Real Estate Investment Trusts In Canada

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Abstract

The Canadian real estate investment trust (REIT) industry began in the early 1990s and, over the past twenty years, the legislative landscape governing REITs has changed dramatically. This dissertation examines how REIT legislation has progressed in Canada and the effects it has had on the industry as a whole. After examining the basic characteristics of a REIT, an overview of the legislative evolution is presented. This thesis argues that recent legislation has been successful in allowing REITs to flourish, with 48 public equity REITs now trading in Canada comprising a market capitalization of over CAD $50 billion. A thorough examination of the current REIT sector is conducted, drawing comparisons to the markets generally, income trusts, and the real estate sector. Little legal academic research has been done on this topic and this dissertation seeks to fill a gap in the legal literature concerning income trusts as a whole.

**Keywords:** real estate investment trusts, REITs, SIFTs, REIT Exception, law, real estate, *Income Tax Act*, legislative history, Toronto Stock Exchange.
Dedication

This work is dedicated to my family members – Jyotsana, Pradeep, Shelina, Aashna, and Oscar – who have been an unwavering support system during my educational pursuits. I also dedicate this dissertation to Mark – your constant encouragement over the past year has been invaluable.
Acknowledgements

Thank you to my co-supervisors, Professor Mohamed Khimji and Professor Colin Campbell, for your guidance during the completion of this work.

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Finally, thank you to the Administration staff at Western Law for your dedication to the graduate program and the assistance provided to students.
# Table of Contents

Abstract .......................................................................................................................... i
Dedication ....................................................................................................................... ii
Acknowledgements ......................................................................................................... iii
List of Tables ................................................................................................................... v
List of Figures ................................................................................................................ vi
List of Appendices ......................................................................................................... vii
List of Abbreviations .................................................................................................... viii

Part I: Introduction ........................................................................................................... 1
    A Note on Canadian Tax Law ...................................................................................... 3
    Literature Review ...................................................................................................... 5
    Methodology ............................................................................................................... 8

Part II: What is a REIT? ................................................................................................ 11
    Legal Structure ......................................................................................................... 12
    Characteristics ........................................................................................................... 18
    Advantages of REITs ................................................................................................ 20

Part III: The History of REIT Legislation in Canada .................................................... 23
    A) 1995 ...................................................................................................................... 23
    B) The 2007 Tax Fairness Plan – SIFT Legislation and the REIT Exception ............ 27
    C) 2010-2013 .......................................................................................................... 39
    D) Present .................................................................................................................. 41

Part IV: The Current Canadian REIT Sector ............................................................... 43
    Methodology .............................................................................................................. 44
    Income Trusts in Canada .......................................................................................... 45
    REITs in Canada ....................................................................................................... 47
    REITs in Comparison .............................................................................................. 56

Part V: Conclusion .......................................................................................................... 63
    Summary ..................................................................................................................... 64
    The Future of the Canadian REIT Industry .............................................................. 67

Appendices ..................................................................................................................... 69
Curriculum Vitae .............................................................................................................. 78
List of Tables

Table 1: Simplified Comparison of Investor Tax Rates under the 2006 Budget ..............31
Table 2: Simplified Comparison of Investor Tax Rates in 2011 under the TFP ..............33
Table 3: REITs in Canada with a Market Capitalization of at least CAD 2 billion ...........49
List of Figures

Figure 1: Income Trust Issuers on the TSX in 2015 .......................................................... 46
Figure 2: Non-REIT Income Trusts on the TSX, 2008 – 2015 .............................................. 47
Figure 3: REITs on the TSX & TSXV, 1995 – 2015 ............................................................... 50
Figure 4: REITs on the TSX & TSXV, 2008 – 2015 ............................................................... 53
Figure 5: Comparison of REIT Issuers and Total TSX & TSXV Issuers, 2008 – 2015 ... 58
Figure 6: Comparison of REIT Market Capitalization and Total TSX & TSXV Market Capitalization, 2008 – 2015 ................................................................................... 59
Figure 7: The Real Estate Sector, 2008 – 2015 .................................................................. 60
Figure 8: Comparison of REITs and the Non-REIT Real Estate Sector, 2008 – 2015 .... 61
Figure 9: REITs as a Percentage of the Real Estate Sector, 2008 – 2015 ......................... 62
List of Appendices

Appendix A: REITs Trading on the TSX & TSXV, 31 December 2015.......................... 69

Appendix B: Income Tax Act, Current to 23 November 2015 .......................... 72

