COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Canada (Attorney General) v. Wu,*
2025 BCCA 171

Date: 20250528
Docket: CA49721

Between:

The Attorney General of Canada on behalf of His Majesty the King in Right of Canada as represented by the Minister of National Revenue

Appellant/
Respondent on Cross Appeal

And

Yunfang Wu

Respondent/
Appellant on Cross Appeal
(Respondent)

And

Bank of Montreal

Respondent
(Petitioner)

And

Xiu Long Gu and Trendspark (Far East) Limited

Respondents
(Respondents)

Before: The Honourable Madam Justice Bennett
The Honourable Mr. Justice Grauer
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated February 14, 2024 (*Bank of Montreal v. Gu*, 2024 BCSC 261, Vancouver Docket H190138).

Counsel for the Appellant: C. Woo
N. Johnston
S. Singh

Counsel for the Respondent, Yunfang Wu: K. Siddall
S. McCalla

Place and Date of Hearing:	Vancouver, British Columbia December 9, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 28, 2025

Written Reasons by:
The Honourable Mr. Justice Grauer

Concurred in by:
The Honourable Madam Justice Bennett
The Honourable Justice Winteringham

Summary:

Following a court-ordered foreclosure sale of property, the purchaser remitted a holdback of 25% of the purchase price to the Canada Revenue Agency under section 116(5) of the Income Tax Act because the foreclosed mortgagor had not confirmed Canadian residency. The first mortgagee was paid out, so that under the sale order, any excess from the holdback would be owing to the respondent as a judgement creditor registered on title. The CRA took the position that any excess could by statute be refunded only to the taxpayer, and not in accordance with the sale order for the distribution of the sale proceeds.

The chambers judge held that the funds were not a tax "overpayment" subject to refund, but rather "net sale proceeds" governed by the creditor priorities established in the foreclosure order. The judge issued a declaration to that effect but upheld the CRA's right to apply the funds to all outstanding tax liabilities under Part 1 of the ITA (instead of only taxes related to the sale of the property) before determining the balance to be remitted.

On appeal, the Attorney General of Canada argues the judge erred in law by mischaracterizing the funds as sale proceeds instead of tax, and by exceeding his jurisdiction in issuing a coercive order against the Crown. The respondent judgment creditor, Ms. Wu, cross appeals, asserting the judge erred in permitting the CRA to apply the funds to all tax debts rather than limiting deductions to those arising from the property sale.

Held: appeal and cross appeal dismissed.

The remitted funds did not belong to the former owner but were, pursuant to the prior court order, designated for creditors. As such, the "refund" of any "overpayment" should properly be made in accordance with the sale order for the benefit of the respondent creditor. It cannot have been Parliament's intention to enable non-residents to use tax mechanisms to avoid creditor obligations in foreclosure proceedings. The judge's declaration was not a coercive order against the Crown; it described the state of the funds and was within the jurisdiction of the court. On the cross appeal, section 116(5) of the ITA permits the CRA to apply remitted funds to all taxes owing under Part I of the Act. The counterclaim is dismissed, appropriately balancing the respondent's rights under the sale order with the public interest in tax collection.

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Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

[1] What are the constraints governing the Canada Revenue Agency in releasing funds it receives in excess of what the taxpayer owes? Must it pay excess funds to the taxpayer even when the funds legally belong to someone else?

[2] Canada says it must: the constraints are statutorily imposed and utterly inflexible. In the court below, Justice Elwood thought otherwise. His reasons are indexed as *Bank of Montreal v Gu*, 2024 BCSC 261.

[3] The problem arises in the context of proceeds from the court-ordered sale in foreclosure proceedings of property owned by Xiu Long Gu. The sale order, pronounced December 5, 2022, approved the sale of the property for $1,890,000. It provided that, after the usual deductions and payment to the Bank of Montreal as mortgagee, the balance was to be paid to Yungfang Wu, a judgment creditor for approximately $45,000,000 who had registered her judgment on title:

> 6. The net sale proceeds after adjustments for taxes, utilities and adjustments, and real estate commission be paid to Richards Buell Sutton LLP, in trust, and then disbursed as follows:
>
> (a) first, to the [Bank of Montreal] … ,
>
> (b) second, to Respondent, Yunfang Wu care of Norton Rose Fulbright Canada LLP to be applied against the amounts owing on the judgments registered in the name of Yungfang Wu in the New Westminster Land Title Office under Numbers CA8453687 and CB24081 plus the taxable costs of Yunfang Wu.
>
> …
>
> [Emphasis added.]

