PRACTICAL INSIGHTS

# CORPORATE RESIDENCE

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## Summary

A corporation resident in Canada is subject to Canadian tax on its worldwide income.  Understanding what facts and circumstances cause a corporation to be resident in Canada is critical to anticipating a corporation's tax burden.  Under the *Income Tax Act*, a corporation incorporated in Canada after April 1965 is resident in Canada.  However, the common law has developed a parallel corporate-residence test that could result in a corporation being resident in Canada, even if the corporation was not incorporated in Canada.  Moreover, some of Canada's tax treaties can deem a corporation not resident in Canada even if it was incorporated in Canada.  Simply put, the relevant law has many facets.

In this Practical Insight, **Peter Aprile and Yoni Moussadji, Counter Tax Lawyers**, comprehensively review and analyse corporate residence in Canadian tax law. In particular, the authors (1) provide an overview of the corporate-residence tests in Canada; (2) explain the evolution, interpretation, and future of the common-law corporate-residence test; (3) examine how tax treaties affect corporate residence; (4) review special considerations, including the possibility of using tax treaties to achieve double non-taxation, the possibility of having corporations with dual corporate residence, and the possibility of having corporations without residence; and (5) set out tips and traps related to various corporate residence concepts relevant in tax litigation.


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## Overview

Canadian resident corporations pay Canadian tax on their worldwide income, whereas non-resident corporations pay Canadian tax only on their Canadian-source income. Clearly, determining whether a corporation is resident in Canada is material when projecting a corporation's tax burden. However, the concept of corporate residence in Canada is nuanced and complex. Individual residence focuses on whether an individual has familial, domiciliary, and social connections to Canada. Corporations do not have these types of connections. Instead, the ties between a corporation and a jurisdiction include the place of incorporation, the location of the head office, the location of management, the location of primary business operations, and the residence of the shareholders.

Consider the following scenario: a corporation is incorporated in Canada but has its office, operations, and employees outside of Canada and only provides services to foreign clients. Is the corporation resident in Canada and taxable on its worldwide income? What about the opposite scenario, where a corporation is incorporated in a foreign jurisdiction but has an office, operations, and employees in Canada and provides services to Canadian clients (in addition to foreign clients)? Is the corporation resident in Canada and taxable on its worldwide income?

The answers turn on which factors Parliament and the courts identified as material for establishing corporate residence. Parliament has legislated that the place of incorporation determines corporate residence; *i.e.*, incorporation in Canada is sufficient to establish Canadian residence (the statutory test). The courts have identified the location of the corporation's central management and control as the determining factor for corporate residence; *i.e.*, a corporation is resident in Canada if its central management and control is in Canada (the common-law test).

Generally speaking, "central management and control" refers to the corporation's strategic management decisions rather than day-to-day operations. Strategic management has been described as the corporation's "highest level of control"[1] and as "the functions of corporate governance that, in accordance with British and Canadian corporate law, are usually found where a majority or totality of the board of directors meets to exercise its powers pursuant to the corporation's constitution".[2]

In addition to the statutory test and the common-law test, the applicability and application of Canada's international tax treaties have an impact in determining whether a corporation is resident in Canada. Specifically, if a corporation is resident in Canada under the statutory test or the common-law test, and if that corporation is also resident in another country with which Canada has a tax treaty, the tax treaty will deem the corporation to be resident in only one country. If the tax treaty deems the corporation to be resident in the foreign country, the corporation is not resident in Canada even if it meets the statutory test or the common-law test.

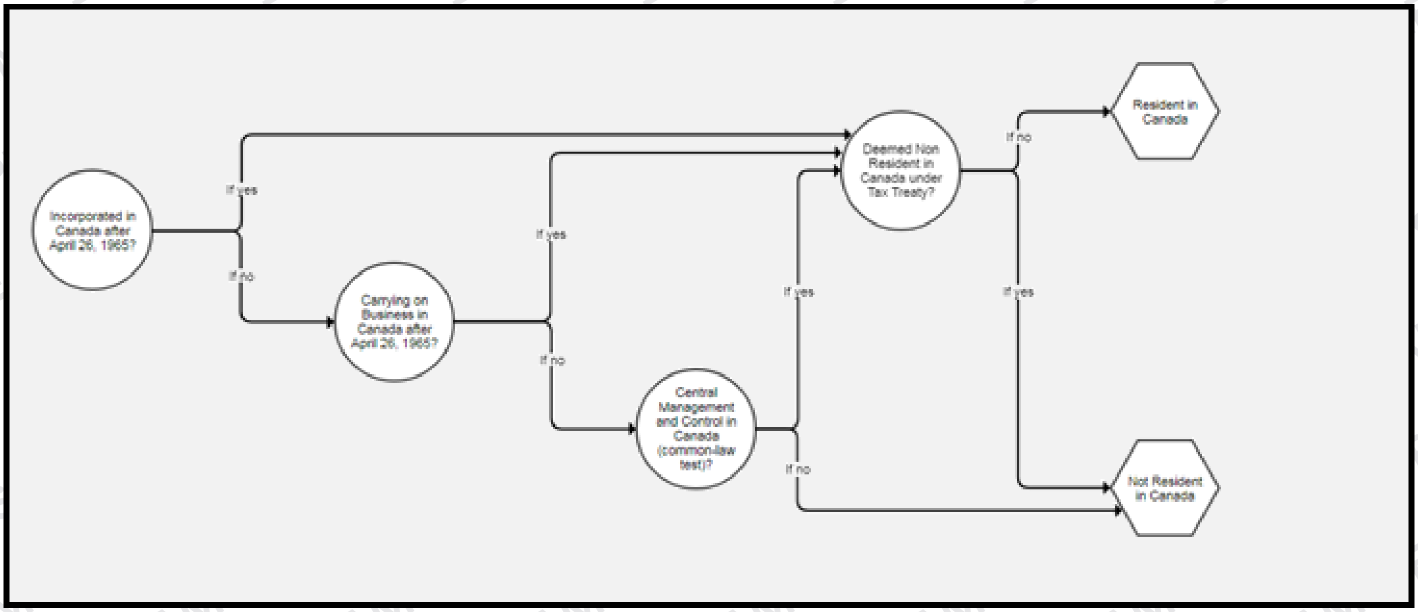
## 1. Corporate-Residence Tests in Canadian Law

### 1.1 Statutory Corporate-Residence Test

Subsection 250(4) of the *Income Tax Act* (ITA) contains the statutory test, which came into effect on April 27, 1965. Under subsection 250(4) of the ITA, a corporation is resident in Canada if it was incorporated in Canada at any time after April 26, 1965.[3] A corporation incorporated in Canada before the statutory test came into effect is not considered resident in Canada unless, in any year ending after April 26, 1965, the corporation either satisfies the common-law test or carries on business in Canada.[4] Note that the term "carrying on business" is a judicially defined term that Parliament expanded in section 253 of the ITA (see below for details).

As soon as a corporation incorporated in Canada before the statutory test came into effect either meets the common-law test or carries on business in Canada, the corporation will be considered resident in Canada for all subsequent fiscal years. In other words, as soon as a corporation incorporated in Canada before April 27, 1965, meets the statutory test, the ITA deems the corporation resident in Canada for all subsequent years regardless of whether the corporation meets the common-law test or carried on business in Canada in the subsequent years.

A corporation that satisfies the statutory test is deemed resident in Canada notwithstanding the corporation's other circumstances; *i.e.*, notwithstanding the location of the corporation's office, business operations, clients, central management or control, or any other factor.




### *1.1.1 Carrying on Business in Canada – Judicial Interpretation*

Whether a corporation carries on business in Canada has a number of implications and consequences under the ITA. However, this Practical Insight focuses exclusively on the implications and consequences related to corporate residence.

As set out above, a corporation incorporated in Canada before April 27, 1965, is not resident in Canada solely because of its incorporation in Canada. Instead, the ITA deems the corporation resident in Canada if the corporation meets the common-law test or if the corporation carried on business in Canada. Two elements determine whether a corporation carries on business in Canada: first, whether the corporation carries on business; second, whether that business is in Canada.

The courts established a low threshold for what constitutes "carrying on business". Specifically, in *Backman v. R.*,[5] the Supreme Court of Canada interpreted "carrying on business" as follows:

> [i]n law, the meaning of "carrying on a business" may differ depending on the context in which it is used. Provincial partnership acts typically define "business" as including "every trade, occupation and profession". The kinds of factors that may be relevant to determining whether there is a business are contained in the existing legal definitions. One simple definition of "carrying on trade or business" is given in *Black's Law Dictionary* (6th ed. 1990), at p. 214: "To hold one's self out to others as engaged in the selling of goods or services." Another definition requires at least three elements to be present: (1) the occupation of time, attention and labour; (2) the incurring of liabilities to other persons; and (3) the purpose of profit: see *Gordon v. The Queen*, [1961] S.C.R. 592, *per* Cartwright J., dissenting but not on this point, at p. 603.

Courts consider various factors when determining whether the business is carried on "in Canada". The place in which a business enters into contracts is one such factor. British courts consider this the primary factor in determining the location of business operations.

On the other hand, Canadian courts agree that the location of contracts is relevant, but is not the lone determining factor. Canadian courts have identified the following factors as relevant for determining whether a corporation carries on business "in Canada":

- where the corporation delivers services,
- where the corporation receives payment,
- where the corporation manufactures or produces products,
- from where the corporation solicits orders,
- where the corporation maintains its inventory,
- the location of the corporation's bank account,
- the location of the corporation's branch office (if any), and
- the location of the corporation's agents or employees.[6]

In *Procter & Gamble Co., Re*,[7] the Saskatchewan King's Bench addressed whether the appellant was carrying on business in Saskatchewan. The appellant maintained its head office in Ontario but advertised in Saskatchewan, maintained a warehouse in Saskatchewan, and employed salespeople who solicited orders in Saskatchewan. The orders the employees solicited stated that the orders were not final or binding until the appellant's head office accepted the orders, which occurred in Ontario. The appellant argued that it was not carrying on business in Saskatchewan because it entered into sales contracts in Ontario only. However, the Court held that the appellant was carrying on business in Saskatchewan because, although technically the appellant completed contracts with its Saskatchewan clients in Ontario, the Court held that the appellant did not do anything of significance to accept the orders. In this circumstance, the Court cited the appellant's operations and activities in Saskatchewan to support the Court's finding that the appellant was carrying on business in Saskatchewan.

In *Gurd's Products Co. v. R.*,[8] the Federal Court of Appeal (FCA) held that Gurd's Products was carrying on business in Canada because it generated its profits in Canada. Gurd's Products was incorporated in Canada in 1932. Its parent corporation was resident in the United States and sold products worldwide. Gurd's Products operated for several years, but was inactive between 1946 and 1969.

