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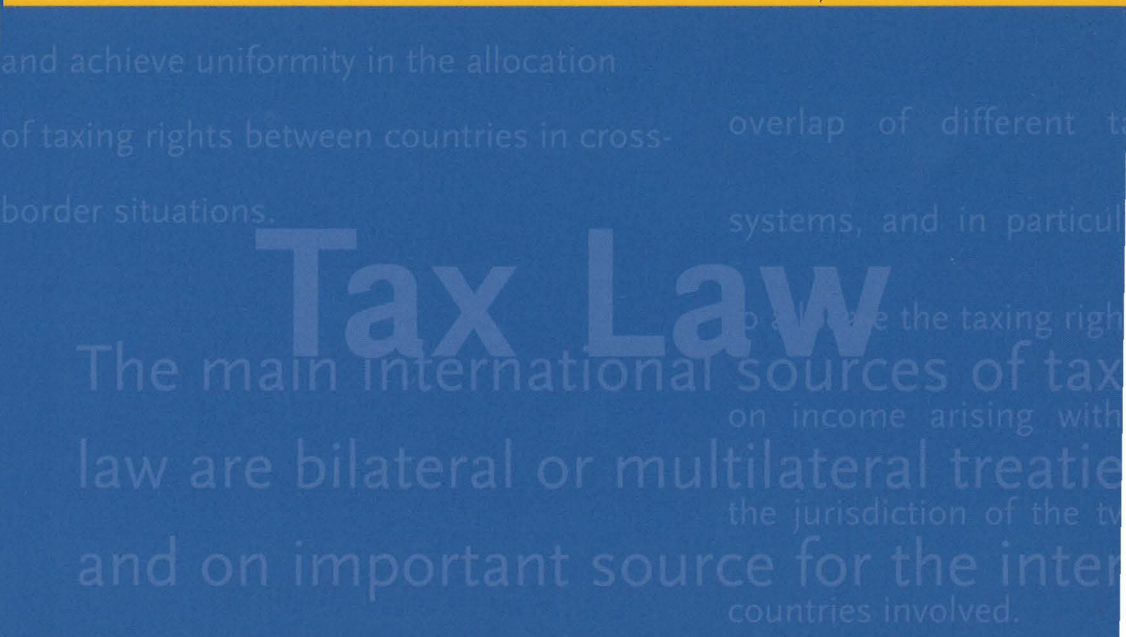
Dispute Resolution under Tax Treaties and Beyond



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edited by
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Chapter 21

Canada

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21.1. Introduction

21.1.1. General domestic rules and mechanisms on tax dispute resolution

21.1.1.1. Audit and assessment

Federal income tax in Canada is levied pursuant to the Income Tax Act (ITA).[2] Responsibility for administering and enforcing the ITA is statutorily conferred upon the Minister of National Revenue (Minister),[3] whose powers and responsibilities are in turn delegated to various officials in the Canada Revenue Agency (CRA).[4] The ITA empowers the Minister to issue "assessments" that determine a taxpayer's liability for tax, interest and penalties for a particular taxation year. When the Minister issues an assessment of a taxation year that has been assessed previously (such as following an audit, or in response to request from a taxpayer to amend a return), the assessment is generally called a "reassessment". Section 248 of the ITA specifies that the term "assessment" includes a "reassessment" and this chapter uses the terms interchangeably.

The Audit Division of the CRA conducts audits of taxpayers to verify their compliance with the ITA. Audits generally conclude with the reassessment of any taxation years in which the CRA determines that adjustments are required.

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2. CA: Income Tax Act, R.S.C. 1985, c. 1, 5th Supp. (amended 9 June 2022) (S.C. 2022, c. 5), Primary Sources IBFD [hereinafter ITA 1985 (amended 2022)]. Also available at https://laws-lois.justice.gc.ca/eNg/acts/I-3.3/index.html.
3. Id., at sec. 220(2).
4. The CRA is a body corporate under the authority of the Minister constituted pursuant to the Canada Revenue Agency Act (CA: Canada Revenue Agency Act, S.C. 1999, c. 17 (amended 9 June 2022) (S.C. 2022, c. 5), available at https://laws-lois.justice.gc.ca/eng/acts/c-10.11/).

21.1.1.2. Litigating tax disputes

Subject to various procedural requirements and time limits, a taxpayer may dispute an assessment by filing an "objection" with the Minister (which, in practice, is received and processed by the CRA Appeals Division).[5] If the objection is not resolved to the taxpayer's satisfaction, the taxpayer may appeal the assessment to the Tax Court of Canada (TCC).[6] In addition, if the Minister fails to dispose of an objection within 90 days (which, as a practical matter, almost never happens),[7] a taxpayer is entitled to waive their right to an objection decision and proceed directly to the TCC.[8] Decisions from the TCC (subject to some limitations applicable to smaller cases) may be appealed as of right by either the Minister or the taxpayer to the Federal Court of Appeal (FCA).[9] Decisions from the FCA may be further appealed, with leave, to the Supreme Court of Canada (SCC).[10]

The ITA also provides for the Minister to issue "determinations" with respect to specific tax-related balances – including in particular losses incurred in a particular year.[11] A taxpayer can dispute a determination in the same manner as an assessment (i.e. through objection and appeal to the TCC).[12] Consequently, unless otherwise stated, the comments in this chapter pertaining to assessments also apply to determinations, mutatis mutandis.

5. Sec. 165 ITA 1985 (amended 2022). Note that sec. 165(2) requires that a notice of objection be "addressed to the Chief of Appeals in a District Office or a Taxation Centre of the Canada Revenue Agency".
6. Id.
7. The current CRA service standard to dispose of "low complexity" and "medium complexity" objections is 180 and 365 days, respectively, 80% of the time. There is no specified service standard for high-complexity objections. *See* CRA, *Dispute resolution – Complaints, objections, and relief requests*, Service Standards 2020-2021, available at https://www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/service-standards-cra/service-standards-2020-21.html.
8. Sec. 169(1)(b) ITA 1985 (amended 2022).
9. CA: Federal Courts Act, R.S.C. 1985, c. F-7, secs. 27(1.1)-(1.3) (amended 23 June 2022) (S.C. 2022, c. 10), available at https://laws-lois.justice.gc.ca/eng/acts/f-7/.
10. CA: Supreme Court Act, R.S.C. 1985, c. S-26, secs. 37(1) and 40 (amended 18 Dec. 2019) (S.C. 2019, c. 25), available at https://laws-lois.justice.gc.ca/eng/acts/f-7/.
11. Sec. 152(1.1) et seq ITA 1985 (amended 2022). For a detailed discussion of the ITA's loss-determination regime, *see* M.H. Lubetsky, *Income Tax Disputes Involving Loss Years: Pitfalls, Foibles, and Possible Reforms*, 67 Canadian Tax Journal 3 (2019), available at https://ssrn.com/abstract=3461759.
12. Sec. 152(1.2) ITA 1985 (amended 2022).

21.1.1.3. Collection of taxes

Although an assessment is presumed valid and binding,[13] most collection proceedings are automatically stayed while an assessment is under objection or appeal – with key exceptions being assessments made of large corporations (for which half of amounts in dispute are collectible) and assessments of unpaid withholding taxes (which can generally be collected in their entirety).[14]

Subsection 220(4) of the ITA authorizes the Minister, on a discretionary basis, to accept security with respect to collectible amounts.[15] The CRA's published guidance on its collections policies explains that "[a]cceptable security must be liquid (easily convertible to cash), equivalent or near equivalent to cash, and realizable on demand without defense or claim from third parties" and include bank letters of guarantee, standby letters of credit or mortgages.[16]

21.1.1.4. Settlement procedures

The ITA does not expressly authorize the Minister to compromise on amounts of tax owing for the purpose of settling tax disputes, and the ITA contains no formal settlement procedure. This said, the CRA often enters into settlement agreements with taxpayers to resolve disputes over their tax liabilities, and the courts have held that such agreements are enforceable unless they require the Minister to act or assess tax in a manner manifestly unsupportable under the ITA.[17]

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13. Id., at sec. 152(8).
14. Id., at sec. 225(1).
15. Id., at sec. 220(4.1) in fact *obliges* the Minister to accept "adequate security" with respect to any collectible amounts under objection or appeal – except more strikingly for the 50% of amounts in dispute by large corporations.
16. CRA, *IC98-1R8: Tax collections policies* (last modified 24 May 2022), available at https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic98-1/tax-collections-policies.html#AcceptableForm.
17. *See*, for example, CA: TCC, 10 Mar. 2017, *Sifto Canada Corp. v. The Queen*, 2017 TCC 37, para. 33, available at https://canlii.ca/t/h2mq8 (*see* sec. 21.3.2.1.); CA: FC, 14 Dec. 2016, *Rosenberg v. Canada (National Revenue)*, 2016 FC 1376, available at https://canlii.ca/t/gx77q (enforcement of an agreement to discontinue audit action); and CA: FCA, 10 Jan. 2020, *Canada v. CBS Canada Holdings Co.*, 2020 FCA 4, available at https://canlii.ca/t/j4sdw (enforcement of a settlement agreement reached in a TCC appeal). The author discloses that he served as counsel in *Rosenberg*.

21.1.2. Domestic rules on cross-border dispute resolution mechanisms

To the extent that the Minister assesses a taxation year in a manner contrary to a tax treaty, the taxpayer may generally dispute the assessment through the objection and appeal process. There is voluminous case law from the TCC, FCA and SCCon the interpretation and application of a wide range of treaty provisions.[18]

18. *See*, for example, CA: SCC, 22 June 1995, *Crown Forest Industries v. Canada*, 2 SCR 802, Case Law IBFD, available at https://canlii.ca/t/1frhz (residency of a corporation under the *Can.-US Tax Treaty*); CA: FCA, 24 Feb. 2000, *Canada v. Dudney*, 2000 DTC 6169, available at https://canlii.ca/t/4l9w (meaning of "fixed base" in the *Can.-US Tax Treaty*); CA: FCA, 14 Oct. 2003, *Edwards v. The Queen*, 2003 FCA 378, available at https://canlii.ca/t/21w77 (applicability of the *Can.-PRC Tax Treaty* to Hong Kong); CA: FCA, 9 Jan. 2008, *Canada v. Canwest Mediaworks Inc.*, 2008 FCA 5, leave to appeal to the SCC ref'd [2008] 2 SCR vi, available at https://canlii.ca/t/1vdxj (validity of assessment issued after a limitation period in the *Can.-Barb. Tax Treaty*); CA: TCC, 16 May 2008, *Knights of Columbus v. The Queen*, 2008 TCC 307, available at https://canlii.ca/t/1xcck) (whether a taxpayer had a permanent establishment in Canada arising from a "dependent agent" under the *Can.-US Tax Treaty*); CA: FCA, 26 Feb. 2009, *Canada v. Prévost Car Inc.*, 2009 FCA 57, available at https://canlii.ca/t/22pcc (entitlement to a treaty rate in the *Can.-Neth. Tax Treaty*); CA: TCC, 8 Apr. 2010, *TD Securities (USA) LLC v. The Queen*, 2010 TCC 186, available at https://canlii.ca/t/298rs (application of the *Can.-US Tax Treaty* rate to branch income earned by a US-resident LLC); CA: TCC, 24 Feb. 2012, *Velcro Canada Inc. v The Queen*, 2012 TCC 57, available at https://canlii.ca/t/fqdzs (entitlement to a treaty rate in the *Can.-Neth. Tax Treaty*); CA: SCC, 12 Apr. 2012, *Fundy Settlement v. Canada*, 2012 SCC 14, available at https://canlii.ca/t/fqx4c (residency of a trust under the *Barb.-Can. Tax Treaty*); CA: FCA, 13 July 2012, *Canada v. Sommerer*, 2012 FCA 207, available at https://canlii.ca/t/fs1r4 (residence of an Austrian private foundation under the *Austria-Can. Tax Treaty* and applicability of treaty provisions to attributed income); CA: FCA, 10 Jan. 2017, *Société Générale Valeurs Mobilières Inc. v. Canada*, 2017 FCA 3, available at https://canlii.ca/t/gx02k (entitlement to a tax credit under the *Braz.-Can. Tax Treaty*); CA: TCC, 14 June 2018, *Davis v. The Queen*, 2018 TCC 110, available at https://canlii.ca/t/hsm40 (residency of an individual under the *Can.-US Tax Treaty*); CA: FCA, 10 Jan. 2019, *Reyes v. Canada*, 2019 FCA 7, available at https://canlii.ca/t/hwzzm (treatment of a pension under the *Can.-Colom. Tax Treaty*); CA: TCC, 8 Mar. 2021, *Landbouwbedrijf Backx B.V. v. The Queen*, 2021 TCC 2, available at https://canlii.ca/t/jd2tm (residency under the *Can.-Neth. Tax Treaty*); and CA: SCC, 26 Nov. 2021, *Alta Energy Luxembourg SARL v. The Queen*, 2021 SCC 49, available at https://canlii.ca/t/jktl6 (entitlement to an exemption in the *Can.-Lux. Tax Treaty*, application of the general anti-avoidance rule).

21.1.3. Treaty rules on cross-border dispute resolution mechanisms

21.1.3.1. OECD Model

Canada is an active member of the OECD, and its treaties are generally based on OECD Model Tax Convention on Income and on Capital (OECD Model).

21.1.3.2. OECD peer review on the MAP procedures

Canada is "an active member of the MAP Forum of the OECD Forum on Tax Administration" and "was part of the first batch of countries subject to the MAP peer review".[19] Canada received generally favourable feedback from its peers in both Stage 1 and Stage 2 of the MAP peer review.[20] Canada also received accolades in the OECD's 2020 Mutual Agreement Procedure Awards for having the second fastest closing time for transfer pricing cases and the fifth highest closing ratio among countries with large case inventories. Canada also won a "co-operation" award with the United States for having the second highest number of MAP cases fully resolved through agreement.[21]

21.1.3.3. Treaty policy

As of the date of submission of this chapter, Canada has bilateral double tax treaties on income and on capital in force with 94 jurisdictions.[22] All of

19. E. Whitsitt & C. Brown, *Canada*, in *Tax Treaty Arbitration* p. 168 (M. Lang et al eds., IBFD 2020), Books IBFD.

20. OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Canada (Stage 1): Inclusive Framework on BEPS: Action 14*, OECD/G20 Base Erosion and Profit Shifting Project (OECD 2017), available at http://dx.doi.org/10.1787/9789264282612-en [hereinafter *MAP Peer Review Report (Stage 1)*]; and OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Canada (Stage 2): Inclusive Framework on BEPS: Action 14*, OECD/G20 Base Erosion and Profit Shifting Project (OECD 2019), available at https://doi.org/10.1787/67dba2bb-en [hereinafter the *MAP Peer Review Report (Stage 2)*]. There were 21 countries that participated in the peer review process for Canada (id., at p. 16).

21. *See* OECD, *2020 Mutual Agreement Procedure Awards* (21 Nov. 2021), available at https://www.oecd.org/tax/dispute/mutual-agreement-procedure-awards.htm.

22. Canada (Department of Finance), *Tax Treaties* (last updated 3 June 2020), available at https://www.canada.ca/en/department-finance/programs/tax-policy/tax-treaties.html#status. Note that, under Canadian law, international treaties signed by the government are not self-executing (CA: SCC, 28 Jan. 1937, *Canada (AG) v. Ontario (AG)*, UKPC 6, at paras. 5

these tax treaties include a provision authorizing a person facing double taxation or taxation potentially not in accordance with the treaty to seek competent authority assistance and, if applicable, to initiate a MAP with the other treaty state.[23] Canada has also adopted the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) and enacted it into force,[24] and has designated 84 of its current tax treaties as "Covered Tax Agreements" thereunder.[25]

When contrasting Canada's approach to MAPs with those of its treaty partners and with the OECD Model, a recurring theme is the CRA's meticulous attention to limitation periods and a strong institutional commitment to enforcing them, even when doing so results in double taxation for reasons entirely beyond a taxpayer's control. Such situations can readily occur in cases where a foreign adjustment resulting in double taxation is made beyond the applicable limitation periods that would apply to any correlative Canadian adjustments.