[4] The sale closed on January 9, 2023, with a transfer from the Bank of Montreal of clear title to the purchasers of the property. Shortly before that, the solicitor for the purchasers advised that Mr. Gu had not provided confirmation of his Canadian residency. This failure threatened to engage section 116 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*], which is designed to ensure that capital gains tax is captured in the event that property is sold by a non-resident. Section 116(4) requires

the non-resident to pay a deposit of 25% of the taxable capital gain realized, in return for which the Minister of National Revenue (now the Minister Responsible for the Canada Revenue Agency) will issue a certificate that protects any purchaser from liability for tax on the capital gain.

[5] Where the non-resident does nothing, and no certificate is issued, subsection (5) applies. It provides that a purchaser who acquires property from a non-resident person:

> … is liable to pay, and shall remit to the Receiver General within 30 days after the end of the month in which the purchaser acquired the property, as tax under this Part [Part 1] for the year on behalf of the non-resident person, 25% of [in this case, the purchase price] … and is entitled to deduct or withhold from any amount paid or credited by the purchaser to the non-resident person or otherwise recover from the non-resident person any amount paid by the purchaser as such a tax.
>
> [Emphasis added.]

[6] Mr. Gu did nothing, and failed to respond to requests that he provide confirmation of his residency. Whether he was in fact a non-resident remains unknown.

[7] Upon closing, the solicitors for the purchasers wrote to the CRA to advise of the sale, indicating that they had no knowledge of whether Mr. Gu was a resident of Canada for income tax purposes, or whether obtaining a certificate of compliance under the *ITA* was necessary. They proposed to hold the funds in their trust account until it was determined whether a certificate was required, and if so, in what amount. The CRA responded by letter dated March 14, 2023:

> Under the Income Tax Act, the non-resident vendor has to inform the Minister of National Revenue that they sold taxable Canadian property and to pay any taxes owing. We will issue a Certificate of Compliance when these requirements are met.
>
> But, when the non-resident vendor does not comply with the above requirements, the purchaser has to pay the tax on behalf of the vendor.
> …
>
> Since you acquired the property for $1,890,000.00 and we have not issued a Certificate of Compliance, we have calculated taxes owing of $472,500.00.
>
> Please send us the payment within 15 days of the date of this letter. …

[8] The CRA did not address the fact that Mr. Gu's resident status was unknown. Nevertheless, in these circumstances, on the insistence of the CRA, the purchaser's solicitor remitted to the Receiver General $472,500 (the "holdback"), being 25% of the purchase price, under section 116(5) of the *ITA*. Ms. Wu's solicitor asked the CRA to confirm that if it determined the holdback was not payable in full or in part as a result of the sale of the property, then the CRA would pay any excess amount to Richards Buell Sutton LLP in trust, in accordance with the terms of the sale order. The CRA declined to give that confirmation.

[9] As the judge observed at paras 7–10, Ms. Wu had gone to considerable lengths to establish and secure the debt Mr. Gu owed to her. First, she obtained judgment in the BC Supreme Court recognizing the judgment of a Chinese court for the amount of the debt. But when she commenced that proceeding, Mr. Gu transferred title to the property into his son's name. Ms. Wu then had to apply to set aside that transfer. In *Wu v Gu*, 2020 BCSC 396, MacNaughton J., as she then was, declared the transfer null and void because it was intended to frustrate Mr. Gu's creditors.

[10] It appears from that judgment that Mr. Gu acquired the property for $1,688,000 (at para 47). If correct, that would likely yield capital gains tax liability considerably less than the holdback paid to the CRA. We do not, of course, know what other Part 1 tax liabilities Mr. Gu may have had.

[11] For now, the question is this: what happens if Mr. Gu's tax liability is less than the holdback that Ms. Wu's solicitor forwarded to the CRA?

[12] In the proceeding below, Canada maintained (1) that the CRA had no ability to do anything other than pay any excess to Mr. Gu as a tax refund, and (2) that it was entitled to apply the holdback not only to tax owing on the sale of the property, but also to any other Part 1 tax owed by Mr. Gu. This latter proposition was based upon the wording of section 116(5) (requiring the purchaser to remit the holdback as "tax under this Part for the year") and the definition of "overpayment" in section

164(7)(a) of the *ITA* as the total of all amounts "paid on account of the taxpayer's liability under this Part for the year minus all amounts payable in respect thereof".

[13] Justice Elwood disagreed with proposition (1), concluding that it was appropriate to preserve the existing priorities under the sale order (at para 69). He nevertheless accepted proposition (2). In the result, the judge declared that "following assessment by the Minister, any Holdback Funds that are not subject to Part 1 Tax are net sale proceeds within the meaning of paragraph 6 of the Sale Order" (at para 71). Canada appeals.

2. ISSUES AND OUTLINE OF ARGUMENT

[14] On this appeal, Canada says that the holdback was remitted as "tax" in accordance with section 116(5) of the *ITA*. As such, it contends, what is done with it must follow the legislative scheme.