During that time, the US parent corporation conducted the corporate group's business without using Gurd's Products. In 1969, the US parent corporation sought to begin operations in Iraq, but due to the political conflict between the United States and Iraq, the US parent corporation wanted to appear to be a Canadian corporation. Therefore, the US parent corporation revived Gurd's Products so that it could use Gurd's Products to continue to sell products to Iraq. The Agency assessed Gurd's Products as Canadian resident on the basis that it carried on business in Canada. Gurd's Products did not advertise in Canada, did not sell products to Canadian customers, did not enter into contracts in Canada, and did not have products in Canada. Gurd's Products argued that it intended to create the impression of operating in Canada so that it could sell to Iraq, but that, in fact, it carried on business in the United States only. The FCA held that Gurd's Products was carrying on business in Canada because it had a Canadian bank account, profited from the sale of products to Iraq, and generated profits for the corporate group. In these circumstances, Gurd's Products was carrying on business in Canada and, therefore, was deemed resident in Canada under paragraph 250(4)(c) of the ITA.

The following factors are relevant in determining whether a corporation is carrying on business in Canada:

- where the corporation delivers services,
- where the corporation receives payment,
- where the corporation manufactures or produces products,
- from where the corporation solicits orders,
- where the corporation maintains its inventory,
- the location of the corporation's bank account,
- the location of the corporation's branch office (if any),
- the location of the corporation's agents or employees, and
- where the corporation is listed in a business directory.[9]

#### 1.1.2 *Carrying on Business in Canada – Expanded Legislative Definition*

The ITA, at section 253, expands the meaning of "carrying on business" in Canada. In these circumstances, a corporation incorporated in Canada before April 27, 1965, is deemed resident in Canada if, in any year after April 26, 1965, it meets the expanded definition of "carrying on business". Section 253, set out below, provides that a person (including a corporation) is carrying on business in Canada if the person

a) produces, grows, mines, creates, manufactures, fabricates, improves, packs, preserves or constructs, in whole or in part, anything in Canada whether or not the person exports that thing without selling it before exportation,
b) solicits orders or offers anything for sale in Canada through an agent or servant, whether the contract or transaction is to be completed inside or outside Canada or partly in and partly outside Canada, or
c) disposes of
   (i) Canadian resource property, except where an amount in respect of the disposition is included under paragraph 66.2(1)(a) or 66.4(1)(a),
   (ii) property (other than depreciable property) that is a timber resource property, an option in respect of a timber resource property or an interest in, or for civil law a right in, a timber resource property, or
   (iii) property (other than capital property) that is real or immovable property situated in Canada, including an option in respect of such property or an interest in, or for civil law a real right in, such property, whether or not the property is in existence.

### 1.2 Common-Law Corporate-Residence Test

The common-law test provides that a corporation is resident in the location of the corporation's central management and control. Central management and control refers to the decisions that drive the corporation's business. In other words, central management and control refers to the corporation's top-level management decisions.[10]

The origin of the central management and control test is *De Beers Consolidated Mines Ltd. v. Howe*,[11] a decision from the British House of Lords. De Beers was a South African corporation that operated diamond mines in South Africa. However, De Beers held its board of directors' meetings in the United Kingdom and

made all major business decisions related to the mining business in the United Kingdom. The House of Lords held that De Beers was resident in the United Kingdom because its central management and control was in the United Kingdom. In *De Beers*, the House of Lords laid out the following principles related to corporate residence:

- A company resides in the place where its real business is carried on, and the real business is carried on where the central management and control actually abides.
- The answer in any given case was a pure question of fact to be determined upon a scrutiny of the course of business and trading.
- Factors to be considered in determining residence include the location of the principle business office, the location of the director's meetings, residence of a majority of the directors, the place of incorporation and registered office, and the location of the policy and decision-making process of the entire corporate activity.[12]

For a detailed analysis on the common-law corporate-residence test, please see section 2 below, entitled Central Management and Control.

### 1.3 The Impact of Tax Treaties on Corporate Residence

As set out above, under the common-law corporate-residence test, a corporation incorporated in a foreign jurisdiction will be resident in Canada if its central management and control is in Canada. However, the corporation is also likely to be resident in the foreign jurisdiction in which it was incorporated. In this situation, a single corporation will be resident in two separate jurisdictions under the domestic law of each jurisdiction. If Canada has a tax treaty with the other country, however, the treaty sets out a tiebreaker so that the corporation will only be resident in one country. Canada's tax treaties are modelled after the Organisation for Economic Co-operation and Development's *Model Tax Convention on Income and on Capital* (OECD Model Treaty). The OECD Model Treaty, at Article IV.3, provides that the corporation is deemed resident only in the country "in which its place of effective management is situated".

The OECD Model Treaty commentary defines the place of effective management as "the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made".[13] The commentary also provides that "[a]n entity may have more than one place of management, but it can only have one place of effective management at any one time".[14]

A corporation's "place of effective management" as defined in the OECD Model Treaty commentary and a corporation's "central management and control" as set out in *De Beers* are strikingly similar: they focus on the corporation's top-level management and business decisions.

If a corporation resident in Canada under Canadian law is deemed, under a tax treaty, to be resident only in a foreign jurisdiction and not in Canada, subsection 250(5) of the ITA deems the corporation not resident in Canada under Canadian law. For more information on how tax treaties impact corporate residence, please see section 3 below, entitled Tax Treaties.

# 2. Central Management and Control

The common-law corporate-residence test provides that a corporation is resident in the place of the corporation's central management and control. This section examines the development of the central management and control test, breaks down precisely what central management and control is, reviews the relevant jurisprudence, and contemplates the future of the central management and control test.

## 2.1 Evolution of Central Management and Control

In the 19th century, courts typically held that corporations were resident in the jurisdiction of incorporation. Courts placed significance on the jurisdiction of incorporation because a business was, generally speaking, a single corporation that was often incorporated in the jurisdiction in which it both made its key management decisions and operated its business, rather than a multi-corporation group with a parent corporation, subsidiary corporations, and holding corporations.[15]

In the late 19th century, British courts began to look at factors other than place of incorporation, but did not go so far as to find that a corporation was not resident in the place of incorporation. In *Calcutta Jute Mills* and *Cesena Sulpher Company*,[16] companion House of Lords decisions in 1876, the House of Lords identified that a corporation was resident where it carried on its real business.[17] Both Calcutta Jute Mills and Cesena Sulpher Company were incorporated in the United Kingdom and carried on business outside of the United Kingdom (in India and in Italy, respectively). Each corporation's board of directors met in the United Kingdom, but the managing director who made the key management decisions for each corporation did so outside of the United Kingdom (again, in India and Italy, respectively). The House of Lords held that both corporations were resident in the United Kingdom because each board of directors met in the United Kingdom. The House of Lords inferred that the corporation's real business was carried on where the board of directors met, even though the key management decisions were made outside of the United Kingdom.

***Calcutta Jute Mills* and *Cesena Sulpher Company* marked the start of the evolution away from place of incorporation as relevant when determining corporate residence**. These cases identified, for the first time, the concept that a corporation is resident where it carries on its real business. However, the House of Lords stopped short of setting out what constitutes the corporation's real business. The House of Lords did not establish what constitutes a corporation's real business until 30 years later in *De Beers*.

### *2.1.1 De Beers*

The House of Lords' decision in *De Beers* changed the law of corporate residence. The Court confirmed that the place of incorporation was not necessarily relevant in determining corporate residence. Instead, the Court held that a corporation was resident in the place that it exercised central management and control.

The facts in *De Beers* are straightforward. In 1901, De Beers Consolidated Mines Limited was incorporated in South Africa and carried on a diamond-mining business in South Africa. De Beers had its head office in South Africa but also maintained an office in England where its board of directors would meet. The House of Lords held that De Beers' true place of business was England because the board of directors met and made all major policy decisions in England. In holding that De Beers was resident in England, the Court set out the following novel principle: "a company resides, for purposes of income tax, where its real business is carried on... I regard that as the true rule; and the real business is carried on where the central management and control actually abides".[18]

The Court identified three bases to support abandoning the place of incorporation as determining corporate residence in favour of central management and control.[19] The first reason was the ease with which corporations could avoid tax. Incorporating a corporation in a foreign jurisdiction is not arduous. A corporation that, for all intents and purposes, operates in England and is managed by individuals in England should not escape taxation in England simply because of being incorporated in a foreign jurisdiction. The second reason was that the central management and control test is more in line with the individual-residence test. The individual-residence test looks to the individual's domicile — where the person sleeps and eats — and where the individual naturally resides. The Court held that, "[a] Company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business."[20] The third reason was that it creating certainty and predictability in the law of corporate residence. Earlier jurisprudence had identified that a corporation should be resident where it carries on its real business (see *Calcutta* and *Cessna*), whereas other jurisprudence maintained the place of incorporation as determining corporate residence.

In this comprehensive text on corporate residence, Robert Couzin interpreted the Court's decision in *De Beers* as setting out "a lasting judicial formula for the determination of corporate residence".[21] In particular, Couzin identifies the *De Beers* judicial formula as four key elements contained in the following phrase: "the real business is carried on where the central management and control actually abides".[22] The first element is the corporate concept of management and control. This concept does not exist when determining individual residence and, therefore, adds an additional layer to the analysis.

The second element relies on the fact that management and control is a single concept rather than two distinct ones. As Couzin states, "[t]he isolated word 'management' might refer to the conduct of the business by executives and 'control' to the power of shareholders to exercise their voting rights to elect the directors and decide upon fundamental aspects of the corporation's constitution."[23] However, "management and control" cannot mean either of these. Instead, it is somewhere in between the shareholder control and running of the corporation's business activities, which the Court in *De Beers* suggested was the decision of the board of directors.

The third element is that it is the management and control that is "central". Couzin interprets the Court's use of "central" as meaning "the highest level of control";[24] *i.e.*, top-level management decisions that are "central to the business".[25] Under this interpretation, "central" does not mean "centralized".

The fourth and final element that Couzin identifies in the *De Beers* judicial formula relates to the word "actually" ("the real business is carried on where the central management and control **actually** abides"). The use of the word "actually" refers to the specific facts of the corporation under review, making the central management and control test a fact-specific test. When corporate residence is in issue, the factual findings of the trial courts are especially important because the appellate courts will not reverse findings of fact unless the finding of fact was a palpable and overriding error.[26]

#### *2.1.2 Development of Central Management and Control after De Beers*

After *De Beers*, courts recognised that a corporation incorporated in a foreign jurisdiction would be resident in the United Kingdom if the corporation's central management and control was in the United Kingdom. However, British courts still considered the place of incorporation relevant to determining corporate residence. Specifically, British courts interpreted the principles set out in *De Beers* as applying only to a corporation incorporated in a foreign jurisdiction, but not applying equally to a corporation incorporated in the United Kingdom. In other words, British courts continued to find as resident in the United Kingdom a company incorporated in the United Kingdom that exercised central management and control outside of the United Kingdom.