Under the ITA, once the Minister issues an assessment to a taxpayer for a given taxation year, the Minister may generally reassess tax in that taxation year only during the "normal reassessment period" (either 3 or 4 years following the date of the first assessment, depending on the type of taxpayer).[26] After the normal reassessment period, the taxation year becomes statute barred and the Minister may only reassess tax in that taxation year in specific situations expressly set out by statute.[27] The ITA contains no standalone provision authorizing the Minister to reassess statute-barred years to give effect to determinations made through a MAP process. Rather, if an assessment is required to implement the results of a MAP, the Minister must

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and 6, available at https://www.bailii.org/uk/cases/UKPC/1937/1937_6.pdf. Consequently, all tax treaties are enacted into law through the enactment of a federal statute that proclaims the treaty to have the force of law. *See*, for example, CA: Tax Conventions Implementation Act, S.C. 2013, c. 27, Primary Sources IBFD (enacting or amending Canada's tax treaties with Hong Kong, Luxembourg, Poland, Namibia, Serbia and Switzerland), also available at https://laws-lois.justice.gc.ca/eng/acts/T-1.7/index.html.

23. *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at p. 9.

24. CA: Multilateral Instrument in Respect of Tax Conventions Act, S.C. 2019, c. 12, available at https://laws-lois.justice.gc.ca/eng/acts/M-12.8/index.html. For a review of the domestic procedural steps leading to ratification, *see* Whitsitt & Brown, *supra* n. 19, at p. 174.

25. Canada, *Status of List of Reservations and Notifications upon Deposit of the Instrument of Ratification* pp. 2-15 (29 Aug. 2019), available at https://www.oecd.org/tax/treaties/beps-mli-position-canada-instrument-deposit.pdf [hereinafter *MLI Instrument of Ratification*].

26. Sec. 152(3.1) and (4) ITA 1985 (amended 2022).

27. Note that loss years do not become statute barred unless a loss determination is requested and issued. *See* Lubetsky, *supra* n. 11, at pp. 510 and 511.

generally rely on some other exception to the normal reassessment period, such as the following:

- if a taxation year becomes statute barred while it is under objection or appeal, the Minister may reassess the taxation year to give effect to any grounds of objection or appeal for which the taxpayer is successful;[28]
- the Minister may reassess a taxation year at any time with respect to an issue for which a taxpayer has waived the benefit of the normal reassessment period. However, to be valid, such a waiver must be given before the expiry of the normal reassessment period;[29]
- the Minister may reassess a taxation year to make transfer pricing adjustments for up to three additional years following the expiry of the normal reassessment period;[30] and
- the Minister may reassess a taxation year at any time to redress any misrepresentation on a tax return that is made wilfully or negligently.[31]

In addition, 17 of Canada's treaties expressly allow the reassessment of statute-barred years to give effect to determinations made through a MAP process – although in two of these cases (including most importantly the Canada-United States Tax Treaty) the authorization to reassess statute-barred years applies only if the competent authority "has received notification that such a case exists within six years from the end of the taxable year to which the case relates".[32]

The remainder of Canada's tax treaties, however, deviate from article 25 of the OECD Model by completely excluding the provision that "[a]ny agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting State". Canada has also reserved the right for the second sentence of article 16(2) of the MLI – which is to the same

28. Sec. 165(3) and (5) ITA 1985 (amended 2022).
29. Id., at sec. 152(4)(a)(ii).
30. Id., at sec. 152(4)(b)(iii)(A).
31. Id., at sec. 152(4)(a)(i).
32. The 15 treaties with provisions equivalent to the second sentence of art.25(2) *OECD Model* are listed in the *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at Annex A, Column 8 (Azerbaijan, Chinese Taipei, Columbia, Greece, Hong Kong, Israel, Korea (Rep.), Madagascar, Namibia, New Zealand, Poland, Serbia, Spain, Switzerland and the United Kingdom). The remaining two treaties (with the 6-year notification constraint) are those with Kuwait and the United States. *See Convention between Canada and the United States with Respect to Taxes on Income and on Capital*, arts. IX(3) and XXVI(2) (26 Sept. 1980, amended by protocols signed on 14 June 1983, 28 Mar. 1984, 17 Mar. 1995, 29 July 1997 and 21 Sept. 2007) [hereinafter *Can.-US Tax Treaty*], Treaties & Models IBFD; and *Agreement Between the Government of Canada and the Government of the State of Kuwait For the Avoidance of Double Taxation and the Prevention Of Fiscal Evasion With Respect to Taxes on Income and on Capital* art. 25(2) (28 Jan. 2022), Treaties & Models IBFD. Sec. 21.2.4. discusses the operation of this 6-year notification rule in more detail.

effect – not to apply to its Covered Tax Agreements (CTAs).[33] In its place, in accordance with article 16(5)(c)(ii) of the MLI, Canada has agreed to negotiate time limits in its CTAs for parties to make primary adjustments in allocation/attribution cases, except in cases of fraud, gross negligence or wilful default.[34] Around half of Canada's tax treaties already set out such time limits (5 or 6 years in most cases), and Canada has undertaken a plan to negotiate amendments to the others to bring them into compliance.[35] In a related vein, Canada's only recorded reservation to the Commentary on Article 25 of the OECD Model reserves it the right to set "a time limit within which a Contracting State can make an adjustment to the income of an enterprise".[36]

All Canada's tax treaties deviate further from article 25 of the OECD Model by limiting access to the MAP to residents of the country concerned and/or requiring a person to initiate a MAP in their country of residence.[37] Canada has likewise reserved the right for the first sentence of article 16(1) of the MLI – which authorizes a person to initiate a MAP process in either of the treaty partners – not to apply to its CTAs.[38] In its place, in accordance with article 16(5)(a) of the MLI, Canada has a "documented notification process in place for all its treaties" to inform a treaty partner when it rejects a MAP application as not justified.[39] As discussed in section 21.2.4.1., Canada prefers requiring that taxpayers apply for competent authority assistance in their country of residence since it allows the CRA to ensure that the relevant years are not statute barred and that they remain open until the MAP is completed.

33. The reservation is made pursuant to art. 16(5)(c) MLI. *See MLI Instrument of Ratification*, *supra* n. 25, at p. 33.
34. Id. The case law has supported the idea that such treaty-based time limits can be relied on by taxpayers in disputing assessments on objection or appeal on the basis that they are treaty-barred. *See* CA: FCA, 9 Jan. 2008, *Canada v. Canwest Mediaworks*, 2008 FCA 5, leave to appeal to the SCC ref'd [2008] 2 SCR vi, para. 19, available at https://canlii.ca/t/1vdxj; and CA: TCC, 22 July 2010, *Sundog Distributing Inc. v. The Queen*, 2010 TCC 392 para. 16, available at https://canlii.ca/t/2bt7c.
35. *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at paras. 229-241. A list of the countries appears at Annex A, Column 8.
36. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 25* para. 100 (21 Nov. 2017), Treaties & Models IBFD. *See also MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para. 53.
37. *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para. 45.
38. The reservation is made pursuant to art. 16(5)(a) MLI. *See MLI Instrument of Ratification*, *supra* n. 25, at p. 33; and *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at paras. 32-33 and 45.
39. *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para. 46.

The majority of Canada's tax treaties further deviate from article 25 of the OECD Model by setting a 2-year time limit for taxpayers to request a MAP.[40] Article 16(1) of the MLI, however, has extended many of these provisions to 3 years (subject to reciprocation by the treaty partner). At least 40 of Canada's tax treaties are affected by this extension,[41] and others may follow as more countries adopt the MLI.[42]

As discussed in more detail in section 21.6., although most of Canada's tax treaties currently lack arbitration provisions,[43] Canada's current treaty policy promotes the adoption of MAP arbitration.[44] In 2007, Canada and the United States established a binding arbitration regime applicable to certain types of MAP cases as part of the Fifth Protocol to the Canada-United States Tax Treaty.[45] Canada and the United Kingdom established a very

40. *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para. 26, counts 72 treaties that specify filing periods under 3 years for one or both treaty parties (2 years in most cases), a list of which appears at Annex A, Column 4.

41. *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para. 36. A list of the treaties appears at Annex A, Column 4.

42. CRA (Competent Authority Services Division), *Mutual Agreement Procedure: Program Report 2020* (undated), p. 4 [hereinafter *MAP Annual Report 2020*], available at https://www.canada.ca/content/dam/cra-arc/serv-info/tax/non-res/map/mp_rprt_2020-en.pdf.

43. In addition to Canada's treaties with the United Kingdom, the United States and Switzerland (discussed in more detail in sec. 21.6.5.), some of Canada's tax treaties include voluntary arbitration clauses authorizing the respective competent authorities, if they agree to do so, to resolve differences through arbitration as a last resort. As Whitsitt & Brown document, "[l]imited information is available the use of these arbitral provisions" such that "few conclusions can be drawn from this experience" (Whitsitt & Brown, *supra* n. 19, at p. 172). The treaties with such provisions are listed in *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at Annex A, Column 11.

44. *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at paras. 200-206.

45. *Can.-US Tax Treaty*. As discussed in sec. 21.6.5., the Canada-United States MAP arbitration regime consists of four principal instruments: (i) art. XXVI(6) and (7) *Can.-US Tax Treaty*, enacted in 2007 as part of the Fifth Protocol; (ii) an exchange of diplomatic notes on 21 Sept. 2007 that have been incorporated into the *Can.-US Tax Treaty* as Annex A to the Fifth Protocol [hereinafter *Can-US Tax Treaty, Annex A*] (CA: SC, 14 Dec. 2007, *An Act to amend the Canada-United States Tax Convention Act, 1984*, SC 2007, c 32, Schedule 1, available at https://canlii.ca/t/8w47); (iii) *Memorandum of Understanding between the Competent Authorities of Canada and the United States of America* (9 Nov. 2010) [hereinafter *Can.-US MAP Arbitration MOU*], available at https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/memorandum-understanding-between-competent-authorities-canada-united-states-america.html; and (iv) *Arbitration Board Operating Guidelines - Canada - United States* (25 Nov. 2010) [hereinafter *Can.-US Arbitration Board Guidelines*], available at https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/arbitration-board-operating-guidelines-canada-united-states.html.

similar regime that went into effect in 2017.[46] Canada has also adopted the provisions of the MLI with respect to binding arbitration – with reservations that largely aim to ensure consistency with its arrangements with the United States and United Kingdom – that has gone or is expected to go into effect with respect to 21 other treaty partners.[47] MAP arbitration proceedings under Canada's current arrangements are strictly confidential and the CRA refuses, on the grounds of confidentiality, to disclose any statistics about its MAP arbitration program.[48] However, "anecdotal evidence" suggests that the number of completed arbitrations is "very low" and that these arbitrations have tended to go against the CRA, which has been perceived as taking "overly aggressive" positions.[49]

In addition, the Income Tax Conventions Interpretation Act (ITCIA)[50] – a separate statute – prescribes certain general rules of treaty interpretation as well as several treaty overrides, in particular with respect to notional expenses (*see* section 21.2.3.), the ITA's general anti-avoidance rule (*see* section 21.2.5.) and trust residency (*see* section 21.3.3.2.).

46. As discussed in sec. 21.6.5., the Canada-United Kingdom MAP arbitration regime consists of two principal instruments: (i) art. 23(6) and (7) of the *Convention Between the Government of Canada and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital Gains* (8 Sep. 1978, amended by protocols signed on 15 Apr. 1980, 16 Oct. 1985, 7 May 1983 and 21 July 2014) [hereinafter *Can.-UK Tax Treaty*], enacted as part of the protocols signed on 21 July 2014; and (ii) an exchange of diplomatic notes (*Agreement Concerning the Application of the Arbitration Provisions of the Convention between the Government of Canada and the Government of the United Kingdom of Great Britain and Northern Ireland* (26 Nov. 2015) [hereinafter *Can.-UK MAP Arbitration Agreement*], available at https://www.canada.ca/en/department-finance/programs/tax-policy/tax-treaties/country/united-kingdom-agreement-2015.html). *See also* CRA, *Entry into force of the Agreement Concerning the Application of the Arbitration Provisions of the Canada-United Kingdom Tax Convention* (8 Feb. 2017), available at https://www.canada.ca/en/department-finance/programs/tax-policy/tax-treaties/notices/2017/united-kingdom-entry-force.html.

47. OECD, *Canada-MLI Arbitration Profile as of 28-06-2022* [hereinafter *Canada MLI Arbitration Profile*], available at https://www.oecd.org/tax/treaties/beps-mli-arbitration-profile-canada.pdf. The countries are Australia, Austria, Barbados, Belgium, Finland, France, Greece, Hungary, Ireland, Italy, Japan, Luxembourg, Malta, the Netherlands, New Zealand, Papua New Guinea, Portugal, Singapore, Slovenia, Spain and Sweden.

48. CRA, *5 May 2021 IFA Roundtable*, Question 6, available at https://taxinterpretations.com/content/610132.

49. Whitsitt & Brown, *supra* n. 19, at pp. 164 and 181.

50. CA: Income Tax Conventions Interpretation Act, R.S.C. 1985, c. I-4 (amended 26 June 2013, S.C. 2013, c. 34) [hereinafter ITCIA], available at https://laws.justice.gc.ca/eng/acts/I-4/index.html.

21.1.4. Domestic rules and administrative guidance for implementing treaty dispute resolution mechanisms

21.1.4.1. Domestic rules on corresponding adjustments

The ITA has no specific rules with respect to transfer pricing-related corresponding adjustments in favour of a taxpayer. The CRA's published guidance provides that requests for downward transfer pricing adjustments "as a result of an upward adjustment initiated by a foreign tax authority" should be addressed to the CRA's competent authority.[51]

21.1.4.2. Competent authority function

Canada's tax treaties generally define "competent authority", in the case of Canada, as "the Minister of National Revenue or the Minister's authorised representative".[52] The Minister's competent authority functions have been in turn delegated to two divisions in the CRA, namely: the Competent Authority Services Division of the International and Large Business Directorate with respect to cases involving specific taxpayers, and the Legislative Policy Directorate with respect to issues involving "general interpretation, non-discrimination, treaty shopping, double non-taxation issues, and general issues concerning the application of tax conventions where specific taxpayers are not involved".[53]

21.1.4.3. Administrative guidance

The CRA's primary public guidance on MAP processes appears in Information Circular 71-17R6: Competent Authority Assistance under

51. CRA, *TPM-03R Downward Pricing Adjustments* paras. 10-12 (21 June 2022) [hereinafter TPM-03R], available at https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/information-been-moved/transfer-pricing/03.html.

52. Older treaties use the language "his authorized representative" rather than "the Minister's authorized representatives". Sec. 33(1) Interpretation Act (a statute that sets out various rules for the interpretation of federal legislation) provides, however, that "words importing male persons include female persons" (CA: Interpretation Act, RSC 1985, c 1-21 (amended 3 Aug. 2021) (SC 2021, c 11), available at https://laws-lois.justice.gc.ca/eng/acts/I-21/). It bears note that the current Minister (the Honourable Diane Lebouthillier) as well as her two immediate predecessors are all female.

53. CRA, *Income Tax Information Circular IC 71-17R6 Competent Authority Assistance under Canada's Tax Conventions*, para. 5 (1 June 2021) [hereinafter IC 71-17R6], available at https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic71-17/guidance-on-competent-authority-assistance-under-canada-s-tax-conventions.html.

