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A-260-20 (lead file)

A-261-20

A-262-20

2021 FCA 218

Mathew McNeeley, Kenneth Chapman and John A. Baker (*Appellants*)

v.

Her Majesty the Queen (*Respondent*)

INDEXED AS: MCNEELEY V. CANADA

Federal Court of Appeal, Webb, Mactavish and LeBlanc JJ.A.—Toronto, September 27; Ottawa, November 15, 2021.

Income Tax — Income Calculation — Consolidated appeals from Tax Court of Canada decision dismissing appellants' appeals from Minister of National Revenue's reassessments of their tax returns — Appeals arising because appellants believed that rules applicable to distribution of shares from trust to employees of corporation would be those rules applicable to prescribed trusts as defined in Income Tax Regulations (Regulations), s. 4800.1 — Desire2Learn Employee Stock Trust (D2L Employee Trust) having as its beneficiaries employees of D2L Corporation (D2L) — Series of corporate transactions occurring between D2L, D2L Holdings Inc., numbered company — D2L Employee Trust twice distributing shares acquired from amalgamated company to several beneficiaries, including appellants — D2L Employee Trust, beneficiaries proceeded on basis that, for purposes of Income Tax Act, D2L Employee Trust was prescribed trust as defined in Regulations, s. 4800.1; that it would be trust for purposes of Act, s. 107; with one exception, filed election contemplated by Act, s. 107(2.001) in relation to distributions to the beneficiaries — D2L Employee Trust, beneficiaries filed their tax returns on basis that Act, s. 107(2.1) applied to distributions of shares to beneficiaries; reported capital gain arising as result of deemed disposition of shares; allocated such capital gains to beneficiaries — Net result of distributions, filings being that appellants McNeeley, Chapman reported taxable capital gain; claimed corresponding capital gains deduction under Act, s. 110.6(2.1) — Appellant Baker not including any amounts in his income resulting from first distribution of shares; reported taxable capital gain in relation to second distribution of shares to him — Minister reassessed appellants to delete taxable capital gains reported; included certain amounts in appellants' incomes on basis distributions of shares were payments from employee benefit plan — Appellants filing notices of objection, then appeals to Tax Court — Tax Court Judge found that D2L Employee Trust was employee benefit plan as defined in Act, s. 248(1); that it could therefore not be prescribed trust as defined in Regulations, s. 4800 — Therefore, rules related to payments from employee benefit plans applied to determine amounts to be included in appellants'

income — Appellant Baker raised additional argument that distributions of shares to him should not be considered to be distributions from employee benefit plan — Tax Court finding that Baker failing to establish that he received shares otherwise than as employee — Whether provisions of Act related to employee benefit plan would apply to D2L Employee Trust, appellants or whether rules related to taxation of prescribed trust would apply — Issues arising for Baker were (a) whether rules related to employee benefit plan contemplate that particular payment from such arrangement may not be included in income under Act, s. 6(1)(g); (b) if so, whether TCC erred in finding that Baker had not satisfied requirements for distributions of shares to him to not be included in his income under Act, s. 6(1)(g) — D2L Employee Trust was employee benefit plan as defined in Act, s. 248(1); also satisfied requirements for prescribed trust as set out in Regulations, s. 4800.1(a) — Definition of trust in Act, s. 108(1) stipulating that trust, for purposes of Act, s. 107, not including employee benefit plan — Also, definition of employee benefit plan is in Act while qualifications for trust to be prescribed trust set out in Regulations — Here, it was not possible to reconcile two provisions as they applied to D2L Employee Trust — D2L Employee Trust fulfilled both the requirements to be employee benefit plan, prescribed trust — Tax consequences for D2L Employee Trust, appellants significantly different based on classification of D2L Employee Trust — Since definition of employee benefit plan is set out in Act, since definition of prescribed trust is set out in Regulations, paramountcy of definition of employee benefit plan in Act had to govern — Parliament could have provided that prescribed trust is not employee benefit plan — Paragraphs (a) to (e) of definition of employee benefit plan in Act, s. 248 exclude number of arrangements, trusts from definition of employee benefit plan — With respect to appellant Baker, arrangement as embodied in D2L Employee Trust, was employee benefit plan — Payments made by D2L Employee Trust to appellants McNeeley, Chapman were not excluded payments for purposes of definition of employee benefit plan — In this case, only single arrangement existing — Under Act, all amounts received by taxpayer under employee benefit plan are included in computing income of that taxpayer from office or employment — Therefore, all amounts received by Baker from D2L Employee Trust included in his income as employment income — Appeals dismissed.

Trusts — Consolidated appeals from Tax Court of Canada decision dismissing appellants' appeals from Minister of National Revenue's reassessments of their tax returns — Appeals arising because appellants believed that rules applicable to distribution of shares from trust to employees of corporation would be those rules applicable to prescribed trusts as defined in Income Tax Regulations (Regulations), s. 4800.1 — Desire2Learn Employee Stock Trust" (D2L Employee Trust) having as its beneficiaries employees of D2L Corporation (D2L) — D2L Employee Trust twice distributing shares acquired from amalgamated company to several beneficiaries, including appellants — D2L Employee Trust, beneficiaries proceeded on basis that, for purposes of Income Tax Act, D2L Employee Trust was prescribed trust as defined in Regulations, s. 4800.1; that it would be trust for purposes of Act, s. 107; filed election contemplated by Act, s. 107(2.001) in relation to distributions to beneficiaries (with exception of first distribution to John Baker) — With exception of first distribution to John Baker, D2L Employee Trust, beneficiaries filed their tax returns on basis that Act, s. 107(2.1) applied to distributions of shares to beneficiaries; reported capital gain arising as result of deemed disposition of shares; allocated such capital gains to beneficiaries — Whether provisions of Act related to employee benefit plan applying to D2L Employee Trust, appellants or whether rules related to taxation of prescribed trust applying — Paragraph (a) of definition of "trust" in Act, s. 108(1) providing that trust listed in that paragraph (including employee benefit plan) not a trust as defined in that subsection — Paragraph (a.1) of definition of "trust" (at Act, s. 108(1)) providing description of certain trusts that are also excluded from definition of "trust" — Exclusion of prescribed trusts from application of paragraph (a.1) meaning that prescribed trust will not be excluded from definition of trust as result of application of paragraph (a.1) — Same trust, however, will be excluded from definition of trust if described in paragraph (a) of definition — Exclusion from application of paragraph (a.1) for prescribed trust could not result in D2L Employee Trust (excluded from definition of trust under paragraph (a)) being reinstated as trust on basis that it is prescribed trust.

