates with the knowledge and context necessary to make an informed decision in respect of compensation.[35]

As discussed above, an employer who elects to remunerate its employees in cryptocurrency is still responsible for remitting source deductions on the income of its employees. Tax reporting may become more complicated from an employer's perspective when withholding and remitting source deductions for cryptocurrency paid to employees as wages as opposed to fiat currency. Although services are available to assist businesses in fulfilling their reporting and tax obligations in relation to paying cryptocurrency as wages, these services may charge a fee to the employer, which adds additional costs to the process. Moreover, an employer will likely be forced to take additional administrative steps to document the compensation scheme, including inserting an authorization to pay employee wages in cryptocurrency in the relevant employment contract.

Employee/ Independent Contractor Benefits

The purported benefits of cryptocurrency have been discussed at length in the scholarship and by its advocates, and we do not intend to provide an exhaustive discussion of the advantages of cryptocurrency. Instead, we merely wish to identify a few of its practical benefits, which may entice employees to seek having their remuneration made in cryptocurrency.

First, proponents of cryptocurrency have long extolled the virtue of cryptocurrency as a long-term hedge against inflation.[36] The fact that cryptocurrency is finite in nature and has a fixed cap has led some to conclude that cryptocurrency is an effective tool against inflation when compared to fiat currency, which can be routinely manipulated by a country's central bank. For instance, Bitcoin has a fixed supply cap of 21 million BTC, while in contrast, the CAD is subject to manipulation and we have seen a dramatic increase in the Canadian money supply as a response to the ongoing pandemic. Indeed, the Bank of Canada reported an increase in M2++ Money Stock, a measurement used to track the amount of money in circulation, from 6.6 in August 2017 to 10.9 in August 2021.[37] Accordingly, employees may find comfort in the fact that the stored value of their cryptocurrency may serve as a hedge against inflation arising from an increase in government expenditures.

Second, offering employees an opportunity to receive cryptocurrency as compensation for services rendered may be particularly useful when paying non-resident employees or independent contractors who live in areas where access to bank accounts may be difficult. Since cryptocurrency is generally paid directly to a digital wallet, this allows employers to by-pass banks entirely and remit payment directly to an employee or independent contractor.

Third, and consistent with the second benefit discussed above, paying employees in cryptocurrency allows these individuals to receive payment almost instantaneously. This is particularly beneficial for payments to non-resident individuals, where remittances in a fiat currency could take days to clear and are subject to bank rules and fees.[38] Commercial services purport to allow for immediate distributions of cryptocurrency, which can be particularly useful for employees to pay their bills or rent on-time, and without unnecessary delay. This method of remuneration also provides the benefit of enabling individuals to avoid the barriers of entry which ordinarily might discourage users from holding cryptocurrency. Individuals who choose to receive remuneration in cryptocurrency through payment by a third-party service are only required to set up a digital wallet to receive payment; they are not required to trade on an exchange or make cryptocurrency purchases on their own initiative. This is an easy and cost-effective method of holding cryptocurrency.

Finally, if the employee chooses to use a cryptocurrency exchange app, transfers of cryptocurrency into fiat currency are also almost instantaneous. As previously discussed, the transfer of crypto-

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31 *Crypto Clamor, supra* note 5.

32 Gil Hildebrand, "Crypto Payroll: What You Need To Know About Paying Employees in Crypto" (February 18, 2021) online: *Gilded* https://blog.gilded.finance/crypto-payroll-what-you-need-to-know/.

33 John Dujay, "Why not pay employees in cryptocurrency?" (April 15, 2021) online: *Canadian HR Reporter* https://www.hrreporter.com/focus-areas/payroll/why-not-pay-employees-in-cryptocurrency/354952 [*Why not pay employees*].

34 *CoinGecko, supra* note 1.

35 *Why not pay employees, supra* note 33.

36 Andrew Singer, "Inflationary winds from around the world spell a sea change for BitCoin" (November 19, 2021) online: *Cointelegraph* https://cointelegraph.com/news/inflationary-winds-from-around-the-world-spell-a-sea-change-for-bitcoin.

37 Bank of Canada, "Monetary Aggregates", online: *Bank of Canada* https://www.bankofcanada.ca/rates/indicators/key-variables/monetary-aggregates/.

38 Kristina Vassilieva, "Paying wages in cryptocurrencies comes with complications" (May 21, 2021) online: *Talent Canada* https://www.talentcanada.ca/paying-wages-in-cryptocurrencies-comes-with-complications/.

currency into fiat would likely result in a taxable disposition under Canadian income tax law. As a result, employees would be well-advised to note the price at which they initially acquired the cryptocurrency to ensure that any capital gains or losses are properly accounted for.

Employee Drawbacks

The most immediate concern of most employees when receiving wages in the form of cryptocurrency is related to the rapid fluctuation in its value.[39] For instance, if an employee receives cryptocurrency at a time when its value is high, he or she will receive fewer units of cryptocurrency than when its value is lower. Accordingly, employees must be amenable to some degree of volatility when electing to receive cryptocurrency as remuneration. One approach that an employee could adopt to mitigate the risk of fluctuating cryptocurrency is to allocate an appropriate balance of income to be received in cryptocurrency and fiat currency rather than receiving the entirety of their compensation in cryptocurrency.

Another potential disadvantage of receiving wages as cryptocurrency is that the tax reporting obligations and compliance mechanisms are more complicated when compared to receiving wages in fiat currency. The CRA is becoming increasingly aggressive in addressing non-compliance in cryptocurrency transactions, as evidenced by a disclosure deal between the CRA and Coinsquare Ltd, a cryptoasset exchange based in Toronto for the information of 16,500 of the firm's largest traders between the years of 2014 and 2020.[40] Thus, it is advisable that an employee who receives cryptocurrency as compensation retain the services of accountants or tax advisors to assist in preparing tax filing on the income received through cryptocurrency. This, of course, may add additional, unanticipated costs to receiving compensation as cryptocurrency for employees. However, services such as Koinly and CoinTrackers are available to individuals as well and can generate the necessary tax forms and reports.

CONCLUSION

As cryptocurrency becomes even more pervasive, employee interest in cryptocurrency remuneration will intensify. Employers should be prepared to meet these demands and understand the tax implications of compensating their employees in cryptocurrency. In general, employers have two options available to pay their employees in cryptocurrency: (1) they can open a business account with an exchange and purchase their own cryptocurrency to compensate employees, or (2) they can rely on the services of a third-party, which will ease the process. It is important that employers evaluate which of these options is most suitable to their business and the benefits and drawbacks that arise from this means of compensation. Employers are encouraged to consult their tax practitioners to develop solutions to address their needs.

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THE PERFECT STORM FOR GOLD

By Nick Barisheff, Founder, President and CEO of BMG Group Inc.