Canada's Tax Conventions, as last updated 1 June 2021 (IC 71-17R6).[54] The Competent Authority Services Division also publishes an annual report summarizing its activities over the past year,[55] the most recent of which (as of the date of submission of this chapter) covers the 2020 calendar year (MAP Annual Report 2020).[56]

For purposes of classification and reporting, Canada groups "negotiable" competent authority cases (i.e. those that require the involvement of the treaty partner)[57] into two categories, namely, "attribution/allocation" cases (defined as those that relate to "the attribution of profits to a permanent establishment or the determination of profits between associated enterprises") and "other".[58] Attribution/allocation cases make up over 70% of Canada's MAP workload and are most often resolved through an agreement resulting in the complete elimination of double taxation.[59] MAP cases in the "other" category tend to have more disparate outcomes, including the granting of unilateral relief by the CRA, the rejection of the taxpayer's objection as not justified, or an "agreement to disagree" with the treaty partner.[60]

As also reported in the MAP Annual Report 2020, cases involving the United States made up 46% of the MAP caseload, with 30 other countries making up the remainder.[61]

21.1.5. Bilateral investment treaties

Canada has bilateral Foreign Investment Promotion and Protection Agreements (FIPAs) with 38 countries,[62] including 8 with which Canada

54. Id.
55. These reports are available at https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/competent-authority-services/mutual-agreement-procedure-map.html.
56. *MAP Annual Report 2020*, *supra* n. 42.
57. Id., at p. 10. "Non-negotiable cases" mostly involve the application of various provisions under the *Can.-US Tax Treaty*, including primarily elections to defer the taxation of distributed pension income (id., at pp. 10 and 11).
58. Id., at p. 7.
59. Id., at Table 1 (126 ÷ 163 = 77%), Table 2 (52 ÷ 74 = 70%).
60. Id.
61. Id., at p. 11.
62. These agreements, albeit with various other categories of agreements and agreements not in force, are available at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng. Note that the FIPA with Ecuador has been terminated, although it continues to produce effects with regard to investments made prior to its termination.

does not have a tax treaty in force.[63] Canada adopted a new model FIPA in 2021.[64]

The FIPAs, generally speaking, provide a vehicle for investors from a treaty partner to seek compensation for government action contrary to the FIPA, with arbitration available in case of a dispute. Most FIPAs, however, specifically exclude "taxation measures" from their ambit and specify that the FIPA is subordinate to any tax treaty between Canada and the treaty partner.[65] On the other hand, most of Canada's FIPAs (including the 2021 model) carve out expropriation matters and agreements directly between the government and the foreign investor from the taxation measures exclusion. In other words, in certain cases and often subject to procedural requirements, if the government repudiates an agreement with a foreign investor concerning the tax treatment of an investment, and/or uses a taxation measure to effect an expropriation of an investment, the foreign investor can potentially seek compensation through the mechanisms set out in the agreement.

Unlike Canada's tax treaties, none of its FIPAs are enacted into law through enabling legislation passed by Parliament. Consequently, while they may produce some effects under international law, they do not formally form part of Canadian law and cannot supersede fiscal legislation.[66]

There has been very limited jurisprudence concerning Canada's FIPAs. Recently, however, in *Li* (2019),[67] a plaintiff sought to initiate a class action in the Supreme Court of British Columbia[68] challenging, on a wide variety

63. Countries with a FIPA with Canada but no tax treaty in force are Benin, Burkina Faso, Costa Rica, Kosovo, Lebanon, Mali, Panama and Uruguay.

64. *Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model*, available at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng.

65. The FIPAs without a general exclusion for "tax measures" are those with Argentina, the Czech Republic, Hungary, Poland, Russia and the Slovak Republic. These FIPAs simply provide that they do not oblige the treaty partners to extend to each other's investors the benefit of any tax treaty with a third party.

66. CA: FCA, 20 Jan. 2016, *Sin v. Canada*, 2016 FCA 16, paras. 11-15, available at https://canlii.ca/t/gn3b8.

67. CA: BCSC, 24 Oct. 2019, *Li v. British Columbia*, 2019 BCSC 1819, available at https://canlii.ca/t/j30wm, confirmed CA: BCCA, 29 June 2021, *Li v. British Columbia*, 2021 BCCA 256, available at https://canlii.ca/t/jgnpj.

68. The Supreme Court of British Columbia is the trial-level superior court of general jurisdiction in British Columbia. Constitutional challenges to tax legislation in Canada can be raised, inter alia, in the context of an ordinary tax appeal or through an action for declaratory relief in superior court. *See* CA: SCC, 13 Dec. 2019, *Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63, paras. 33-42, available at https://canlii.ca/t/j3xhq.

of constitutional grounds, the validity of a land transfer tax imposed by the Province of British Columbia on sales of residential property to non-residents of Canada (a measure adopted in 2016 to address an increase in housing prices that was largely attributed to increased demand from absentee foreign owners). The plaintiff – a national of China (People's Rep.) in Canada on a temporary work permit – alleged, among other things, that the tax was contrary to Canada's obligations under its various FIPAs and thus rendered inoperable by the constitutional doctrine of paramountcy (according to which federal law takes precedence over provincial law). The trial judge dismissed the plaintiff's claim, holding that although the FIPAs were "in force", they were not enacted into law through federal enabling legislation and thus could not pre-empt valid provincial legislation.[69] Specifically with respect to the Canada-China (People's Rep.) FIPA, the trial judge also held that the taxation-exclusion measure of article 14 would apply to the plaintiff's situation and that the plaintiff did not qualify with the procedural requirements to argue that the tax fell under the exception applicable to expropriations.[70] The British Columbia Court of Appeal confirmed the lower court's decision.[71]

21.2. Paragraph 1 of article 25 of the OECD Model

21.2.1. Persons entitled to MAP and arbitration

Most of Canada's tax treaties, like the OECD Model, refer to the MAP process being initiated by a "person", although a significant minority substitute the term "resident".

This said, regardless of whether they use the term "person" or "resident", most of Canada's tax treaties deviate from the current OECD Model and require initiators of a MAP process to do so in their country of residence

69. *Li* (2019) para. 173; and *see also Li* (2021) para. 109.
70. *Li* (2019) paras. 65, 67 and 168-169.
71. On appeal to the BCCA, the plaintiff seems to have abandoned her arguments based on Canada's FIPAs and instead focused on a similar argument based on the investor protection provisions of the (since repealed) *North American Free Trade Agreement* (NAFTA). The Court held that the federal legislation implementing NAFTA was limited in scope and did not have the effect of imbuing its investor protection provisions with force of law capable of pre-empting provincial legislation. (*Li* (2021), at para. 81, pp. 103-124). Note that art. 32.3 *Canada-United States-Mexico Agreement* (which replaced NAFTA effective 1 July 2020), available at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between, contains a broad exclusion for "Taxation Measures", an analysis of which falls outside the scope of this chapter.

(which was the procedure set out in the OECD Model prior to the adoption of the BEPS Action 14 Final Report in 2015).[72] As discussed in section 21.1.3.3., the adoption of the MLI is not expected to affect these provisions given that Canada has reserved against the application of the first sentence of article 16(1) of the MLI.[73] As discussed in section 21.2.4.1, Canada prefers obliging taxpayers to apply for competent authority assistance in their country of residence since it allows the CRA to ensure that the relevant years are not statute barred and will not become statute barred until the MAP is completed.

Requiring taxpayers to apply for a MAP in their country of residence creates an issue for taxpayers who are citizens but not residents of a treaty country who claim a violation of a treaty non-discrimination provision. The pre-BEPS version of the OECD Model specifically authorized persons in such situations to initiate the MAP process in their country of citizenship.[74] Most of Canada's tax treaties lack such an exception. In the majority of cases, however, the lack of such an exception does not impair access to the MAP, either because the tax treaty does not include a non-discrimination provision or because the non-discrimination provision only applies to residents of the treaty countries.[75] For the four remaining treaties with non-discrimination provisions that extend to non-residents of the treaty countries,[76] Canada has adopted an administrative exception to "accept, when the other general conditions under the MAP article are met, a non-discrimination case presented by a national even when the MAP article does not [expressly] include such a possibility", provided that the treaty partner is prepared to do so as well.[77] The legal basis for such a MAP could arguably be found in treaty provisions authorizing the respective competent authorities to resolve "any difficulties or doubts arising as to the interpretation or application of the tax treaty", as discussed in section 21.4.1.1.

All of Canada's tax treaties define "person" as "an individual, a company and any other body of persons." Most treaties expand the definition to expressly include trusts and/or partnerships. The CRA has no published

72. *OECD Model Tax Convention on Income and on Capital* (15 July 2014), Treaties & Models IBFD; *see also MAP Peer Review Report (Stage 2)*, *supra* n. 20, at p. 81.
73. *See* the sources listed in *supra* n. 38 and 39.
74. Art. 25(1) *OECD Model* (2014).
75. *MAP Peer Review Report (Stage 1)*, *supra* n. 20, at paras. 15-17; and *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at paras. 22-24.
76. These four treaties are listed in *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at Annex A, Column 3 (France, Lebanon, Slovenia and Sweden).
77. *MAP Peer Review Report (Stage 1)*, *supra* n. 20, at para. 18; and *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para 25.

guidance with respect to what kind of entity is or is not eligible to initiate an MAP process. However, given that a condition precedent for a person/resident to institute a MAP is taxation of that person/resident not in accordance with the applicable tax treaty, the applicant must presumably be an entity generally subject to taxation (or at least facing taxation) either in Canada or in the treaty partner. Indeed, and accordingly, IC 71-17R6 generally refers to MAP applicants as "taxpayers" rather than "persons".[78]

21.2.2. Actions of one or both contracting states

IC 71-17R6 does not discuss the scope of the term "actions" other than to remark that "[f]or Canadian-initiated cases, a request will be considered complete only when an adjustment is confirmed by a reassessment".[79] Foreign-initiated cases are presumably treated more flexibly; a dispute, for example, over whether the tax on a payment to a Canadian resident has been withheld at a rate in excess of the treaty rate could potentially be triggered by a formal denial of a refund rather than an assessment.[80] Moreover, several passages in IC 71-17R6 suggest that a taxpayer can initiate a MAP application in response to a proposal from either the CRA or the tax administration of the treaty partner that, if implemented, would result in taxation contrary to a tax treaty.[81] These passages could potentially apply, for example, to a MAP request made under the accelerated competent authority procedure (ACAP) (*see* section 21.3.1.4.), or else in situations involving the United States where a taxpayer seeks to benefit from the 6-year notification period in the Canada-US Tax Treaty (*see* section 21.2.4.).

Generally speaking, the CRA does not consider a taxpayer-initiated request for an adjustment – in and of itself – an "action" triggering access to the MAP procedure. This position broadly reflects the legal framework

78. *See*, for example, IC 71-17R6, *supra* n. 53, at para. 15 ("Where a taxpayer considers that an action by Canada or one of its treaty partners results or will result in taxation not in accordance with the relevant treaty, a taxpayer may initiate a request for competent authority assistance by submitting a written application to the Canadian competent authority.").

79. IC 71-17R6, *supra* n. 53, at para. 16.

80. Id., at para. 11. Note that, in Canada, under sec. 227(7) ITA 1985 (amended 2022), if a non-resident makes a timely request for a refund of amounts of tax withheld on its behalf (such as to claim the benefit of a treaty exemption or a treaty rate), and the Minister determines that the claim is not well-founded, the Minister is *obligated* to issue a notice of assessment to allow the non-resident to object and appeal.

81. Id., at paras. 17(f), 17(j), 82 (setting out the documentation that must be submitted with a MAP application) and 63 (discussing the treatment of "proposed" transfer pricing penalties in a MAP).

applicable in Canada to amended tax returns.[82] Other than in a few specified cases (particularly to claim deductions that crystallize in subsequent taxation years),[83] the ITA does not contemplate taxpayers amending their returns once filed, and the case law has held that "an amended income tax return is simply a request that the Minister reassess for that year" and "does not trigger the Minister's obligation to assess".[84]

This question of whether the filing of an amended return constituted an "action" giving rise to a MAP process arose parenthetically in *Teletech* (2013)[85] – a transfer pricing dispute over the allocation of profits and expenses between a US parent and its Canadian subsidiary. The dispute commenced when both entities voluntarily sought to reallocate profits from Canada to the United States for prior years following the receipt of a transfer pricing report. Both entities filed amended tax returns with the CRA and the United States' Internal Revenue Service (IRS), and both applied for a MAP. The CRA, however, declined to initiate a MAP on the grounds that there had been by that point no action on the part of the IRS resulting in double taxation. The IRS did, however, issue a reassessment a month later, which set in motion a 7-year procedural imbroglio discussed in detail in section 21.3.3.3. Ultimately, the issue of whether it was reasonable for the CRA to decline to initiate a MAP prior to issuance of an assessment by the IRS was not decided by the Court.[86]

Following *Teletech*, the CRA published guidance with respect to taxpayer-initiated downward adjustments that now appears in IC 71-17R6 (as well as the CRA's separately published guidance about downward transfer pricing adjustments).[87] The guidance advises that the CRA will accept a case under the MAP that involves a request for the downward adjustment when: (i) "[t]he upward adjustment has been accepted for consideration by the other tax authority"; (ii) "[t]he other competent authority takes steps to resolve the case under the MAP by reviewing the case, providing the Canadian

82. *See* I. Crosbie, *Amended Returns, Refunds and Interest*, in *Tax Dispute Resolution, Compliance and Resolution in Canada*, pp. 1-33 (Canadian Tax Foundation 2013).
83. *See*, for example, sec. 152(6) ITA 1985 (amended 2022).
84. CA: FCA, 21 Mar. 2006, *Armstrong v. Canada (Attorney General)*, 2006 FCA 119, para. 8, available at https://canlii.ca/t/1mx6w. This principle was recently reaffirmed in CA: FCA, 6 July 2022, *St. Benedict Catholic Secondary School Trust v. Canada*, 2022 FCA 125, leave to appeal to the SCC ref'd, 2023 CanLII 19743, para. 32, available at https://canlii.ca/t/jqbtg.
85. CA: FC, 29 May 2013, *Teletech Canada Inc v. Minister of National Revenue*, 2013 FC 572, available at https://canlii.ca/t/fz31l.
86. Id., at paras. 52-56.
87. TPM-03R, *supra* n. 51, at paras. 10-12.

competent authority with a detailed analysis as to why the other tax authority agrees with the adjustment and agrees to negotiate the case; (iii) "[t]he request for competent authority assistance is made within the time limits of the applicable treaty"; and (iv) "[t]he issue is not one that the Canadian competent authority has decided, as a matter of policy, not to consider".[88]

21.2.3. "Taxation not in accordance with the provisions of this Convention"

IC 71-17R6 includes a discussion of "typical requests for assistance from the Canadian competent authority" that lists various "[e]xamples of taxation not in accordance with a tax convention that may warrant a request for assistance to the Canadian competent authority", including disputes over residence, disputes over whether a taxpayer has a permanent establishment, transfer pricing adjustments, allocation of income among branches, withholding at rates in excess of treaty rates and uncertainty over whether a treaty covers a particular item of income.[89] This list is not exhaustive and, as discussed in section 21.4.1.1., almost all of Canada's tax treaties also provide for their competent authorities to consult together for the elimination of double taxation in cases not provided for in their tax treaties.

On the other hand, IC 71-17R6 also states that, as a matter of policy, the CRA will not consider for negotiation situations involving notional expenses (i.e. "Canada will not give correlative relief in the form of a notional expense for a notional income adjustment raised by a treaty partner") and cases with respect to the application of the ITA's thin-capitalization rules.[90] This said, even in these cases, Canada will not necessarily refuse to initiate the MAP process, but rather will commence the MAP process but "limit its role to providing an explanation to the other tax authority"[91] of the Canadian tax treatment with a view to obtaining a correlative adjustment.

The CRA's refusal to negotiate over notional expenses reflects the CRA's "long-standing view that notional expenses are generally not allowed in determining profits attributable to a PE"[92] – a view that was endorsed by the

88. IC 71-17R6, *supra* n. 53, at para. 27.
89. Id., at para. 11.
90. Id., at para. 25.
91. Id.
92. N. Armstrong (ed.), *26 May 2016 IFA Roundtable*, at Q. 2, available at https://taxinterpretations.com/content/367354.

FCA over 20 years ago in *Cudd Pressure* (1998).[93] This position is largely enshrined in paragraph 4(b) of the ITCIA, which bars notional expenses "except to the extent that an agreement between the competent authorities of the parties to the convention expressly provide otherwise".[94] The only such agreement in effect at this time is with the United States, as discussed below in section 21.4.1.1.[95]

21.2.4. Time limit for submitting the case

As mentioned in section 21.1.3.3., zealous attention to any applicable limitation periods is characteristic of the CRA's approach to MAPs.

21.2.4.1. Which state's notification matters

The CRA's general position is that in any dispute proceeding a MAP, the Canadian-resident taxpayer must submit a MAP request to the Canadian competent authority – even in transfer pricing disputes where the affected foreign entity has submitted a MAP request to the competent authority of the treaty partner. This requirement has been criticized by some of Canada's treaty partners as non-compliant with their tax treaties and contrary to the effective functioning of the MAP.[96] However, the CRA has persevered in its position, since it allows the CRA to verify that the affected taxation years are not statute barred and to oblige the taxpayer to take steps to ensure that they remain open for the duration of the MAP.[97] This said, the CRA has also confirmed that in cases where a taxpayer applies for a MAP with a foreign treaty partner instead of the CRA, the CRA would treat the date of the foreign application as the pertinent date for assessing whether the MAP application was timely.[98]

21.2.4.2. When action is deemed to be first notified

IC 71-17R6 explains that, from a "Canadian perspective", the expression "the first time that the taxpayer is notified of the action by a revenue

93. CA: FCA, 19 Oct. 1998, *Cudd Pressure Control Inc. v. Canada*, 98 DTC 6630 (FCA), available at https://canlii.ca/t/4m5w.
94. ITCIA, *supra* n. 50.
95. Armstrong, *supra* n. 92, at Q. 2.
96. *MAP Peer Review Report (Stage 1)*, *supra* n. 20, at para. 19; and *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para. 28.
97. *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para. 28.
98. Id.

authority that results in taxation not in accordance with the convention" refers to the "date of the notice of (re)assessment".[99] As discussed in section 21.2.2., a broader approach may be applicable to foreign-initiated matters. For example, a foreign notification might take the form of a refusal to issue a refund. Similarly, as discussed in section 21.2.4.5., in the case of a United States-initiated adjustment, a taxpayer will want to inform the CRA that "the case exists" within 6 years from the end of the taxation year to which the adjustment relates, even if a United States reassessment has yet to be issued.