These were consolidated appeals from a Tax Court of Canada decision dismissing the appellants' appeals from the Minister of National Revenue's reassessments of their tax returns. These appeals arose because the appellants believed that the rules applicable to the distribution of shares from a

trust to employees of a corporation would be those rules applicable to prescribed trusts as defined in section 4800.1 of the *Income Tax Regulations* (Regulations).

In 2005, Patricia Baker contributed \$210 to settle the “Desire2Learn Employee Stock Trust” (the D2L Employee Trust). The beneficiaries of the D2L Employee Trust are the employees of D2L Corporation (D2L), which was founded by Patricia Baker’s son, John Baker, one of the appellants. The D2L Employee Trust acquired some class B common shares of D2L for \$10. The D2L Employee Trust subsequently transferred the shares of D2L to D2L Holdings Inc. (D2L Parent) for the same number and class of shares of D2L Parent. On the amalgamation of D2L Parent with a numbered company, the D2L Employee Trust acquired a large number of non-voting class B common shares of the amalgamated company, which retained the name D2L Holdings Inc. On the same day that the amalgamation occurred, the D2L Employee Trust distributed shares to various beneficiaries, including to John Baker and to Kenneth Chapman. Later in 2012, the D2L Employee Trust distributed its remaining shares to 227 beneficiaries, including to Mathew McNeeley and again to John Baker. The fair market value of the shares at the time of the first and second distribution was \$8.415 per share. The D2L Employee Trust and the beneficiaries proceeded on the basis that, for the purposes of the *Income Tax Act*, the D2L Employee Trust was a prescribed trust as defined in section 4800.1 of the Regulations and that it would be a trust for the purposes of section 107 of the Act. The D2L Employee Trust filed the election contemplated by subsection 107(2.001) of the Act in relation to the distributions to the beneficiaries with one exception regarding the first distribution of shares to John Baker. As a result, other than the first distribution of shares to John Baker, the D2L Employee Trust and its beneficiaries filed their tax returns on the basis that subsection 107(2.1) of the Act applied to the distributions of shares to the beneficiaries. The D2L Employee Trust reported a capital gain arising as a result of the deemed disposition of the shares, in the amount equal to the difference between the fair market value of such shares and the adjusted cost base of such shares. The taxable capital gain was one-half of the capital gain. The D2L Employee Trust allocated such taxable capital gains to the beneficiaries. For the first distribution of shares to John Baker, the D2L Employee Trust and John Baker filed their tax returns on the basis that subsection 107(2) of the Act applied. Mathew McNeeley and Kenneth Chapman sold their shares to a numbered company owned by John Baker. John Baker transferred the shares that he received on the first distribution to the numbered company for shares of that company and filed the election under subsection 85(1) of the Act, electing for proceeds of disposition equal to the adjusted cost base of these shares. John Baker sold the shares that he received on the second distribution to the numbered company. Since the D2L Employee Trust recognized the capital gain arising on the second distribution of shares to John Baker, his adjusted cost base of these shares was equal to the fair market value of these shares. The net result of these distributions and filings was that both Mathew McNeeley and Kenneth Chapman reported a taxable capital gain equal to one-half of the amount by which the fair market value of the shares distributed to them exceeded the adjusted cost base of such shares, and they both claimed corresponding capital gains deduction under subsection 110.6(2.1) of the Act. As for John Baker, he did not include any amounts in his income as a result of the first distribution of shares to him and his transfer of these shares to his numbered company; and he reported a taxable capital gain equal to the taxable capital gain realized by the D2L Employee Trust in relation to the second distribution of shares to him. The Minister reassessed the appellants to delete the taxable capital gain that each appellant had reported and to include in each appellant’s income an amount equal to the fair market value of the shares distributed to such appellant, on the basis that the distributions of these shares were payments from an employee benefit plan. For John Baker, the Minister included an amount in his income for both the shares distributed to him as part of the first distribution and the second distribution. The appellants filed notices of objection and subsequently appeals to the Tax Court of Canada.

The Tax Court Judge found that the D2L Employee Trust was an employee benefit plan as defined in subsection 248(1) of the Act and that it could therefore not be a prescribed trust as defined in section 4800.1 of the Regulations. Therefore, the rules relating to payments from employee benefit plans were the applicable rules to determine the amounts to be included in the appellants’ income. John Baker also raised an additional argument that the distributions of shares to him should not be considered to be distributions from an employee benefit plan, on the basis that he did not receive these shares as an employee of D2L. The Tax Court Judge found that it was possible to have a

distribution from an employee benefit plan that would not be included in income under paragraph 6(1)(g) of the Act but that John Baker had failed to establish that he had received the shares otherwise than as an employee.

The main issue in these appeals was whether the provisions of the Act related to an employee benefit plan would apply to the D2L Employee Trust and the appellants or whether the rules related to the taxation of a prescribed trust would apply. The issues arising for John Baker were (a) whether the rules related to an employee benefit plan contemplate that a particular payment from such an arrangement may not be included in income under paragraph 6(1)(g) of the Act; and (b) if so, whether the Tax Court Judge erred in finding that John Baker had not satisfied the requirements for the distributions of shares to him to not be included in his income under paragraph 6(1)(g) of the Act.

Held, the appeals should be dismissed.

The D2L Employee Trust was an employee benefit plan as defined in subsection 248(1) of the Act in that it was an arrangement; Patricia Baker made a contribution to the D2L Employee Trust and she did not deal at arm's length with the employer (D2L); and payments were to be made from the D2L Employee Trust to or for the benefit of employees of D2L. The exceptions to the definition of an employee benefit plan, as set out in paragraphs (a) to (e) of this definition, were not applicable to the D2L Employee Trust. The D2L Employee Trust also satisfied the requirements for a prescribed trust as set out in paragraph 4800.1(a) of the Regulations because it was a trust maintained primarily for the benefit of employees of D2L; one of the main purposes of the D2L Employee Trust was to hold shares of the capital stock of D2L Holdings; and D2L Holdings did not deal at arm's length with D2L.