In *Swedish Central Railway v. Thompson*,[27] the appellant corporation was incorporated in England and, at first, exercised central management and control in England.[28] However, after several years, the appellant company moved its central management and control from England to Sweden.[29] The Court found as fact that the appellant's central management and control was in Sweden, but still held that the appellant was resident in England on the following bases:

1. the *De Beers* principle deems resident in the United Kingdom a company incorporated outside of the United Kingdom having its central and management and control in the United Kingdom, but does not deem non-resident in the United Kingdom a corporation incorporated in the United Kingdom having its central management and control outside of United Kingdom;[30]
2. a corporation can be resident in more than one country at a single time; [31] and
3. the common law provides two circumstances in which a corporation is resident in England:
    a. the corporation's central management and control is in England; and
    b. the corporation is incorporated in England.[32]

Also, see *Egyptian Hotels, Limited v. Mitchell (Surveyor of Taxes)*,[33] in which the Court held that the corporation was resident in the United Kingdom because it was incorporated in the United Kingdom.

However, in *Todd v. Egyptian Delta Land & Investment Co.*,[34] the House of Lords clarified *Swedish Central Railway*, holding that, although the place of incorporation could be a factor in the corporate residence analysis, it was not a corporate-residence test in and of itself. Instead, the Court confirmed that the one-and-only common-law test for corporate residence was the location of the corporation's central management and control, as set out in *De Beers*.[35] The Court also confirmed that the central management and control test applied equally to all corporations regardless of the place of incorporation.[36]

## 2.2 Central Management and Control Explained

Central management and control refers to the strategic management decisions that drive the corporation's business. In the industry, and even in the jurisprudence, central management and control is often referred to as the corporation's "mind and management". However, mind and management and central management and control are synonyms for the same test: the common-law corporate-residence test. It is possible that many professionals and judges use the term "mind and management" as a way to prevent importing shareholder control into the analysis. In any event, central management and control and mind and management both refer to the corporation's strategic management decisions.

To understand what constitutes strategic management decisions, it is necessary to set out the different levels of corporate decisions. In 1982, the United Kingdom commissioned a working party to examine, among other things, the different levels of corporate decisions.[37] The working party identified the following three categories of corporate management and decision making: strategic management, actual or effective management, and junior management.

Strategic management refers to the management exercised by the corporation's director or board of directors. Specifically, strategic management includes decisions related to:

1. acquiring or selling substantial assets,
2. significant capital expenditures,
3. approving or rejecting budgets,
4. major operational decisions,
5. reorganising subsidiary corporations, and
6. approving or executing material contracts.

Although directors have the legal authority to make strategic management decisions, they do not always exercise this authority and, therefore, a proper analysis will also examine who — regardless of title — makes the strategic management decisions. Central management and control refers to strategic management and, therefore, the place where the strategic management decisions are made determines the corporation's residence.

Actual or effective management refers to the management exercised by the corporation's executives. The task of the corporation's executives — *e.g.*, chief executive officer, chief financial officer, chief operating officer, president, *etc.* — is to run the corporation according to the strategic management. In other words, the corporation's executives make decisions that they believe will result in the corporation implementing the corporation's strategic management decisions and achieving the corporation's strategic goals. Actual or effective management does not constitute strategic management and, therefore, is not relevant in the corporate-residence analysis.

Junior management refers to the management of the corporation's day-to-day operations. The day-to-day operations will vary depending on the corporation's business. However, generally speaking, the individuals managing the day-to-day operations are individuals that report to the corporation's executives. Junior management is not relevant in the corporate-residence analysis.

Another level of decision making that is not relevant to the corporate-residence analysis is the shareholder level. In particular, the shareholders' right to elect directors and to amend the corporation's constating documents is not relevant in the corporate-residence analysis.

**Central management and control is** the power to make key strategic decisions relating to the direction of the company, including acquiring or selling substantial assets, making significant capital expenditures, approving or rejecting budgets, making major operational decisions, reorganising subsidiary corporations, and approving or executing material contracts.

**Central management and control is not** the following:

- the shareholders' power to elect directors, remove directors, and amend the constating documents;
- the top-level executives' power to make business decisions that are designed to accomplish and achieve the outcomes established by the corporation's strategic decision makers; or
- day-to-day management of the corporation's business.

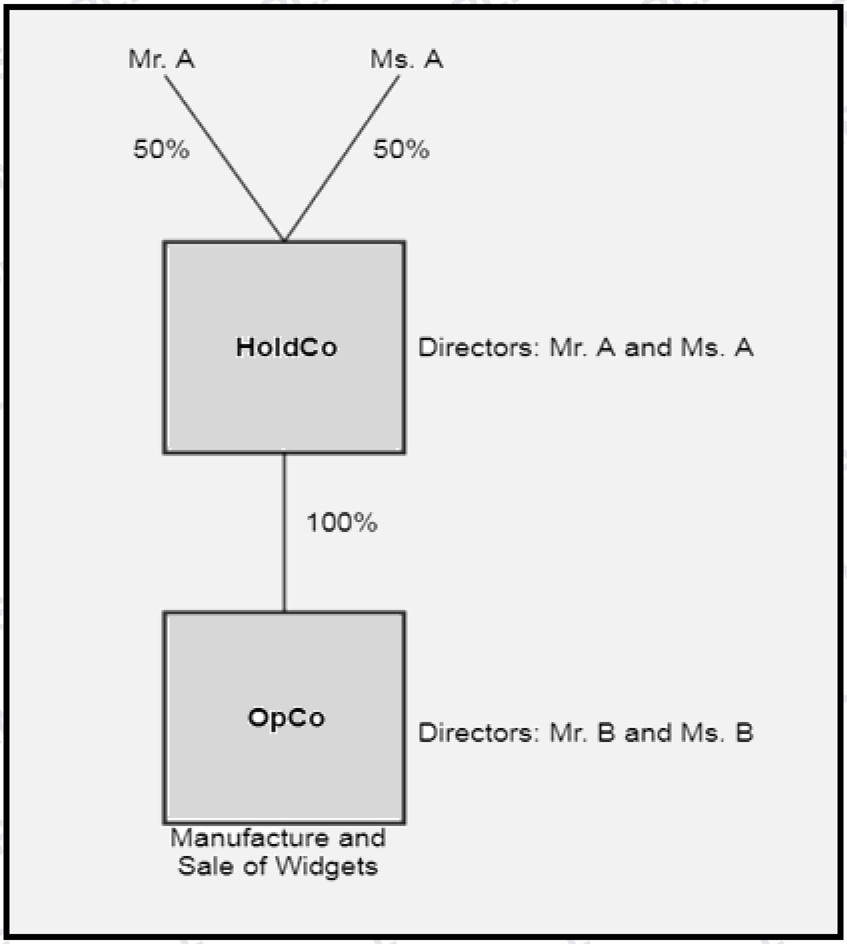
Based on the foregoing, a proper analysis of corporate residence necessarily involves answering the following questions:

1. What are the corporation's strategic management decisions?
2. Who are the individuals that make the corporation's strategic management decisions?
3. Where are the individuals when they make the corporation's strategic management decisions?

### *2.2.1 Determining a Corporation's Strategic Management Decisions*

The first step when applying the common-law test to determine a corporation's residence is to identify what constitutes a strategic management decision *for the particular corporation*. The question must look to the specific corporation under review because it is not possible to determine what constitutes top-level decision related to the corporation's business without examining the specific corporation's business and purpose.

Consider the following example (set out in the diagram below). OpCo operates a business manufacturing and selling widgets. HoldCo owns all the shares of OpCo. HoldCo does not operate an active business, but it receives dividends from OpCo. Ms. A and Mr. A own all the shares of HoldCo and are HoldCo's directors. Ms. B and Mr. B are OpCo's directors.



OpCo's business is manufacturing and selling widgets. The strategic management decisions related to OpCo's business are the top-level decisions regarding manufacturing and selling widgets, including the decisions about how to manufacture widgets and how to sell them. OpCo's strategic management decisions could include some of the following examples:

1. whether OpCo should build a manufacturing plant and hire employees to manufacture the widgets itself or outsource the manufacturing to a third party and focus exclusively on selling widgets;
2. whether OpCo should sell widgets to a distributor or directly to consumers — in other words, whether OpCo's business should include retail; and
3. if OpCo decides to build its own manufacturing plant, whether OpCo should use its own capital or borrow funds to finance construction.[38]

Note that OpCo's strategic management decisions would include neither the executive management decisions that implement and execute the strategic management decisions nor the day-to-day decisions related to manufacturing or selling widgets.

HoldCo, on the other hand, does not have an active business and, therefore, its strategic management decisions are vastly different from OpCo's strategic management decisions. HoldCo's strategic management decisions would likely relate to what Holdco does with its assets, for example:

1. how HoldCo should use the money it receives as dividends from OpCo; *e.g.*, whether to invest the money, pay dividends to Ms. A and Mr. A, or do something else with the money; and
2. what, if anything, to do with its OpCo shares; *e.g.*, whether to sell the OpCo shares, keep the OpCo shares, or reorganise its ownership of OpCo.

HoldCo's strategic management decisions would not likely be the administrative filings and registrations required to maintain HoldCo's status. Fulfilling administrative requirements — such as filing corporate tax returns, renewing corporation registrations, *etc*. — should not constitute strategic management decisions, regardless of a corporation's level of business activity. Instead, strategic management decisions are the key management decisions that drive the corporation's business, or, in the case of a holding company, that determine how to use the corporation's assets.

A final important consideration is that a corporation's strategic management decisions relate only to the corporation itself. A decision that relates to the corporate group but does not directly relate to the specific corporation's business or assets cannot be the specific corporation's strategic management decision. For example, if OpCo decided to spin off its manufacturing business into a subsidiary corporation (ManufactureCo) and simply maintain its sales business, the decision to create ManufactureCo and to transfer the manufacturing assets to ManufactureCo would be strategic business decisions of OpCo only. These would not be HoldCo's strategic business decisions because HoldCo's assets are OpCo's shares, not OpCo's business assets. Also, these would not be ManufactureCo's strategic business decisions because the decision to incorporate and transfer assets to ManufactureCo was made before ManufactureCo existed.

### *2.2.2 Determining Who Makes a Corporation's Strategic Management Decisions*

After determining the corporation's strategic management decisions or the type of decisions that would be strategic management decisions based on the corporation's business or purpose, the second step when applying the common-law test is to determine who makes the strategic management decisions.

In *De Beers*, the House of Lords identified that strategic management decisions are the decisions of the director or board of directors. In law, the corporation's directors have the authority to make the types of decisions that are strategic management decisions. However, as the *De Beers* judicial formula sets out, what is relevant is where the "central management and control *actually abides*". In these circumstances, a proper analysis will identify who actually makes the decisions, regardless of the person's title, and where that person makes the decisions.