21.2.4.3. When the MAP application is deemed to have been presented

IC 71-17R6 states that for Canadian-initiated cases, "[t]he Canadian competent authority will only commence work once a complete request for assistance is received", and that an application is considered complete only when: (i) an adjustment in confirmed by a reassessment; and (ii) all of the information listed at paragraph 17 of IC 71-17R6 (which is fairly voluminous and open ended) is provided.[100] As discussed in sections 21.2.2. and 21.3.1.4., a broader approach may be applicable to foreign-initiated matters or applications involving the ACAP.

21.2.4.4. Acceptance of late filing of the MAP application

As discussed in section 21.2.4.1., the CRA may accept a MAP application presented to the CRA beyond the time limits set out in a tax treaty if the matter has been presented to the treaty partner's competent authority within the treaty time limits. Otherwise, an application "must be made within the relevant time limit (if any) specified in the relevant treaty".[101]

21.2.4.5. Filing time limit in the absence of a treaty deadline

With respect to tax treaties (other than that with the United States) that do not specify a time limit during which a person may apply for a MAP,[102]

99. IC 71-17R6, *supra* n. 53, at para. 30.
100. Id., at para. 16.
101. Id.
102. There are eight such treaties (those with Australia, Brazil, Chile, China (People's Rep.), Denmark, Guyana, Sweden and the United States) (*MAP Peer Review Report (Stage 2)*, *supra* n. 20, at Annex A, Column 4).

the taxpayer must apply before the taxation years are statute barred in the country (or countries) where an adjustment is sought,[103] otherwise the application will be rejected.[104] IC 71-17R6 further explains that the taxpayer should apply "well before" the relevant statute years become statute barred.[105] At the Canadian Tax Foundation's Transfer Pricing Conference in February 2021, the director of the CRA's competent authority services division explained that "well before" means "as soon as possible".[106]

The Canada-United States Tax Treaty does not set a time limit during which a person may apply for a MAP and also authorizes the implementation of MAP agreements notwithstanding any domestic limitation periods – subject to the constraint that the competent authority that is being requested to make a correlative adjustment "has received notification that such a case exists within six years from the end of the taxable year to which the case relates".[107] Notification must be made in writing and is the responsibility of the taxpayer.[108] This 6-year "notification period" causes known problems for taxpayers given that transfer pricing adjustments, among others, may potentially be made after this period under domestic limitation periods. IC 71-17R6 acknowledges the conundrum faced by taxpayers in such situations:

> [T]he [Canada-United States Tax] Convention does not contain time limits which prevent a Contracting State from raising an adjustment. This may result in circumstances where notification of an adjustment or a case to the other competent authority within six years from the end of the taxation year is not possible. For example the CRA generally has seven years domestically from the date of original assessment to raise a transfer pricing adjustment under section 247 of the Act, and may do so beyond the six year treaty notification limit. Taxpayers should be aware that if this happens, there is no requirement for a Contracting State to withdraw its adjustment. Taxpayers should take steps to keep years open in both jurisdictions if they are aware of a pending adjustment which may surpass the six year notification limit.[109]

103. IC 71-17R6, *supra* n. 53, at para. 30, notes that this principle might theoretically not apply if a tax treaty authorizes the implementation of MAP settlements notwithstanding the expiry of domestic limitation periods, although that such treaties generally stipulate time limits for presenting a MAP case. The observation is correct. All 16 treaties (other than that with the United States) that authorize the implementation of MAP settlements notwithstanding the expiry of any domestic limitation periods (*see* those listed in *supra* n. 32) specify a time limit during which a person may apply for a MAP.
104. IC 71-17R6, *supra* n. 53, at para. 23.
105. Id., at para. 30.
106. N. Armstrong, *3 February 2021 Transfer Pricing Conference* (3 Feb. 2021), available at https://taxinterpretations.com/content/607302 (accessed 8 May 2023).
107. Arts. IX(3) and XXVI(2) *Can.-US Tax Treaty*.
108. IC 71-17R6, *supra* n. 53, at paras. 80 and 81.
109. Id., at para. 85.

21.2.4.6. MAPs application related to expired taxable periods

All MAP applications must include "a schedule of the statute-barred dates in each jurisdiction (domestic time limits) in respect of all years for which relief is sought" and taxpayers "are responsible for" taking steps (such as the filing of a notice of objection or a waiver) to ensure that all relevant years do not become statute barred while the MAP process is underway.[110]

As mentioned in section 21.2.4.5., with respect to tax treaties that do *not* specify a time limit during which a person may apply for a MAP (except for that with the United States), the application must be made while taxation years for which adjustments are sought are open under domestic limitation periods; if not, the application will be summarily rejected.

With respect to tax treaties that *do* specify a time limit during which a person may apply for a MAP, IC 71-17R6 states that the CRA "is restricted in providing relief" with respect to statute-barred years unless the applicable tax treaty has a provision that specifically overrides the ITA's limitation periods.[111] The somewhat cryptic wording suggests that the CRA could be importuned to participate in a MAP with respect to a statute-barred year when a person applies for one within the time frame allowed by a treaty, but that its participation will be limited to explaining the basis on which the taxpayer has been assessed and, perhaps, attempting to convince its treaty partner to provide ancillary relief.

21.2.4.7. Suspension of the MAP

Canada will suspend a MAP process if a taxpayer actively initiates or seeks to advance an objection or appeal of a matter under competent authority consideration and does not request that the objection or appeal be held in abeyance. As discussed in sections 21.3.1.3. and 21.2.5., the MAP process may resume following the disposition of the objection and/or appeal, subject to certain restrictions.[112]

110. Id., at para. 17(l), 32-33.
111. Id., at para. 31.
112. Id., at paras. 48 and 49.

21.2.5. Acceptance or denial of the MAP request and related remedies

In IC 71-17R6, the CRA states that, in cases where a Canadian reassessment relies on "any anti-avoidance provisions" of the ITA – with the two examples given being the general anti-avoidance rule at section 245 (the Canadian GAAR) or the transfer pricing transaction-recharacterization provision at paragraphs 247(2)(b) and (d) – the CRA will accept a case for a MAP but will not negotiate the adjustment with the treaty partner. Rather, the CRA will limit its participation to "forwarding the case to the other competent authority for any relief that the other competent authority may provide at the latter's discretion".[113] In cases involving treaty anti-avoidance rules, the CRA may also seek to use the MAP as an opportunity for "consensus on the application or non-application of the treaty anti-avoidance rules".[114]

The Canadian courts have yet to consider whether the CRA's position in this regard is correct or reasonable, given that Canada's tax treaties do not expressly exempt adjustments based on "anti-avoidance rules" from the MAP process,[115] and Canada has not recorded any reservation in respect to paragraph 26 of the Commentary on Article 25 of the OECD Model, which states that "[t]he simple fact that a charge of tax is made under an avoidance provision of domestic law should not be a reason to deny access to mutual agreement" and "[t]he circumstances in which a State would deny access to the mutual agreement procedure must be made clear in the Convention".[116] Arguably, for the CRA to categorically refuse ex ante to negotiate an adjustment that gives rise to an entitlement to a MAP for a reason not set out in statute or in the tax treaty concerned constitutes impermissible fettering of discretion.[117] A taxpayer seeking to challenge such a categorical refusal by

113. Id., at para. 43; *see also MAP Peer Review Report (Stage 1)*, *supra* n. 20, at para 37; *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para. 68; and Armstrong, *supra* n. 106, at "CASD's refusal to negotiate s. 247(2)(d) assessments".

114. IC 71-17R6, *supra* n. 53, at para. 44; Armstrong, *supra* n. 106, at "CASD's willingness to negotiate Treaty anti-abuse provisions".

115. *MAP Peer Review Report (Stage 1)*, *supra* n. 20, at para 36; and *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para. 67.

116. Para. 26 *OECD Model: Commentary on Article 25* (2017).

117. "Fettering of discretion" is a principle of administrative law that provides that "decision-makers who have a broad discretion under a law cannot fetter the exercise of their discretion by relying exclusively on an administrative policy [...] A policy can aid or guide the exercise of discretion under a law, but it cannot dictate in a binding way how that discretion is to be exercised". *See* CA: FCA, 26 Oct. 2011, *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, paras. 21-25, 43 and 60, available at https://canlii.ca/t/fnnrb.

the CRA would presumably do so through an application for judicial review to the Federal Court, as discussed in section 21.3.3.1.[118]

Other situations in which the CRA will agree to commence a MAP but not negotiate over the adjustment at issue and will limit its role to seeking correlative relief from the treaty partner include: (i) when a taxpayer rejects an agreement negotiated by competent authorities and decides to dispute the adjustment through the objection and appeal process; (ii) if a court issues a final decision with respect to the Canadian adjustment; and (iii) if an objection is resolved through a settlement agreement and the taxpayer waives any further right of objection or appeal.[119]

21.3. Paragraph 2 of article 25 of the OECD Model

21.3.1. Possible outcome of an admissible request

21.3.1.1. Informing the taxpayer about a competent authority agreement

After an agreement is reached with a treaty partner through a MAP, and confirmed in writing with the treaty partner, the CRA advises the taxpayer, first verbally and then with a formal letter.[120]

21.3.1.2. Time interval granted to the taxpayer to accept the competent authority agreement

The formal letter from the CRA informing a taxpayer of a MAP agreement "generally requires the taxpayers to notify whether they accept such agreement within 30 days".[121] Extensions are possible.[122]

118. This said, in the particular case of adjustments that disallow treaty benefits under the Canadian GAAR, the CRA could arguably find support for a categorical refusal to negotiate the adjustment in sect. 4.1 ITICIA, which provides that the GAAR applies "[n]otwithstanding the provisions of a convention or the Act giving the convention the force of law in Canada".
119. IC 71-17R6, *supra* n. 53, at paras. 52, 54 and 67.
120. *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para. 221. *See also Sifto* (2017) para. 33.
121. *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para. 221. *See also Sifto* (2017) paras. 47 and 48.
122. *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para. 226 ("Canada clarified that delays may occur if the taxpayer fails to provide its consent to the MAP agreement timely").

21.3.1.3. Refusal of the competent authority agreement

A taxpayer may reject an agreement negotiated by the competent authorities. In such cases, the MAP agreement will not be implemented and the taxpayer may dispute the CRA adjustment that has given rise to the MAP through the objection and/or appeal process, provided that a valid objection or appeal has been filed. As discussed in sections 21.2.4.6. and 21.2.5., in such situations, if the final resolution of the objection and/or appeal process results in the taxpayer facing a situation of double taxation, the CRA will agree to start a second MAP for the limited purpose of seeking a correlative adjustment.[123]

It bears note that a taxpayer must accept or reject a competent authority agreement as a whole and cannot accept it with respect to certain issues or years.[124]

21.3.1.4. Implementation of the competent authority agreement

To accept a competent authority agreement, a taxpayer must waive all further rights of objection or appeal for all relevant taxation years,[125] after which the agreement will be sent to the local tax service office or appeal office for implementation.[126]

In transfer pricing cases, a competent authority agreement may also include provisions allowing a taxpayer to repatriate funds to avoid withholding tax on the final amount of the transfer pricing adjustment (such amounts being deemed by the ITA and, as dividends, taxed accordingly). These withholding taxes will be waived or refunded if the taxpayer completes the repatriation – whether through a fund transfer or adjustment to intercompany accounts – within a specified time period.[127]

Canada also offers the ACAP, according to which a taxpayer can request that "the competent authorities ... apply a MAP settlement to taxation years that are in the process of a risk assessment or in the preliminary stages of an audit, or which may be considered for audit review, without requiring

123. IC 71-17R6, *supra* n. 53, at para. 67.
124. Id., at para. 66.
125. Id., at para. 68.
126. *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para. 221.
127. IC 71-17R6, *supra* n. 53, at para. 70.

a (re)assessment and another formal competent authority request".[128] An ACAP request may be made contemporaneously with the MAP request or "at any time before the conclusion of the competent authority negotiations under the MAP process", and must be accepted by both competent authorities concerned.[129]

Canada's tax treaties do "not extend to cover domestic interest or penalties levied as a result of an adjustment relating to an international transaction". Consequently, the CRA's competent authority has no authority to waive or negotiate over interest or penalties (such as transfer pricing penalties) that may result from "(re)assessments or adjustments that are the subject of a request for competent authority assistance".[130] Consequently, when a MAP agreement is implemented through a reassessment, any applicable interest and/or penalties payable (or refundable) under the ITA will be calculated automatically or incorporated in the reassessment and/or statement of account.[131] This said, the Minister does have a separate authority to waive or cancel interest and penalties imposed under the ITA accrued over the prior 10 years (counting back from the date of application for interest and/or penalty relief).[132] This relief is generally afforded in situations of financial hardship, in situations where interest has accrued as a result of undue delay on the part of the CRA or other extenuating circumstances that prevented a taxpayer from avoiding the accrual of interest or the imposition of a penalty.[133] Following the implementation of a MAP agreement, a taxpayer

128. Id., at para. 21. *See also* CRA, *TPM-12: Accelerated Competent Authority Procedure* (ACAP) (12 Dec. 2008), available at https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/information-been-moved/transfer-pricing/12.html.

129. IC 71-17R6, *supra* n. 53, at para. 21.

130. Id., at para. 62.

131. There is an argument to be made that transfer pricing penalties under the ITA should never apply to any MAP settlement, since the ITA has a stand-alone charging provision for MAP settlements that operates independently of its transfer pricing provisions (*see* sec. 115.1 ITA 1985 (amended 2022), discussed in sec. 21.3.2.). This issue was raised as an alternative argument in *Sifto* (2017) para. 2 but in the end was never adjudicated. *See* B. Robson, *Subsection 115.1(1): Unanswered Questions from Sifto*, 25 Canadian Tax Highlights 8 (2017), available at https://www.ctf.ca/ctfweb/EN/Newsletters/Canadian_Tax_Highlights/2017/8/170802.aspx.

132. Sec. 220(3.1) ITA 1985 (amended 2022). Note that the 10-year limitation on interest relief "has long been criticized as being unfair and inconsistent with the underlying policy objectives of subsection 220(3.1), as well as limiting the effectiveness of the CRA's voluntary disclosures program". *See* M.H. Lubetsky, *Interest Relief on Income Tax Debts: Canada Versus the United States*, 68 Canadian Tax Journal 4, p. 947 (2020). Taxpayers in protracted disputes should consider submitting an application for discretionary cancellation of interest as the 10-year anniversary of the taxation year approaches, in order to preserve their rights.

133. For a detailed discussion of discretionary relief of interest and penalties under the ITA 1985 (amended 2022), *see* J.A. Sorensen, *A Comprehensive Review of Penalty and*

may apply for this discretionary relief,[134] and if relief is not granted, the taxpayer may seek judicial review of the refusal in the Federal Court.[135]

The OECD Peer Reports generally contained positive feedback with respect to Canada's implementation of MAP agreements and no modifications from Canada in its implementation practices are anticipated.[136]

This said, in the relatively recent case of *Kerry* (2019),[137] the CRA refused to implement a competent authority determination on the basis that 2 of the relevant taxation years became statute barred while the competent authority process was ongoing – even though the taxpayer had taken the steps set out in the CRA's published guidance to keep the years open. This decision was found to be unreasonable by the Federal Court and sent back to the CRA for reconsideration.