[15] That scheme, Canada submits, operates this way: by section 26 of the *Financial Administration Act*, RSC 1985, c F-11 [*FAA*], monies paid into the Consolidated Revenue Fund cannot be paid out without the authority of Parliament. If Mr. Gu overpaid the amount of tax he owes for the year, that authority is found in section 164 of the *ITA*. Section 164(1) provides that any overpayment shall be refunded, and provides no mechanism for refunding the money to anyone other than the taxpayer. By section 67 of the *FAA*, a Crown debt (in this case any overpayment) is not assignable. It follows, Canada argues, that any overpayment can be paid only to Mr. Gu by way of a refund; the CRA cannot pay it to Ms. Wu, Richards Buell Sutton LLP, or anyone else.

[16] Moreover, Canada argues, it is well-settled that it is not open to the court to make a coercive order against the Crown by, in effect, ordering the CRA to pay the funds to any person or account other than the taxpayer. Canada says that, while the judge sought to get around this by making a declaration, that declaration is simply a thinly-disguised mandatory injunction.

[17] In Canada's submission, the judge erred:

1. by mischaracterizing “tax” paid pursuant to section 116 of the *ITA* as “net proceeds of sale” contrary to the clear wording of the *ITA*; and

2. by assuming jurisdiction to issue a coercive order against the Crown.

[18] Ms. Wu cross appeals, contending that the judge erred in law:

3. by determining that the CRA could deduct from the holdback not only tax arising from the sale of the property, but also any other Part 1 tax owed by Mr. Gu.

[19] Before discussing these issues, I observe that we are somewhat in the dark. We do not know whether Mr. Gu was in fact a non-resident. We do not know whether he did or ever will file a tax return for 2023, the year in question (refunds are payable once a return has been filed and assessed, and an overpayment has been established). And we do not know his tax liabilities.

3. DID THE JUDGE MISCHARACTERIZE THE HOLDBACK PAYMENT AS PROCEEDS OF SALE INSTEAD OF TAX?

3.1 Overview

[20] I begin with two observations.

[21] First, the mischief that can arise from the interpretation urged by Canada is obvious. It would permit a person in the position of Mr. Gu to use the CRA to obtain funds that do not belong to him. Having lost their property to foreclosure and sale, an unscrupulous debtor could nevertheless regain a substantial portion of the property’s value through the “refund” of monies paid from foreclosure sale proceeds to the CRA on account of tax under section 116(5)—effectively cleansing the funds of the foreclosure process. The problem, of course, is that it is not truly a “refund” at all. The taxpayer has no right to it whatsoever.

[22] Second, the legislative provisions upon which Canada relies make it perfectly clear that neither the *ITA* nor the *FAA* contemplates the situation before us. This is

evident from both the relevant statutory provisions and the cases Canada cites in support of its position.

[23] A situation very like the one before us was considered by Master (now Associate Judge) Harper in *1074022 BC Ltd v Li*, 2020 BCSC 65 [*Li*], upon which the judge relied heavily. Canada was unsuccessful in that case, and seeks to distinguish it. It did not appeal it. I discuss it in detail below.

3.2 The *Li* case and the judgment below

[24] After reviewing Canada's position, the judge considered whether the application before him was governed by the decision in *Li*. He concluded that it was.

[25] The judge reviewed *Li* in detail, observing at para 34 that *Li* also arose out of foreclosure proceedings and involved similar facts. A court order approving the sale of the property in question set out the priorities for the payment of the net sale proceeds. The mortgagor, Mr. Li, was not a resident of Canada and did not give notice of the transaction to the CRA. Accordingly, as in our case, the purchaser remitted 25% of the purchase price to the CRA. It was clear that the amount remitted exceeded Mr. Li's tax liability. That seems likely in our case also.

[26] There was, however, one significant difference. Mr. Li had provided the CRA with a written, irrevocable authority and direction to pay the excess funds to his lawyer in trust, whence, he had agreed with his creditors, the funds would be disbursed in accordance with the sale order.

[27] Canada argued in *Li*, as it did before us, that there was no legislative authority allowing the CRA to pay the funds to anyone other than Mr. Li in the form of a tax refund. Relying on section 67 of the *FAA* and section 164(1) of the *ITA*, Canada submitted that it could not be compelled to pay the excess holdback into court or otherwise in compliance with the direction to pay.