A common circumstance in which someone other than the director makes the strategic management decisions occurs when a corporation's shareholders are actively involved in driving a corporation's business. This is the most common occurrence because the corporation's shareholders are the beneficial owners of the corporation's business and the corporation's assets. In the OpCo-HoldCo example set out above in section 2.2.1, Ms. A and Mr. A own HoldCo and indirectly own OpCo. Ms. A and Mr. A are HoldCo's directors, and Ms. B and Mr. B are OpCo's directors. In law, Ms. A and Mr. A have the authority to make HoldCo's strategic management decisions and Ms. B. and Mr. B have the authority to make OpCo's strategic management decisions. However, if, in reality, Ms. A and Mr. A make OpCo's strategic management decisions, it is Ms. A's and Mr. A's decisions that are relevant for determining the corporation's central management and control.

Moreover, why persons other than a corporation's directors make decisions is not relevant. Directors could be nominee directors that simply follow instructions from shareholders, rubber stamping the shareholder decisions; directors could delegate their decision-making power to another person; shareholders could exert influence over directors to such an extent as to eliminate the directors' decision-making authority. Regardless of the reason, what matters is determining who actually makes the corporation's strategic business decisions.

### *2.2.3 Determining Where Strategic Management Decisions are Made*

After determining what are, and who makes a corporation's strategic management decisions, the third step when applying the common-law test is to determine where the strategic management decisions are made. This step may appear straightforward. However, there may be circumstances in which it is not easy to determine where a decision is made.

First, although the decision makers' personal residence is irrelevant when determining corporate residence, some people mistakenly assume that personal residence is relevant and that individuals make decisions in their country of residence.[39] If a corporation's directors are resident in Canada, some people assume that directors are making the strategic management decisions in Canada, unless there is evidence to support that the individuals hold directors' meetings outside of Canada. It is important to examine where the individual decision makers *actually make the decisions*, not simply where the individual decision makers normally reside.

Second, there may be situations in which not all decision makers are in the same place when they make a decision. For example, a board of directors might meet with some directors in Canada and some directors outside of Canada attending the meeting by telephone, or video conference. In this situation, it is arguable that the decisions are made in the country where the majority of the directors are located during the meeting. However, if there are three directors and each is in a different country at the time they make a strategic management decision, where is that decision considered to have been made? The answer is unclear. It is arguable that the decisions are made in the country that initiates the conference call or video conference. In these cases, it is likely that appropriate processes and meeting documentation will play an important role in determining where the meeting, and the decisions, took place.

### 2.3 Judicial Interpretation of Central Management and Control

As discussed above, the location of a corporation's central management and control is a fact-specific determination. In this section, the authors examine significant cases in which British and Canadian courts interpret and apply the central management and control test.

*British Columbia Electric Railway v. R.*[40] was the first instance in which a Canadian court considered the central management and control test. The principal issue was whether the appellant company was a Canadian debtor. As part of the Court's analysis of this issue, the Court examined whether the appellant corporation was a Canadian resident (*i.e.*, if the appellant corporation was not resident in Canada, it could not be a Canadian debtor).[41] BC Electric was incorporated in the United Kingdom, but had its head office in Vancouver, British Columbia. It operated and supplied electricity to electric railways and buses in British Columbia. The Court found as fact that the corporation's activities in the United Kingdom were limited to administrative tasks and requirements, whereas the corporation's business and profit-making activities and decisions occurred in Canada. The Court cited *De Beers* as support for its conclusion that the corporation was resident in Canada due to its central management and control in Canada, even though it was incorporated in the United Kingdom.

In *Yamaska Steamship Co. v. Minister of National Revenue*,[42] the appellant's directors resided in Canada, but did not hold any directors' meetings during the years under appeal. The Court held that, because the directors did not hold any meetings and because all the appellant's actions were taken under instruction from the beneficial owner of the corporation in England, the directors did not exercise central management and control. Without the directors exercising central management and control, the Court held that central management and control must have been where the beneficial shareholder resided, in England. For this reason, the Court held that the appellant was not resident in Canada.

*Zehnder & Co. v. Minister of National Revenue*[43] is similar to *Yamaska Steamship* in that the directors were in Canada, but did not hold director meetings during the years under appeal. The relevant facts are as follows. Zehnder and Company was incorporated in Canada, but carried on business outside of Canada (operating ships outside of Canada). The directors were Canadian resident, but did not have directors' meetings. Instead, the Court found that the non-resident shareholders made the strategic management decisions and provided instructions to the directors. However, the Court concluded that Zehnder and Company was resident in Canada because, although the directors implemented the decisions of the non-resident shareholders, the directors still maintained their power and authority over the corporation's business. Specifically, the Court stated that the "management of the corporation's business and the controlling power and authority over its affairs were vested in its Halifax directors". In this case, the Court held that the directors maintain sufficient autonomy for them to be exercising central management and control, even if they did not have formal directors' meetings.

In *Victoria Insurance Co. v. Minister of National Revenue*,[44] the Court addressed the question of what constitutes the central management and control of the particular corporation under appeal versus the corporate group as a whole. The Court confirmed that each corporation in the corporate group has its residence. The appellant corporation was resident in the Bahamas and was the subsidiary of a corporation resident in Canada (the parent corporation). The parent corporation was an insurance company, and the appellant subsidiary corporation obtained reinsurance contracts for the parent corporation. The appellant corporation did not take any steps to maintain or administer the reinsurance contracts after securing them, leaving that instead to the parent corporation. The Minister's position was that the appellant's central management and control was in Canada because the parent corporation made decisions related to maintaining and administering the reinsurance contracts. Simply put, the Minister's position was that the appellant subsidiary did not operate an active business and, therefore, all strategic management decisions related to the appellant subsidiary's purpose were made by the parent corporation. The Court rejected the Minister's position, holding that the subsidiary corporation's purpose was simply to secure the reinsurance contracts and, therefore, the Minister could not apply the parent corporation's strategic management decisions as applying to the subsidiary corporation. Instead, the Court held that the corporate-residence analysis must examine the real business of the specific corporation under appeal.

The fact that the appellant subsidiary corporation's real business was limited to securing reinsurance contracts and, as a result, would not involve many strategic management decisions did not allow the Minister to apply the parent corporation's key management decisions to the appellant subsidiary.

*Wood v. Holden*[45] is a British Court of Appeal case that is instructive regarding director autonomy. The issue in *Holden* was whether a Dutch trust company's directors exercised sufficient autonomy to have actually made the strategic management decisions, or whether the tax advisors for the corporate group, located in the United Kingdom, made the strategic management decisions. The British government's position was that the tax advisors in the United Kingdom established a specific plan for the corporate group, and the plan included instructions to the Dutch trust company about holding meetings in the Netherlands and signing specific corporate documents. The Court of Appeal reviewed various levels of impact that a parent corporation could have over a subsidiary and held that there was a material distinction between a parent corporation *usurping* the subsidiary's directors and merely *influencing* or *instructing* the subsidiary's directors. The Court of Appeal held that when a subsidiary corporation is incorporated for a specific purpose, it is common for the parent corporation to expect and instruct that the subsidiary corporation accomplish the specific purpose. However, the parent corporation needs to do more than issue instructions and expectations to usurp a subsidiary corporation's directors. The Court stressed that it is still necessary to determine whether the subsidiary's directors exercised their own discretion in acquiescing to the parent's request. Consider the following Court of Appeal comments:

> [i]t is possible (and is common in modern international finance and commerce) for a company to be established which may have limited functions to perform, sometimes being functions which do not require the company to remain in existence for long. Such companies are sometimes referred to as vehicle companies or SVPs (special purpose vehicles). "Vehicle" has a belittling sound to it, but such companies do exist. They can stand and do fulfil important functions within international groups, and they are principals, not mere nominees or agents, in whatever roles they are established to undertake. They usually have board meetings in the jurisdictions in which they are believed to be resident, but the meetings may not be frequent or lengthy. The reason why not is that in many cases the things which such companies do, though important, tend not to involve much positive outward activity.[46]

The Court of Appeal held that, although the Dutch corporation's directors did not initiate any business decisions or strategic management decisions, they had the authority to review and reject the British tax advisors' instructions. In these circumstances, the Court of Appeal held that the Dutch corporation's central management and control was in the Netherlands and not in the United Kingdom. For a detailed discussion about *Wood v. Holden*, see Geoffrey Loomer's article, *The Disjunction Between Corporate Residence and Corporate Taxation: Is Improvement Possible?*[47].

The most recent Tax Court of Canada case in which a corporation's residence was in issue is *1143132 Ontario Ltd. v. R.*[48] Simply put, this was a strange case in which the appellant unsuccessfully attempted to use the central management and control test to defeat a transfer-pricing reassessment. The facts are as follows. The appellant corporation was resident in Canada. Its business was creating and distributing advertising materials to Canadian and US customers. The appellant incorporated a subsidiary corporation in Barbados (BarbadosCo), through which the appellant funneled its sales to US customers, thereby shifting some of its profits to BarbadosCo. BarbadosCo's two directors resided in Barbados. The Minister reassessed the appellant on the basis that it had violated the transfer-pricing provisions in the ITA with its transfer price with BarbadosCo related to the products ultimately sold to US customers. At the hearing of the appeal, the appellant argued that BarbadosCo's central management and control was in Canada and, therefore, BarbadosCo was resident in Canada and the Minister's transfer-pricing reassessment was wrong in fact and law. The appellant's evidence was that, after BarbadosCo's initial set up, BarbadosCo would operate without any significant work and without the need for the directors to make strategic management decisions. The appellant also argued that the appellant's business operations allowed BarbadosCo to continue to earn revenue and that BarbadosCo's two directors did not take any active role in BarbadosCo's management. The Court rejected the appellant's position on the basis that, because BarbadosCo did not require any direct management or strategic management decisions to continue to earn revenue, no party had to make strategic management decisions related to BarbadosCo. In these circumstances, the Court held that BarbadosCo was resident in Barbados.

The Supreme Court of Canada (SCC) has not considered the central management and control test in the context of corporate residence. However, in 2012, in *Garron Family Trust (Trustee of) v. R.*,[49] the SCC confirmed that the central management and control test applied when determining whether a trust is resident in Canada. In applying the central management and control test to the question of a trust's residence, the SCC implicitly accepted the central management and control test for determining corporate residence.

In *Garron*, Canadian taxpayers were shareholders of a Canadian corporation that had an unrealised capital gain. Through a series of transactions, two trusts were settled in Barbados, each with a single Barbados resident trustee, and the Barbados trusts became indirect shareholders in the Canadian corporation with an unrealised capital gain (holding their interest in the Canadian corporation through Canadian holding corporations), making the Canadian taxpayers beneficiaries of the Barbados trusts. The Barbados trusts ultimately sold their shares in the Canadian holding companies and realised the capital gain. The Barbados trusts took the position that the Canada-Barbados tax treaty provided that the capital gain was taxable in Barbados and not Canada.[50] The Minister reassessed the Barbados trusts on the basis that they were resident in Canada, not in Barbados, and, therefore, the capital gain was taxable in Canada. The appellant maintained that a trust is resident where the majority of its trustees are resident, which, in this case, was Barbados.