Kerry involved two upward transfer pricing adjustments to a Canadian-resident taxpayer – namely, an increase in the revenue earned from an US affiliate (the US adjustment), and the disallowance of payments made to an Irish affiliate (the Irish adjustment) – in its 2001-2003 taxation years. During the audit leading to the adjustments, the taxpayer filed with the CRA a waiver of the normal reassessment period with respect to 2001 – presumably because that year was about to become statute barred and the taxpayer wanted additional time to make representations to the auditor. Several months later, the audit concluded and the CRA issued reassessments implementing the US adjustment and the Irish adjustment for 2001,

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Interest Relief under the Income Tax Act, in *Report of Proceedings of the Sixty-Seventh Tax Conference, 2015 Conference Report* (Canadian Tax Foundation 2016); and Lubetsky, *supra* n. 132, at pp. 939-947.

134. IC 71-17R6, *supra* n. 53, at para. 64. Transfer pricing penalties can also potentially be disputed through the objection and appeal process (e.g. on the basis that the taxpayer made reasonable efforts to determine the arm's length transfer prices, with appropriate contemporaneous documentation, under sec. 247(3)-(4) ITA 1985 (amended 2022)), and a taxpayer can potentially pursue such an objection or appeal even after accepting a MAP resolution with respect to a transfer pricing adjustment and waiving the right to object to or appeal the transfer pricing adjustment itself.

135. Canadian case law has held that, due to sec. 165(1.2) ITA 1985 (amended 2022), the TCC does not have jurisdiction over refusals by the Minister to waive or cancel interest under sec. 220(3.1). While there is an argument to be made that this case law is based on a misinterpretation of sec. 165(1.2), the law on this point has been settled. *See* M.H. Lubetsky, *The Fractured Jurisdiction of the Courts in Income Tax Disputes* in *Tax Disputes in Canada: The Path Forward* pp. 43-44 (P. Mihailovich and J. Sorensen eds., Canadian Tax Foundation 2022), available at https://taxfind.ca/#/document/2022_TDC_paper_3.

136. *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at paras. 226-227.

137. CA: FC, 27 Mar. 2019, *Kerry (Canada) Inc. v. Canada (Attorney-General)*, 2019 FC 377, available at https://canlii.ca/t/hzmgp.

2002 and 2003. The taxpayer objected and asked that the objection be held in abeyance pending the outcome of the competent authority process. The filing of the objection had the effect of keeping the 2002 and 2003 years open after the expiration of the normal reassessment period with respect to both the US and Irish adjustments.[138]

The taxpayer then applied for competent authority assistance with respect to both adjustments. The US adjustment was resolved first through a MAP with the IRS, in which the CRA agreed to reverse the US adjustment in its entirety. This agreement was implemented through reassessments of the 2011, 2012 and 2013 taxation years.

At this point, however, the question of the Irish adjustment remained pending. However, the reassessments issued by the CRA to implement the MAP agreement with the IRS arguably closed the 2002 and 2003 taxation years unless the taxpayer filed a new notice of objection within 90 days of those reassessments; Canadian case law has consistently held (in non-MAP contexts) that when a taxation year under objection is reassessed for any reason – even for reasons completely unrelated to the objection – the reassessment under objection is annulled and the objection likewise becomes a nullity.[139] To preserve their rights with respect to any other issues raised in the annulled objection, taxpayers must file a new objection within the usual time limits against the new reassessment, reiterating the grounds of objection. This requirement does not, in fact, expressly appear in the ITA and is not always appreciated by taxpayers or their advisers. The CRA routinely advises taxpayers in such situations of the requirement to file a new objection to preserve their rights, although they apparently did not do so to the taxpayer in *Kerry*.[140]

Around 15 months later, the CRA's competent authority decided – apparently following a MAP with the Irish competent authority – that the Irish adjustment should be reversed. However, the CRA Appeals Division (which was charged to implement the decision) refused to do so on the grounds that the taxation years had become statute barred. Following some back and forth with the taxpayer, the CRA Appeals Division relented with respect to

138. Sec. 165(5) ITA 1985 (amended 2022).
139. The seminal case on this issue is CA: *Abrahams [No. 1] v. MNR*, 66 DTC 5451 (Ex. Ct.), p. 5452. *See also* CA: FCA, *Bowater Mersey Paper Co. v. Canada*, 87 DTC 5382 (FCA), p. 5383; and CA: FCA, 19 Oct. 2001, *Transcanada Pipelines Ltd. v. The Queen*, 2001 FCA 314, para. 12, available at https://canlii.ca/t/4jtv.
140. *Kerry* (2019), paras. 65, 68 and 69.

the 2011 taxation year – for which the taxpayer had executed a waiver during the audit leading to the reassessments at issue – but not 2012 or 2013.

The taxpayer sought judicial review in Federal Court of the CRA's refusal to implement the decision of its own competent authority. After determining that it had jurisdiction over the matter (*see* section 21.3.3.5.), the Court concluded that the taxpayer's original notices of objection, coupled with its request for competent authority assistance and its requests that its objections be held in abeyance pending the outcome of the competent authority process, both evidenced a clear intention from the taxpayer to waive the normal reassessment period in respect of the Irish adjustment.[141] Consequently, the Court concluded that the CRA's determination that it could not reassess the taxpayer's 2012 and 2013 taxation years to reverse the Irish adjustment was unreasonable.[142]

Kerry represented a victory for common sense that will hopefully inform the CRA's conduct in similar cases. However, it also illustrates the zealousness of the CRA when it comes to the application of limitation periods.

21.3.2. Interaction between MAP and domestic procedures

21.3.2.1. Settlements

As permitted by the BEPS Action 14 Minimum Standard,[143] the CRA distinguishes between settlements made in the course of an audit (under the aegis of a CRA "tax services office") and those made on objection (under the aegis of the CRA Appeals Division). An audit settlement – even if it includes a waiver of rights of objection or appeal – does not preclude a taxpayer from seeking competent authority assistance with respect to adjustments agreed upon in the settlement and, once the competent authority has carriage of the case, it may vary the settlement.[144] In contrast, in the case of

141. Id., at para. 49 et seq. The Court apparently did not consider the question of *when* precisely the waiver had been given - which was arguably relevant since sec. 152(4)((a)(ii) ITA 1985 (amended 2022) provides that, to be valid, a waiver must be given prior to the expiration of the normal reassessment period.
142. Id., at paras. 73 and 74.
143. OECD/G20 Base Erosion and Profit Shifting Project, *Making Dispute Resolution Mechanism More Effective: Action 14: 2015 Final Report* (2015), sec. 2.6 [hereinafter *Action 14 Final Report*] available at https://www.oecd.org/tax/beps/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report-9789264241633-en.htm.
144. IC 71-17R6, *supra* n. 53, at paras. 47 and 73; and *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at paras. 74-82.

a settlement concluded by the CRA Appeals Division, if there remains an issue of double taxation, "the Canadian competent authority will present the case to the other competent authority for their consideration of correlative relief, but will not vary the Canadian settlement position".[145]

The acceptance of a MAP agreement by a taxpayer – who, as mentioned in section 21.3.1.4., must waive any further rights of appeal as a condition of acceptance – creates a settlement agreement. If the Minister subsequently assesses tax in a manner inconsistent with a settlement agreement, the taxpayer can object and appeal the assessment to the TCC and plead the settlement agreement.[146] Such a situation occurred in *Sifto* (2017) – a transfer pricing case involving sales of mined rock salt from a Canadian taxpayer to a US-based sister company.[147] After a transfer pricing report suggested that the transfer price for the rock salt needed to be increased, the Canadian taxpayer made a voluntary disclosure and filed amended tax returns for the taxation years at issue. The CRA reassessed the taxation years in accordance with the amended returns, after which the Canadian taxpayer and its US-based sister company both sought competent authority assistance for correlative adjustments in the United States. A 3 year-long MAP process took place that ultimately concluded in a MAP agreement in which the United States agreed to provide a correlative downward adjustment to the US-based sister company and to allow the repatriation of over USD11 million free of withholding taxes. The MAP agreement was accepted by both taxpayers and implemented.

While the MAP process was ongoing, however, the CRA Audit Division commenced a transfer pricing audit for a period that overlapped with the period covered by the MAP. The CRA's competent authority was apparently deeply concerned by the audit, generating an unusually blunt, written complaint from the CRA's competent authority to the CRA's Assistant Commissioner of Compliance.[148]

145. IC 71-17R6, *supra* n. 53, at para. 54; and *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para. 76.
146. If a valid objection for the taxation year is pending at the time of the assessment, the taxpayer can proceed directly to the TCC without re-objection (sec. 165(7) ITA 1985 (amended 2022)). If the Minister simply refuses to implement the MAP settlement, then as discussed in sec. 21.3.3., the taxpayer's remedies depend on whether a valid objection is pending in respect of the taxation year. If a valid objection is pending, then the taxpayer can proceed directly to the TCC (sec. 169(1)(b) ITA 1985 (amended 2022)) and plead the settlement agreement. If there is no valid objection, then the taxpayer must seek judicial review in Federal Court (as occurred in *Kerry* (2019)).
147. *Sifto* (2017).
148. Id., at para. 76.

The CRA's competent authority's protests were ultimately in vain, however, and the CRA Audit Division issued reassessments for the years covered by the MAP agreement to make additional transfer pricing adjustments. The taxpayer objected and appealed the reassessments to the Tax Court on the grounds that the MAP agreement constituted a binding settlement agreement that barred the Minister from reassessing the affected taxation years. The TCC concurred and referred the reassessments back to the Minister for reassessment in accordance with the MAP agreement.

As mentioned in section 21.1.1.4, a settlement agreement cannot be enforced by the TCC if it requires the issuance of assessments that are manifestly not supportable on the facts – with archetypical examples involving "splitting the difference" in cases where the ITA specifies a binary outcome.[149] However, section 115.1(1) of the ITA specifically excludes this principle in the case of MAP agreements that are accepted by the taxpayer.[150]

21.3.2.2. Litigation

Taxpayers may preserve their right to object to and appeal reassessments containing adjustments subject to a competent authority process, including a MAP, by filing a notice of objection and requesting that the objection be held in abeyance. As discussed in section 21.3.1.4., taxpayers that accept a competent authority agreement must, prior to the implementation of the agreement, agree to waive all further domestic appeal rights pertaining to the adjustments at issue.[151] If the matter is not resolved through the

149. The seminal case on this point is CA: FCA, 6 June 1974, *Gallway v. MNR*, [1974] 1 FC 600 (FCA), pp. 602 and 603, available at https://canlii.ca/t/jqrkv. *See also Rosenberg* (2016) paras. 79-88 (review of case law); and CA: FCA, 10 Jan. 2012, *CIBC World Markets Inc. v. Canada*, 2012 FCA 3, paras. 17-21, available at https://canlii.ca/t/fpnmp.

150. Sec. 115.1(1) was originally enacted in 1987 to allow the Minister to enter into deferred tax agreements with taxpayers pursuant to para. XIII(8) *Can.-US Tax Treaty*, which deals with gains realized in the context of cross-border corporate reorganizations that can result in timing mismatches and double taxation. The CRA Competent Authority deals with such cases without a MAP (IC 71-17R6, *supra* n. 53, at paras. 95-110). The provision was expanded to its current form in 1992 to allow it to encompass a broader range of transactions. *See* CA: Minister of Finance, *Technical Notes to a Notice of Ways and Means Motion Relating to Income Tax* pp. 62-63 (5 June 1987); and CA: Minister of Finance, *Amendments to the Income Tax Act and Related Statutes: Explanatory Notes* pp. 3-147 (June 1992).

In *Sifto* (2017) paras. 160-165, the taxpayer attempted to argue that sec. 115.1(1) imposed upon the Minister an obligation to implement the MAP agreement that the CRA had reached with the IRS and that the taxpayer accepted. The Court rejected this interpretation of sec. 115.1(1), while nevertheless finding that the MAP agreement was enforceable on general principles.

151. IC 71-17R6, *supra* n. 53, at para. 68.

competent authority process to the taxpayer's satisfaction, the taxpayer may pursue domestic remedies.[152]

As mentioned in section 21.2.4.7., Canada will suspend a MAP process if a taxpayer decides to advance an objection or appeal on a matter under competent authority consideration. However, if a single reassessment contains multiple issues – some subject to competent authority assistance and others not – the taxpayer may independently prosecute objections or appeals relating to the non-competent authority issues while the competent authority process proceeds in parallel.[153]

As discussed in section 21.2.5., if a situation of double taxation or taxation not in accordance with a tax treaty persists after (i) a taxpayer rejects an agreement negotiated by competent authorities and decides to pursue the matter through the objection and appeal process;[154] (ii) a court issues a final decision with respect to the Canadian adjustment;[155] or (iii) an objection is resolved through a settlement agreement with the CRA Appeals Division and the taxpayer waives any further right of objection or appeal,[156] the CRA may agree to commence (or recommence) a MAP with the relevant treaty party for the purpose of seeking correlative relief but will not negotiate over the adjustment at issue.

21.3.2.3. Collection

Within the CRA, the collections function operates completely independently of audit, appeals or competent authority. As explained in IC 71-17R6, "acceptance of a MAP case is not contingent on the taxpayer first complying with CRA's collection policies. The Canadian competent authority will accept and work a MAP case without regard to any outstanding collections issues that the taxpayer may have or be subject to."[157] At the same time, CRA Collections may act to collect any amounts that are collectible under the ITA even if they are subject to a MAP process; Canada has not entered into agreements with other competent authorities to "stop or defer collection

152. Id., at para. 46.
153. Id., at para. 48. Sec. 171(2) ITA 1985 (amended 2022) authorizes the TCC, on the consent of the parties, to bifurcate an appeal and to decide issues raised in a single assessment separately.
154. IC 71-17R6, *supra* n. 53, at para. 67.
155. Id., at para. 52.
156. Id., at para. 54.
157. Id., at para. 57.

of income tax on cases that are the subject of a request for competent authority assistance".[158]

As mentioned in section 21.1.1.3, section 220(4) of the ITA authorizes the Minister, on a discretionary basis, to accept security with respect to collectible amounts.[159] A refusal by the CRA to accept security proffered by the taxpayer is potentially subject to judicial review in the Federal Court,[160] although there do not appear to be any reported cases of such a challenge.

21.3.3. Domestic judicial control of the MAP process

21.3.3.1. Overview of judicial remedies against the Minister

Various courts have jurisdiction over acts and omissions of the Minister in administering the ITA, and the lines between them are often unclear and arbitrary.[161]

Generally speaking (and oversimplifying somewhat), the TCC has exclusive jurisdiction to hear appeals of assessments,[162] with such jurisdiction being limited to whether the assessment properly reflects the quantum of tax, interest and penalties for which a taxpayer is liable under the ITA. As part of this jurisdiction, if the Minister issues an assessment contrary to a binding settlement agreement – including a MAP agreement that has been accepted by the taxpayer – the taxpayer can plead and seek to enforce the settlement in the context of an appeal to the TCC against the assessment, as discussed in section 21.3.2.1.

The TCC hears appeals of assessments *de novo*, and taxpayers are generally free to adduce new evidence and arguments in support of their positions

158. Id., at paras. 58 and 59.
159. Id., at para. 60.
160. CA: FC, 12 May 2014, *ColasCanada Inc. v. Canada (National Revenue)*, 2014 FC 452, para. 32, available at https://canlii.ca/t/g7208.
161. *See* Lubetsky, *supra* n. 135.
162. As mentioned in sec. 21.1.1.2., the ITA also provides for the Minister to issue "determinations" with respect to specific tax-related balances - including, in particular, losses incurred in a particular year. Such determinations can generally be disputed in the same manner as assessments.

In addition, pursuant to sec. 173 ITA 1985 (amended 2022), taxpayers and the Minister may also, by agreement, refer any question to the TCC that relates to "any assessment, proposed assessment, determinations or proposed determination". As a practical matter, however, the Minister rarely consents to such referrals (Lubetsky, *supra* n. 135, at fn. 12).