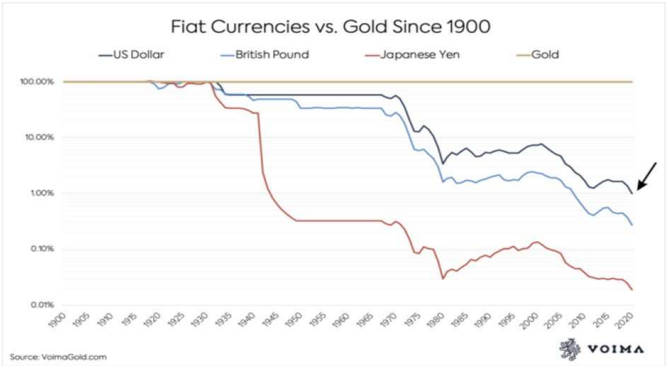
In December 1997, *The Financial Times* ran an article entitled "The Death of Gold." Since then, the gold price in US dollars has increased 519% from $288 to $1,780. Today, after many political events and crises we have evidence of the continuous and in many ways spectacular growth of the gold price. This confluence of many current events is creating a perfect storm for gold to increase dramatically more than we imagined.

CURRENCY DEVALUATION

Typically, currency devaluation is always at the heart of a rising gold price. This has been taking place in all the major fiat currencies, resulting in an average annual price increase in gold of over 10% since 2000.

> For the naïve there is something miraculous in the issuance of fiat money. A magic word spoken by the government creates out of nothing a thing which can be exchanged against any merchandise a man would like to get. How pale is the art of sorcerers, witches, and conjurors when compared with that of the government's Treasury Department.
>
> Ludwig Von Mises

Since 1900, all major fiat currencies have been devalued by over 90%.



To understand currency devaluation, it is necessary to understand that all currency is created by governments issuing debt and then the central bank monetizing that debt by printing the currency. In 1960, the U.S. federal debt to GDP stood at 52.2%, whereas today it has grown to 125.9%. The Federal Reserve has increased its balance sheet by a historically unprecedented amount of over $7.5 trillion since 2008.

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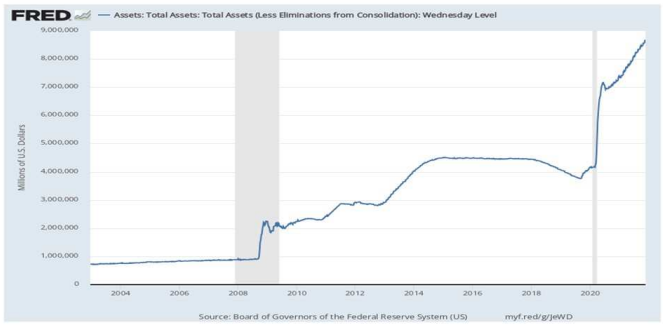
39 *Why not pay employees, supra* note 33.

40 Anish Kamboj, "Taxation of Cryptocurrencies: Unnamed Person Requirement and Cryptocurrency Exchanges" (2021) Taxes & Wealth Management 14-2, 8 at 11.



Because of this central bank policy, all western currencies are being devalued and this in turn leads to inflation.

> Nations are not ruined by one act of violence, but gradually and in an almost imperceptible manner by the depreciation of their circulating currency, through excessive quantity.
>
> Nicholas Copernicus — 1525

> Fed Chairman Powell has pumped trillions of newly printed dollars into the system in order to prop up the financial markets, but in the process has unleashed a tsunami of inflation that is unlike anything we have seen since the 1970s.
>
> Michael Snyder

AS CURRENCIES ARE DEVALUED, PRICE INFLATION WILL INEVITABLY FOLLOW

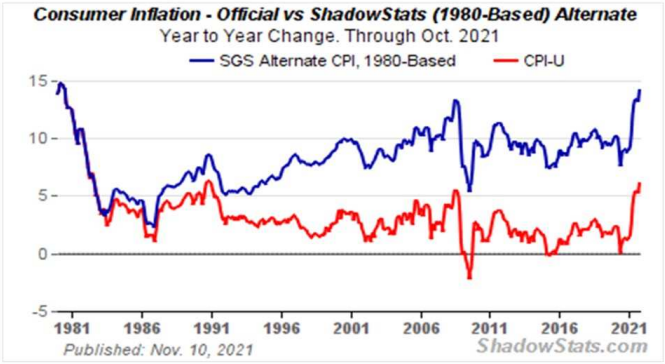
Inflation, as this term was always used everywhere and especially in North America, means increasing the quantity of money and bank notes in circulation and the quantity of bank deposits subject to check. But people today use the term 'inflation' to refer to the phenomenon that is an inevitable consequence of inflation, and that is the tendency of all prices and wages to rise.

> For the first time in history, ALL the major central banks are printing money. One of two things will occur. If they continue to print, their respective currencies will lose their purchasing power, and we'll have inflation or even hyper-inflation.
>
> Richard Russell

In October 2021, consumer inflation jumped to a four-decade high, the highest since the days of runaway inflation in the early 1980s. Headline year-to-year GDP inflation hit a 38-year-plus high of 4.53%.

According to John Williams of Shadowstats.com, if inflation was calculated using 1980s methodology, the CPI would be nearly 15%. Since treasury yields are about 2%, the true inflation-adjusted treasury yield would be about -13%.

Gold Rises Fastest When Real Yields Go Negative



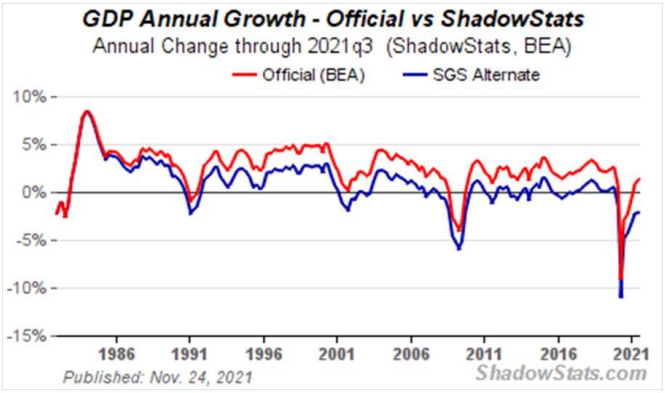
Inflation is destined to go even higher in 2022. Many of the biggest corporations have already announced price increases that will take effect in 2022.

DECLINING GDP — STAGFLATION

> The. . .economy is facing a period of stagflation in which both growth and inflation disappoint.
>
> David Walton—Goldman Sachs

Stagflation is worse than a recession. It's because *stagflation combines the bad economic effects of a recession (stock declines, unemployment increases, housing market dips) with inflated prices*. When this is dragged out over the long term, it becomes a problem that can have a big impact on societal habits.

To make matters worse, we are already experiencing declining GDP together with increasing inflation. This is due to an unusual combination of supply chain disruptions and labour shortages due to COVID-19 policies that have been implemented in most western countries.