It had to be determined which rules governed in this case. If the D2L Employee Trust were treated as a trust for the purposes of section 107 of the Act, the rules relied upon by the appellants in filing their tax returns and reporting their income as they did would be applicable. However, the definition of a trust in subsection 108(1) of the Act stipulates that a trust, for the purposes of various sections (including section 107 of the Act), does not include an employee benefit plan. Therefore, if the D2L Employee Trust is an employee benefit plan for the purposes of the Act, the provisions of section 107 of the Act (on which the appellants rely) would not be applicable. The payments made from the D2L Employee Trust to the appellants would be included in their income under paragraph 6(1)(g) of the Act in the amount equal to the fair market value of the shares transferred to them. Also, in this case, the definition of an employee benefit plan is in the Act while the qualifications for a trust to be a prescribed trust are set out in the Regulations. Here, it was not possible to reconcile the two provisions as they applied to the D2L Employee Trust. The D2L Employee Trust fulfilled both the requirements to be an employee benefit plan and a prescribed trust. The tax consequences for the D2L Employee Trust and the appellants were significantly different based on the classification of the D2L Employee Trust. However, since the definition of an employee benefit plan is set out in the Act and since the definition of a prescribed trust is set out in the Regulations, the paramountcy of the definition of an employee benefit plan in the Act had to govern. Parliament could have provided that a prescribed trust is not an employee benefit plan. Paragraphs (a) to (e) of the definition of an employee benefit plan exclude a number of arrangements and trusts from the definition of an employee benefit plan. If Parliament had also intended to exclude prescribed trusts from the definition of an employee benefit plan, a reference to a prescribed trust could have been added to paragraph (e) or as a separate paragraph.

Section 107 will only apply to trusts as defined in subsection 108(1) of the Act. The definition of a trust provides that a number of different trusts will not be included as a trust as defined in that subsection. Paragraph (a) of the definition of a trust in subsection 108(1) provides that a trust listed in that paragraph, which includes an employee benefit plan, will not be a trust as defined in that subsection. Paragraph (a.1) provides a description of certain trusts that are also excluded from the definition of a trust. The exclusion of prescribed trusts from the application of paragraph (a.1) means that a prescribed trust will not be excluded from the definition of a trust as a result of the application of paragraph (a.1). The same trust, however, will be excluded from the definition of a trust if it is a trust described in paragraph (a) (or in any of the other paragraphs of the definition of a trust). The exclusion from the application of paragraph (a.1) for a prescribed trust could not result in the D2L

Employee Trust (which is excluded from the definition of a trust under paragraph (a) since it is an employee benefit plan) being reinstated as a trust on the basis that it is a prescribed trust.

With respect to John Baker's additional argument there was disagreement on the Tax Court's interpretation. In determining whether a particular arrangement is an employee benefit plan, one of the conditions as set out in the definition of an employee benefit plan in subsection 248(1) is related to the payments that are made under this arrangement. A particular arrangement is an employee benefit plan if one or more payments are to be made to or for the benefit of employees or former employees. In determining whether this condition is satisfied, any payment that would not be included in income, if section 6 were read without reference to subparagraph 6(1)(a)(ii) and paragraph 6(1)(g) of the Act, is excluded. While the appellants and the Tax Court Judge contemplated an interpretation of the definition of an employee benefit plan that would result in the arrangement involving the D2L Employee Trust being subdivided into two parts, the basis for the subdivision was not in any of paragraphs (a) to (e) of the definition of an employee benefit plan. The arrangement as embodied in the D2L Employee Trust was an employee benefit plan. There was no dispute that the payments made by the D2L Employee Trust to Mathew McNeeley and Kenneth Chapman were not excluded payments for the purposes of the definition of an employee benefit plan. In this case, there was only a single arrangement. Under paragraph 6(1)(g) of the Act, all amounts received by a taxpayer out of or under an employee benefit plan are included in computing the income of that taxpayer from an office or employment. Therefore, all the amounts received by John Baker from the D2L Employee Trust were included in his income as employment income.

STATUTES AND REGULATIONS CITED

Income Tax Act, R.S.C. 1985 (5th Supp.), c. 1, ss. 6, 7, 85(1), 107, 108(1) "trust", 110.6(2.1), 248(1) "employee benefit plan".

Income Tax Regulations, C.R.C., c. 945, ss. 4800.1, 6800.

CASES CITED

APPLIED:

Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3.

CONSIDERED:

Minister of National Revenue v. Chrysler Canada Limited (1992), 92 D.T.C. 6346, [1992] 2 C.T.C. 95 (F.C.T.D.).

REFERRED TO:

Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235.

CONSOLIDATED APPEALS from a Tax Court of Canada decision (2020 TCC 90, [2020] 6 C.T.C. 2174) dismissing the appellants' appeals from the Minister of National Revenue's reassessments of their tax returns involving the distribution of shares from a trust to a corporation's employees. Appeals dismissed.

APPEARANCES

Chia-yi Chua, Douglas A. Cannon and Anu Koshal for appellants.

Lindsay Tohn for respondent.

McCarthy Tétrault LLP, Toronto, for appellants.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

[1] WEBB J.A.: These appeals arise because the appellants believed that the rules applicable to the distribution of shares from a trust to employees of a corporation would be those rules applicable to prescribed trusts as defined in section 4800.1 of the *Income Tax Regulations*, C.R.C., c. 945 (the Regulations). The Minister of National Revenue (the Minister), however, reassessed the appellants on the basis that the rules applicable to employee benefit plans, as defined in the *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1 (the Act), determined the tax implications arising from the distribution of shares by the trust.

[2] The appellants' appeals to the Tax Court of Canada were dismissed (2020 TCC 90, [2020] 6 C.T.C. 2174).

[3] For the reasons that follow, I would dismiss these appeals.

[4] These appeals were consolidated, with A-260-20 as the lead appeal. These reasons will apply to all of the appeals. The original of these reasons will be placed in A-260-20 and a copy will be placed in each of the other files.