– with one key exception being that large corporations are barred from raising issues, advancing reasons or seeking relief that has been set out and quantified in a preceding objection.[163] Other than in smaller cases,[164] taxpayers also have the opportunity to examine for discovery a representative of the CRA, as well as to receive potentially extensive documentary production.[165] It bears note that in *Sifto*, discussed in section 21.3.2.1., correspondence exchanged between Canadian and US competent authorities was adduced to the record and three members of the CRA's competent authority directorate testified at trial.[166]

Administrative acts or omissions of the Minister or CRA that fall outside the jurisdiction of the TCC are generally subject to "judicial review" by the Federal Court.[167] In Canada, the expression "judicial review" encompasses, among other things, the remedies and causes of action known as a writ of certiorari (i.e. quashing a decision and ordering that it be reconsidered), writ of mandamus (i.e. ordering an official to perform an act that they are required by law to perform) and a writ of prohibition (i.e. ordering an official to not perform a particular act).[168]

Judicial review proceedings are generally decided on the record, meaning that the Court will (with limited exceptions) only consider information that was before the decision-maker whose decision or conduct is subject to review.[169] In addition, a deferential standard of review applies, such that the Court will generally not interfere with a decision unless it is substantively "unreasonable" – meaning that it falls outside "a range of possible,

163. Secs. 165(1.13) and 169(2.1) ITA 1985 (amended 2022).
164. CA: Tax Court of Canada Act, R.S.C. 1985, c. T-2, sec. 17.3(1) (amended 23 June 2022) (S.C. 2022, c 10), available at https://laws-lois.justice.gc.ca/eng/acts/t-2/.
165. CA: Tax Court of Canada Rules (General Procedure), SOR/90-688a (amended 27 Feb. 2014) (SOR/2014-26), Rule 78-100, available at https://laws-lois.justice.gc.ca/eng/regulations/SOR-90-688a/.
166. *Sifto* (2017) paras. 7-14 and 29 et seq.
167. Sec. 18 Federal Courts Act. Note that the Minister and the CRA are both considered a "federal board, commission or other tribunal" by virtue of sec. 2, which defines the expression to mean "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament".
168. Sec. 18(1) Federal Courts Act. For a discussion of these remedies in the ITA context, *see* G. Du Pont & M.H. Lubetsky, *The Power to Audit is the Power to Destroy: Judicial Supervision of the Exercise of Audit Powers*, 61 Canadian Tax Journal, pp. 105-108 (2013) (Supp).
169. The leading case on this point is CA: FCA, 23 Jan. 2012, *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, paras. 19 and 20, available at https://canlii.ca/t/fpszj. For a recent example in the tax context, *see* CA: FC, 15 Feb. 2022, *Glenogle Energy Inc. v. Canada (Attorney General)*, 2022 FC 198, paras. 15-20, available at https://canlii.ca/t/jmhzd.

acceptable outcomes which are defensible in respect of the facts and law"[170] – and/or was arrived at in a manner that is procedurally defective (such as where the decision-maker fails to properly document the reason for the decision).[171]

Although the overall body of case law of judicial review proceedings against the Minister in income tax matters is voluminous, there are relatively few reported decisions relating specifically to MAP proceedings, with the principal cases being *Perry* (2007/2008), *Teletech*, *CGI Holding* (2016) and *Kerry*.[172]

21.3.3.2. *Perry:* Mandamus to negotiate an issue in a MAP

Perry concerned a newly formed trust with a Canadian settlor and US trustee and beneficiaries. The trust was concerned that legislation had been introduced in Canada that, if adopted, would have retroactively amended the ITA in a manner that could have deemed the trust resident in Canada and made the settlor jointly and severally liable for the trust's Canadian tax obligations. In addition, there was uncertainty as to how the residency tiebreaker rules in the Canada-United States Tax Treaty applied to trusts. Consequently, the trust requested that the CRA and the IRS conduct a MAP pursuant to article IV(4) of that treaty to definitively confirm its residency.

In June 2005, the CRA declined to institute a MAP, taking the position that it would not negotiate with respect to the application of ITA provisions that deem a trust to be resident in Canada. However, it indicated that if the trust found itself subject to tax in both Canada and the United States,

170. CA: SCC, 19 Dec. 2019, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para. 86, available at https://canlii.ca/t/j46kb, citing CA: SCC, 7 Mar. 2008, *Dunsmuir v. New Brunswick*, 2008 SCC 9, para. 47, available at https://canlii.ca/t/1vxsm. The standard of review applicable in judicial review proceedings is a subject of perennial debate in Canada, as well as lengthy and sometimes inconsistent decisions in the case law.

171. Id. For an example of a recent CRA decision that was found unreasonable for want of justification, *see* CA: FCA, 19 Aug. 2022, *Barrs v. Canada (National Revenue)*, 2022 FCA 147, paras. 38 and 39, available at https://canlii.ca/t/jrkg8.

172. CA: FC, 18 Oct. 2007, *2005 Robert Julien Family Delaware Dynasty Trust v. Canada (National Revenue)*, 2007 FC 1071, available at https://canlii.ca/t/1tbsd, confirmed CA: FCA, 15 Sept. 2008, *Perry v. Canada (National Revenue)*, 2008 FCA 260, available at https://canlii.ca/t/20qvd; *Teletech* (2013); CA: FC, 27 Sept. 2016, *CGI Holdings LLC v Minister of National Revenue*, 2016 FC 1086, available at https://canlii.ca/t/gtw7l; and *Kerry* (2019).

it "would be prepared to consider a request for relief from any resulting double taxation".[173]

Undaunted, the trust approached the IRS with the same request. The IRS instituted a MAP with the CRA, over the course of which the CRA again categorically refused to negotiate over the residency of the trust. The IRS was apparently dissatisfied with the CRA's attitude, describing it as "inconsistent with the spirit and letter of our income tax treaty",[174] and referred the matter to the US Treasury Department.

In November 2006, the IRS advised the trust that the MAP had concluded with no agreement due to the CRA's intransigence. The trust then applied in the Federal Court for a writ of mandamus ordering the CRA to settle the issue of its residence in accordance with article IV(4) of the Canada-United States Tax Treaty.

The jurisdiction of the Federal Court to hear the case was not contested and, after a brief analysis, the Court confirmed that it "has jurisdiction to deal with this application for judicial review and mandamus".[175] However, the Court went on to dismiss the trust's application, inter alia on the grounds that the application for mandamus was "premature" given that "it is inappropriate for this Court to require, by mandamus, that a Minister of the Crown or officials acting on his or her behalf, endeavour to settle the residence of a trust under a provision of law that may, or may not, some day be adopted by Parliament".[176] The FCA endorsed this reasoning on appeal.[177]

Following *Perry*, Parliament added a provision to the ITCIA to confirm that the deemed-residency trust rules of section 94(3) of the ITA take precedence over any tax treaty residency rules.[178] In 2017, the CRA's competent authority confirmed that it would negotiate with its treaty partners over the

173. *Perry* (2007/2008), para. 3 and Annex B (FC Decision).
174. Id., at Annex C (FC Decision).
175. Id., at para. 19 (FC Decision).
176. Id., at paras. 26 and 27 (FC Decision). The FC also held, somewhat paradoxically, that the trust's application was time barred under the Federal Courts Act (id., at paras. 22-24 (FC Decision)). This aspect of the decision was found to be erroneous by the FCA (id., at para. 13 (FCA Decision)).
177. Id., at para. 14 (FCA Decision). The trust also argued before the FCA that the question of its residency was potentially at issue under the then-existing provisions of the ITA, and that the FC erred in regarding the case as being based entirely on the prospect of the ITA being amended. The FCA rejected this submission based on the record, as well as on the fact that under the then-existing provisions of the ITA, the trust was clearly not subject to tax in Canada (id., at paras. 17-19 (FCA Decision)).
178. Sec. 4.3 ITCIA.

tax treatment of foreign trusts that are also deemed resident in Canada under section 94(3) of the ITA, but that "it is generally the Canadian competent authority's position that it would not be appropriate to cede Canadian residence of trusts subject to section 94 of the Act in the course of negotiations with the competent authority of the other Contracting State" and that "it is the Canadian competent authority's expectation that the negotiation of these cases with a view to settle the question of dual residence will generally not be possible or advisable".[179] Consequently, a dual-resident trust would be obligated to file tax returns in Canada as a Canadian resident, although if such a trust is ever faced with a situation of double taxation contrary to a tax treaty, the CRA's competent authority would be willing to seek a solution, either unilaterally or through a MAP.[180]

21.3.3.3. *Teletech:* Mandamus to compel a MAP

As mentioned in section 21.2.2., *Teletech* was a transfer pricing case involving a Canadian-resident taxpayer of a US-resident parent. A transfer pricing report concluded that profits between 2000 and 2002 were "dramatically" misallocated to Canada at the expense of the United States. Both companies submitted amended returns and requested a MAP from the CRA and IRS. What followed, unfortunately, was a failure of process from both tax agencies that left the taxpayer in precisely the situation of double taxation that MAP processes aim to avoid.

The case began to go off the rails in 2006 when the CRA summarily declined to initiate a MAP on the grounds that there had been no "action" on the part of the IRS resulting in double taxation. Less than a month later, however, the IRS informed the CRA that it had reassessed the US-resident parent's tax returns to increase its profits, thus triggering double taxation and inviting the CRA to participate in a MAP. The CRA ignored the IRS letter, and the IRS did not follow up.

Two years later, in July 2008, the IRS audited the parent's amended returns and again reassessed the years at issue. The parent renewed its request with the IRS for competent authority assistance and the Canadian-resident taxpayer followed suit with the CRA in December 2009. The CRA apparently opened a new case file and assigned an analyst, but never actually advised

179. K. Campbell (for the CRA competent authority), *2017 STEP CRA Roundtable: Question 3: Dual-resident estate and Article IV*, (13 June 2017), CRA 2017-0693451C6 (Taxnet Pro).
180. Id.

the taxpayer. Over a year later, in May 2011, believing that the file was not being processed, the taxpayer instituted judicial review proceedings to compel the CRA to action.

Before the Federal Court could hear and dispose of the judicial review, however, the CRA advised that it would not initiate a MAP process, on the grounds that the relevant taxation years had become statute barred and the 6-year notice period set out in the Canada-United States Tax Treaty to advise the CRA's competent authority of the case (*see* section 21.2.4.5.) had expired. (It bears note that this latter determination was surely incorrect, given that the CRA's competent authority was first advised of the case in 2006.)

The taxpayer's judicial review proceedings continued before the Federal Court. Much of the debate before the Court consisted largely of attempting to characterize what, exactly, it was being asked to review and what remedy was being sought. Eventually, however, the Court dismissed the application on entirely procedural grounds, namely that:

- the Court could not review the original decision, in 2006, not to initiate a MAP, since it was a discrete, identifiable decision that had to be challenged within 30 days. A challenge to that decision was thus untimely;[181]
- the Court could not grant mandamus ordering the CRA to make a decision over whether to proceed with a MAP, since the CRA had already made such a decision such that the question was moot;[182]
- the Court could not review the second decision not to initiate a MAP, since that decision was made subsequent to the application for judicial review and the taxpayer did not amend its application to seek review of this decision;[183] and
- the Court could not grant mandamus ordering the CRA to initiate a MAP, since mandamus cannot order a specific outcome to a discretionary decision.[184]

Teletech provides taxpayers with an important reminder that Federal Court challenges to definitive CRA decisions (in the context of a MAP or otherwise) must be made with celerity – a point that taxpayers can easily overlook in the context of what they may perceive as an ongoing constructive dialogue with the CRA's competent authority.

181. *Teletech* (2013), para. 41-51. The Court did not seem to consider the point that, under sec. 18.1(2) Federal Courts Act, it had jurisdiction to extend the 30-day limit.
182. *Teletech* (2013), para. 59.
183. Id.
184. Id., at paras. 60-62.

21.3.3.4. *CGI Holding:* Judicial review of positions taken during a MAP

CGI Holding concerned the withholding rate applicable on dividends received by a US LLC from a related Canadian-resident company in 2007. Prior to 2010, the CRA's longstanding view was that fiscally transparent US LLCs were not eligible for the 5% withholding rate set out in the Canada-United States Tax Treaty, and that the ITA's default 25% rate applied instead. However, in 2010, the TCC held in *TD Securities* (2010) that US LLCs were entitled to the treaty rate.[185] The CRA amended its guidance, and the LLC taxpayer applied for a refund of the 20% difference. The CRA denied the refund on the grounds that the 2-year period set out in the ITA to request refunds of withholding tax had expired.[186] The LLC taxpayer sought competent authority assistance from the IRS, which in turn requested a MAP with the CRA. The MAP, however, did not produce an agreement.

The LLC taxpayer then sought judicial review essentially of the CRA's intransigence during the MAP. As a remedy, the LLC taxpayer asked the Court to issue an order of mandamus ordering the Minister to issue a reassessment of its 2007 taxation year so that it could object and appeal the matter to the TCC.

The Minister made a preliminary objection that the Court had "no jurisdiction over treaty discussions between Canada and the US".[187] The Court summarily dismissed this argument, holding that "the administrative actions of the Minister even in the context of the MAP process are subject to review, provided the Court, in its supervisory role, shows appropriate deference to the role of the Minister and her prerogative powers over foreign affairs".[188]

On the merits, however, the Court found that under the particular facts of the case, it was reasonable for the CRA to take the position that the LLC taxpayer's situation was materially different from that considered in *TD Securities*, such that it was not entitled to the refund. Applying the deferential standard of review applicable to judicial review proceedings, the Federal Court thus dismissed the judicial review application.

185. *TD Securities* (2010).
186. Sec. 227(6) ITA 1985 (amended 2022).
187. *CGI Holdings* (2016), para. 13.
188. Id., at para. 18.

The Court also made some observations concerning the fact that the taxpayer was not a direct party to the negotiations between the CRA and IRS, which are discussed in section 21.7.1.

21.3.3.5. *Kerry:* Mandamus to implement a competent authority decision

The facts and decision on the merits of *Kerry* – in which a taxpayer successfully sought judicial review of the CRA's remarkable refusal to implement a decision of its own competent authority – are discussed in section 21.3.1.4. Essentially, that case concerned transfer pricing adjustments involving two separate countries (namely, Ireland and the United States) that the competent authority dealt with separately. Ultimately, the CRA's competent authority decided to reverse both the adjustments. However, the CRA Appeals Division – when charged to implement the MAP agreements – took the position that the reassessments issued to give effect to the MAP agreement with the IRS vacated the taxpayer's outstanding objections and resulted in the taxation years becoming statute barred, such that it could not implement the subsequent MAP agreement with the Irish competent authority. The Federal Court found that this decision was unreasonable given that the taxpayer had implicitly waived the normal reassessment period with respect to the Irish adjustment.

Interestingly, the Federal Court held that it did not have jurisdiction to entertain one of taxpayer's alternative arguments, namely whether its objections subsisted following the issuance of reassessments to implement the US adjustment. The Minister argued that if the objections had indeed subsisted, it necessarily implied that the taxpayer retained at all times the right to appeal to the TCC to enforce the MAP agreement (*see* section 21.3.2.1.), and since a valid objection is a jurisdictional requirement to appeal to the TCC, the TCC would have been able to rule on whether the taxpayer's objection had indeed subsisted. The Federal Court agreed with this analysis and held that, because the TCC's jurisdiction is exclusive, the Federal Court did not have jurisdiction to decide whether the taxpayer's objections were valid and subsisting.[189]

On the other hand, the Federal Court held that it *did* have jurisdiction over the question of whether the taxpayer had implicitly provided a waiver of the normal reassessment period.[190] While the TCC has jurisdiction to

189. Id., at paras. 31-36.
190. Id., at paras. 30 and 36

determine if a taxpayer has provided a waiver in a particular taxation year, this jurisdiction is only triggered by the issuance of a reassessment in a statute-barred year that the taxpayer challenges.[191] In other words, the TCC has jurisdiction over a taxpayer's claim to have *not* given a waiver for a particular year (or that a proffered waiver does not cover the impugned reassessment), while the Federal Court has jurisdiction over a taxpayer's claim to have *had* given a waiver where the Minister refuses to reassess the taxpayer. Such arbitrary distinctions are, alas, characteristic of the allocation of jurisdiction between the TCC and the Federal Court.

21.4. Paragraph 3 of article 25 of the OECD Model

21.4.1. Interpretative MAPs and double taxation not covered by a tax treaty

21.4.1.1. Interpretive MAPs

All of Canada's tax treaties either include a provision requiring the respective competent authorities "to endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the tax treaty" or else have incorporated by reference the first sentence of article 16(3) of the MLI, which is to the same effect.[192]

The CRA publishes its agreements with other competent authorities on its "Competent Authority Agreements and Notices" website.[193] Each agreement generally indicates an effective date.