Supply Chain Disruptions

The COVID-19 pandemic impact and the disruptive government responses continue to have an enormous negative impact on global supply chains. Beyond COVID-19, compounding profound governance incompetence, media bias, political conflicts, disintegration of society split by "Covid politics", natural disasters, cybersecurity breaches and international trade disputes have negatively impacted supply chains leading to product shortages,

distribution delays, and manufacturing disruptions. The lockdowns imposed in many countries have led to revenue declines and many bankruptcies, with many more to come. Making matters even worse is the implementation of vaccine mandates, causing over 4 million people to leave the workforce in the U.S. This will lead to other societal problems due to the lack of first responders, nurses, firefighters and police.

Some analysts expect that it will take years for the capacity constraints and backlogs to ease.

Labour Shortages

How can the U.S. economy be recovered minimally, with October 2021 payroll employment still 2.8% shy of recovering its pre-pandemic/pre-recession peak? Except for the severe recessions in 1981 and 2007, and despite being well off bottom, the current pandemic-driven payroll shortfall remains deeper than anything seen at the troughs of the other six U.S. recessions all the way back to 1957.

Even with unemployment well above pre-pandemic levels there is also pressure on wages resulting in companies having to pass on additional wage costs. It appears that we have the beginning of a wage price spiral.

The Tax Foundation estimates that the Democrats' new welfare bill will destroy 103,000 jobs over the next 10 years.

Many of these job losses are due to tax increases, increased regulatory burdens and energy inefficiency introduced by the Green New Deal.

The job losses projected by the Tax Foundation are in addition to hundreds of thousands of job losses facing the economy in the short run because of vaccine mandates and the firing of employees who refuse to be injected with the gene-modification treatments called 'vaccines.' In the U.S., 4.4 million people have already quit their jobs due to vaccine mandates.

THE MISERY INDEX

Since the launch of the fiat money era in the early 1970s, economies have gone very wrong, and unemployment and inflation rates have skyrocketed. Campaigning in the late 1970s, then-presidential candidate Ronald Reagan added the two numbers together and famously named the result the Misery Index. Subsequently, the Misery Index became the bellwether for stagflation — the combination of economic stagnation and runaway inflation.

The Misery Index (sometimes known as the Economic Discomfort Index, or EDI) is simply the sum of the inflation rate plus the unemployment rate. The higher the combined score, the worse the economic situation.

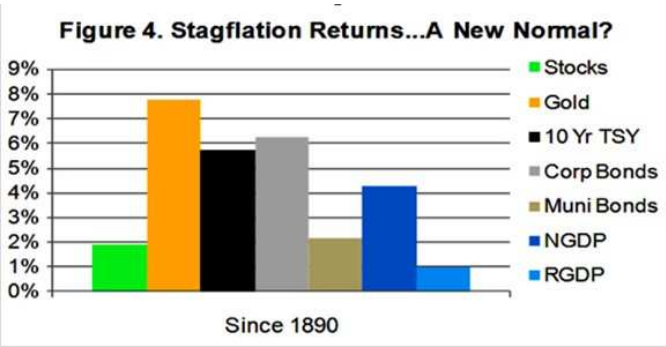
Misery Index By US Presidential Administration

Index = Unemployment rate + Inflation rate (lower number is better)

President	Time Period	Average	Low	High	Start	End	Change
Harry Truman	1948–1952	7.88	3.45 – Dec 1952	13.63 – Jan 1948	13.63	3.45	-10.18
Dwight D. Eisenhower	1953–1960	9.26	2.97 – Jul 1953	10.98 – Apr 1958	3.28	9.96	+5.68
John F. Kennedy	1961–1963	7.14	6.40 – Jul 1962	8.38 – Jul 1961	8.31	6.82	-1.49
Lyndon B. Johnson	1963–1968	6.77	5.70 – Nov 1965	8.19 – Jul 1968	7.02	8.12	+1.10
Richard Nixon	1969–1974	10.57	7.80 – Jan 1969	17.01 – Jul 1974	7.80	17.01	+9.21
Gerald Ford	1974–1976	16.00	12.66 – Dec 1976	19.90 – Jan 1975	16.36	12.66	-3.70
Jimmy Carter	1977–1980	16.26	12.60 – Apr 1978	21.98 – Jun 1980	12.72	19.72	+7.00
Ronald Reagan	1981–1988	12.19	7.70 – Dec 1986	19.33 – Jan 1981	19.33	9.72	-9.61
George H. W. Bush	1989–1992	10.68	9.64 – Sep 1989	14.47 – Nov 1990	10.07	10.30	+0.23
Bill Clinton	1993–2000	7.80	5.74 – Apr 1998	10.56 – Jan 1993	10.56	7.29	-3.27
George W. Bush	2001–2008	8.11	5.71 – Oct 2006	11.47 – Aug 2008	7.93	7.39	-0.54
Barack Obama	2009–2016	8.83	5.06 – Sep 2015	12.87 – Sep 2011	7.83	6.77	-1.06
Donald Trump	2017–2020	6.91	5.21 – Sep 2019	15.03 – Apr 2020	7.30	8.06	+0.76
Joe Biden	2021–2021	9.77	7.70 – Jan 2021	11.29 – Jun 2021	7.70	10.19	+

WEALTH PRESERVATION

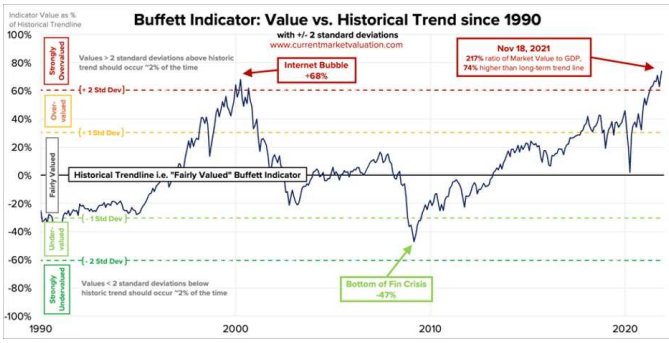
> I believe that the times ahead will be radically different from the times we have experienced so far in our lifetimes, though similar to many other times in history.
>
> Ray Dalio