[28] Associate Judge Harper disagreed (*Li* at para 15):

> In my view, Canada's interpretation of s. 67 of the *FAA* and s. 164 of the *ITA* is overly narrow. If CRA pays the excess funds to Mr. Li's lawyer in trust, the

> payment is neither an “assignment” of the excess funds to a third party, nor a payment for the benefit of anyone other than Mr. Li. The funds remain Mr. Li’s to be dealt with in accordance with the trust conditions agreed upon between him, his lawyer and the secured creditors. Mr. Li’s agreement that the funds be paid out of his lawyer’s trust account in accordance with the priorities of the order approving sale is none of Canada’s concern.

[29] Below and before us, Canada argued that *Li* was distinguishable because the taxpayer provided a direction to pay. It is somewhat ironic that Canada would seemingly find it acceptable to depart from its legislative scheme in accordance with a direction to pay, but not in accordance with a court order. In any event, the judge disagreed:

> [42] Canada argues that *Li* is distinguishable because Mr. Li provided the CRA with a direction to pay. I do not agree. As in this case, Canada argued in *Li* that s. 164 of the *ITA* required the CRA pay the excess funds to the taxpayer as a tax refund and that s. 67 of the *FAA* prohibited an assignment of the refund to his creditors. Associate Judge Harper rejected that interpretation. Had she agreed, the direction to pay would have been unenforceable.
>
> [43] In other words, the decision on the first question in *Li* turned on the Court’s interpretation of the *ITA* in the context of a foreclosure sale, not on the direction to pay itself.

[30] In *Li,* Harper A.J. went on to consider the issue in the absence of a binding direction to pay. She began by reviewing the purpose of section 116 of the *ITA*, and the question of a “refund”:

> [29] CRA interprets s. 116 of the *ITA* as if this case involved a private sale. In my view, this interpretation is not correct.
>
> [30] The purpose of s. 116 is to ensure that funds owing for tax on capital gains arising on a disposition of property go to CRA, rather than to a tax debtor who is out of the reach of CRA collections procedures.
>
> [31] CRA relies on the plain wording of s. 116 to argue that it has no discretion to comply with the vesting order. However, in my view, CRA's interpretation of s. 116 is unnecessarily narrow. Nothing in the *ITA*, including s. 116:
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> a. contemplates a sale by court order rather than private sale;
>
> b. gives the Crown priority for tax obligations over a mortgage;
>
> c. provides any mechanism by which sales proceeds paid to CRA under s. 116 which are encumbered by mortgage security [or a registered judgment] can be effectively "cleansed" of those security interests; or

> d. changes the nature of the mortgage itself, being a transfer of title of the property to the mortgagee subject to the right of redemption.
>
> [32] The statutory scheme set out in s. 116 presupposes that the sale is a voluntary sale by a registered owner which requires the vendor to clear title. There would be no unpaid secured creditors in such a sale (otherwise, the vendor would, of course, not be able to clear title) and therefore no unfairness to the secured creditors would arise as it does on the facts before me.
>
> [33] In the present case, the funds that CRA refers to as a "refund" are part of the funds that were encumbered by the mortgage security held on Mr. Li's property. Those funds remain in place and stead of the lands. Accordingly, the "refund" cannot be properly considered a tax refund owing to Mr. Li. […]
>
> …
>
> [38] One of the major difficulties with Canada's position is that it disregards the authority of the court. The court maintains jurisdiction over its own orders. In this case, the court maintains jurisdiction over the order approving sale by which the court ordered that the proceeds of sale were to be distributed in accordance with the priorities established by date of registration: *LTA*, s. 28.
>
> [39] Nothing in s. 116 of the *ITA* has the effect of reversing any priorities established by the order approving sale. The intent of s. 116 is to ensure that the tax debts of non-resident property owners are paid so that funds that would go to paying those debts do not leave the country. Section 116 cannot sensibly be construed as requiring funds over and above the amount of the tax debt to be paid directly to the taxpayer who is outside the jurisdiction, thus depriving the taxpayer's creditors of the money rightfully owing to them.

[31] Below, Canada argued that this part of Harper A.J.'s reasons comprise *obiter dicta* given her conclusion on the direction to pay. The judge disagreed, considering that all aspects of *Li* were part of the *ratio decidendi* of the decision, and binding on associate judges and judges of the BC Supreme Court. They are not, of course, binding on us.

[32] The judge below went on to consider whether he had jurisdiction to make the order sought given the additional issues raised. He agreed with Harper A.J.'s analysis concerning the purpose of section 116 and whether the excess holdback funds could properly be considered a tax refund.

[33] The judge began by observing at para 52, as had Harper A.J., that in a court-ordered foreclosure sale the funds remitted to the CRA are from net sale proceeds that stand "in the place and stead of the land, subject to the same priorities to which

the land was subjected": *Canada Permanent Mortgage Corporation v Kerr et al* (1984), 55 BCLR 13 at para 1, 1984 CanLII 898 (SC). This is what allows the purchaser to receive clear title. Secured creditors lose the security of their registered charges but gain an entitlement to a portion of the sale proceeds in accordance with the priorities in the court order. The owner-debtor, meanwhile, has no entitlement to any of the proceeds.