Relatively few of the CRA's published agreements with other competent authorities, however, are based on the treaty equivalent to article 25(3) of the OECD Model. Indeed, the only published agreement that refers *expressly* to the treaty equivalent of article 25(3) is the one with the IRS with respect to the deduction of notional expenses, discussed in section 21.2.3.[194]

191. *See*, for example, CA: FCA, 24 Jan. 2008, *Arpeg Holdings Ltd. v. Canada*, 2008 FCA 31, available at https://canlii.ca/t/1vkrk; and CA: TCC, 29 June 2011, *Rémillard v. The Queen*, 2011 TCC 327, paras. 19-27, available at https://canlii.ca/t/fmrgz.
192. *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at paras. 2-9.
193. CRA, *Competent Authority Agreements and Notices* (last modified 10 Nov. 2021), available at https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/competent-authority-agreements-notices.html.
194. *Canada-US Tax Convention – Agreement between Competent Authorities on the interpretation of Article VII (Business Profits)* (26 June 2012), available at https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/competent-authority-agree

The express invocation of the treaty equivalent of article 25(3) apparently aims to confirm that the agreement constitutes "an agreement between the competent authorities of the parties to the convention" for the purposes of paragraph 4(b) of the ITCIA (which, as discussed in section 21.2.3., is a treaty override with respect to notional expenses).[195]

21.4.1.2. Double taxation not covered by a tax treaty

All but one of Canada's tax treaties either include a provision authorizing their respective competent authorities to consult for the elimination of double taxation in cases not provided for in their tax treaties, or else have incorporated (or, in one case, is expected to incorporate) by reference the second sentence of article 16(3) of the MLI, which is to the same effect.[196] With respect to the one outlier treaty (namely, that with Ecuador), Canada has indicated its intention to renegotiate the provisions in due course.[197]

The CRA's published guidance to taxpayers with respect to MAPs does not distinguish between requests with respect to specific provisions of a tax treaty and those with respect to "double taxation in cases not provided for in their tax treaties".

21.4.2. Interpretive value of competent authority agreements

There do not appear to be any reported cases to date in Canada concerning whether a competent authority agreement – whether based on the treaty equivalent to article 25(3) of the OECD Model or otherwise – went beyond the scope of what was potentially authorized by the applicable tax treaty.

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ments-notices/canada-s-tax-convention-agreement-between-competent-authorities-on-interpretation-article-business-profits.html. For a discussion of the history and purpose of the agreement, *see* P.G. Alary & J. Wilson, *Canada And U.S. Announce Agreement Regarding PE Attribution Of Income Principles Under Canada-U.S. Treaty* (15 Jan. 2013), available at tinyurl.com/pe-gowlings.

195. Alary & Wilson, *supra* n. 194, at sec. II (although, as the authors point out, there is potentially some residual ambiguity over whether the competent authority agreement falls within the parameters of para. 4(b) ITCIA).

196. *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at paras. 82-100 and Annex A, Column 10. The *MAP Peer Review Report* refers to two countries for which adoption of the MLI was pending: Indonesia and Ivory Coast. As can be verified in the OECD's MLI Matching Database (https://www.oecd.org/tax/treaties/mli-matching-database.htm), Indonesia deposited its instrument of notification on 28 Apr. 2020 and reciprocated Canada's designation of the second sentence of art. 16(3). Ivory Coast remains outstanding as of the date of submission of this chapter.

197. *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para. 99.

21.4.3. Undefined terms under article 3(2)

Section 3 of the ITICA provides that a term in a "convention" is to be ascribed its meaning under the ITA, as amended from time to time, except to the extent that the "convention" defines the term differently.[198] Section 2 defines "convention" as meaning "any convention or agreement between Canada and another state relating to tax on income, and includes any protocol or supplementary convention *or agreement relating thereto"* [emphasis added]. It follows that, insofar as a competent authority agreement constitutes an "agreement relating" to a tax treaty, a competent authority agreement can ascribe a definition to a treaty term that would apply over that of the ITA.

Indeed, during the parliamentary proceedings leading to the adoption of the ITCIA in 1984, the Parliamentary Secretary to the Minister of Finance (who presented the legislation to the House of Commons on behalf of the government) specifically discussed how the legislation would authorize competent authorities to agree upon the interpretation of undefined terms in a tax treaty:

> The Bill provides that this interpretation rule shall not apply if other arrangements have been made, which would be the case, in the previous example, if the appropriate authorities of both countries had agreed on a specific definition of the term "dividend", as part of the mutual agreement procedure provided under most tax treaties.[199]

Although speeches by individual members of Parliament are not dispositive of the scope of a statute, they are routinely considered and given weight by the courts in Canada, especially when made by a cabinet minister sponsoring the legislation.[200]

198. ITCIA, *supra* n. 50.

199. House of Commons Debates, 33rd Parliament, 1st Session: Vol. 1 (13 Dec. 1984), at p. 1177 (C. Lanthier), available at https://parl.canadiana.ca/view/oop.debates_HOC3301_01/1179.

200. For but a few recent SCC examples in the tax context, *see* CA: SCC, 9 Sept. 2016, *Musqueam Indian Band v. Musqueam Indian Band (Board of Review)*, 2016 SCC 36, para. 17, available at https://canlii.ca/t/gt9fr; CA: SCC, 13 Dec. 2019, *Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63, paras. 13 (Karakatsanis J) and 130 (Wagner CJ, dissenting in part), available at https://canlii.ca/t/j3xhq; and CA: SCC, 25 Mar. 2021, *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, para. 51, available at https://canlii.ca/t/jdwnw.

21.4.4. Issues not covered by article 25(1)

21.4.4.1. Cascade effects

Adjustments made pursuant to a MAP agreement may produce a variety of cascade effects that fall outside of the CRA's competent authority's purview and may require a referral to the CRA Income Tax Rulings Directorate to definitively resolve.

Such a ruling, for example, was issued in 2018 with respect to a situation involving a Canadian public corporation with, inter alia, a wholly owned Canadian subsidiary and a wholly owned foreign subsidiary. The Canadian parent entered into contracts with both the Canadian subsidiary and the foreign subsidiary to provide services to other members of the corporate group. The amounts paid to the foreign subsidiary constituted "active business income" for the purpose of the ITA's foreign affiliate rules, which have been described as "staggeringly complex".[201]

The CRA reallocated some of the amounts paid by the parent to the foreign subsidiary to the Canadian subsidiary, ostensibly in reliance on the ITA's transfer pricing rules. The Canadian and foreign subsidiaries sought competent authority assistance to relieve the resultant double taxation. A MAP between the Canadian and foreign competent authorities took place and resulted in an agreement in which the foreign tax agency would give a correlative reduction in the foreign subsidiary's income with a commensurate refund of the taxes paid. The MAP agreement also specified that there would be no secondary adjustments to the income of either subsidiary and no repatriation of funds.

Not addressed by the MAP agreement was how it would affect the calculation of the foreign affiliate's "exempt surplus" (essentially, the tax account that tracks active business income for the purpose of the foreign affiliate rules). When the time came for the foreign affiliate to pay out dividends to its Canadian parent, a ruling was sought (and obtained) to confirm the proper treatment.[202] The outcome of the ruling was, essentially, that on the

201. G. Loomer, *Canada*, in *Taxation of Intercompany Dividends Under Tax Treaties and EU Law* sec. 14.5.2 (G. Maisto ed., IBFD 2012), Books IBFD; *see also* M.A. Gaudreau Duval & M.N. Kandev, *Foreign Affiliate Issues in Troubled Times*, 112 International Tax (CCH, June 2020), available at https://www.dwpv.com/en/People/-/media/019D5018AAC943D5A89C444898B3D253.ashx. FAPI stands for "Foreign Accrual Property Income".
202. CRA Ruling 2017-0729431R3 - Transfer Pricing Adjustment and Earnings (2018), available at https://taxinterpretations.com/cra/severed-letters/2017-0729431r3.

particular facts of the case, "the exempt surplus balance ... increases only by the amount of tax overpaid as a result of a foreign tax authority's notional downward transfer pricing adjustment".[203]

The CRA commented further on the ruling during the CRA Roundtable at the 2019 IFA Canada Conference, advising that, "given that there are a multitude of factors that need to be considered in determining the impact of transfer pricing adjustments on the computation of earnings including ... mutual agreement procedure settlements, ... the CRA will only consider the consequences of any particular scenario upon a request in the context of an advance income tax ruling request involving proposed transactions".[204]

21.4.4.2. Provincial income taxes

Canada is a federation in which each of its ten provinces (and three territories)[205] also impose income tax. In all but two cases (the exceptions being Quebec and, for corporations, Alberta), provincial income tax is calculated based on taxable income under the ITA and is administered by the CRA on the province's behalf.[206] The provincial income tax legislation provides essentially that whenever a federal income tax assessment is issued – for whatever reason and at whatever time – provincial income tax is recalculated accordingly, and a provincial income tax reassessment issued. Consequently, although the provinces are themselves not signatories to Canada's tax treaties and are not parties to competent authority processes, MAP agreements generally apply consequentially to provincial income tax.

In the case of Quebec and (for corporations) Alberta, which administer their own income regimes, their income tax legislation generally authorizes the reassessment of any provincial income tax within 1 year of being notified of any federal assessment to take into account any federal adjustments. IC 71-17R6 explains that "[t]hese provincial tax administrations have also historically accepted competent authority settlements, although there is no

203. M. Cepparo, *CRA: Surplus After Foreign Tax Adjustment*, 27 Canadian Tax Highlights 4, p. 2 (2019).
204. CRA Roundtable 2019-0798781C6 – Foreign Affiliate Earnings and Foreign Transfer Pricing Adjustments (15 May 2019), available at https://taxinterpretations.com/cra/severed-letters/2019-0798781c6.
205. Canada's three territories have devolved governments with powers and responsibilities similar to those of the provinces. Unless otherwise stated, the comments in this chapter pertaining to provinces also apply to the territories.
206. IC 71-17R6, *supra* n. 53, at para.74; and Lubetsky, *supra* n. 135, at pp. 30-32.

obligation for them to do so".[207] Taxpayers are also advised to take steps to ensure that the relevant taxation years remain open with Alberta and Quebec while a MAP remains pending.[208]

21.5. Paragraph 4 of article 25 of the OECD Model

21.5.1. Joint commission and consultation

Virtually all of Canada's tax treaties – either in the MAP article or in the general "miscellaneous" article - expressly authorize the competent authorities to communicate with each other directly.[209] Seven treaties expressly add the possibility of creating a "commission" for the purpose of facilitating negotiation in the context of a MAP,[210] although as a practical matter, the constitution of such "commissions" is not ordinary practice and is largely, if not completely, undiscussed in the CRA's published guidance and the Canadian literature.

207. IC 71-17R6, *supra* n. 53, at para. 75.
208. Id., at para. 76.
209. The one exception seems to be Canada's treaty with Nigeria.
210. The treaties in question are *Convention between the Government of Canada and the Government of the People's Democratic Republic of Algeria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, art. 25(4) (28 Feb. 1999), Treaties & Models IBFD; *Convention between Canada and France for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital*, art. 25(4) (2 May 1975, amended through 2010), Treaties & Models IBFD; *Convention between the Government of Canada and the Government of the Italian Republic for the Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fiscal Evasion*, art. 24(4) (3 June 2002), Treaties & Models IBFD; *Convention between the Government of Canada and the Government of the Republic of Senegal for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, art. 24(5) (2 Aug. 2001), Treaties & Models IBFD; *Synthesised Text of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting and the Convention between Canada and the Republic of Serbia for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital*, art. 25(5) (27 Apr. 2012, MLI synthesized text 2019), Treaties & Models IBFD; *Convention between Canada and the Republic of Tunisia for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital*, art. 24(6) (10 Feb. 1982), Treaties & Models IBFD; and *Convention between Canada and the Republic of Zambia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, art. 24(6) (16 Feb. 1984), Treaties & Models IBFD.

21.6. Paragraph 5 of article 25 of the OECD Model

21.6.1. Scope of arbitration

Although Canada has "no domestic law limitations for including MAP arbitration in its tax treaties",[211] as a policy matter Canada generally limits its MAP arbitration to factual matters. Under Canada's MAP arbitration regimes with the United Kingdom and the United States, the only issues presumptively eligible for arbitration are those involving (i) the residence of individuals; (ii) the existence of a permanent establishment (and, for the United Kingdom, a "fixed base");[212] (iii) attribution of business profits; (iv) transfer prices; and (v) royalties between related parties (and, for the United States, allocation of amounts between taxable and non-taxable royalties).[213] Moreover, MAP arbitration decisions are confidential, non-precedential and not accompanied by written reasons.[214]

Given these general constraints, there does not appear to be any consideration in the CRA's publications or the Canadian literature of using binding arbitration as a vehicle to address broader interpretative or application issues raised under the treaty equivalent of article 25(3) of the OECD Model.

211. *MAP Peer Review Report (Stage 1)*, *supra* n. 20, at para. 125; and *MAP Peer Review Report (Stage 2)*, *supra* n. 20, at para. 200.

212. Art. XIV *Can.-US Tax Treaty*, which used to incorporate a notion of "fixed base", was deleted as part of the Fifth Protocol on the grounds that "no practical distinction can be made between a 'fixed base' and a 'permanent establishment', and that independent personal services of a resident of a Contracting State, to the extent that such resident is found to have a permanent establishment in the other Contracting State with respect to those services, shall be subject to the provisions of art. VII (Business Profits)" (*Can.-US Tax Treaty*, at Annex B, sec. 4).

213. *See Can.-US Tax Treaty, Annex A*, at preamble; and art. 23(7) *Can.-UK Tax Treaty*. As discussed in sec. 21.6.3., Canada's MLI reservations limit the scope of MAP arbitration along the same lines. The MAP arbitration provision of the *Can.-Switz. Tax Treaty* – which, as discussed in sec. 21.6.5., is not fully developed - is limited to matters of permanent establishments, business profits and transfer pricing (*Convention between Canada and Switzerland For the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital*, art. 24(7) (5 May 1997, amended 22 Oct. 2010) [hereinafter *Can.-Switz. Tax Treaty*]).

214. *Can.-US Tax Treaty, Annex A*, secs. 4, 10 and 14; *Canada-US MAP Arbitration MOU*, *supra* n. 45, secs. 7 and 16; *Canada-US Arbitration Board Guidelines*, *supra* n. 45, secs. 2 and 13; *Canada-UK MAP Arbitration Agreement*, *supra* n. 46, secs. 8, 16 and 20. As discussed in sec. 21.6.3., Canada's MLI reservations contemplate similar requirements with its MLI treaty partners.

21.6.2. Partial scope versus resolution of the whole case

As discussed in section 21.6.6., Canada prefers last best offer or baseball arbitration (i.e. where each competent authority submits a proposed resolution, and the arbitrators simply choose one without explanation). The Canada-United States MAP Arbitration Memorandum of Understanding (MOU) provides that when a case consists of multiple issues, each issue is addressed and decided separately unless the competent authorities agree to instead present the issues as a package.[215] An analogous provision appears in the Canada-United Kingdom MAP Arbitration Agreement as well as in the last best offer arbitration regime set out in MLI.[216]

Such arbitration, by its nature, limits the role of the arbitral tribunal to deciding the particular points on which the competent authorities fail to reach agreement.

21.6.3. Reservations

Canada has made a number of reservations to the MLI arbitration regime that largely aim to ensure consistency with its published MAP policies as well as the MAP arbitration practices and procedures in place with the United Kingdom and the United States.