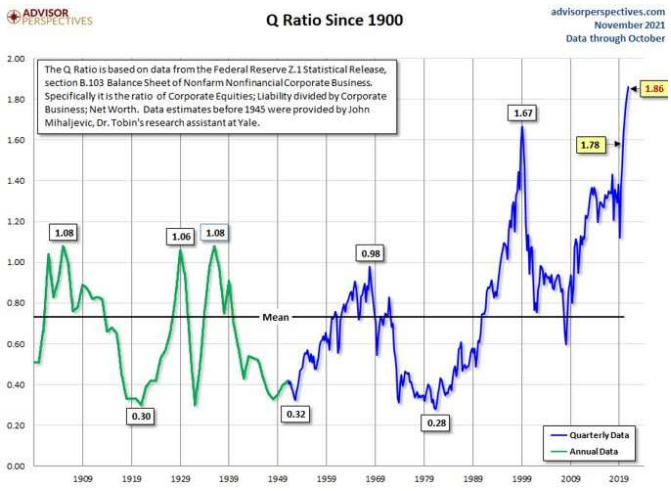


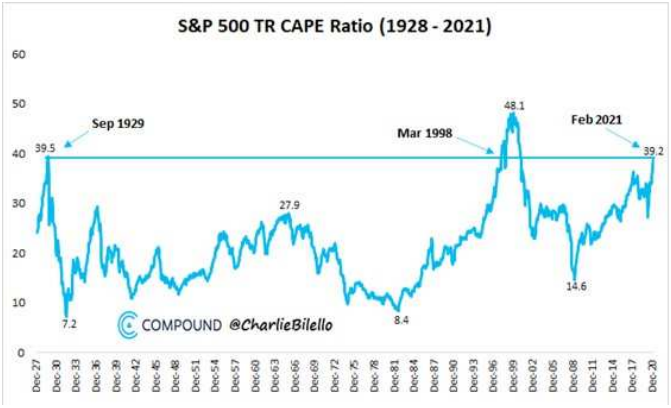
Source: https://www.etf.com/sections/features/6900-the-new-normal-and-asset-class-cycles.html/page/0/1

OVERVALUED EQUITY MARKETS

To add even more cause for concern, the U.S. equity markets are more overvalued than during the financial crisis of 2008 and, depending on the methodology, may be more overvalued than during the dot.com bubble in 1999 and even the 1929 crash. Although some of the excess money supply has resulted in consumer price increases, much of it has gone into the equity markets and real estate.







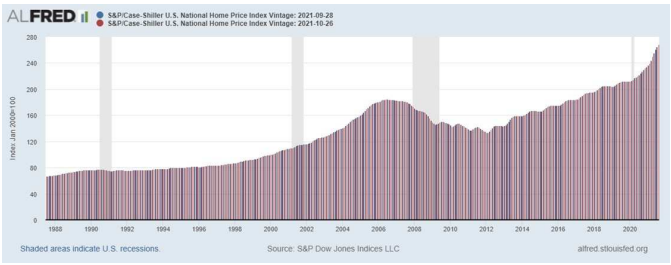
During past equity decines, gold has generated positive returns.

S&P 500 Largest Declines	S&P 500	Gold
Sept 21, 1976 - March 6, 1978	-19.4%	53.8%
Nov 28, 1980 - Aug 12, 1982	-27.1%	-46.0%
Aug 25, 1987 - Dec 4, 1987	-33.5%	6.2%
July 16, 1990 - Oct 11, 1990	-19.9%	6.8%
July 17, 1998 - Aug 31, 1998	-19.3%	-5.0%
March 27, 2000 - Oct 9, 2002	-49.0%	12.4%
Oct 9, 2007 - March 9, 2009	-56.8%	25.5%
May 10, 2011 - Oct 3, 2011	-19.0%	9.4%

Source: https://www.gold-eagle.com/rate/price-of-gold/

OVERVALUED REAL ESTATE

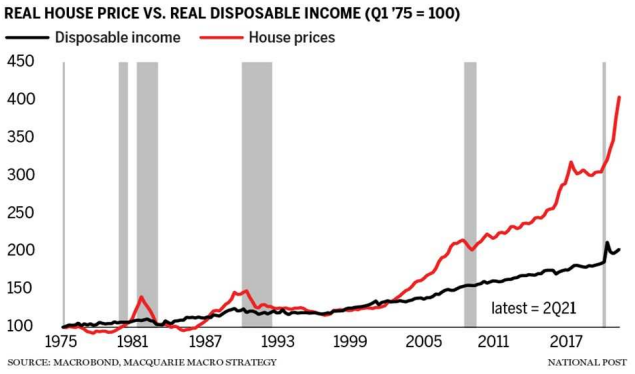
According to the Case Shiller National Home Price Index, home values are 38% higher than during the 2008 market crash.



The UBS Global Real Estate Bubble index ranks Toronto just behind Frankfurt among the major urban markets, with overpriced housing that is not supported by incomes and demands outsized mortgages.

HOUSING AFFORDABILITY IN CANADA

House prices to disposable income have soared



Gold, in the end, is not just competition for the dollar; it is competition for bank deposits, stock and bonds and most particularly during times of economic stress—and that is the source of enduring interest amongst policymakers.

Paul Volcker

Gold In USD Has Been The Best *Stagflation* Performer Since 1973

AAAR since Q1 1973*

Asset	Full Sample	Goldilocks	Reflation	Stagflation	Deflation
Gold (USD / Oz)	54.7	-3.1	8.4	32.2	12.8
S&P 500 Index	54.4	16.8	28.5	-6.6	11.4
EAFE Equities	29.5	10.5	18.8	-11.6	11.7
US Tsy & Agency Bonds	32.4	7	2.3	9.6	11.2
US Corporate Bonds	44	10.9	8.6	6.1	14.1
S&P GSCI Index	48.8	9	34.7	17.5	-13.5
US Dollar Index	5.5	4.6	0.6	0.9	-0.7

The combined effects of currency devaluation, inflation and declining GDP, when taken together with overvalued equity and residential real estate, creates a perfect storm for dramatically increasing precious metals prices in the future. Every portfolio should have at least 20% allocated to bullion in order to preserve wealth, improve returns and reduce portfolio volatility. Investors need to consider that if they lose 50% of their portfolio, they will need to achieve gains of 100% just to break even. Although prices still may go up, it would be prudent to sit out the next few months in cash or gold. That will provide investors with the opportunity to reinvest in their favourite assets at considerable discounts at the bottom.

This is the perfect time to allocate to gold based on all the factors and data during this "perfect storm for gold".

Nick Barisheff is the Founder, President and CEO of BMG Group Inc. Nick can be reached at 905.474.1001 or n.barisheff@bmg-group.com.

CRA OFFERS RELIEF TO THOSE UNABLE TO COMPLY WITH NEW GST/HST RULES

By Daniel Kiselbach, Partner, Miller Thomson LLP,
Thomas Ghag, Associate, Miller Thomson LLP, and
Jason Fitzpatrick, Articling Student, Miller Thomson LLP

INTRODUCTION

As of July 1, 2021, some foreign vendors who sell products or services digitally in Canada have a new duty to collect and remit the Goods and Services Tax (GST) and/or the Harmonized Sales Tax (HST). The Canada Revenue Agency ("CRA") considers GST/HST to be trust money held for and on behalf of the federal Crown. Generally, the CRA may assess a director on account of any failure by a corporation to pay GST/HST. This is so unless the director can make out a "due diligence" defence. A director of a digital sales corporation should take reasonable care to ensure that the corporation they manage has complied with the GST/HST digital sales rules. In addition, the CRA may grant relief in the form of "forbearance" in certain circumstances. The following is a brief outline of the rules and their expected impact.

THE STATUTORY SCHEME

The federal Government of Canada imposes a 5% GST on the sale of most goods and services in Canada.[1] In some provinces (sometimes referred to as "participating provinces"), federal and provincial sales tax elements are harmonized. If the place of supply is in a participating province, then HST is levied at the applicable rate (e.g., 13% in Ontario and 15% in New Brunswick, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island). The CRA is responsible for the administration and enforcement of the GST/ HST.