Appendix C: Income Tax Act, 22 June 2007......................................................... 77
**List of Abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ITA</td>
<td><em>Income Tax Act</em></td>
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<td>MFT</td>
<td>Mutual fund trust</td>
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<tr>
<td>REIT</td>
<td>Real estate investment trust</td>
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<tr>
<td>SIFT</td>
<td>Specified investment flow through</td>
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<td>TFP</td>
<td>Tax Fairness Plan</td>
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<td>TSX</td>
<td>Toronto Stock Exchange</td>
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<td>TSXV</td>
<td>TSX Venture Exchange</td>
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</table>
Part I: Introduction

Over the past twenty years, the Canadian real estate sector has changed dramatically. In dealing with cycles of both bubbles and bursts, participants in the real estate industry have been forced to develop new strategies for capitalizing on the value of real property assets. One of the most noteworthy developments during this time has been the growth of real estate investment trusts (REITs) as preferred investment vehicles in the Canadian public markets. The advent of REITs has allowed for the securitisation of investment-grade real property that would be otherwise illiquid.1 This change did not occur overnight and, in fact, required important shifts in both Canada’s economy and the legal landscape.2 This dissertation will explore the Canadian REIT sector and will advance the argument that legislative amendments have been a crucial factor in driving the growth of REITs towards the multi-billion-dollar industry they are today. While this work will focus primarily on the development of legislation pertinent to REITs, it is important to note that statutory provisions cannot be analysed in isolation from the economy; market conditions must also be afforded some degree of consideration.

Prior to 1995, REITs did not technically exist in Canadian law and were simply structured as open-end mutual funds that held interests in real property.3 In 1995, on recommendations from Revenue Canada, amendments were made to the federal Income Tax Act4 (the ITA) allowing REITs to qualify as closed-end mutual fund trusts (MFTs),

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4 RSC 1985, c 1 (5th Supp) [ITA].
which provided certain benefits not afforded to their open-end counterparts. In 2006, the federal government announced that it would be further amending the ITA through its Tax Fairness Plan (TFP), with the intention to shut down a tax benefit being taken advantage of by specified flow-through (SIFT) entities.\(^5\) Briefly put, SIFTs are trusts that engage in commercial activities; income generated flows through the trust and into the hands of the unitholder. Consequently, SIFTs are not taxed at the entity-level.\(^6\) REITs are a sub-type of SIFT entity but were recognized by the government as being worthy of an exception to the new legislation and were therefore able to continue taking advantage of the preferential tax treatment. These provisions were put into force in 2007 with a four-year grace period that lasted until 2011. The real estate industry provided extensive feedback prior to the amendments being enacted in full in 2011, many of which were taken into consideration in subsequent amendments to the new laws, effected in 2013.\(^7\) This dissertation will examine the evolution of REIT law in greater detail and put forth the argument that the progression of the law, specifically the REIT Exception\(^8\) provided for in the 2007 SIFT Legislation,\(^9\) has been instrumental in allowing REITs to flourish in Canada.

\(^5\) Canada, Department of Finance, Archived – Canada’s New Government Announces Tax Fairness Plan, (Ottawa: Department of Finance, 2006), online: Department of Finance Canada <http://www.fin.gc.ca> [Department of Finance, TFP].


\(^8\) The REIT Exception, for introductory purposes, is a tax exemption provided for in the ITA. It applies to qualifying REITs and exempts such entities from a higher taxation rate implemented by the SIFT Legislation. Instead, REITs are taxed only on income that is not distributed to unitholders.

\(^9\) The 2007 SIFT Legislation, for introductory purposes, changed the way in which Canadian income trusts are taxed. Previously, all income trusts were taxed only on income that was not distributed to unitholders. All income trusts, with the exception of REITs, are now taxed in a similar manner to Canadian corporations – income is taxed both at the entity level and in the hands of unitholders – thereby removing any previous tax advantage being utilised.
Following an explanation of this dissertation’s research objectives, an overview of existing literature will be completed and a full description of methodology will be made. Part II of this work will address the question “What is a REIT?” and will provide insight into the investment structures being assessed in this thesis. Part III will examine the legislative history of provisions governing REITs in Canada and will delve into the amendments enacted in 2007, referred to as the “SIFT Legislation” and “REIT Exception”. Part IV will then examine the REIT industry in Canada as it exists today and analyse the effects that the REIT Exception has had on the sector. Finally, Part V will conclude this dissertation, providing both a summary of the arguments presented and commentary on the future of REITs in Canada.