As set out above, the Tax Court applied the corporate concept of central management and control to determine the trusts' residence. The Tax Court conducted a fact-specific analysis to determine who actually made the trusts' key management decisions. Based on the evidence before the Court, the Court concluded that the trusts' beneficiaries (*i.e.*, the original Canadian shareholders of the corporation with the unrealised gain) and their tax advisors made the key management decisions related to the trusts. The Court concluded that the trustees in Barbados simply provided administrative support and signed the documents the beneficiaries and their tax advisors sent. In these circumstances, the Tax Court held that the trusts were resident in Canada. Unsurprisingly, due to the fact-specific nature of the central management and control test, the FCA and SCC upheld the Tax Court's decision.

## 2.4 The Future of the Central Management and Control Test

It is settled law that the place of the corporation's central management and control determines the corporation's residence. However, some scholars and government commissions have recommended adopting different criteria for determining corporate residence. In particular, the UK government's *Report of the Working Party on Company Residence, Tax Havens, and Upstream Loan*,[51] commissioned in 1982, recommended adopting the place of effective or actual management as determining corporate residence. More recently, Geoffrey Loomer makes a case for adopting the place of effective management as the factor that determines corporate residence. Loomer identifies the possibility for manipulation as a reason to abandon central management and control in favour of the place of effective management.[52]

It is unlikely that courts will look to change the common-law corporate-residence test in the foreseeable future. However, any push to change the common law will likely arise as a result of the potential for manipulation of corporate residence that the central management and control test provides. This section looks at the possible ways corporations and multinational enterprises can manipulate corporate residence and the potential ways that the courts and Parliament could react to redress the manipulation.

### *2.4.1 Manipulation of Corporate Residence*

The common-law test is corporation specific, meaning that a corporation's residence must be determined according to the facts and circumstances of the particular corporation: whether the specific corporation's directors have autonomy to make the corporation's strategic management decisions and, if so, where the directors make these decisions. This is the case regardless of the number of corporations in the corporate group and irrespective of the purpose or business of the corporate group as a whole. In these circumstances, corporations have the opportunity to shift profits to low-tax jurisdictions by creating specific-purpose corporations in low-tax jurisdictions that have boards of directors with sufficient autonomy to make strategic management decisions in the low-tax jurisdiction.

With globalisation increasing, it is becoming easier for corporate groups to manipulate corporate residence. As Loomer succinctly and accurately summarised:

> [i]t is well known that the dominant form of international business organization is now a globally integrated network of corporations, often with a single headquarters company and numerous foreign affiliates. Obviously, this evolution in the mode of international enterprise challenges the efficacy of any tax system that is based on the twin concepts of separate corporate personality and corporate residence. This is especially true when, as explained below, courts that are asked to determine the tax residence of "offshore" subsidiaries take a formal, entity-by-entity view of the matter.[53]

The challenge due to the "twin concepts of separate corporate personality and corporate residence" that Loomer refers to is that "the test for corporate residence from *De Beers* has become a mere 'tax-planning device'"[54] and that a corporate group "can 'exploit its androgynous nature to make corporate residence ineffective.'"[55]

A hypothetical example of how a corporate group might manipulate corporate residence to reduce its tax burden is as follows. The corporate group's parent corporation is a holding company in one jurisdiction, and has three subsidiary corporations (sister corporations), all in separate countries. One subsidiary manufactures products, one subsidiary markets the product, and one subsidiary sells the product. Each subsidiary is subject to the taxation laws of the country in which it is resident. Subject to each country's transfer-pricing regime, the corporate group could shift its profits to the country that has the lowest tax burden. All the corporate group needs to do is ensure that the central management and control of each subsidiary corporation is in the selected country.

A real example of a corporate group manipulating corporate residence is *Holden*,[56] in which the British Court of Appeal held that because the directors of a subsidiary corporation in the Netherlands had autonomy to make the corporation's strategic management decisions, the subsidiary was resident in the Netherlands rather than in the United Kingdom.

## 3. Tax Treaties

Aside from the statutory test and the common-law test, the third factor that may impact corporate residence is Canada's tax treaties. Canada currently has tax treaties with 97 countries. Tax treaties are bilateral agreements between Canada and one other country (referred to in the treaties as "contracting states"). The purpose of a tax treaty is to prevent double taxation and double non-taxation (*i.e.*, tax evasion). Although tax treaties address many international tax issues, this article will focus exclusively on the treaty articles that relate to corporate residence and the dispute process when a corporation alleges that Canada and the other treaty country tax the corporation in a manner that is inconsistent with the tax treaty.

### 3.1 Tax Treaty Impact on Residence under the ITA

Tax treaties provide that individuals and corporations can only be resident in one of the contracting states. This principle ensures that taxpayers will not be subject to double taxation. The tax treaties set out various tiebreaker provisions to apply when a taxpayer is considered resident in both contracting states. If the tiebreaker provisions result in the taxpayer being resident in Canada and not the other contracting state, the tax treaty deems the taxpayer resident in Canada. Similarly, if the tiebreaker provisions result in the taxpayer being resident in the other contracting state and not Canada, the treaty deems the taxpayer resident in the other contracting state.

If a tax treaty between Canada and another contracting state deems a corporation resident in another contracting state, the ITA, at subsection 250(5), deems the corporation not resident in Canada for the purposes of the ITA.

If a corporation is resident in Canada and another country, but Canada does not have a tax treaty in force with the other country, the corporation does not benefit from any relieving provisions and will continue to be subject to tax in Canada as a corporation resident in Canada.

Canada's tax treaties are based on the OECD's model tax treaty. In addition to providing a model tax treaty, the OECD also provides a detailed commentary that is an extremely valuable tool when attempting to interpret the provisions of Canada's tax treaty.[57] However, Canada's tax treaties do not necessarily follow the OECD Model Treaty in every respect. Specifically, the majority of Canada's tax treaties use a different tiebreaker when a corporation is resident in both Canada and the treaty partner.

### 3.2 Corporate Residence in the OECD Model Treaty

The OECD Model Treaty, at Article 4, provides information related to corporate residence. Specifically, Article 4.1 states the following:

> For the purposes of this Convention, the term "resident of a Contracting State" means any person, who under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of similar nature, and also includes that state and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that state in respect only of income from sources in that State or capital situated therein.[58]

Article 4.2 sets out the tiebreaker rules if **an individual** is resident in both contracting states; Article 4.2 is irrelevant for determining corporate residence.[59]

Article 4.3 establishes that, if **a corporation** is considered resident in both contracting states under the treaty, the corporation shall be resident in the place of the corporation's effective management:

> Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of only one of the States in which its place of effective management is situated.[60]

Article 4 is a relieving provision ensuring that a corporation is not subject to tax on the same income or capital gain in two jurisdictions.

The OECD Model Treaty commentary provides that, "the place of effective management is the place where the key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made."[61] It is unclear whether the "place of effective management" has the same meaning as "central management and control" or whether it means effective or actual control (*i.e.*, the decisions of the executives that implement the directors' strategic management decisions). It is also possible that "place of effective management" is a hybrid of central management and control and executive management. See Loomer for a detailed discussion about the uncertainty related to "place of effective management".[62] However, as set out below, Canada's tax treaties steer clear of "place of effective management" as the primary tiebreaker for corporate residence and, therefore, the uncertainty is more of an academic issue than a practical issue in Canada.

### 3.3 Corporate Residence in Canada's Tax Treaties

Generally speaking, Canada's tax treaties adopt the definition of "resident of a Contracting State" in Article 4.1 of the OECD Model Treaty. However, Canada's tax treaties do not adopt the same "place of effective management" tiebreaker in Article 4.3 of the OECD Model Treaty. Instead, Canada's tax treaties employ the following tiebreakers for corporations that are resident in both contracting states:

1. approximately 60 percent of Canada's tax treaties use place of incorporation as the primary corporate-residence tiebreaker and, if the place of incorporation does not break the tie, the secondary tiebreaker is an agreement between the two countries' competent authorities;
2. approximately 40 percent of Canada's tax treaties use an agreement between the two countries' competent authorities as the only corporate residence tiebreaker.[63]

There are two important concepts in Article 4 of Canada's tax treaties that warrant analysis. First, the definition of "resident of a Contracting State" in Article 4.1 might not be as all-inclusive as it appears. Second, the procedure for engaging the competent authority to resolve the question of corporate residence is complex and may not lead to a resolution.

### *3.3.1 Resident of a Contracting State*

Article 4.1 provides that a person (including a corporation) is a "resident of a Contracting State" if the person, "under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of similar nature". A corporation does not have a domicile or a residence insofar as it does not have a dwelling. However, a corporation does have a place of management and has a residence insofar as it has a residence for tax purposes. The OECD commentary clarifies that this phrase is intended to apply to individuals and corporations that are subject to "a comprehensive liability to tax – 'full tax liability' – based on the taxpayers' personal attachment to the State concerned."[64] The OECD commentary also makes clear that Article 4.1 does not discriminate between the various ways tax authorities' subject taxpayers to a "full tax liability". Instead, the only relevant consideration for being a "resident of a Contracting State" under the treaty is whether the taxpayer is subject to as comprehensive a tax liability as possible under the country's tax law.

Simply put, if a corporation is not subject to a country's complete tax legislation, the corporation is not considered resident in that country for treaty purposes. If the corporation is not considered resident in the country, then the corporation does not access the relieving provisions in Article 4 of the treaty.

This issue arose in *Crown Forest Industries Ltd. v. R.*[65] Crown Forest was a corporation resident in Canada that rented ships from Norsk Pacific Steamship Company Limited (Norsk). Norsk was incorporated in the Bahamas, but its head office was in the United States, it carried on business in the United States, and its central management and control was in the United States. Norsk filed non-resident tax returns in the United States because the test for corporate residence in the United States is only place of incorporation, not the place of the corporation's central management and control. Crown Forest withheld 10 percent from its rental payments to Norsk as withholding tax on the basis that Norsk was resident in the United States and the Canada-US tax treaty applied to reduce the withholding tax on Crown Forest's rental payments to Norsk from 25 percent to 10 percent. The Supreme Court of Canada held that Norsk was not considered a resident of the United States for the purposes of the Canada-US tax treaty because it was not subject to a full tax liability under US law.[66] The SCC held that being resident under the treaty means more than simply carrying on business in a country and being subject to tax in that country. In these circumstances, Crown Forest was required to withhold and remit to the CRA 25 percent of its rental payments to Norsk.