Prior to July 1, 2021, foreign digital vendors with no physical presence in Canada were not required to charge and collect GST/ HST. The result was adverse to domestic suppliers because such suppliers were required to charge and collect GST/ HST. In order to level the playing field for domestic suppliers, new amendments to the *Excise Tax Act* (Canada) and related regulations were introduced. The new legislation contained the digital tax sales rules.

THE NEW DIGITAL TAX SALES RULES

The new rules for GST/ HST impact foreign vendors carrying on the following types of businesses:

1. cross-border digital products and services such as video streaming services;

2. the supply of qualifying goods in Canada, including those located in fulfillment warehouses and those shipped directly to a purchaser in Canada; and

3. platform-based short-term accommodation.

Affected businesses not already registered under Canada's normal GST/ HST regime may register under the simplified GST/ HST registration, reporting, and remittance system. In order to register, an entity must be able to properly charge, collect, report and remit

[1] Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15.

GST/ HST. The new rules are complex and detailed. A comprehensive outline of all the rules is not beyond the scope of this article. Suffice to say that the uninitiated may find it difficult to follow the new digital sales tax rules.

WHAT IF AN AFFECTED BUSINESS IS UNABLE TO COMPLY?

Given the short notice of the registration date, some non-resident entities have found that their business systems were not set up to properly charge, collect, report and/ or remit GST/ HST by July 1, 2021. This is not considered the fault of the business operators who must now cope with unexpected new obligations under the new digital tax rules. As a result, the CRA has taken steps to minimize any hardship during the transition period in which the new digital tax has been imposed. In particular, the CRA has implemented a discretionary forbearance system for the first 12 months following the introduction of the new digital tax. This system provides relief by allowing adversely affected businesses to apply for a delayed registration date. The result is, in effect, a waiver of compliance with the new digital tax collection and remittance obligations for the relevant period.

Which Businesses Can Apply?

Under CRA's policy, forbearance may be granted to affected businesses that "have taken reasonable measures but are unable to meet their new obligations for operational reasons".[2]

In other words, if an affected business has taken reasonable steps to comply with the new system, but their current systems are still unable to do at least one of charging, collecting, reporting, or remitting GST/ HST by July 1, 2021, then they may apply for a delayed registration date.

For example, if an online vendor's current systems prevent them from being able to properly charge their customers GST/ HST, or if they are unable to disclose to customers that they are charging those taxes, then they may be able to apply for forbearance while they adapt their systems.

The granting of forbearance is fact-specific and exercised entirely at the discretion of the CRA. While the CRA does not provide any specific factors that it considers, it is most concerned with *why* an entity was unable to comply.

How to Apply

No forms are required to apply for forbearance. In order to apply, one must contact the CRA directly and provide the following information with the request:

1. the identity of the entity requesting forbearance;
2. the general nature of the business;
3. the reason the business was unable to comply by the registration date (July 1, 2021);
4. the steps taken to comply and the steps still required in order to comply; and
5. a proposed alternative date by which the business will be able to comply.

The CRA has a department dedicated to the new measures. The dedicated department can be reached at 1-833-585-1463 between 8:15am - 4:15pm Eastern Time. In complex cases it may be prudent to retain legal counsel to stickhandle through the process to better ensure that an application for forbearance is granted.

Granting of Relief

If an affected business receives the CRA's written approval exercising their discretion to grant temporary forbearance, then it will not have to register until the alternate date.

All obligations for the GST/ HST under the new regulations start on the delayed registration date. For example, if an entity was able to secure a December 1, 2021 registration date, then it would not be required to charge, collect, report or remit the new tax until December 1, 2021.

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NEGLIGENT TAX ADVICE — WHAT ARE THE DAMAGES?

By Peter Macaulay, P. Macaulay & Associates Inc.

Where a party has received negligent tax advice, recovery through the courts involves two main key components: 1) proving that the tax advice was negligent, and 2) proving the Plaintiff's damages. This short article focuses on how to focus on the quantification of damages.

WHEN TO QUANTIFY DAMAGES?

It is often helpful to prepare a preliminary quantification early on to allow the Plaintiff to weigh up the projected costs against the likely recovery. A preliminary quantification allows for a more focused discovery process and avoids having to request needed information later.

HOW ARE DAMAGES QUANTIFIED?

When you ask someone what they lost, there are as many answers as there are people. However, it is the courts that award damages and they are quite specific as to what is to be included in damages, and what is not.

Damages are generally defined as

[2] Canada Revenue Agency, *GST/HST for Digital Economy Businesses, online:* https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/gst-hst-businesses/digital-economy-gsthst.html.

> the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.[1]

This can be broken down into:

> **The Actual Case:** The financial position that the Plaintiff is in having received the negligent professional advice.
>
> **The Expected Case:** The financial position that the Plaintiff would have been in but for the negligent professional advice.
>
> **The Difference** = Damages

Where a Plaintiff has received negligent professional advice, they often fail to understand the damages that flow from it. If the advice given had been true, the Plaintiff would have received a tax refund in the $millions. Therefore, the Plaintiff asserts that their damages are $millions. However, the test for damages in professional negligence cases is based on the financial position the Plaintiff would be in if the Plaintiff had received *competent* professional advice.

Here is an example. If, as the professional advisor represented, the tax shelter had been accepted by CRA, the Plaintiff would have saved $millions in taxes. However, if the Plaintiff had received competent professional advice, they would have been told that the tax shelter would not be accepted by CRA and they would not have proceeded with the tax shelter. Therefore, the actual and expected cases are similar, hence very limited damages.

Alternatively, if the Plaintiff bought or sold a property based on negligent tax advice — and suffered a financial loss as a result — then they may have a substantial claim for damages. That is to say, had they received competent professional advice, they would not have entered into the money-losing transaction. Therefore, the difference between the actual and expected cases gives rise to a claim for damages.

WHO SHOULD QUANTIFY DAMAGES?

The Plaintiff and their counsel are often the first to quantify damages. Early in the process, it can be beneficial to engage an expert in damage quantification to ensure that calculations are well founded. Later in the process, a report from an expert can support the case.

In conclusion, where a party has received negligent tax advice and proposes to seek recovery through the courts, taking the time to understand their damages — as the courts will assess them — will allow them to make better decisions all the way through the process.

Peter Macauley is the Principal of P. Macaulay & Associates Inc. and a Forensic Accountant. Peter can be reached at pmacaul@pmacaulay-assoc.com.

[1] *Livingstone v. Rawyards Coal Co.* (1880) 5 App. Cas. 25 at 39.

"~~NO~~ TAKESIES BACKSIES" ESTOPPEL IN TAX DISPUTES

By Molly Luu, Partner, Miller Thomson LLP

In *Landbouwbedrijf Backx B.V. v. The Queen*,[1] the Federal Court of Appeal ("FCA") and the Tax Court considered estoppel as protection against the Canada Revenue Agency ("CRA") taking inconsistent positions in different years.

