

Supreme Court denies Crown's request for leave to appeal Cameco transfer pricing decision

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Authors: [Peter Macdonald](#), [Mark Sheeley](#), [Monica Biringer](#)

On February 18, 2021, the Supreme Court of Canada declined the Crown's application seeking leave to appeal the June 2020 decision of the Federal Court of Appeal (FCA) in the *Cameco* transfer pricing case. As is customary dealing with leave applications, the Supreme Court did not issue reasons for its decision.

The decision seals Cameco's success in this precedent-setting transfer pricing case – the first opportunity for Canadian courts to interpret the scope of the "recharacterization" branch of Canada's transfer pricing rules in section 247 of the *Income Tax Act*.

The Crown sought leave to appeal, and ultimately overturn, the FCA's holding that the "recharacterization" branch of the transfer pricing rules contains an objective test that asks whether *any* hypothetical arm's length persons have entered into the transactions at issue. The FCA rejected the Crown's subjective test based on the idiosyncrasies of the parties to the transactions.

The FCA held that the provision will apply only when no arm's length persons would have entered into the transaction (or series) in question, under any terms and conditions. In other words, if the transaction (or series) can be priced (e.g., market pricing exists), it should be analyzed under the traditional pricing provision in paragraphs 247(2)(a) and (c), not paragraphs 247(2)(b) and (d). The FCA decision should mean that recharacterization under paragraphs 247(2)(b) and (d) will apply in limited circumstances.

The case was being watched closely by taxpayers, especially in light of recent audit activities and public comments from the Canada Revenue Agency indicating increasing comfort with reassessing under the recharacterization branch.

The dispute in *Cameco* concerned the profits Cameco's Swiss subsidiary realized on the sale of uranium it acquired from Cameco and several other arm's length parties. At the FCA, the Crown argued that under Canada's transfer pricing rules, the agreements between Cameco and its Swiss subsidiary should be recharacterized or repriced such that all of the profits would be realized by Cameco in Canada. The Crown abandoned the argument that Cameco's international structure and transactions were a sham and should be disregarded, after the Tax Court emphatically rejected it.

For more detailed commentary on the decisions of the FCA and the Tax Court, see our Osler Updates [here](#) and [here](#).

If you have any questions about [transfer pricing](#) matters or [tax litigation](#), please contact one of the authors above or a member of the [National Tax Group](#).