The Tax Court of Canada has followed the SCC's interpretation of residence for the purpose of tax treaties. In *McFadyen v. R.*,[67] the Tax Court cited *Crown Forest* as having established the following principles:

1. residence of a contracting state for the purposes of a treaty is distinct from "residence in the sense of the Canadian common law";[68]
2. to meet the definition of resident of a contracting state for the purposes of the treaty, the person must be subject to "as comprehensive a tax liability as is imposed" in the specific country;[69] and
3. the person seeking treaty relief must prove "that he was subject to as comprehensive a tax liability as is imposed" by the relevant country.[70]

The OECD Model Treaty commentary and the jurisprudence show that, to benefit from the tiebreaker provisions for corporate residence in tax treaties, it is necessary that the corporation be subject to "as comprehensive a tax liability" as Canada and the other contracting state impose. The corporation does not necessarily have to be subject to tax on all its income and capital gains, as some jurisdictions consider certain types of income or capital gains tax-free. However, the treaty requires that the corporation be subject to the country's complete taxation law to be considered resident of that country under the tax treaty.

### *3.3.2 Competent Authority: The Treaty Dispute-Resolution Process*

As set out above, all of Canada's tax treaties use an agreement between the two countries' competent authorities as a corporate-residence tiebreaker (the competent-authority tiebreaker). Approximately 60 percent of Canada's tax treaties use the competent-authority tiebreaker as the secondary tiebreaker for corporate residence; Canada's remaining tax treaties use the competent-authority tiebreaker as the only tiebreaker for corporate residence. This section sets out the procedure for engaging competent authorities when attempting to determine a corporation's residence under a tax treaty.

The OECD Model Treaty, at Article 25, sets out a Mutual Agreement Procedure (the MAP) for contracting states when a taxpayer takes the position that one of the contracting states is not taxing the taxpayer in accordance with the treaty[71] — in other words, when the taxpayer is subject to double taxation, or believes so. Canada's tax treaties adopt the MAP process set out in the OECD Model Treaty's Article 25, with various modifications, and often as a different article number. For example, in the Canada-UK tax treaty, the MAP is set out in Article 23.

Below is a step-by-step analysis of the various stages in the MAP process, as well as potential applications for judicial review of decisions in the MAP process, for the following example: a corporation resident in Canada filed Canadian resident tax returns, paid corporate tax in Canada, subsequently determined that the corporation was also resident in the United Kingdom under UK law, and took the position that the treaty tiebreaker provisions deemed the corporation resident in the United Kingdom.

***Step 1***

The first requirement for accessing the MAP in Article 23 is that one or both of the contracting states (Canada and the United Kingdom) must be taxing the corporation "not in accordance with the provisions of [the Treaty]".[72] There are two possible interpretations of the phrase "not in accordance with the provisions of [the Treaty]". One possible interpretation is that the corporation must be subject to double tax (the double-tax interpretation). The second possible interpretation is that the corporation has not been subject to double tax, but believes that it paid tax in the wrong country (the wrong-country interpretation). The present example falls into the wrong-country interpretation.

The SCC's decision in *Crown Forest* suggests that the double-tax interpretation is correct. Specifically, at paragraph 50, the SCC held that a person must be subject to double taxation to benefit from a treaty.[73] However, if the wrong-country interpretation is correct, the mere fact that the wrong country imposed tax would allow the corporation to engage the MAP.

When a corporation is subject to tax “not in accordance with the provisions of [the Treaty]”, the corporation can file an application to the competent authority of the country in which the corporation believes it should be deemed resident under the Canada-UK tax treaty for relief under Article 23.1.[74] If the corporation’s position is that it is resident in the United Kingdom and not Canada, the corporation must make its application under the MAP to the UK competent authority. This application would include a request that the UK competent authority contact Canada’s competent authority to negotiate a resolution that would result in taxation that is in accordance with the treaty. Upon receiving the application, the UK competent authority is required to consider whether it can, on its own, relieve the corporation’s double taxation. If the UK competent authority is not willing or able to relieve the corporation’s double taxation but determines that the application is justified, the UK competent authority is required to try to negotiate an agreement with the Canadian competent authority.[75]

***Step 2***

The next step in the MAP process is contingent on whether the Canadian competent authority agrees to negotiate with the UK competent authority. The two possible outcomes are set out below.

*Possible Outcome 1*

If the Canadian competent authority refuses to negotiate with the UK competent authority regarding the corporation’s residence, the Canadian competent authority *will* advise the UK competent authority, and the Canadian competent authority *may* choose to inform the corporation, too. At that time, the corporation will have the opportunity to file an application for judicial review in the Federal Court to dispute the Canadian competent authority’s discretionary decision to refuse to negotiate with the UK competent authority. The Federal Court has jurisdiction to review the Canadian competent authority’s actions in the MAP process,[76] and the Canadian competent authority’s decision in the MAP process is a reviewable decision.[77] However, the standard of review is reasonableness[78] and, therefore, successfully overturning the Canadian competent authority’s decision in the MAP process will prove difficult.

*Possible Outcome 2*

If the UK competent authority and the Canadian competent authority negotiate but cannot resolve the issue, the parties may attempt to resolve any outstanding issues through arbitration.[79] If the Canadian competent authority and the UK competent authority engage in arbitration, the corporation will be a “concerned person” (as opposed to a party in the arbitration) and will not have the opportunity to make submissions. Moreover, the corporation will not have any authority to compel the UK competent authority and the Canadian competent authority to engage in arbitration. However, the corporation will have the ability to prevent an arbitration hearing if it sees fit.[80]

***Step 3***

If the Canadian competent authority and the UK competent authority negotiate but cannot resolve the issue of whether the treaty deems the corporation resident in Canada or the United Kingdom — regardless of whether the Canadian competent authority and UK competent authority engage in arbitration — the corporation can file a protective application for judicial review (to ensure that no limitation period expires and its rights are protected) related to the Canadian competent authority’s actions and decisions in the MAP process (*i.e.*, in the negotiation). The 30-day limitation period to file the application for judicial review of the Canadian competent authority's decision starts to run on the date the Canadian competent authority made "a clear and unequivocal communication of its decision."[81] In *Julien Trust*, the applicant failed to initiate the application for judicial review within 30 days and, therefore, the Federal Court dismissed the application. In these circumstances, the corporation cannot wait for the Canadian competent authority and UK competent authority to engage in arbitration. Instead, the corporation could ask that the Federal Court hold the protective application for judicial review in abeyance pending the Canadian competent authority and the UK competent authority arbitration result.

If the Canadian competent authority and the UK competent authority arbitration result is favourable, the corporation can accept the arbitration result (waiving any right to dispute the reassessments) and withdraw the application for judicial review.

If the Canadian competent authority and the UK competent authority arbitration result is unfavourable, the corporation can reject the arbitration result and resume the application for judicial review. Again, the standard of review is reasonableness. In these circumstances, persuading the Federal Court to grant the application for judicial review and, in the second step, persuading the Canadian competent authority to render a favourable decision will prove difficult.

## 4. Special Considerations

### 4.1 Using Tax Treaties to Attempt to Achieve Double Non-Taxation

Tax treaties provide relief from double taxation and, therefore, creative tax planners often look for ways to use the relieving provisions in a tax treaty to reduce tax burdens and, at times, even to achieve double non-taxation — *i.e.,* to avoid taxes entirely. One type of tax-treaty planning is referred to as "treaty shopping". Treaty shopping occurs when a taxpayer attempts to become resident in a specific country to take advantage of a certain beneficial tax treatment under that country's tax treaty with Canada.[82] *MIL (Investments) S.A. v. R.*[83] is a case in which the taxpayer successfully defended a tax plan that involved treaty shopping. MIL Investments (MIL) was incorporated in the Cayman Islands. In 1993, MIL acquired shares in Diamond Field Resources (DFR), a Canadian public corporation. In June 1995, DFR discovered significant mineral deposits in Newfoundland. In July 1995, MIL migrated its corporate status to Luxembourg (in other words, moved its corporate residence from the Cayman Islands to Luxembourg). Shortly thereafter, MIL sold its DFR shares and realised a significant capital gain. Although MIL was not resident in Canada, MIL's capital gain related to Canadian-source property and, therefore, was taxable under the ITA. However, MIL relied on the Canada-Luxembourg tax treaty to exempt the capital gain from Canadian tax. MIL would not have had the same exemption if it had not migrated from the Cayman Islands to Luxembourg. The Agency reassessed MIL under section 245 of the ITA, the General Anti-Avoidance Rule (GAAR). The TCC and FCA held that GAAR did not apply because none of the transactions were avoidance transactions.[84] Moreover, the TCC and FCA held that treaty shopping on its own is not abusive and, therefore, the selection of a low tax jurisdiction over another cannot on its own be abusive enough to impose the GAAR.[85]

Another type of tax-treaty planning occurred in *Black v. R.*,[86] in which Conrad Black sought to use the Canada-UK tax treaty to avoid paying tax on his Canadian-source and US-source income. In this case, the parties filed an agreed statement of facts, setting out that:

1. Black was resident in Canada under the ITA;
2. Black was resident in the United Kingdom under UK law;
3. Article 4.2 of the Canada-UK tax treaty deemed Black resident in the United Kingdom;
4. although Black was resident in the United Kingdom under UK law, he was considered a non-domiciled resident of the United Kingdom.[87]

Under UK law, a person that is a non-domiciled resident of the United Kingdom is not subject to tax on the person's foreign-source income unless the person brings the foreign-source income into the United Kingdom. Black's position was that, because he was deemed resident in the United Kingdom and subject to UK law, he was not subject to Canadian tax on his worldwide income. The Tax Court dismissed Black's appeal, holding that there was nothing in the ITA that deemed him non-resident in Canada and nothing in the tax treaty that that would preclude him remaining resident in Canada under the ITA. The fundamental problem in Black's case was that "[d]ouble taxation between Canada and the U.K. is not an issue."[88]

Also, it is important to note that although subsection 250(5) of the ITA now deems non-resident any person (*i.e.*, individual, trust, partnership, or corporation) that is deemed resident of another country under a tax treaty between Canada and the other country, the version of subsection 250(5) that was in force at the relevant time for *Black* only applied to corporations. Both sides argued (albeit for different reasons), and the Tax Court agreed, that subsection 250(5) did not apply to *Black*.

### 4.2 Dual Corporate Residence

It is clear that a corporation can be resident in more than one country at any given time. For example, a corporation incorporated in the United States that has its central management and control in Canada will be resident in the United States under US law and resident in Canada under the common-law test.

What is less clear is whether a corporation can have its central management and control in more than one country at any given time.

Some scholars believe that the central management and control test does not support the concept of dual residence because a corporation cannot have central management and control in more than one place at any given time.[89] However, the following two British cases from the 1950s suggest that simultaneous central management and control in more than one country might be possible.