I. Background

[5] In 2005, Patricia Baker contributed \$210 to settle the "Desire2Learn Employee Stock Trust" (the D2L Employee Trust). The beneficiaries of the D2L Employee Trust are the employees of D2L Corporation (D2L). D2L was founded by Patricia Baker's son, John Baker, who is one of the appellants. The D2L Employee Trust acquired 2,950 class B common shares of D2L for \$10.

[6] The D2L Employee Trust subsequently transferred the shares of D2L to D2L Holdings Inc. (D2L Parent) for the same number and class of shares of D2L Parent. On the amalgamation of D2L Parent with a numbered company, the D2L Employee Trust acquired 3,705,344 non-voting class B common shares of the amalgamated company, which retained the name D2L Holdings Inc.

[7] On the same day that the amalgamation occurred, the D2L Employee Trust distributed 3,356,415 of its shares to various beneficiaries. In particular, 2,317,109 shares were distributed to John Baker and 71,772.18 shares were distributed to Kenneth Chapman. Later in 2012, the D2L Employee Trust distributed its remaining 348,929 shares to 227 beneficiaries. This distribution included a distribution of 707.66 shares to Mathew McNeeley and 50,384.96 shares to John Baker. The fair market value of the shares at the time of the first and second distribution was \$8.415 per share.

[8] The D2L Employee Trust and the beneficiaries proceeded on the basis that, for the purposes of the Act, the D2L Employee Trust was a prescribed trust as defined in section 4800.1 of the Regulations and that it would be a trust for the purposes of section 107 of the Act. The D2L Employee Trust filed the election contemplated by subsection

107(2.001) of the Act in relation to the distributions to the beneficiaries (other than the first distribution to John Baker). As a result, other than the first distribution of shares to John Baker, the D2L Employee Trust and its beneficiaries filed their tax returns on the basis that subsection 107(2.1) of the Act applied to the distributions of shares to the beneficiaries.

[9] Assuming that subsection 107(2.1) of the Act was applicable, the D2L Employee Trust reported a capital gain arising as a result of the deemed disposition of the shares, in the amount equal to the difference between the fair market value of such shares and the adjusted cost base of such shares. The taxable capital gain was one-half of the capital gain. The D2L Employee Trust allocated such taxable capital gains to the beneficiaries.

[10] For the first distribution of shares to John Baker, the D2L Employee Trust and John Baker filed their tax returns on the basis that subsection 107(2) of the Act applied, i.e. the D2L Employee Trust was deemed to have disposed of these shares for an amount equal to the adjusted cost base of these shares to the D2L Employee Trust, and John Baker was deemed to have acquired them at a cost equal to this same amount.

[11] Mathew McNeeley and Kenneth Chapman sold their shares to a numbered company owned by John Baker. John Baker transferred the shares that he received on the first distribution to the numbered company for shares of that company and filed the election under subsection 85(1) of the Act, electing for proceeds of disposition equal to the adjusted cost base of these shares. John Baker sold the shares that he received on the second distribution to the numbered company. Since the D2L Employee Trust recognized the capital gain arising on the second distribution of shares to John Baker, his adjusted cost base of these shares was equal to the fair market value of these shares.

[12] The net result of these distributions and filings, for the purposes of the Act, was:

- (a) Mathew McNeeley reported a taxable capital gain equal to one-half of the amount by which the fair market value of the shares distributed to him exceeded the adjusted cost base of such shares, and he claimed a corresponding capital gains deduction under subsection 110.6(2.1) of the Act;
- (b) Kenneth Chapman reported a taxable capital gain equal to one-half of the amount by which the fair market value of the shares distributed to him exceeded the adjusted cost base of such shares, and he claimed a corresponding capital gains deduction under subsection 110.6(2.1) of the Act; and
- (c) John Baker did not include any amounts in his income as a result of the first distribution of shares to him and his transfer of these shares to his numbered company, and he reported a taxable capital gain equal to the taxable capital gain realized by the D2L Employee Trust in relation to the second distribution of shares to him.

[13] The Minister reassessed the appellants to delete the taxable capital gain that each appellant had reported and to include in each appellant's income an amount equal to the fair market value of the shares distributed to such appellant, on the basis that the

distributions of these shares were payments from an employee benefit plan. For John Baker, the Minister included an amount in his income for both the shares distributed to him as part of the first distribution and the second distribution.

[14] The appellants filed notices of objection and subsequently appeals to the Tax Court of Canada.

II. Decision of the Tax Court

[15] The Tax Court Judge found that the D2L Employee Trust was an employee benefit plan as defined in subsection 248(1) of the Act. He then found that since the D2L Employee Trust was an employee benefit plan it could not also be a prescribed trust as defined in section 4800.1 of the Regulations. Therefore, the rules related to payments from employee benefit plans were the applicable rules to determine the amounts to be included in the appellants' income.

[16] John Baker also raised an additional argument that the distributions of shares to him should not be considered to be distributions from an employee benefit plan, on the basis that he did not receive these shares as an employee of D2L. The Tax Court Judge found that it was possible to have a distribution from an employee benefit plan that would not be included in income under paragraph 6(1)(g) of the Act but that John Baker had failed to establish that he had received the shares otherwise than as an employee.

[17] As a result, the appeals were dismissed.

III. Relevant Statutory and Regulatory Provisions

[18] The key statutory provisions to which reference will be made in these reasons are paragraph 6(1)(g) of the Act, subsections 107(2), (2.001) and (2.1) of the Act, the definition of a trust in subsection 108(1) of the Act and the definition of an employee benefit plan in subsection 248(1) of the Act. Reference will also be made to section 4800.1 of the Regulations. These provisions are reproduced in the Appendix following these reasons.

IV. Issues and Standards of Review

[19] The main issue in these appeals is whether the provisions of the Act related to an employee benefit plan will apply to the D2L Employee Trust and the appellants, or whether the rules related to the taxation of a prescribed trust will apply.

[20] Additional issues arise for John Baker:

- (a) do the rules related to an employee benefit plan contemplate that a particular payment from such an arrangement may not be included in income under paragraph 6(1)(g) of the Act; and
- (b) if so, did the Tax Court Judge err in finding that John Baker had not satisfied the requirements for the distributions of shares to him to not be included in his income under paragraph 6(1)(g) of the Act?