In the recent decision, the FCA allowed an appeal by the taxpayer. One key issue was whether the appellant, an LLC established under the laws of the Kingdom of Netherlands, was a resident of Canada for tax purposes in 2009.

The taxpayer was successful at the FCA. The victory was, however, somewhat hollow because the FCA agreed with the TCC that the taxpayer was resident in Canada in 2009 (a key year under consideration) and sent the decision back to the Tax Court to consider certain other issues. Spoiler alert: the taxpayer was unsuccessful with respect to the redetermination in Tax Court.

What is interesting is that the FCA and Tax Court commented on the issue of estoppel in the assessment context. Note the following:

- For ten years from 1998 to 2008, the taxpayer reported its share of the partnership income and filed income tax returns as a non-resident of Canada. CRA issued notices of assessment as filed. Those years are not under appeal.
- In 2009, the taxpayer sold its partnership interest to a newly formed Ontario corporation owned and controlled by the same individuals. It is an agreed-upon fact that this sale resulted in a capital gain of approximately $1.7 million.
- The Minister took the position that the taxpayer was a resident of Canada in 2009 and the capital gain was not treaty-protected property. CRA reassessed the taxpayer for Part I tax on the capital gain.

In the appeal, the taxpayer made the argument that the doctrine of estoppel and reasonable expectations barred the CRA from treating the taxpayer's residency status in 2009 differently than it had in the 1998-2008-period. Namely, "CRA, you treated me as a non-resident for 10 years, no takesies-backsies for 2009!"

The Tax Court disagreed. Takesies-backsies are allowed in Tax Law in this context. See below the Court's analysis (emphasis added):

> [14] As noted by the FCA, the Appellant argued that this Court had failed to consider the doctrine of estoppel and reasonable expectations in relation to the Appellant's residency and *that "the Minister's acceptance of the Appellant's residency as being the Netherlands for previous years binds the Minister."* It was argued that the Appellant *should be able to rely on the "position taken by the Minister in 1998 to 2008 when he taxed and assessed the appellant as a non-resident of Canada" and that the Minister was now estopped and precluded "from assessing it as a Canadian resident in 2009."*

[1] 2019 F.C.A. 310.

[15] The FCA did not agree, relying on Ludmer v. Canada, *[13]* ("Ludmer") and *indicating that "it is well-established law that the doctrine of estoppel cannot be invoked to preclude the exercise of a statutory duty" and that "a concession made in one year in the absence of any statutory provisions to the contrary, does not preclude the Minister from taking a different view in a later year.*" It also held that "*an assessment is conclusive as between the parties only in relation to the assessment for the year in which it was made.*"

[16] The FCA added that "*how the Minister may have treated similar facts in previous years does not bind the Court*" and that "the respondent is not the arbiter of what is right or wrong in tax law" before concluding that "although the Tax Court did not address the estoppel argument in its reasons, it nonetheless reached the correct conclusion."

[17] The FCA concluded that the Tax Court had committed "no palpable or overriding errors in finding that the appellant's central management and control in 2009 actually abided in Canada."

[18] I therefore conclude, as I did in paragraph 47 of the TCC Decision *and in accordance with the FCA decision, that the Appellant was a resident of Canada in 2009.*

. . .

[51] I agree with the Respondent that this assertion is misguided since the Appellant chose to file as a non-resident of Canada from 1998 to 2008. *This constituted its filing position. The Minister was free to accept or reject the tax return as filed and issue an assessment or reassessment based on its understanding of the facts and interpretation of the law at the relevant time. The fact that the Appellant's filing position was accepted by the Minister, as evidenced by the notices of assessment for those years, is not binding on this Court and, as noted by the FCA or by Bowman J. in Goldstein, this Court is not estopped from reaching a different conclusion.*

The taxpayer also made certain arguments about Income Tax Act (Canada) subsection 152(8), which provides that "an assessment shall, subject to being varied or vacated on an objection or appeal (. . .) be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto".

The Court held ". . .it is established that the provision cannot be used to *prevent the Crown* from taking a position in a Reply that is inconsistent with an earlier assessment that has not been appealed . . ." (see para. 65 of the decision).

There you have it, the Minister and her agent, the CRA, can suck in some years and blow in others. This complicates tax planning and is something that I often note to clients. It doesn't matter that [filing position X] was accepted in prior years, or that the CRA did not take issue with [filing position X] in other audits or reviews; each year is a fresh game, with new rules, and new audit risks.

When working on a tax plan, it is prudent to always turn your mind to preparing an audit file to defend each and every filing position.

Molly Luu is a Partner in Miller Thomson's Tax Dispute Resolutions Group. Molly can be reached at mluu@millerthomson.com.

BUSINESS SUCCESSION PLANNING — LESSONS TO BE LEARNED FROM THE RECENT ROGERS SAGA

By Honor M. Lay, Associate, Miller Thomson LLP

INTRODUCTION

A battle for control over Rogers Communications Inc. ("Rogers") between Edward Rogers ("Edward") on one side and his sisters and mother on the other wrapped up in a British Columbia courtroom on Monday, November 1, 2021.[1] The Shakespearean drama that unfolded within the family is a reminder that family business planning is an art, sometimes resulting in colourful consequences when the plan does not play out as it was intended or the children do not behave as the parents had anticipated.

BACKGROUND

Rogers was incorporated in 1987 under the laws of British Columbia and has grown to be one of Canada's largest public telecommunications and media companies. The company has what is known as a "dual-class" share structure which involves the distinction of Class A voting shares from Class B non-voting shares in order to separate voting power over the company from the ability to invest in and subscribe for shares in the company.[2] Whereas a large pool of investors may subscribe for the Class B non-voting shares, the Class A voting shares are typically issued to a small group of shareholders, such as the company founder or the founder and family members.

During his lifetime, Ted Rogers ("Ted"), the Rogers company founder and family patriarch, owned the majority of the Class A voting shares. Upon his death in 2008, Ted's Class A voting shares passed to the Rogers Control Trust (the "Trust") for the benefit of the Rogers family. As of February 2021, the Trust owned 97.5% of the Class A voting shares and 9.89% of the Class B non-voting shares of the company. The dual-class share structure enables Rogers to be a publicly-traded company while still concentrating control power over the company in the hands of the Rogers Family through the Trust.

RECENT EVENTS

The Trust is governed by a Chair, a Vice-Chair, and a 10-person Trust Advisory Committee. Ted appointed his son, Edward, as Chair of the Trust on Ted's passing. Edward's sister, Melinda Rogers ("Melinda"), was appointed Vice-Chair. The Advisory Committee is comprised of the four Rogers children, Ted's surviving spouse, Loretta Rogers ("Loretta"), and five other members who are not part of the Rogers family. Edward is also Chairman of the Board of Directors of Rogers. The rest of the Board consists of the other members of the immediate Rogers family, the other members of the Advisory Committee, and four other "independent directors."