First, in *Union Corp. v. Commissioners of Inland Revenue*,[90] the British Court of Appeal commented, albeit in *obiter dicta*, that "central management and control may be divided, and that such division, being a matter of fact and degree in each case, is not denied by the circumstances that the supreme command, the power of final arbitrament, may be found to be, or to be predominately, in one place."[91] The Court of Appeal set out that, because the determination is fact specific and the types of decisions vary depending on the corporation's business and purpose, it is possible that the strategic management decisions are made in more than one country.[92]

Second, in *United Construction Co. v. Bullock (Inspector of Taxes)*,[93] the House of Lords stated that a corporation's central management and control may be divided if the facts do not make it possible to identify any single country as the seat of central management and control.[94] However, this comment may be more of a suggestion that the central management and control test, as articulated in *De Beers*, may not always produce a clear result, rather than an endorsement of dual residence under the central management and control test.[95]

### 4.3 Corporations without Residence

With the increase in e-commerce and the fact that corporate residence is corporation-specific, it is possible to create a corporation that is not resident anywhere. A corporation is not required to have an office or employees in the country in which it provides services or earns revenue. This allows corporate groups that engage in e-commerce to select jurisdictions that may reduce the corporate group's tax burden. For example, consider a corporation that earns revenue, but does not have a physical office, employees, executive officers, or ongoing business operations (Corporation X). This type of corporation can exist in a corporate group in which related corporations undertake the necessary business activities to produce, market, and sell services, and the group funnels that revenue to Corporation X. In the appropriate jurisdiction, Corporation X might pay little to no corporate tax.

In fact, this is precisely what the Apple corporate group achieved.[96] Apple Inc. (Apple Parent) is a corporation resident in the United States. Apple Parent incorporated subsidiary corporations in Ireland (Apple Sales International and Apple Operations Europe). Apple Sales International and Apple Operations Europe had the right to manufacture and sell Apple products outside of the Americas. Apple Sales International created a satellite or branch that it referred to as its "head office". Under Irish law, an Irish corporation could establish a satellite or branch office (the branch) outside of Ireland and allocate any amount of the corporation's profits to that branch. Under Irish tax law, profits allocated to the branch were taxable where the branch operated and not in Ireland (unless the branch operated in Ireland). Apple Sales International's branch was virtual: it was not based in any country and existed only in the cloud. It did not have a physical office or any other premises and had no employees. Its only activity was infrequent meetings of the board of directors. Apple Sales International allocated the majority of its profits from sales outside of the Americas to the branch. The profits allocated to the branch were not taxable in Ireland and were not taxable in the United States. According to the European Commission Press Release Database, Apple Sales International paid corporate tax in Ireland equal to approximately 0.05 percent in the 2011 fiscal year and approximately 0.005 percent in the 2014 fiscal year. By any measure, this constitutes aggressive tax planning.

In Canada, the transfer-pricing provisions, at section 247 of the ITA, would have allowed the Agency to attack the Apple group's aggressive tax-planning strategy. In Europe, The European Commission conducted an investigation and concluded that Ireland's tax law related to allocating profits to a branch had the effect of granting undue benefits to Apple Sales International — *i.e.*, Apple Sales International paid a minimal amount of corporate tax.[97] Granting an undue benefit was illegal under the European Union state-aid rules, and the Irish tax authority was required to seek unpaid taxes from Apple Sales International. Specifically, the Irish tax authority had to reallocate Apple Sales International's profits between its Irish operations and its branch (in the same way that the Agency would determine the appropriate transfer price between a Canadian corporation and a non-arm's-length foreign corporation).

The authors believe that, in most cases, if a corporate group shifts its profits to a corporation (or branch of a corporation) that is without residence, the Agency's primary argument will be that the transfer-pricing provisions allow the Agency to tax the appropriate amount of the corporate group's profit in Canada (and the Agency will impose transfer-pricing penalties under section 247 of the ITA). However, the facts of the specific situation may also allow the Agency to argue that the corporation supposedly without residence is in fact resident in Canada, thereby subjecting the corporation's profits to tax in Canada.

# 5. Tips and Traps

## 5.1 Onus of Proof and Burden of Proof in Corporate Residence Tax Court Appeals

A corporation's residence is a question of mixed fact and law.[98] The Minister is entitled to make assumptions of fact to support the Minister's assessment (or reassessment) at the audit and objection stages. At Tax Court, the taxpayer has the onus to demolish the Minister's assumptions of fact. Based on the SCC's decision in *Hickman Motors Ltd. v. R.*,[99] the taxpayer can satisfy this onus by making out a *prima facie* case:

> 92. It is trite law that in taxation the standard of proof is the civil balance of probabilities: *Dobieco Ltd. v. Minister of National Revenue*, [1966] S.C.R. 95, and that within balance of probabilities, there can be varying degrees of proof required in order to discharge the onus, depending on the subject matter: *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164; *Pallan v. M.N.R.*, 90 D.T.C. 1102 (T.C.C.), at p. 1106. The Minister, in making assessments, proceeds on assumptions (*Bayridge Estates Ltd. v. M.N.R.*, 59 D.T.C. 1098 (Ex. Ct.), at p. 1101) and **the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment** (*Johnston v. Minister of National Revenue*, [1948] S.C.R. 486; *Kennedy v. M.N.R.*, 73 D.T.C. 5359 (F.C.A.), at p. 5361). **The initial burden is only to "demolish" the exact assumptions made by the Minister but no more**: *First Fund Genesis Corp. v. The Queen*, 90 D.T.C. 6337 (F.C.T.D.), at p. 6340.
>
> 93. **This initial onus of "demolishing" the Minister's exact assumptions is met where the appellant makes out at least a *prima facie* case**: *Kamin v. M.N.R.*, 93 D.T.C. 62 (T.C.C.); *Goodwin v. M.N.R.,* 82 D.T.C. 1679 (T.R.B.).[100] [emphasis added]

If the taxpayer makes out at least a *prima facie* case, the onus "shifts to the Minister to rebut the *prima facie* case".[101] In other words, the taxpayer's burden of proof is to make out a *prima facie* case, which, if accomplished, satisfies the taxpayer's initial onus. The onus then shifts to the Minister to prove the assumptions on a balance of probabilities.

Although *Hickman Motors* is still good law, practitioners should note Justice Webb's recent comments regarding the taxpayer's burden of proof in *Sarmadi v. Canada*.[102] In *Sarmadi*, each judge wrote concurring reasons for dismissing the appeal. Justice Webb's reasons provided a lengthy analysis, albeit *in obiter*, of the extent of the taxpayer's burden for demolishing the Minister's assumptions. After reviewing the relevant jurisprudence, Justice Webb concluded that the taxpayer's burden of proof to demolish the Minister's assumptions is no different than the taxpayer's burden to prove the facts on which the taxpayer relies. Justice Webb's position was that the taxpayer only satisfies the burden — and shifts the onus to the Minister — if the taxpayer demolishes the Minister's assumptions on a balance of probabilities.[103] In other words, Justice Webb proposes to eliminate any distinction between the taxpayer's "initial burden" to demolish the Minister's assumption by making out a *prima facie* case and the burden of proof in civil law.

Although Justice Stratas commended J.A. Webb's analysis of the onus of proof, Justice Stratas stated that, "at this time and in these circumstances, I decline to express a definitive opinion of the correctness of [Justice Webb's] views on this fundamental point."[104]

It seems likely that the FCA will revisit the taxpayer's burden of proof when demolishing the Minister's assumptions in the future. Practitioners should ensure that they stay up to date on the relevant law and remain aware of any modifications to the taxpayer's burden of proof. However, regardless of the taxpayer's burden of proof, corporations should document and maintain a record of who is making each decision and where the individuals making the decisions are at the relevant time.

As set out above, a corporation's residence is a question of mixed fact and law.[105] The Minister cannot assume a conclusion of law or mixed fact and law and, therefore, the Minister cannot assume that a corporation is resident in Canada or not resident in Canada. Instead, the Minister is restricted to assuming the factual components of the question of mixed fact and law. For example, the Minister can assume that Mr. A and Ms. A are the individuals that made *specific* strategic management decisions and that they were in Canada when they made the decisions, but the Minister cannot assume that the corporation's central management and control was in Canada.

### 5.2 Personal Residence of Directors

The relevant considerations for determining a corporation's central management and control are as follows:

1. What decisions are strategic management decisions for the specific corporation under review?
2. Who makes the corporation's strategic management decisions?
3. Where are the individuals when they make the strategic management decisions?

The strategic decision makers' residence under the ITA is irrelevant for determining central management and control. Consider the following example. An individual is resident in Canada under the ITA. The individual spends six months of each year in Canada and six months of each year in the Cayman Islands. The individual is the director of a company incorporated in the Cayman Islands and makes the corporation's strategic business decisions during her six months in the Cayman Islands. The fact that the individual is resident in Canada under the ITA is irrelevant in determining the location of the corporation's central management and control.

However, the Agency has, in some cases, confused the common-law test and adopted the position that the decision makers' residence is relevant when determining a corporation's central management and control. In fact, the Agency has gone so far as to conclude that a corporation is resident in Canada solely because the corporation's decision makers are resident in Canada under the ITA, even when the decision makers spent most of their time outside of Canada. In particular, see the following excerpt from the Agency's audit proposal letter: "…all material transactions with respect to [the corporation] were directed by persons resident in the Province of X, Canada (namely [Ms. X] and [Ms. Y]). As a result, [corporation X] is considered to be a resident of Canada for income tax purposes."

It is clear that the Agency's emphasis on the decision makers' residence for tax purposes is wrong. However, we understand the natural tendency to assume that individuals make decisions in the place that they are resident. In these circumstances, corporations seeking to avoid being resident in Canada should consider having the majority of the strategic decision makers reside outside of Canada.

Note that installing nominee directors outside of Canada will not achieve this purpose because the Agency and the courts will look at who actually makes the strategic business decisions, regardless of title. If it is not possible for the majority of the strategic decision makers not to be resident in Canada, the decision makers should take extreme care making strategic management decisions only at meetings held outside of Canada. The corporation should carefully record the strategic decision makers' travel records and should record minutes of the meetings so that the corporation can defend against a potential Agency proposal that the corporation's central management and control is in Canada.

## 6. Government Publications

OECD (2015), *Model Tax Convention on Income and on Capital 2014 (Full Version)*, OECD Publishing.
OECD (2015), *Preventing the Granting of Treaty Benefits in Appropriate Circumstances, Action 6 -2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing.

## 7. Additional Readings

Baker, A. and I. Gamble. "Corporate Residence" Canadian Tax Foundation (2011).
Couzin, R. *Corporate Residence and International Taxation* (Amsterdam: IBFD Publications BV, 2002).
The Institute for Fiscal Studies, *Report of the Working Party on Company Residence, Tax Havens, and Upstream Loan*, IFS Report Series No. 3 (London: 1982).
Kyres, C.A. "Carrying on Business in Canada" (1995) 45:5 Can. Tax J.
Loomer, G. "The Disjunction Between Corporate Residence and Corporate Taxation: Is Improvement Possible?" (2015) 63:1 Can. Tax J.
North, P. and J. Fawcett. *Cheshire and North's Private International Law*, 13th ed. (London: 1999).