[21] The interpretation of statutory provisions is a question of law for which the standard of review is correctness. The standard of review for any findings of fact or

mixed fact and law is palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

V. Analysis

A. *The D2L Employee Trust Satisfies the Requirements to be an Employee Benefit Plan and a Prescribed Trust*

[22] The D2L Employee Trust was an employee benefit plan as defined in subsection 248(1) of the Act:

- it was an arrangement;
- Patricia Baker made a contribution to the D2L Employee Trust and she did not deal at arm's length with the employer (D2L); and
- payments were to be made from the D2L Employee Trust to or for the benefit of employees of D2L.

[23] The exceptions to the definition of an employee benefit plan, as set out in paragraphs (a) to (e) of this definition, are not applicable to the D2L Employee Trust.

[24] The D2L Employee Trust also satisfied the requirements for a prescribed trust as set out in paragraph 4800.1(a) of the Regulations:

- it was a trust maintained primarily for the benefit of employees of D2L;
- one of the main purposes of the D2L Employee Trust was to hold shares of the capital stock of D2L Holdings; and
- D2L Holdings did not deal at arm's length with D2L.

[25] While the definitions of employee benefit plan and prescribed trust overlap in this case, they do not completely overlap. It is possible to create an employee benefit plan that is not a prescribed trust and vice versa.

B. *Which Rules Govern—Paramountcy of the Act*

[26] Whether the tax consequences will be determined based on the D2L Employee Trust being an employee benefit plan or a trust that is a prescribed trust is the main issue in this appeal. If the D2L Employee Trust is treated as a trust for the purposes of section 107 of the Act, the rules relied upon by the appellants in filing their tax returns and reporting their income as they did would be applicable.

[27] However, the definition of a trust in subsection 108(1) of the Act stipulates that a trust, for the purposes of various sections (including section 107 of the Act), does not include an employee benefit plan. Therefore, if the D2L Employee Trust is an employee benefit plan for the purposes of the Act, the provisions of section 107 of the Act (on which the appellants rely) are not applicable as the D2L Employee Trust would not be a trust for the purposes of section 107 of the Act. The payments made from the D2L Employee Trust to the appellants will be included in their income under paragraph

6(1)(g) of the Act in the amount equal to the fair market value of the shares transferred to them.

[28] The appellants rely on the decision of Justice Strayer in *Minister of National Revenue v. Chrysler Canada Limited* (1992), 92 D.T.C. 6346, [1992] 2 C.T.C. 95 (F.C.T.D.). In that case, the Court was faced with a potential conflict between the stock option rules in section 7 and the employee benefit plan rules. However, in that case, the conflict arose as a result of the wording of provisions in the same statute. In this case, the definition of an employee benefit plan is in the Act while the qualifications for a trust to be a prescribed trust are set out in the Regulations.

[29] In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at page 38, Justice La Forest, writing on behalf of the Supreme Court of Canada, confirmed that regulations (which are subordinate legislation) cannot conflict with their parent legislation:

The basic principles of law are not in doubt. Just as subordinate legislation cannot conflict with its parent legislation (*Belanger v. The King* (1916), 54 S.C.R. 265), so too it cannot conflict with other Acts of Parliament (*R. & W. Paul, Ltd. v. Wheat Commission*, [1937] A.C. 139 (H.L.)), unless a statute so authorizes (*Re Gray* (1918), 57 S.C.R. 150). Ordinarily, then, an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation. However, as a matter of construction a court will, where possible, prefer an interpretation that permits reconciliation of the two. ...

[30] In this case, it is not possible to reconcile the two provisions as they apply to the D2L Employee Trust. The D2L Employee Trust fulfills both the requirements to be an employee benefit plan and a prescribed trust. The tax consequences for the D2L Employee Trust and the appellants are significantly different based on the classification of the D2L Employee Trust as an employee benefit plan or a prescribed trust. However, since the definition of an employee benefit plan is set out in the Act and since the definition of a prescribed trust is set out in the Regulations, the paramountcy of the definition of an employee benefit plan in the Act must govern. Otherwise, the Act would be amended by the Regulations if an arrangement, such as the one in this appeal, is not an employee benefit plan as defined in the Act because it is also a prescribed trust as defined in the Regulations.

[31] Parliament could have provided that a prescribed trust is not an employee benefit plan. Paragraphs (a) to (e) of the definition of an employee benefit plan exclude a number of arrangements and trusts from the definition of an employee benefit plan. In particular, paragraph (e) refers to a prescribed arrangement, which is defined in section 6800 of the Regulations. If Parliament had also intended to exclude prescribed trusts from the definition of an employee benefit plan, a reference to a prescribed trust could have been added to paragraph (e) or as a separate paragraph.

C. Which Rules Govern—Submission Based on Paragraph (a.1) of the Definition of a Trust

[32] The appellants submit that the prescribed trust rules should govern based on the wording of paragraph (a.1) of the definition of a trust in subsection 108(1) of the Act. Section 107 will only apply to trusts as defined in subsection 108(1) of the Act. The definition of a trust provides that a number of different trusts will not be included as a trust as defined in this subsection.

[33] Paragraph (a) of the definition of a trust in subsection 108(1) provides that a trust listed in this paragraph, which includes an employee benefit plan, will not be a trust as defined in this subsection. Paragraph (a.1) provides a description of certain trusts that are also excluded from the definition of a trust. The opening words of paragraph (a.1) are the words upon which the appellants focus:

Definition

108 (1)

***trust***

(a.1) a trust (other than a trust described in paragraph (a) or (d), a trust to which subsection 7(2) or (6) applies or a trust prescribed for the purpose of subsection 107(2))

[34] The appellants submit that because this paragraph carves out prescribed trusts from those to which it would otherwise apply, all prescribed trusts are to be included as trusts for the purposes of the definition of a trust. Therefore, in their submission, the rules as set out in section 107 will apply even though an employee benefit plan is not a trust as provided in paragraph (a) of the definition of a trust.

[35] However, the words to which the appellants refer only carve out or exclude certain trusts from the application of paragraph (a.1). This does not mean that a prescribed trust is reinstated as a trust. There are a number of trusts that are excluded under paragraph (a) of the definition of a trust. One such trust is an employee life and health trust. Applying the appellants' interpretation, an employee life and health trust would also be reinstated as a trust, since it is also included in the exception to the application of paragraph (a.1) as it is a trust described in paragraph (a). This cannot be a proper interpretation of the effect of this provision.