As Chair of the Trust, which is the controlling shareholder of the company, Edward has the ability to exercise voting power over the company at his discretion unless the Advisory Committee acts to

1 *Rogers v. Rogers Communications Inc.*, 2021 BCSC 2184 (B.C. S.C.).

2 Shaw Communications Inc., Fairfax Financial Holdings Ltd., Bombardier Inc., and Canadian Tire Corp. Ltd. are among other prominent Canadian companies with dual-class share structures.

constrain or replace him with a two-thirds vote. Until recently, relations have been amicable between Edward and the Advisory Committee and Board of Directors, such that Edward has not had to resort to his powers as Chair. However, in September 2021, relations soured between Edward and Rogers CEO Joe Natale, and Edward grew suspicious that the four independent directors on the Board were forging an alliance against him. Through a pocket dial, Edward inadvertently blurted out to Joe Natale his plans to oust and replace the CEO. A rift ultimately fractured the Board: Edward, on one side, seeking the removal of Joe Natale as CEO; and Loretta and her daughters, Melinda and Martha Rogers ("Martha"), on the other, seeking to defend Joe Natale's position as CEO and to remove Edward as Chair of the Trust and Chairman of the Board.

In October 2021, Edward obtained consents from five directors on the Board — none of which were his family members — to act as a director. He then mailed to all registered voting shareholders a written consent resolution (the "Consent Resolution") to remove five Board directors and replace them with five new appointees. Both the Board and the Advisory Committee held votes. The Board voted to remove Edward as Chairman of the Board. At the Advisory Committee meeting, Loretta, Melinda, and Martha voted to constrain Edward, but the rest of the Advisory Committee did not, so the two-thirds vote to constrain Edward and the Consent Resolution failed. Edward ultimately filed a petition seeking a declaration that the Consent Resolution and his newly-appointed Board were valid pursuant to the company's Articles of Incorporation (the "Articles") and the B.C. *Business Corporations Act*[3] (the "BC Act"). Edward's mother, sisters, and Rogers responded that the Consent Resolution and new Board were invalid because the removal and replacement of directors required a shareholders' meeting, not merely a written resolution, pursuant to the Articles and the BC Act. Edward's family further argued that Edward failed to follow accepted principles of good corporate governance and abused his position as Chair.

BC SUPREME COURT'S DECISION

The BC Supreme Court found in Edward's favour, determining that the Articles and the BC Act allow anyone with two-thirds control of the voting shares of the company to remove and replace directors via Consent Resolution without requiring a shareholders' meeting.

The Court focused its analysis on a plain reading and "commonsense" approach to interpreting the Articles and the BC Act. As provided in the BC Act, a company and its shareholders are "bound by" the company's articles of incorporation, which represent a contract between the shareholders and the company.[4] A company's articles of incorporation are subject to the BC Act and, unless a contrary provision is found, the Articles are intended to be interpreted in accordance with the statutory provisions of the BC Act.[5]

The BC Act is unique when compared to the federal statute (the *Canada Business Corporations Act*[6]), which is the model adopted by most of the provinces and territories, including Ontario. Under federal and Ontario legislation, a resolution to remove a director requires a majority shareholder resolution passed at a shareholders' meeting, or a resolution in writing signed by all shareholders entitled to vote.[7] Under the BC Act, however, companies are permitted to dictate in the company's articles virtually any procedure for the removal of directors.[8]

Edward's family argued that the wording of Article 3.4 of the Articles implies the requirement of a shareholders' meeting in order to remove Board directors. Article 3.4 provides as follows (emphasis added):

> Removal of Directors — Subject to the provisions of the Act, the shareholders may by ordinary resolution remove any Director from office and the vacancy created by such removal may be filled at the same meeting failing which it may be filled by the Directors.

The Court reasoned, *inter alia*, that the word "may" was too permissive to mandate that director removal take place at a shareholders' meeting.[9] In addition, the court considered the meaning of the word "meeting" in the context of section 180 of the BC Act which deems a "consent resolution" to be a "meeting" under certain circumstances:[10]

> A consent resolution of shareholders is deemed (a) to be a proceeding at a meeting of those shareholders, and (b) to be as valid and effective as if it had been passed at a meeting of shareholders that satisfies all the requirements of this Act and the regulations, and all the requirements of the memorandum and articles of the company, relating to meetings of shareholders.

The Court was further satisfied that the Consent Resolution fulfilled the meaning of "ordinary resolution" for purposes of Article 3.4 after interpreting the meaning of "ordinary resolution" and "consent resolution" under subsection 1(1) of the BC Act. An "ordinary resolution" that is "(b) passed, after being submitted to all of the shareholders holding shares that carry the right to vote at general meetings, by being consented to in writing by shareholders holding shares that carry the right to vote at general meetings who, in the aggregate, hold shares carrying at least a special majority [two-thirds] of the votes entitled to be cast on the resolution" qualifies as a "consent resolution" for purposes of subsection 1(1) of the Act.[11] Edward mailed the Consent Resolution to the voting shareholders and, through his 97.5% of the voting shares as Chair of the Trust, satisfied the two-thirds special majority requirement. Based on the above, Edward persuaded the Court that the Consent Resolution satisfied the requirements under the Articles and the BC Act.

The Court dismissed as irrelevant much of the evidence about the circumstances surrounding the adoption of the Articles in 2004. For example, Edward's family filed Ted's "private and confidential" Memorandum of Wishes written in 2007 (the "Memorandum of Wishes"),[12] which spoke to, among others, Ted's hope that, in the event of a deadlock between Chair and Board over the constitution of the Board, the Chair would consult the Board and hold a shareholders' meeting to resolve the dispute.[13] However, because

3 S.B.C. 2002, c. 57.
4 *Supra* note 1, at para. 81.
5 *Ibid.*, at para. 85.
6 R.S.C. 1985, c. C-44.
7 *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 109; *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 122.
8 See subparagraph 128(3)(b) of the BC Act.
9 *Ibid.*, at para. 172.
10 *Ibid.*, at para. 171.
11 *Ibid.*, at paras. 145-152.
12 The Court does not refer to the contents of the Memorandum of Wishes in great detail, primarily because the Court found them to be irrelevant, but presumably also to protect the personal nature and confidentiality of the document.
13 *Supra* note 1, at para. 91.

Ted penned the Memorandum of Wishes in 2007, three years after the adoption of the Articles in 2004, the Court dismissed them as irrelevant to confirming "only those facts and circumstances present at the time of contracting (here 2004)".[14] The Court described the extrinsic evidence as providing a "colourful backdrop" to the dispute, but of being ultimately "of no assistance in interpreting the intentions" of the founder in 2004 when the Articles were adopted.[15]

The company announced that it will not be appealing the decision.

CONSEQUENCES FOR THE BUSINESS AND THE FAMILY

The Rogers family feud highlights some of the regrettable consequences that can arise on the succession of a business from one generation to the next.

