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Elie Roth and Stephen Ruby Discuss Tax Ruling with *Canadian Lawyer* and *The Lawyer's Daily*

Following the Supreme Court of Canada's recent ruling in *MacDonald v Canada* that a taxpayer's forward contract was a hedge for income tax purposes, *Canadian Lawyer* and *The Lawyer's Daily* spoke to Davies partners Elie Roth and Stephen Ruby, counsel for the appellants, for their insights on the decision.

"We are naturally disappointed with the decision," said Elie. "However, we note that the Federal Court of Appeal in this case had held that a taxpayer's 'intention' was not relevant to the determination of whether a derivative instrument was being used as a speculation or as a hedge of an underlying risk."

Importantly, Elie noted, both the Supreme Court's majority and Justice Côté in dissent, "restored the well-established principle of tax law, as advanced by the taxpayer on appeal, that a taxpayer's intention, or purpose, is indeed particularly relevant to the determination of whether a derivative instrument is to be regarded as a speculation or as a hedge of an underlying risk."

Stephen pointed out, however, that the decision leaves open the question of the level of sufficient linkage required to characterize as a hedge what would otherwise be a speculative derivative instrument. "One result of this decision is that it will require closer consultation between taxpayers and their advisers as to whether a derivative instrument is a speculation or a hedge of an underlying risk," he advised.