[36] The exclusion of prescribed trusts from the application of paragraph (a.1) means that a prescribed trust will not be excluded from the definition of a trust as a result of the application of paragraph (a.1). The same trust, however, will be excluded from the definition of a trust if it is a trust described in paragraph (a) (or in any of the other paragraphs of the definition of a trust).

[37] The exclusion from the application of paragraph (a.1) for a prescribed trust cannot result in the D2L Employee Trust (which is excluded from the definition of a trust under paragraph (a) since it is an employee benefit plan) being reinstated as a trust on the basis that it is a prescribed trust.

D. Conclusion for the Appeals of Mathew McNeeley and Kenneth Chapman

[38] As a result, I would dismiss the appeals for Mathew McNeeley and Kenneth Chapman.

E. Additional Argument for John Baker

[39] An additional argument was raised by John Baker. The Tax Court Judge found that, as a result of the definition of an employee benefit plan in subsection 248(1) of the Act, it would be possible for certain payments out of or under an employee benefit plan to not be included in income under paragraph 6(1)(g) of the Act. However, since the Tax

Court Judge found that John Baker had failed to establish that he would qualify within this exception, the amounts were included in his income as payments from an employee benefit plan.

[40] I do not agree with the interpretation as adopted by the Tax Court Judge.

[41] In determining whether a particular arrangement is an employee benefit plan, one of the conditions as set out in the definition of an employee benefit plan is related to the payments that are made under this arrangement:

Definition

248 (1)

employee benefit plan ... under which one or more payments are to be made to or for the benefit of employees or former employees of the employer or persons who do not deal at arm's length with any such employee or former employee (other than a payment that, if section 6 were read without reference to subparagraph 6(1)(a)(ii) and paragraph 6(1)(g), would not be required to be included in computing the income of the recipient or of an employee or former employee)

[42] A particular arrangement is an employee benefit plan if one or more payments are to be made to or for the benefit of employees or former employees. In determining whether this condition is satisfied, any payment that would not be included in income, if section 6 were read without reference to subparagraph 6(1)(a)(ii) and paragraph 6(1)(g) of the Act, is excluded. Subparagraph 6(1)(a)(ii) of the Act provides that a benefit received or enjoyed under a retirement compensation arrangement, an employee benefit plan or an employee trust will not be included in income as a benefit from employment under paragraph 6(1)(a). This subparagraph does not require amounts to be included in income. Rather it excludes certain amounts from being included in income under paragraph 6(1)(a) of the Act. Paragraph 6(1)(g) provides that all amounts received under an employee benefit plan will be included in income. Therefore, the excluded payments for the purposes of the definition of an employee benefit plan are payments that would only be included in income as amounts received from an employee benefit plan.

[43] In my view, the reference to the exclusion of certain payments in determining whether an arrangement is an employee benefit plan means that each payment to be made from a particular arrangement is examined to ascertain whether such payment is an excluded payment or not. If all of the payments are excluded payments, the arrangement is not an employee benefit plan. If, however, the arrangement includes at least one payment that is not an excluded payment, the arrangement is an employee benefit plan.

[44] It is important to note that this is part of the definition of an employee benefit plan and, therefore, part of the criteria to be examined to determine whether a particular arrangement satisfies this definition. It is not a taxing provision. Paragraph 6(1)(g) of the Act dictates the amount to be included in income as a result of a payment under an employee benefit plan. This paragraph provides that all amounts received from an employee benefit plan are to be included in the income of the recipient. There is no exception in paragraph 6(1)(g) of the Act for any payment that, "if section 6 were read without reference to subparagraph 6(1)(a)(ii) and paragraph 6(1)(g), would not be

required to be included in computing the income of the recipient or of an employee or former employee”.

[45] The interpretation proposed by the appellants and adopted by the Tax Court Judge would mean that there would be different arrangements—one under which payments from the D2L Employee Trust will be included in income under paragraph 6(1)(g) and another where payments from the D2L Employee Trust would not be included in income under this paragraph.

[46] The definition of an employee benefit plan does contemplate that a portion of an arrangement may not be an employee benefit plan, as the closing words of the first part of the definition (immediately before paragraphs (a) to (e)) state: “but does not include any portion of the arrangement that is”.

[47] Therefore, if part of the arrangement is a trust or arrangement described in paragraphs (a) to (e) of the definition of an employee benefit plan, then such part will not be an employee benefit plan. In effect, there will be two arrangements—the part that is an employee benefit plan and the portion that is a trust or arrangement as described in paragraphs (a) to (e).

[48] While the appellants and the Tax Court Judge contemplated an interpretation of the definition of an employee benefit plan that would result in the arrangement being subdivided into two parts, the basis for the subdivision as found by the Tax Court Judge is not in any of paragraphs (a) to (e) of the definition of an employee benefit plan. None of these paragraphs contemplate a separation of the employee benefit plan into separate arrangements based on whether a payment would not be included in income if section 6 were read without reference to subparagraph 6(1)(a)(ii) and paragraph 6(1)(g) of the Act.

[49] The arrangement as embodied in the D2L Employee Trust is an employee benefit plan. There is no dispute that the payments made by the D2L Employee Trust to Mathew McNeeley and Kenneth Chapman are not excluded payments for the purposes of the definition of an employee benefit plan.

[50] No portion of this arrangement is excluded from the definition of an employee benefit plan as a result of the application of paragraphs (a) to (e) of this definition. Therefore, there is only a single arrangement. Under paragraph 6(1)(g) of the Act, all amounts received by a taxpayer out of or under an employee benefit plan are included in computing the income of that taxpayer from an office or employment. Therefore, all the amounts received by John Baker from the D2L Employee Trust are included in his income as employment income.

[51] As a result, I would dismiss John Baker’s appeal.

VI. Conclusion

[52] I would dismiss the appeals with one set of costs payable in relation to John Baker’s appeal.

MACTAVISH J.A.: I agree.

LEBLANC J.A.: I agree.

APPENDIX

The following are the current versions of the provisions of the *Income Tax Act* reproduced below. While some of these provisions were amended after the taxation year in issue in these appeals, the amendments are not material to the issues raised in these appeals.