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[1] Geoffrey Loomer, "The Disjunction Between Corporate Residence and Corporate Taxation: Is Improvement Possible?" (2015) 63:1 Can. Tax J. 111, citing United Kingdom, Inland Revenue, *Statement of Practice 1/90*, at para. 11 (reproduced in United Kingdom, HM Revenue & Customs, *International Manual* (London: HMRC, 2014), online at: https://www.gov.uk/hmrc-internal-manuals/international-manual/intm120200), at section 120200).
[2] *Ibid.* at 111.
[3] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) as amended [ITA], para. 250(4)(a).
[4] *Ibid.*, para. 250(4)(c).
[5] 2001 CSC 10, 2001 SCC 10, 2001 CarswellNat 246, 2001 CarswellNat 247 (S.C.C.), para. 19.
[6] See Constantine A. Kyres, "Carrying on Business in Canada" (1995) 45:5 Can. Tax J. 1642.
[7] 1937 CarswellSask 71, (sub nom. Income Tax Act, 1932, Re) [1938] 2 D.L.R. 597 (Sask. K.B.).
[8] 1985 CarswellNat 310, (sub nom. R. v. Gurd's Products Co.) [1985] 2 C.T.C. 85 (Fed. C.A.) [*Gurd's Products*].
[9] Kyres, *supra* note 6 at 1642.
[10] Robert Couzin, *Corporate Residence and International Taxation* (Amsterdam: IBFD Publications BV, 2002).
[11] [1906] A.C. 455, 5 T.C. 198 (U.K. H.L.) [*De Beers*].
[12] *Ibid.* at 213.
[13] OECD (2015), *Model Tax Convention on Income and on Capital 2014 (Full Version)*, OECD Publishing, page 192 [*OECD Model Tax Convention*].
[14] *Ibid.*
[15] See Loomer, *supra* note 1 at 105.
[16] *Calcutta Jute Mills, Limited v. Nicholson (Surveyor of Taxes)* (1876), 1 T.C. 83 (H.L.) and *Cesena Sulphur Company, Limited v. Nicholson (Surveyor of Taxes)* (1876), 1 T.C. 88 (H.L.), reported together as *Cesena Sulphur Company, Limited v. Nicholson (Surveyor of Taxes)* (1876), 1 Ex.D. 428 (H.L.).
[17] *Ibid.* at 454.

[18] *De Beers*, *supra* note 11 at 213.
[19] See *Couzin*, *supra* note 10 at 42-44.
[20] *De Beers*, *supra* note 11 at 212-213.
[21] See *Couzin*, *supra* note 10 at 43.
[22] *De Beers*, *supra* note 11 at 212.
[23] See *Couzin*, *supra* note 10 at 43-44.
[24] *Ibid*. at 44.
[25] *Ibid*.
[26] *Ibid*.
[27] [1925] A.C. 495 (U.K. H.L.) [*Swedish Railway HL*].
[28] *Ibid*. at 495.
[29] *Ibid*.
[30] *Ibid*. at 497.
[31] *Swedish Central Railway Company, Limited v. Thompson (Inspector of Taxes)*, [1924] 2 K.B. 225 [*Swedish Railway KB*] at 265.
[32] *Swedish Railway HL*, *supra* note 28 at 497.
[33] (1914-15) 6 T.C. 542 (H.L.).
[34] (1929) 14 T.C. 119 (H.L.) [*Egyptian Delta*].
[35] *Ibid*. at 154.
[36] *Ibid*.
[37] *Report of the Working Party on Company Residence, Tax Havens, and Upstream Loan*, IFS Report Series No. 3 (London: The Institute for Fiscal Studies, 1982) [*IFS Company Residence Report*].
[38] Note that these are examples of strategic management decisions, but are not meant to be an exhaustive list of Opco's strategic management decisions.
[39] Albert Baker and Ian Gamble, "Corporate Residence", *Canadian Tax Foundation* (2011) at 17.
[40] 1945 CarswellNat 14, [1945] C.T.C. 162, [1945] 3 D.L.R. 613 (Can. Ex. Ct.) [*BC Electric*].
[41] *Ibid*. at para. 4.
[42] 1961 CarswellNat 271, 61 D.T.C. 716 (Can. Tax App. Bd.) [*Yamaska Steamship*].
[43] 1970 CarswellNat 237, 1970 CarswellNat 318, 70 D.T.C. 6064 (Can. Ex. Ct.).
[44] 1977 CarswellNat 386, [1977] C.T.C. 2443, 77 D.T.C. 320 (T.R.B.).
[45] [2005] S.T.C. 789 (Ch. D.), affirmed [2006] S.T.C. 443 (C.A.) [*Holden*].
[46] *Ibid*., para. 25.
[47] See Loomer, *supra* note 1 at 115-119.
[48] 2009 TCC 477, 2009 CarswellNat 2867, 2009 CarswellNat 4324 (T.C.C. [General Procedure]) [*1143132 Ontario Limited*].
[49] 2012 SCC 14, 2012 CarswellNat 953, 2012 CarswellNat 954, (sub nom. Garron Family Trust v. Canada) 343 D.L.R. (4th) 670 (S.C.C.) [*Garron*].
[50] Agreement between Canada and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, signed at Bridgeport, Bahamas on January 22, 1980, Article 14.4.
[51] *IFS Company Residence Report*, *supra* note 38.
[52] See Loomer, *supra* note 1 at 108.
[53] *Ibid*. at 114.
[54] *Ibid*., quoting Brian J. Arnold, "A Tax Policy Perspective on Corporate Residence" (2003) 51:4 Can. Tax J. 1564.
[55] *Ibid*., quoting Michael J. McIntyre, "Determining the Residence of Members of a Corporate Group" (2003) 51:4 Can. Tax J. 1570.
[56] *Holden*, *supra* note 46.
[57] *OECD Model Tax Convention*, *supra* note 13.
[58] *Ibid*. at 37.
[59] *Ibid*.
[60] *Ibid*.
[61] *Ibid*. at 192.

62 See Loomer, *supra* note 1 at 126-129.
63 *Ibid*. at 122-123.
64 *OECD Model Tax Convention*, *supra* note 13 at 184.
65 1995 CarswellNat 707, 1995 CarswellNat 384, [1995] 2 S.C.R. 802, (sub nom. Crown Forest Industries Ltd. v. Canada) 125 D.L.R. (4th) 485 (S.C.C.) [*Crown Forest*].
66 *Ibid*. at paras. 44-51, 58, and 68.
67 2000 CarswellNat 1968, 2000 CarswellNat 4691, [2000] 4 C.T.C. 2573 (T.C.C. [General Procedure]) [*McFadyen*].
68 *Ibid*. at para. 137.
69 *Ibid*. at para. 138.
70 *Ibid*. at para. 139.
71 *OECD Model Tax Convention*, *supra* note 13 at 83.
72 Convention Between the Government of Canada and the Government of the United Kingdom of Great Britain and Northern Ireland, signed in London, England on September 28, 1978, as amended by the protocols signed on April 15, 1980 and October 16, 1985, Article 23.1 [*Canada – UK Tax Treaty*].
73 *Crown Forest*, *supra* note 66, para. 50.
74 *Canada – UK Tax Treaty*, *supra* note 73, Article 23.1 states that a person seeking relief under the MAP to apply to the "competent authority of the Contracting State of which the person is a resident" to claim a revision of the double taxation.
75 *Ibid*. Article 23.2.
76 *CGI Holding LLC v. Minister of National Revenue*, 2016 CF 1086, 2016 FC 1086, 2016 CarswellNat 4651, 2016 CarswellNat 10480, 2016 D.T.C. 5102 (F.C.), paras. 16-19 [*CGI Holding*].
77 *Ibid*. at paras. 43-44.
78 *Ibid*. at paras. 46-50.
79 *Canada – UK Tax Treaty*, supra note 73, Article 23.6.
80 Although the *Canada – UK Tax Treaty* states that the unresolved issues "shall be submitted to arbitration", the arbitration rules and procedures agreement that Canada and the United Kingdom reached (the "Exchange Notes") provide that the issues will not go to an arbitration hearing if the Canadian competent authority and the UK competent authority agree that the unresolved issues are not suitable for arbitration. Also, the person affected (the corporation) can refuse to provide its consent under section (8) of the Exchange Notes, and the refusal will preclude the arbitration hearing from taking place even if the Canadian competent authority and the UK competent authority determine that the issues are appropriate for arbitration.
81 *2005 Robert Julien Family Delaware Dynasty Trust (Trustee of) v. Minister of National Revenue*, 2007 FC 1071, 2007 CarswellNat 3425, 2007 CarswellNat 4258 (F.C.) [*Julien Trust*] at paras. 22-24.
82 OECD (2015), *Preventing the Granting of Treaty Benefits in Appropriate Circumstances, Action 6 -2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing at 17.
83 2007 CAF 236, 2007 FCA 236, 2007 CarswellNat 1719, 2007 CarswellNat 4139, 2007 D.T.C. 5437 (Eng.) (F.C.A.) [*MIL Investments*].
84 *Ibid*. at para. 6.
85 *Ibid*. at para. 5.
86 2014 TCC 12, 2014 CarswellNat 49, 2014 CarswellNat 41 (T.C.C. [General Procedure]), affirmed 2014 CAF 275, 2014 FCA 275, 2014 CarswellNat 4995, 2014 CarswellNat 8424 (F.C.A.), leave to appeal refused *R. v. Black*, 2015 CarswellNat 1274, 2015 CarswellNat 1275 (S.C.C.) [*Black*].
87 *Ibid*. at para. 4.
88 *Ibid*. at para. 39.
89 Sir Peter North and J.J. Fawcett, *Cheshire and North's Private International Law*, 13th ed. (London: 1999) at 173.
90 [1952] 1 All E.R. 646 (C.A.), (1952-1953) 34 T.C. 207 [*Union Corporation*].
91 *Ibid*. at 274.
92 *Ibid*.
93 (1959), [1960] A.C. 351, [1959] 3 All E.R. 831 (C.A.), (1958-1959) 38 T.C. 712 (H.L.) [*Unit Construction*].
94 *Ibid*. at 739.

[95] See Couzin, *supra* note 10 at 79.

[96] See <http://europa.eu/rapid/press-release_IP-16-2923_en.htm> for European Commission press release related to Apple's illegal tax benefits [*European Commission*].

[97] *Ibid*.

[98] *1143132 Ontario Limited*, *supra* note 49, para. 24.

[99] 1997 CarswellNat 3046, 1997 CarswellNat 3047, [1997] 2 S.C.R. 336 (S.C.C.) [*Hickman Motors*].

[100] *Hickman Motors*, *ibid.*, paras. 92-93.

[101] *Hickman Motors*, *ibid.*, para. 94, quoting *Magilb Development Corp. v. Minister of National Revenue*, 1986 CarswellNat 495, 87 D.T.C. 5012 (Fed. T.D.) at 5018.

[102] 2017 FCA 131, 2017 CarswellNat 2790 (F.C.A.) [*Sarmadi*].

[103] *Ibidi*, paras. 61-63.

[104] *Ibid.*, para. 71.

[105] *1143132 Ontario Limited*, *supra* note 48, para. 24.