[34] In the judge's view, it followed that the funds remitted by the purchaser to the CRA under section 116 comprised sale proceeds subject to the same priorities. Consequently, while section 116 requires the purchaser to remit the funds "as tax … on behalf of the non-resident person", it does not necessarily follow that any amount exceeding the non-resident's tax liabilities constitute an "overpayment" of that tax requiring a "refund" to the non-resident (at paras 59–61). Applying the "modern approach" to statutory interpretation (citing *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 1998 CanLII 837, and *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26), the judge went on to say this:

> [61] The ordinary meaning of "overpayment" and "refund" in their entire context, consistent with the purpose of s. 116 and the intention of Parliament belie this interpretation. The use of the word "overpayment" in s. 164 indicates that a "refund" will be forthcoming when the taxpayer is otherwise entitled to the remitted funds, for example, as income from which an employer deducted taxes at source.
>
> [62] The purpose of s. 116 is to provide a mechanism to ensure that tax is properly collected from non-residents. The liability of the purchaser to remit 25% of the purchase price is intended to ensure that the seller's potential tax liabilities are protected in the transaction. The remitted funds might be an "overpayment" on behalf of the taxpayer in a private sale, but not necessarily in a court-ordered foreclosure sale, where, as discussed, the sale proceeds "stand in the place and stead of the land, subject to the same priorities to which the land was subjected".
>
> [63] There is no indication in s. 116 that Parliament intended to extinguish the priorities and equities that exist in a court-ordered foreclosure sale. Put another way, Parliament did not intend s. 116 to cleanse non-resident debtors of their liabilities to other creditors.
>
> [64] In proper context, therefore, the funds remitted "as tax" under s. 116 which exceed the tax liabilities of the non-resident are not an "overpayment" requiring a "refund" to the non-resident under s. 164. Instead, they are proceeds of sale that remain subject to the priorities set out in the order approving the sale.

> [65] On this interpretation, the funds remain subject to the court order when they are remitted to the Receiver General under s. 116. The Receiver General may deposit the funds into the CRF, where they become co-mingled with funds from many other sources. However, the handling of the funds is a matter of convenience to the government. Deposit into the CRF should not have the unintended effect of extinguishing the priorities under the court order or entitling the debtor to an unjustified "refund".
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> [Emphasis added.]

3.3 Discussion

[35] Canada argues that the judge's analysis was flawed. As the *ITA* and *FAA* are highly specialized and technical statutes, Canada urges that the court should give most weight to the specific words used when interpreting their provisions in accordance with the well-known "modern approach" to statutory interpretation as adopted by the Supreme Court of Canada in *Rizzo*:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[36] The plain and ordinary meaning of section 116 of the *ITA*, Canada submits, is that the holdback is remitted as tax and cannot be "recharacterized" as proceeds of sale. Similarly, Canada says, the judge erred in his conclusion that any amount of those funds in excess of the tax owing is not an "overpayment" that requires a "refund" to the non-resident, contrary to the express meaning of sections 164 and 116(5).

[37] But the problem as I see it is not one of straightforward interpretation, but in how to deal with what seems to me (as it did to Harper A.J.) to be an obvious lacuna in the legislation. The legislative scheme simply does not cover this situation.

[38] Section 116(5) provides that the purchaser is "liable to pay, and shall remit… [the holdback] …as tax under this Part for the year on behalf of the non-resident person". That makes it clear that the money must be paid to satisfy the non-resident's tax liability, but it cannot be read as intending to alter the character of funds that are subject to the priorities established by a court order in foreclosure

proceedings. That is because, while the *ITA* may require a portion of those funds to be paid on behalf of the taxpayer, they are not in fact the taxpayer's funds, and nothing in section 116 addresses that state of affairs. It is not a question of re-characterizing the funds. That is what they were from the start.

[39] Canada nevertheless argues that the legislation prevents the CRA from paying any excess—any "refund"—to anyone other than the taxpayer. But the legislation does not expressly say that. Does it necessarily follow from the context, and from the scheme and the object of the legislation, that the grammatical and ordinary sense of the word "refund" must be interpreted as a payment back to the taxpayer? I do not think it does. Parliament cannot have intended the *ITA* to be used, in effect, to assist the taxpayer in evading the lawful encumbrance of funds.