Paragraph 6(1)(g) of the Act

Amounts to be included as income from office or employment

6 (1) There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable

...

Employee benefit plan benefits

(g) the total of all amounts each of which is an amount received by the taxpayer in the year out of or under an employee benefit plan or from the disposition of any interest in any such plan, other than the portion thereof that is

(i) a death benefit or an amount that would, but for the deduction provided in the definition of that term in subsection 248(1), be a death benefit,

(ii) a return of amounts contributed to the plan by the taxpayer or a deceased employee of whom the taxpayer is an heir or legal representative, to the extent that the amounts were not deducted in computing the taxable income of the taxpayer or the deceased employee for any taxation year,

(iii) a superannuation or pension benefit attributable to services rendered by a person in a period throughout which the person was not resident in Canada, or

(iv) a designated employee benefit (as defined in subsection 144.1(1));

Subsections 107(2), (2.001) and (2.1) of the Act

107 (1)

Distribution by personal trust

(2) Subject to subsections (2.001), (2.002) and (4) to (5), if at any time a property of a personal trust or a prescribed trust is distributed (otherwise than as a SIFT trust wind-up event) by the trust to a taxpayer who was a beneficiary under the trust and there is a resulting disposition of all or any part of the taxpayer's capital interest in the trust,

(a) the trust shall be deemed to have disposed of the property for proceeds of disposition equal to its cost amount to the trust immediately before that time;

(b) subject to subsection (2.2), the taxpayer is deemed to have acquired the property at a cost equal to the total of its cost amount to the trust immediately before that time

and the specified percentage of the amount, if any, by which

(i) the adjusted cost base to the taxpayer of the capital interest or part of it, as the case may be, immediately before that time (determined without reference to paragraph (1)(a))

exceeds

(ii) the cost amount to the taxpayer of the capital interest or part of it, as the case may be, immediately before that time;

(b.1) for the purpose of paragraph (b), the specified percentage is,

(i) where the property is capital property (other than depreciable property), 100%, and

(ii) [Repealed, 2016, c. 12, s. 36]

(iii) in any other case, 50%;

(c) the taxpayer's proceeds of disposition of the capital interest in the trust (or of the part of it) disposed of by the taxpayer on the distribution are deemed to be equal to the amount, if any, by which

(i) the cost at which the taxpayer would be deemed by paragraph (b) to have acquired the property if the specified percentage referred to in that paragraph were 100%

exceeds

(ii) the total of all amounts each of which is an eligible offset at that time of the taxpayer in respect of the capital interest or the part of it;

(d) where the property so distributed was depreciable property of a prescribed class of the trust and the amount that was the capital cost to the trust of that property exceeds the cost at which the taxpayer is deemed by this section to have acquired the property, for the purposes of sections 13 and 20 and any regulations made under paragraph 20(1)(a)

(i) the capital cost to the taxpayer of the property shall be deemed to be the amount that was the capital cost of the property to the trust, and

(ii) the excess shall be deemed to have been allowed to the taxpayer in respect of the property under regulations made under paragraph 20(1)(a) in computing income for taxation years before the acquisition by the taxpayer of the property.

(d.1) [Repealed, 2010, c. 12, s. 10]

(e) [Repealed, 1994, c. 7, Sch. VIII, s. 43]

(f) [Repealed, 2016, c. 12, s. 36]

No rollover on election by a trust

(2.001) Where a trust makes a distribution of a property to a beneficiary of the trust in full or partial satisfaction of the beneficiary's capital interest in the trust and so elects in

prescribed form filed with the Minister with the trust's return of income for its taxation year in which the distribution occurred, subsection (2) does not apply to the distribution if

- (a) the trust is resident in Canada at the time of the distribution;
- (b) the property is taxable Canadian property; or
- (c) the property is capital property used in, or property described in the inventory of, a business carried on by the trust through a **permanent establishment** (as defined by regulation) in Canada immediately before the time of the distribution.

...

Other distributions

(2.1) Where at any time a property of a trust is distributed by the trust to a beneficiary under the trust, there would, if this Act were read without reference to paragraphs (h) and (i) of the definition **disposition** in subsection 248(1), be a resulting disposition of all or any part of the beneficiary's capital interest in the trust (which interest or part, as the case may be, is in this subsection referred to as the "former interest") and the rules in subsections (2) and (3.1) and sections 88.1 and 132.2 do not apply in respect of the distribution,

- (a) the trust is deemed to have disposed of the property for proceeds equal to its fair market value at that time;
- (b) the beneficiary is deemed to have acquired the property at a cost equal to the proceeds determined under paragraph (a);
- (c) subject to paragraph (e), the beneficiary's proceeds of disposition of the portion of the former interest disposed of by the beneficiary on the distribution are deemed to be equal to the amount, if any, by which
 - (i) the proceeds determined under paragraph (a) (other than the portion, if any, of the proceeds that is a payment to which paragraph (h) or (i) of the definition **disposition** in subsection 248(1) applies)

exceed the total of

- (ii) where the property is not a Canadian resource property or foreign resource property, the amount, if any, by which

- (A) the fair market value of the property at that time

exceeds the total of

- (B) the cost amount to the trust of the property immediately before that time, and

- (C) the portion, if any, of the excess that would be determined under this subparagraph if this subparagraph were read without reference to this clause that represents a payment to which paragraph (h) or (i) of the definition **disposition** in subsection 248(1) applies, and

- (iii) all amounts each of which is an eligible offset at that time of the taxpayer in respect of the former interest;

(d) notwithstanding paragraphs (a) to (c), where the trust is non-resident at that time, the property is not described in paragraph (2.001)(b) or (c) and, if this Act were read without reference to this paragraph, there would be no income, loss, taxable capital

gain or allowable capital loss of a taxpayer in respect of the property because of the application of subsection 75(2) to the disposition at that time of the property,

(i) the trust is deemed to have disposed of the property for proceeds equal to the cost amount of the property,

(ii) the beneficiary is deemed to have acquired the property at a cost equal to the fair market value of the property, and

(iii) the beneficiary's proceeds of disposition of the portion of the former interest disposed of by the beneficiary on the distribution are deemed to be equal to the amount, if any, by which

(A) the fair market value of the property

exceeds the total of

(B) the portion, if any, of the amount of the distribution that is a payment to which paragraph (h) or (i) of the definition **disposition** in subsection 248(1) applies, and

(C) all amounts each of which is an eligible offset at that time of the taxpayer in respect of the former interest; and

(e) where the trust is a mutual fund trust, the distribution occurs in a taxation year of the trust before its 2003 taxation year, the trust has elected under subsection (2.11) in respect of the year and the trust so elects in respect of the distribution in prescribed form filed with the trust's return of income for the year,

(i) this subsection shall be read without reference to paragraph (c), and

(ii) the beneficiary's proceeds of disposition of the portion of the former interest disposed of by the beneficiary on the distribution are deemed to be equal to the amount determined under paragraph (a).