First, pursuant to article 28(2)(a) of the MLI, Canada has reserved "the right to limit the scope of issues eligible for arbitration" essentially to the same list of factual issues eligible for arbitration with the United Kingdom and the United States (*see* section 21.6.1.), namely, issues arising under provisions akin to articles 4 (for individuals only), 5, 7, 9 and 12 (for transactions involving related persons only) of the OECD Model.[217]

Second, also pursuant to article 28(2)(a) of the MLI, Canada has reserved the right to exclude arbitration of issues pertaining to anti-abuse provisions.[218] This reservation is consistent with the CRA's policy, discussed in section 21.2.5., to refuse to negotiate over adjustments made pursuant to "anti-avoidance provisions" of the ITA or a tax treaty. The Canada-United Kingdom MAP Arbitration Agreement likewise excludes from arbitration

215. *Canada-US MAP Arbitration MOU*, *supra* n. 45, at para. 11.
216. *Canada-UK MAP Arbitration Agreement*, *supra* n. 46, at para. 14; art. 23(a) MLI.
217. *MLI Instrument of Ratification*, *supra* n. 25, at pp. 42 and 43.
218. Id. at p. 43.

cases which "[involve] primarily the application of domestic anti-abuse provisions".[219]

Third, pursuant to article 19(12) of the MLI, Canada has reserved against arbitration processes being commenced or continued if "a decision concerning the issue is rendered by a court or administrative tribunal of one of the Contracting Jurisdictions".[220] As discussed in section 21.2.5., Canada categorically will not negotiate over adjustments that have been decided by a court.[221] Canada's MAP arbitration regimes with the United Kingdom and the United States contain analogous limitations.[222]

Fourth, pursuant to article 23(3) of the MLI, Canada has reserved against conducting arbitrations in accordance with article 23(2) of the MLI (i.e. the "independent opinion arbitration", in which the arbitral panel decides the issues and issues a reasoned decision).[223] As discussed in section 21.6.6., Canada prefers last best offer arbitration as provided for at article 23(1) of the MLI, which is also the approach it uses with the United Kingdom and the United States.[224] Of Canada's 21 MLI treaty partners who have adopted (or who expect to adopt) the MLI arbitration regime, 8 have reserved the right not to apply last best offer arbitration.[225] The arbitration provisions of

219. *Canada-UK MAP Arbitration Agreement*, *supra* n. 46, at para. 6(d).
220. *MLI Instrument of Ratification*, *supra* n. 25, at p. 41.
221. IC 71-17R6, *supra* n. 53, at para. 52.
222. *Canada-US MAP Arbitration MOU*, *supra* n. 45, at paras. 3(1) and 4; art. 23(6) *Can.-UK Tax Treaty*.
223. *MLI Instrument of Ratification*, *supra* n. 25, at p. 41.
224. *See* sources cited in *supra* n. 214.
225. Hellenic Republic, Ministry of Finance, Status of List of Reservations and Notifications upon deposit of the instrument of ratification, p. 24 (30 Mar. 2021), available at https://www.oecd.org/tax/treaties/beps-mli-position-greece-instrument-deposit.pdf; Republic of Hungary, Status of List of Reservations and Notifications upon deposit of the instrument of ratification, p. 29 (25 Mar. 2021), available at https://www.oecd.org/tax/treaties/beps-mli-position-hungary-instrument-deposit.pdf; Japan, List of Reservations and Notifications, p. 31 (21 Apr. 2021), available at https://www.oecd.org/tax/treaties/beps-mli-position-japan-consolidated.pdf; Malta, Malta's Reservations and Notifications under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, p. 43 (18 Dec. 2018), available at https://www.oecd.org/tax/treaties/beps-mli-position-malta-instrument-deposit.pdf; Independent State of Papua New Guinea, Status of List of Reservations and Notifications at the Time of Signature, p. 20 (23 Jan. 2019), available at https://www.oecd.org/tax/treaties/beps-mli-position-papua-new-guinea.pdf; Portuguese Republic, Status of List of Reservations and Notifications upon Deposit of the Instrument of Ratification, p. 44 (28 Feb. 2020), available at https://www.oecd.org/tax/treaties/beps-mli-position-portugal-instrument-deposit.pdf;
Republic of Slovenia, Status of List of Reservations and Notifications upon Deposit of the Instrument of Ratification, p. 36 (22 Mar. 2018), available at https://www.oecd.org/tax/treaties/beps-mli-position-slovenia-instrument-deposit.pdf;
and Kingdom of Sweden, Status of List of Reservations and Notifications upon Deposit

the MLI will not come into effect with these countries until agreement is reached about the form of arbitration to be followed.[226]

Fifth, Canada has chosen to apply article 23(5) of the MLI (which imposes confidentiality obligations on taxpayers with regard to cases submitted to arbitration) and, pursuant to article 23(7), Canada has reserved against having the MLI arbitration regime apply with treaty partners that have reserved against the application of article 23(5).[227] Canada's arbitration regimes with the United Kingdom and the United States have analogous requirements.[228]

Finally, pursuant to article 26(4) of the MLI, Canada had reserved against having the MLI arbitration regime apply to its treaty with the United Kingdom, given that it "already provides for mandatory binding arbitration of unresolved issues arising from a mutual agreement procedure case".[229]

21.6.4. Denial of access to arbitration

Canada can deny access to arbitration, inter alia, if (i) the unresolved issue(s) fall outside the scope of matters specified in the applicable tax treaty or related instrument as eligible for arbitration;[230] (ii) a court has decided the issue(s) (or, in some cases, litigation is progressing with respect to the issue(s));[231] (iii) the taxpayer does not undertake to keep the information received during the course of the arbitration confidential;[232] or (iv) if, for whatever reason, the case becomes ineligible for competent authority assistance.[233] In addition, the arbitration regimes in effect with both the United

of the Instrument of Ratification, p. 24 (22 June 2018), available at https://www.oecd.org/tax/treaties/beps-mli-position-sweden-instrument-deposit.pdf.

226. *Canada MLI Arbitration Profile*, *supra* n. 47, at p. 1.

227. *MLI Instrument of Ratification*, *supra* n. 25, at p. 41. None of Canada's MLI treaty parties has apparently made such a reservation.

228. Art. XXVI(6)(c) and 7(d) *Can.-US Tax Treaty*; and *Canada-UK MAP Arbitration Agreement*, *supra* n. 46, at para. 8. A copy of the non-disclosure statement that taxpayers have to sign prior to a Canada-US MAP arbitration is available at https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/nondisclosure-statement-taxpayer.html.

229. Id.

230. *See* sec. 21.6.1.

231. *See supra* nn. 220-222 and associated text.

232. *See supra* nn. 227-228 and associated text.

233. *Canada-US MAP Arbitration MOU*, *supra* n. 45, sec. 3(1).

Kingdom and the United States allow the competent authorities to mutually agree that a particular case is not suitable for arbitration.[234]

As discussed in section 21.3.3.1., a taxpayer could conceivably seek judicial review of an unreasonable or unjustified refusal of the CRA to submit a case to arbitration as contemplated by an applicable tax treaty, although there seem to be no reported examples to date of such a case.

21.6.5. Procedural aspects of the arbitration

Canada has fully fleshed-out arbitration regimes in place only with the United Kingdom and the United States. In each case, the tax treaty's MAP provision provides for binding arbitration on unresolved issues according to rules and procedures agreed upon through the exchange of diplomatic notes.[235] Those notes have been duly exchanged in the form what is now Annex A to the Canada-United States Tax Treaty and Canada-United Kingdom MAP Arbitration Agreement, each of which specifies inter alia the eligible subject matters for arbitration (*see* section 21.6.1.) as well as the mode of arbitration (i.e. last best offer arbitration, *see* section 21.6.6.).[236]

Annex A to the Canada-United States Tax Treaty also expressly authorizes the competent authorities to "modify or supplement" its provisions "as necessary to more effectively implement the intent of [the MAP arbitration provision] to eliminate double taxation".[237] In accordance with this provision, the CRA and IRS have also concluded the Canada-United States MAP Arbitration MOU and the Canada-United States Arbitration Board Guidelines.[238]

234. Art. XXVI(6)(b)(i)(B) *Can.-US Tax Treaty*. *Canada-US MAP Arbitration MOU*, *supra* n. 45, sec. 3(2); *Canada-UK MAP Arbitration Agreement*, *supra* n. 46, at preamble. Note that there is potentially an argument to be made that the provision in the *Canada-UK MAP Arbitration Agreement* that allows the competent authorities to mutually agree that a particular case is "not suitable for determination by arbitration" is contrary to art. 23(6) and (7) *Canada-United Kingdom Tax Convention*, which provides that "any unresolved issues arising from the case *shall* be submitted to arbitration" [emphasis added]. Art. 23(7) authorizes the competent authorities to *add* to the list of subject matters eligible for arbitration but does not say that they can subtract from it.

235. Art. XXVI(6) *Can.-US Tax Treaty*; and art. 23(6) *Can.-UK Tax Treaty*.

236. *Can.-US Tax Treaty*, *Annex A*; and *Can.-UK MAP Arbitration Agreement*, *supra* n. 46.

237. *Can.-US Tax Treaty*, *Annex A*, para. 17.

238. *Can.-US MAP Arbitration MOU*, *supra* n. 45; and *Can.-US Arbitration Board Guidelines*, *supra* n. 45.

Canada's tax treaty with Switzerland also includes a binding arbitration provision, added in 2010, analogous to that found in the Canada-United Kingdom Tax Treaty.[239] However, to date, no exchange of diplomatic notes has taken place to prescribe the rules and procedures, and thus the regime is not in effect.[240] The Canada-Switzerland Tax Treaty is currently under renegotiation;[241] presumably, the settlement of the rules and procedures of MAP arbitration is one of the points under discussion.

In a similar vein, article 19(10) of the MLI requires treaty partners which adopt the MLI arbitration regime to "by mutual agreement ... settle the mode of application of the provisions contained in this part". To date, however, Canada has not reached mutual agreement with any of its MLI treaty partners,[242] and the CRA is apparently working on a model competent authority agreement.[243]

21.6.6. Different types of arbitration

Canada prefers last best offer or baseball arbitration, which is the approach that it uses with the United Kingdom and the United States, and is its default approach under the MLI.[244]

As explained by a representative of Canada's Department of Finance at the 2017 Annual Conference of the Canadian Tax Foundation, Canada opted for last best offer arbitration under the MLI for the following reasons: efficiency; consistency with the existing arbitration regime in place with the United States; and better suitability to the fact-based questions (such as residency and permanent establishment) to which Canada limits arbitrations.[245]

239. Art. 24(7) *Can.-Switz. Tax Treaty*.
240. J. Shafer & D. Boychuk, *Understanding the Competent Authority Process* in *Report of Proceedings of the Sixty-Eighth Tax Conference, 2016 Conference Report*, p. 12 (Canadian Tax Foundation 2017).
241. Canada (Department of Finance), *Under negotiation or re-negotiation*, available at https://www.canada.ca/en/department-finance/programs/tax-policy/tax-treaties/under-negotiation.html.
242. *Canada MLI Arbitration Profile*, *supra* n. 47, at pp. 1 and 2.
243. N. Armstrong, *15 September 2020 IFA Online Seminar – Finance Update* at Q.4 [summary of comments from B. Ernewein, General Director of the Legislation, Tax Policy Branch of the Ministry of Finance], available at https://taxinterpretations.com/content/603922.
244. *See supra* nn. 214-216, 223-226 and associated text.
245. N. Armstrong, *20 November 2017 CTF Annual Conference – Department of Finance on BEPS*, at "Baseball-style arbitration in the MAP" [summary of comments made by S.

21.6.7. Interaction between arbitration and domestic remedies

As discussed in section 21.6.3., Canada will not submit to arbitration with respect to issues on which a domestic court has issued a decision. In a similar vein, Canada's arbitration regimes with both the United Kingdom and the United States provide for the suspension of arbitral proceedings if the taxpayer pursues litigation on the issues subject to arbitration.[246]

After an arbitration decision is rendered, taxpayers have the option to accept or reject it in essentially the same manner as any other MAP agreement, as discussed in section 21.3.1.,[247] with a key point of difference being that the taxpayer must communicate acceptance within 30 days (for the United States) or 45 days (for the United Kingdom) or else the arbitration is deemed rejected and the taxpayer's right to an arbitration decision is lost.[248] If the taxpayer accepts the arbitration decision, they must waive their right to pursue further domestic remedies.[249]

The time period for the taxpayer to decide whether to accept or reject the decision may well not provide sufficient time for a taxpayer to obtain definitive decisions from the CRA with respect to ancillary matters such as discretionary cancellation of arrears interest or penalties (*see* section 21.3.1.4.) or a ruling with respect to cascade effects outside the scope of the competent authority's jurisdiction (*see* section 21.4.4.1.). Taxpayers with cases subject to arbitration thus need to be prepared to make a fairly quick decision – potentially with incomplete information – over whether to accept the outcome.

Decisions reached in the course of arbitration proceedings under either the Canada-United States Tax Treaty or the Canada-United Kingdom Tax Treaty are not precedential,[250] even with respect to related transactions or

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Smith, Senior Chief of Tax Treaties Section, Department of Finance], available at https://taxinterpretations.com/content/486298.

246. *See supra* nn. 220-222 and associated text.

247. UK 23(6) *in fine*; and US XXVI 7(e).

248. *Canada-US MAP Arbitration MOU*, *supra* n. 45, sec. 3(1), at para. 16(2); and *Canada-UK MAP Arbitration Agreement*, *supra* n. 46, at para. 17. Note that under the *Canada-UK MAP Arbitration Agreement*, an arbitration decision is also deemed rejected if the taxpayer has an appeal pending and does not advise the relevant court within 45 days.

249. *Canada-UK MAP Arbitration Agreement*, *supra* n. 46, at para. 17; and IC 71-17R6, *supra* n. 53, at para. 68.

250. *See supra* n. 214.

other taxation years. This said, as discussed in section 21.3.1.4., Canada offers an ACAP programme, which allows for the results of a MAP proceeding to be applied to additional taxation years,[251] as well as an advance pricing arrangements (APAs) programme, which allows a taxpayer to essentially request a MAP "with respect to the taxpayer's specified international covered transactions with its related party(ies)", including such matters as "the taxpayer's international transfer pricing, the determination of business profits allocable to a permanent establishment, and/or the arm's length value of other international transactions with a related party(ies) for future years".[252] The arbitration regime between Canada and United States applies to ACAP and ALA proceedings.[253]

21.7. Other issues

21.7.1. Transparency and protection of taxpayers' rights

Canada has "actively participated in the OECD initiative on improving mechanisms for the resolution of tax treaty disputes to gather and exchange ideas with other OECD country members to improve the MAP process" – including in the creation of the Manual on Effective Mutual Agreement Procedures (MEMAP).[254] Canada generally accepted the recommendations of the MEMAP that related specifically to the MAP process (although not necessarily for other programmes).[255] Canada has also committed "to implement the minimum standard by all countries adhering to the outcomes of the BEPS Project", including Action 14.[256]

Canadian administrative law recognizes the right of individuals to "to present their case fully and fairly" in processes that affect them, even though "meaningful participation can occur in different ways in different situations".[257] IC 71-17R6 explains that MAP discussions "are a government-to-government process in which there is generally no direct taxpayer

251. IC 71-17R6, *supra* n. 53, at para. 21-22; and *Canada-US MAP Arbitration MOU*, *supra* n. 45, at paras. 2 and 18.
252. IC 71-17R6, *supra* n. 53, at para. 78.
253. IC 71-17R6, *supra* n. 53, at paras. 91 and 93; *Can.-US Tax Treaty, Annex A*, para. 16(a); and *Canada-US MAP Arbitration MOU*, *supra* n. 45, at paras. 2, 4 and 19.
254. *See* https://taxinterpretations.com/cra/website/old/E/pub/tp/itnews-41/itnews41-e#node-377139 (accessed 8 May 2023).
255. Id.
256. *Action 14 Final Report*, *supra* n. 143, at p. 10.
257. CA: SCC, 9 July 1999, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras. 28 and 33, available at https://canlii.ca/t/1fqlk.

involvement", but that taxpayers are entitled to present their views and assist with fact-finding outside of the negotiation process and "taxpayers may be invited to make a presentation before the competent authorities, where appropriate, to ensure a common understanding of the facts of a particular case".[258] The CRA considers that taxpayers have adequate opportunity "to present their case fully and fairly" in MAP processes even though they are excluded from the front-line negotiation process.

In *CGI Holding* – which, as discussed in section 21.3.3.4., involved a judicial review essentially of the CRA's intransigence during a MAP concerning the applicable dividend withholding rate – the taxpayer argued that its procedural rights had been breached on the basis that "since it was not party to the discussions between the CRA and the IRS, it was unaware of the CRA's concerns".[259] The Court rejected this argument on factual grounds, noting that the taxpayer "had notice of the CRA's concerns" and had been "afforded the opportunity to address these issues in writing during the MAP process", such that "there has been no breach of procedural fairness in this case".[260] While *CGI Holding* seems to support the general proposition that the exclusion of a taxpayer from the MAP competent authority discussions does not violate a taxpayer's right to procedural fairness, it implies that such a violation could result if the exclusion results in a taxpayer not being apprised fully of any relevant concerns of the competent authorities and having the opportunity to address them.

21.7.2. Coordination with the EU Dispute Resolution Directive and the EU Multilateral Convention on transfer pricing

Canada is not in the European Union and thus not subject to the EU Dispute Resolution Directive or the EU Multilateral Convention on transfer pricing.

258. IC 71-17R6, *supra* n. 53, at para. 35.
259. *CGI Holdings* (2016), para. 58.
260. Id., at para. 61.