The most unfortunate consequence is, of course, the damage done to the relationships within the family. The Rogers family had managed to run the company amicably for some 13 years after Ted's passing in 2008. Given the need for court intervention this year, the spirit of cooperation in the Rogers family appears to have been snuffed out. It is difficult to imagine a family reconciling their differences on a personal, let alone a professional, level after these recent events.

A feud that pits the Chairman of the Board against his family's very own company is bad for business. As the public witnessed, infighting within a company can stir panic among investors, depress stock values, and potentially threaten major business deals already underway.[16]

While the Memorandum of Wishes does not feature prominently in the court decision, excerpts of the document do appear in the decision as well as in press releases on the dispute. Parts of the document indicate that Ted may have envisioned a model of governance in 2007 slightly more cooperative in nature than what he had in mind in 2004 when the Articles were drafted. Some of those excerpts include:[17]

> **On family businesses**: "My experience over my lifetime makes me conclude that families owning active businesses seem on balance to be more serious-minded and family-oriented. The businesses often take most of the family resources so there is not as much cash to spoil the family. As well, the opportunity to work together seems to result in more benefits than negatives. On the other hand, I have often seen wealthy families whose businesses were sold to be devoid of a unified purpose after a time with portfolio investments. In many cases, the plentiful cash spoiled the families and robbed the young of initiative."
>
> **On the role of the control-trust chair**: "The main reason for the Control Trust is to facilitate one person, the Control Trust Chair being responsible, subject to various checks and balances, for voting the Rogers family's control position. My lifetime experience has been that committee and shared decision making often leads to slow, if any, decision making."
>
> **On the duty of the control-trust chair**: "The Control Trust Chair must consult widely and earnestly with [beneficiaries, the advisory committee and trustees] before making a final decision — always subject to the necessity from time to time to react swiftly due to external events."

Based on excerpts from the Memorandum of Wishes, one is left wondering whether Ted would, if he could, go back in time to amend the Articles to provide additional restraint on the powers of the Chair.

At least one detail in the Memorandum of Wishes suggests that Ted did not conceive of it seeing the light of day for anyone other than his immediate family, lawyers, and executors. The document includes a stipulation that for purposes of a "spouse" of the Rogers family inheriting under his Will, "spouse" does not include a common-law or same-sex spouse.

LESSONS TO BE LEARNED FOR BUSINESS SUCCESSION PLANNING

The following is a summary of some lessons to be learned from the Rogers saga when planning the succession of one's business.

- Know that a testamentary "instruction," which is binding on your executor, is distinct from a testamentary "wish," which is only morally binding but not legally binding. While we would expect that this distinction was likely made known to Ted, and we cannot assume that he intended the Memorandum of Wishes to have any greater weight than simply as moral guidance, parents may sometimes overestimate their children's willingness to honour their wishes absent a legal obligation to do so.

- Know that your Will or ancillary documents, such as memoranda attached to the Will, may be publicly exposed if your Will is probated or your estate is litigated. When an executor applies for probate to obtain authority to administer an estate, the Will becomes a document of public record. Clients should be aware of the risk that the public may access a copy of the Will from the local court Registrar and that details therein could become public knowledge. As in the Rogers dispute, families may still be inclined to publicly file documents that are marked as "private and confidential" in order to substantiate their positions.

- Be realistic about your children, their temperaments, and the family dynamic. Consider who is best suited for leadership roles in the company and what checks and balances are available to prevent the escalation of any family disagreement.

- Jurisdiction often matters. Shareholders' rights may differ depending on whether the company was incorporated under federal or provincial laws. Likewise, testators' and beneficiaries' rights may differ depending on the province.

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14 *Ibid.*, at para. 101.
15 *Ibid.*, at para. 95.
16 In Spring of 2021, Rogers negotiated a purchase agreement with Shaw Communications Inc. for the price of $26 billion dollars. The transaction is scheduled to close in Spring of 2022 subject to regulatory approval (*Ibid.*, at paras 37-38).
17 Jason Kirby, "On his deathbed, Ted Rogers looked into the future. This is not what he saw" in *The Globe and Mail* (November 19, 2021), available online: https://www.theglobeandmail.com/business/article-on-his-deathbed-ted-rogers-looked-into-the-future-this-is-not-what-he/ [emphasis added].

- Review your estate plan regularly in case updates should be made. Whether this includes your Will, Powers of Attorney, shareholders' agreements, corporate constating documents, any memoranda of wishes, trusts or other corporate structures put in place to effect your estate plan, it is important to ensure the plan evolves with your intentions as time passes and circumstances change.

CONCLUSION

Business succession planning can be complex and requires consideration of several factors: understanding the business owner's testamentary instructions or wishes; appreciating family dynamics; protecting the interests of the business; and identifying tax planning opportunities, among others. There is no crystal ball to foresee with certainty how a succession plan will ultimately unfold, particularly when it comes to predicting human behaviour. However, a proper plan will identify the client's succession goals, canvass potential consequences that can be known at the time, and implement appropriate checks and balances to help fortify the plan to give effect to the client's intentions. Business owners considering passing the business on to the next generation should consult the appropriate legal advisors with experience in corporate, tax, and estate law when getting their estates in order.

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HOW GREEN IS YOUR BANK?

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When it comes to Environmental, Social and Governance measures or ESG factors, banks are usually considered the cleanest and greenest businesses. But have you ever thought how much your bank contributes to fuel emissions not just by its own operations but also by its lending activities?

Vancouver City Savings Credit Union recently released a report showing annual greenhouse gases emitted by its business and consumer borrowers total 105,000 tonnes or 36 times those of its own operations.

It is the first Canadian financial institution to release such a report, but it will not be the last.

These are financed emissions that are getting a lot of attention recently.

Tallying up green house gas emissions by a financial institution and its borrowers is not an easy task. Banks lend, on their own or in syndicates, to a variety of businesses so they can grow and expand their business. Sometimes the activities of these businesses are carbon intensive. Think about oil sands producers who are all financed by banks.

In addition, banks finance the purchase of millions of houses and cars by consumers that each have their own emissions profile. Add to that the mutual funds that the banks own and the emissions profiles of all the businesses that they invest in, and you can get an idea of the complexity of calculating total greenhouse gases emitted by a financial institution and its customers.

The financial world's contribution to global emissions consumed a large part of the agenda at the UN talks in Glasgow, Scotland in November 2021. Financed emissions were a big part of the discussion as they account for 700 times that of the greenhouse gases emitted by banks and insurers themselves, according to CDP, formerly the Carbon Disclosure Project.

The big Canadian banks are busy compiling their data with regards to financed emissions and TD Bank is the first big bank who is going to issue a report in 2022.

The big banks have made carbon neutrality pledges but have resisted calls from environmental groups to decarbonize by stopping their finance activities in the energy sector. The banks say they are better off supporting Canadian businesses while using their resources to help reduce their clients' carbon emissions.

Once all Canadian banks file their reports on financed emissions, Canadians will have a much better idea as to the enormity of the problem that our country has to solve to achieve its net-zero emissions target.

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