[40] Section 164(1)(a)(iii) permits the CRA to refund any overpayment for the year, but does not purport to limit the CRA as to how that refund is to be made. It does say that what is to be refunded is an overpayment. An "overpayment" is defined by section 164(7) as follows:

> (7) In this section, *overpayment* of a taxpayer for a taxation year means
>
> (a) where the taxpayer is not a corporation, the total of all amounts paid on account of the taxpayer's liability under this Part for the year minus all amounts payable in respect thereof; …

[41] Viewed in context, the concept of "refund" must be taken to mean a repayment to the party that is by law rightfully entitled to the overpayment. In most cases, that will be the taxpayer. In this case, it is not. In this, I depart somewhat from the reasoning of the judge (see para 34 above) but arrive at the same result.

[42] Canada relies on the fact that any overpayment constitutes a Crown debt, which I accept, and that, according to section 67 of the *FAA*:

> a) Crown debt is not assignable; and
>
> b) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of that debt.

[43] But there is no assignment of debt here. The debt is and always was owing not to the taxpayer, but, in accordance with the terms and priorities set out in the sale order, to Richards Buell Sutton LLP in trust. As Harper A.J. remarked, the funds remain in the place and stead of the lands sold, and cannot properly be considered a refund (tax or otherwise) owing to the taxpayer debtor.

[44] Among the cases Canada relies on to support its contention that any overpayment owing must be paid to the taxpayer lest it violate section 67 of the *FAA* is *Beattie v Ladouceur*, [1995] OJ No 1149, 1995 CanLII 7192 (Ont SC). In *Beattie*, Justice Rutherford dealt with an argument much the same as that advanced here:

> [11] The Attorney General's position, put very briefly, is that there is in place a legislative framework comprised of various provisions in a number of statutes, which govern the degree to which and manner by which monies payable by the government of Canada to an individual under the income tax, pensions and old age security legislation, may be garnisheed or otherwise intercepted. … Counsel for the Attorney General characterizes the scheme of the impugned order as an attempt to do in an indirect or disguised manner, that which is not permitted by the existing legislation.
>
> [Emphasis added.]

[45] I observe that the case before us is not one of garnishment or interception. It is one of returning the funds whence they came and where they belong.

[46] Canada also relies on *Marzetti v Marzetti*, [1994] 2 SCR 765, 1994 CanLII 50 for the proposition that a taxpayer is unable to assign his right to an income tax refund because of section 67 of the *FAA*. But the question in that case was whether the refund should go to the taxpayer's trustee in bankruptcy or to the Director of Maintenance Enforcement to whom the taxpayer was obliged to pay $250 per month and who had garnished the taxpayer's wages. Ultimately, and interestingly, the case turned in part on the finding that the post-bankruptcy income tax refund in question retained the character of wages to the extent that it represented a return of employer withholdings. The taxpayer's purported assignment to his trustee could not survive section 67 of the *FAA*, so that the Director's steps to garnish had priority.

[47] In our case, we do not have an assignment, purported or otherwise. Section 67 seems to me to have no application. What we do have is a refund that retains the character not of wages, as in *Marzetti*, but of sale proceeds pursuant to foreclosure.

[48] Similarly, Canada relies on *Profitt v Wasserman*, [2002] OJ No 1128, 2002 CanLII 44914 (Ont CA), where the Court of Appeal for Ontario said this:

> [20] Any overpayment by a taxpayer results in money owed by the government to the taxpayer. As the taxpayer has a right to a refund of the money, of that right is not discharged by payment, the taxpayer may enforce the right by an action against the government. The right to reimbursement is therefore a chose in action within the definition of "Crown debt"….

[49] In the present case, the overpayment was not by a taxpayer, nor does the taxpayer have a right to the refund. Canada has not shown anything in the *FAA* or *ITA* that creates in the taxpayer a "right" to an "overpayment" that by law belongs to someone else. Indeed, to refund the money to the taxpayer would subvert the course of justice as determined in the foreclosure proceedings, which cannot possibly have been the intention of the legislative scheme upon which Canada relies.

[50] Canada relies also on section 26 of the *FAA* which provides that "no payments shall be made out of the Consolidated Revenue Fund without the authority of Parliament". It maintains that the only authority of Parliament that applies is that set out in the *ITA*. But, as the judge observed at para 65, payment by the CRA into the Consolidated Revenue Fund should not have the unintended effect of extinguishing priorities under the sale order or entitling the debtor to a refund in the form of sale proceeds that in law belong to someone else.

[51] Interpreting the legislation as I have, the CRA already has Parliament's authority to "refund" an "overpayment". As I noted at the outset, the question is, to whom? Where, as here, the overpayment comprises sale proceeds subject to a sale order, the answer is, look to the order. In my view, nothing in the legislation prohibits that. Alternatively, instead of insisting that the holdback be paid to it under section 116(5), the CRA could have agreed to it remaining in trust until Mr. Gu's residency

status and tax liabilities were established—subject, of course, to such conditions as the CRA thought fit to negotiate. That would have accomplished the legislative goal of ensuring funds that would go to paying the tax debts of non-resident property owners do not leave the country. At the same time, it would not have ignored the authority of the court and threatened to deprive the taxpayer's creditors of proceeds lawfully belonging to them (see *Li* at para 39).