Definition of "Trust" in subsection 108(1) of the Act

Definitions

108 (1) In this Subdivision,

...

trust includes an *inter vivos* trust and a testamentary trust but in subsections 104(4), (5), (5.2), (12), (13.1), (13.2), (14) and (15) and sections 105 to 107 does not include

(a) an amateur athlete trust, an employee life and health trust, an employee trust, a trust described in paragraph 149(1)(o.4) or a trust governed by a deferred profit sharing plan, an employee benefit plan, an employees profit sharing plan, a foreign retirement arrangement, a pooled registered pension plan, a registered disability savings plan, a registered education savings plan, a registered pension plan, a registered retirement income fund, a registered retirement savings plan, a registered supplementary unemployment benefit plan or a TFSA,

(a.1) a trust (other than a trust described in paragraph (a) or (d), a trust to which subsection 7(2) or (6) applies or a trust prescribed for the purpose of subsection 107(2)) all or substantially all of the property of which is held for the purpose of providing benefits to individuals each of whom is provided with benefits in respect of, or because of, an office or employment or former office or employment of any

individual,

(b) a related segregated fund trust (within the meaning assigned by section 138.1),

(c) a trust deemed by subsection 143(1) to exist in respect of a congregation that is a constituent part of a religious organization,

(d) an RCA trust (within the meaning assigned by subsection 207.5(1)),

(e) a trust each of the beneficiaries under which was at all times after it was created a trust referred to in paragraph (a), (b) or (d) or a person who is a beneficiary of the trust only because of being a beneficiary under a trust referred to in any of those paragraphs, or

(e.1) a cemetery care trust or a trust governed by an eligible funeral arrangement,

and, in applying subsections 104(4), (5), (5.2), (12), (14) and (15) at any time, does not include

(f) a trust that, at that time, is a unit trust, or

(g) a trust all interests in which, at that time, have vested indefeasibly, other than

(i) an alter ego trust, a joint spousal or common-law partner trust, a post-1971 spousal or common-law partner trust or a trust to which paragraph 104(4)(a.4) applies,

(ii) [Repealed, 2013, c. 34, s. 236]

(iii) a trust that has, in its return of income under this Part for its first taxation year that ends after 1992, elected that this paragraph not apply,

(iv) a trust that is at that time resident in Canada where the total fair market value at that time of all interests in the trust held at that time by beneficiaries under the trust who at that time are non-resident is more than 20% of the total fair market value at that time of all interests in the trust held at that time by beneficiaries under the trust,

(v) a trust under the terms of which, at that time, all or part of a person's interest in the trust is to be terminated with reference to a period of time (including a period of time determined with reference to the person's death), otherwise than as a consequence of terms of the trust under which an interest in the trust is to be terminated as a consequence of a distribution to the person (or the person's estate) of property of the trust if the fair market value of the property to be distributed is required to be commensurate with the fair market value of that interest immediately before the distribution, or

(vi) a trust that, before that time and after December 17, 1999, has made a distribution to a beneficiary in respect of the beneficiary's capital interest in the trust, if the distribution can reasonably be considered to have been financed by a liability of the trust and one of the purposes of incurring the liability was to avoid taxes otherwise payable under this Part as a consequence of the death of any individual. (*fiducie*)

Definition of "Employee Benefit Plan" in subsection 248(1) of the Act

Definitions

248 (1)

employee benefit plan means an arrangement under which contributions are made by an employer or by any person with whom the employer does not deal at arm's length to another person (in this Act referred to as the "custodian" of an employee benefit plan) and under which one or more payments are to be made to or for the benefit of employees or former employees of the employer or persons who do not deal at arm's length with any such employee or former employee (other than a payment that, if section 6 were read without reference to subparagraph 6(1)(a)(ii) and paragraph 6(1)(g), would not be required to be included in computing the income of the recipient or of an employee or former employee), but does not include any portion of the arrangement that is

- (a) a fund, plan or trust referred to in subparagraph 6(1)(a)(i) or paragraph 6(1)(d) or (f),
- (b) a trust described in paragraph 149(1)(y),
- (c) an employee trust,
 - (c.1) a salary deferral arrangement, in respect of a taxpayer, under which deferred amounts are required to be included as benefits under paragraph 6(1)(a) in computing the taxpayer's income,
 - (c.2) a retirement compensation arrangement,
- (d) an arrangement the sole purpose of which is to provide education or training for employees of the employer to improve their work or work-related skills and abilities, or
- (e) a prescribed arrangement; (*régime de prestations aux employés*)

Section 4800.1 of the Regulations (Prescribed Trusts)

4800.1 For the purposes of paragraph 107(1)(a) and subsections 107(1.1), (2) and (4.1) of the Act, the following are prescribed trusts:

- (a) a trust maintained primarily for the benefit of employees of a corporation or two or more corporations which do not deal at arm's length with each other, where one of the main purposes of the trust is to hold interests in shares of the capital stock of the corporation or corporations, as the case may be, or any corporation not dealing at arm's length therewith;
- (b) a trust established exclusively for the benefit of one or more persons each of whom was, at the time the trust was created, either a person from whom the trust received property or a creditor of that person, where one of the main purposes of the trust is to secure the payments required to be made by or on behalf of that person to such creditor; and
- (c) a trust all or substantially all of the properties of which consist of shares of the capital stock of a corporation, where the trust was established pursuant to an agreement between two or more shareholders of the corporation and one of the main purposes of the trust is to provide for the exercise of voting rights in respect of those shares pursuant to that agreement.