[52] Canada argues, however, that, if the overpayment is refunded to the taxpayer, Ms. Wu is not without a remedy. She could, Canada says, petition Mr. Gu into bankruptcy and pursue payment of her judgment through the bankruptcy process. This is because section 67(1)(c) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, which is federal legislation, permits tax refunds to be paid to a trustee in bankruptcy. For the reasons explained by Harper A.J. in *Li* at paras 41–46, I agree with her that this would constitute an expensive, cumbersome and wholly unsatisfactory means for Ms. Wu to pursue recovery of her judgment. I would add that, as submitted by Ms. Wu, this is "not a general solution to every case where a judgment debtor is uncooperative in providing confirmation of their residency". What other assets the debtor might have is unknown, and, in any event, it is not always possible for one creditor to petition someone into bankruptcy. The proper solution is to facilitate the well-established enforcement mechanism through foreclosure that already exists.

3.4 Conclusion

[53] I conclude that, in the particular circumstances of this case, interpreting the legislation as the "modern approach" requires supports the result reached both by Harper A.J. in *Li*, and by the judge below. I therefore agree with Elwood J.'s conclusion that anything remaining of the holdback after the appropriate taxes are assessed and collected by the CRA remains subject to the terms of the sale order.

[54] I deal below with the question of what taxes may appropriately be assessed and deducted, which is the subject of the cross appeal. But first, I turn to the

question of whether the declaration the judge made amounts to a coercive order against the Crown and was therefore beyond the court's jurisdiction.

4. DOES THE JUDGE'S DECLARATION AMOUNT TO A COERCIVE ORDER?

[55] Canada is correct in submitting that the Crown is immune from coercive orders. This flows both from statute and the common law. As the Court of Appeal of Manitoba observed in *Daniels v Daniels*, 2011 MBCA 94 at para 79:

> Common-law Crown immunity is founded on the concept of sovereign authority whereby the Crown is not subject to any superior authority. As such, the Crown is immune from orders that are coercive in nature.

[56] In British Columbia, the *Crown Proceeding Act*, RSBC 1996, c 89, section 11(2) (which, of course, applies only to His Majesty in Right of British Columbia), incorporates the common law principle by prohibiting a court from granting an injunction or making an order for specific performance against the government, while permitting the court to make "an order declaring the rights of the parties instead of an injunction or an order for specific performance".

[57] Canada argues that the judge erred by "issuing an order that, while on its face a declaration, seeks to compel the Minister to pay the income tax refund to a third-party creditor". It says that the purported declaration—that the holdback funds not subject to Part 1 tax are net sale proceeds within the meaning of the sale order—amounts to a mandatory injunction against the Crown which, by section 18 of the *Federal Courts Act*, RSC 1985, c F-7, is in the exclusive jurisdiction of the Federal Court.

[58] I agree with Canada that neither the judge below nor this Court has jurisdiction to issue a mandatory injunction against Canada, and that only the Federal Court may do so. I disagree, however, that the judge's declaration amounts to such an injunction, or any kind of injunction at all. In my view, it is not a coercive order, and the fact that it is issued in circumstances where injunctive relief might have been sought does not alter the court's jurisdiction.

[59] In this, I adopt what Justice Horsman, then of the Supreme Court of British Columbia, said in *Mortifee v Harvey*, 2022 BCSC 275 at para 47:

> … The fact that the declaration is sought in circumstances where injunctive relief—but for s. 11(2) of the *Crown Proceeding Act*—might also have been sought does not undermine the court's jurisdiction to grant relief. The breadth of situations in which declaratory relief might be appropriate is described in a passage from SA de Smith, *Constitutional and Administrative Law*, 4th ed., (Harmondsworth: Penguin Books, 1981) at 604, which is cited with approval in Wilson J.'s judgment in [*Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441] at 486:
>
> > The declaratory judgment is basically a twentieth-century judicial remedy and has come to be used for a great variety of purposes in public and private law. Declarations can be awarded in almost every situation where an injunction will lie—the most important exception is that interim relief cannot be granted by way of a declaration—and they extend to a number of situations where an injunction would be inappropriate (for example, because there is nothing to prohibit) or could not be obtained for other reasons (for example, because the prospective defendant was the Crown). …
>
> [Emphasis original.]

[60] The fact that, as Horsman J. pointed out at para 53, "[g]overnment officials are expected to implement a judicial decision, even one in declaratory form", does not make the declaration a coercive order. It declares a state of affairs. How Canada chooses to deal with that is up to Canada. At present, we do not know what, if anything, will be left over from the holdback. As Elwood J. put it,

> [66] While I agree with counsel for Canada that this Court cannot order the CRA to pay funds to Ms. Wu or a law firm in trust, a coercive order is unnecessary. On a proper interpretation of ss. 116 and 164, it is sufficient to make a declaration that the remaining Holdback Funds, after Part I Taxes are assessed and collected by the Minister, are subject to the terms of the Sale Order.
>
> [67] The resulting order is not an injunction against the Crown and does not offend Crown immunity. It is more in the nature of an injunction against Mr. Gu, prohibiting him from receiving a refund to which he is not entitled.
>
> [68] A declaration in the foreclosure proceedings is not declaratory relief in a judicial review over which the Federal Court would have exclusive jurisdiction under s. 18(1) of the *FCA*. Ms. Wu does not seek judicial review of any decision by the CRA. Instead, she seeks an order under Rule 21-7(5) to clarify the priorities already set out in the Sale Order.
>
> [69] An order of this nature does not treat the CRA as a "clearing house" for creditors. Established case law prevents creditors from seeking remedies against the CRA directly. The order that I propose simply preserves existing

> priorities under a court order after taxes are assessed and collected by the CRA. Paying the excess funds in accordance with a court order will not expose the CRA to any risk.
>
> [Emphasis added.]

[61] I see no error in that reasoning.

5. DID THE JUDGE ERR IN ACCEPTING THE CRA'S ENTITLEMENT TO COLLECT ALL PART 1 TAX OWING, BEYOND TAX ARISING FROM THE SALE OF THE PROPERTY?

[62] After concluding that his order was not coercive, but simply preserved existing priorities, the judge said this:

> [70] That said, it is important that the order not interfere with the ordinary tax assessment procedure under the *ITA.* Two limitations follow from this. First, the order must recognize that the Holdback Funds may be held by Canada until the Minister assesses Mr. Gu's tax liabilities. Second, the order must recognize the Minister's entitlement to collect any Part I Tax owing by Mr. Gu, not limited to tax arising from the sale of the Lands.
>
> [Emphasis added.]

[63] Ms. Wu argues that, as the sale proceeds, after property tax and commission, stand in the place and stead of the land, subject to the same priorities, only property-related tax can be deducted—not generally any tax owed by the taxpayer to the CRA.

[64] In Ms. Wu's submission, Part 1 tax of Mr. Gu was not contemplated in the sale order. That order was concerned solely with liabilities related to the property. Now Mr. Gu will benefit by being able to use Ms. Wu's money to pay his overall tax bill—not just the capital gains tax arising from the disposition of the property.

[65] In my view, Ms. Wu's position, while logical, is not sustainable in the face of the legislation.

[66] I observe that no income tax of Mr. Gu was contemplated in the sale order. If Mr. Gu had been a resident, it would not have been necessary for the purchaser to withhold anything. It would have been up to Mr. Gu to deal with the CRA in relation to any taxable capital gain.

[67] In this case, in the absence of any proof of residency, the CRA invoked section 116(5) of the *ITA* to require the purchaser to remit the holdback. That, of course, protected the purchaser from liability over and above the purchase price. Nothing in the terms of the sale order prevented this.

[68] As discussed above, this did not change the character of the holdback by entitling Mr. Gu to any refund. At the same time, however, it did not change the plain meaning of section 116(5), which made the purchaser liable to pay the holdback "as tax under this Part for the year…". What is to be refunded? The legislation contemplates refunding only an "overpayment".

[69] In interpreting the legislation, I concluded above that, in the circumstances of this case, it did not make the "refund" payable only to the taxpayer where the funds were not, in law, the taxpayer's. But in my view, it does limit what is to be refunded. This follows not only from section 116(5), but also from the definition of "overpayment" in section 164(7) as "the total of all amounts paid on account of the taxpayer's liability under this Part for the year minus all amounts payable in respect thereof" (emphasis added).

[70] It follows, in my view, that the judge was correct in declaring that "following assessment by the Minister, any holdback funds that are not subject to Part 1 Tax are net sale proceeds within the meaning of para 6 of the Sale Order…" (emphasis added).

[71] This is not an ideal resolution. It will likely result in Mr. Gu benefiting from his non-resident status in an inequitable way. Nevertheless, in my opinion, this adequately balances the legal rights of Ms. Wu pursuant to the sale order with the public interest in the collection of tax. By contrast, that public interest would not be advanced by the refund of excess holdback funds to Mr. Gu rather than Ms. Wu.

6. DISPOSITION

[72] For these reasons, I would dismiss both the appeal and the cross appeal.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Justice Winteringham"