A Note on Canadian Tax Law

There is one important note that must be made prior to this analysis of Canadian REITs: this is a policy analysis, not a treatise on taxation. Although the relevant legislation concerns taxation and is found within the ITA, legal taxation concepts will be discussed only to the extent that they are necessary to understand the impact that tax legislation has had on the Canadian REIT sector. The intricacies of income tax law will not be explored. Instead, this work focuses on the crucial policy area found at the intersection of taxation, finance, real estate, and Canadian legislation.
Research Objectives

There are two main objectives to be accomplished by this research project. The first is to provide a comprehensive legal summary of the Canadian REIT industry – consisting primarily of an exploration of the relevant ITA legislative history. The second objective is to answer the following research question: What effects did the 2007 amendments to the ITA have on the Canadian REIT sector?

These research objectives are important for a number reasons. Firstly, as will be expanded upon in the literature review portion of this thesis, there is very little legal academic literature concerning Canadian REITs. While there has been a fair amount of legal research published concerning income trusts generally, REITs and the REIT Exception are often a footnote found within larger works. This thesis will take that footnote and delve into far greater detail, thereby contributing to a fuller portfolio of research on Canadian income trusts.

There appears to be a general disconnect between real estate and legal research; legal research on real estate topics is very rarely conducted. However, the idea of real property is, at its root, a legal concept that manifests itself as land or structures. Consider Keogh and Darcy’s three-level hierarchy of institutions:\(^\text{10}\):

\[\text{These institutions are (i) at the top of the hierarchy and broader society-level institutions such as legal, political, economic and social; (ii) in the middle, real estate market-level institutions, which are far more local, such as legal and conventional aspects of property rights, legal and conventional aspects of land use and development and decentralised and informal institutions that affect real estate markets; and (iii) at the bottom of the hierarchy, an organisation of real estate markets itself according bundling and unbundling of rights associated with real estate, such as use,}\]

investment, development and other services involved in this market, including real estate service providers, financial service providers, professional bodies and government and nongovernmental institutions.\textsuperscript{11} [emphasis added]

Clearly real estate concepts, even those found largely within the financial sector such as REITs, cannot be analysed separately from their governing legal regimes, which can be found on various levels.

This lack of legal literature concerning REITs is problematic, particularly in light of the fact that the REIT industry is growing in Canada and that REITs make up an impressive amount of market capitalization on the Toronto Stock Exchange (TSX). From consisting of only three REITs in the early 1990s,\textsuperscript{12} the market has expanded significantly with 48 REITs publicly traded on the TSX as of 31 December 2015. They have a market capitalization of approximately CAD $53 billion.\textsuperscript{13} Given that REITs are financial and legal constructs, it is crucial that they be analysed not just by scholars of finance, but also those conducting legal academic research.

\textit{Literature Review}

As previously stated, there is very little legal academic research concerning Canadian REITs. In 1995, Meretsky published an article that, similarly to this dissertation, provided a comprehensive overview of REITs.\textsuperscript{14} At the time of publication

\begin{footnotesize}

\begin{itemize}
\item\textsuperscript{11} Piyush Tiwari & Michael White, \textit{Real Estate Finance in the New Economy} (United Kingdom: Wiley Blackwell, 2014) at 57.
\item\textsuperscript{12} Meretsky, \textit{supra} note 3 at 113.
\item\textsuperscript{13} “Real Estate Companies Listed on TSX and TSXV” (2 February 2016) \textit{TSX Inc.}, online: <https://www.tsx.com/listings/listing-with-us/sector-and-product-profiles/real-estate> [TSX, “Real Estate Companies Listed”]. This includes REIT units being traded on both the TSX and the TSXV. There were 41 REITs traded on the TSX and 7 traded on the TSXV as of 31 December 2015.
\item\textsuperscript{14} \textit{Supra} note 3.
\end{itemize}
\end{footnotesize}
there were no legislative provisions regarding REITs, but the amendments relevant to REIT structures had been announced. Meretsky analysed REITs as they were at the time, assessed the potential impact of the proposed legislation, and predicted strong future growth of the industry. This is the article that most closely parallels the research being conducted in this project.

Chamberlain and Shahriari also conducted legal research into REITs, assessing the effects of the 2007 legislation on the value of REITs. Ultimately, their empirical study concluded that, while the original 2006 announcement had a negative impact on REIT values, the overall effect was positive. Finally, there are some journal articles that have been published concerning the ITA amendments themselves, providing a certain amount of commentary. Armstrong and Glickich, for instance, wrote a brief piece outlining the proposed legislative changes and argued that the rules were “poorly drafted”.

Despite the minimal literature concerning the nexus of REITs and the law, there are two relevant categories of related scholarly research that provide some insight into the work conducted here. The first is academic research on REITs from a finance perspective and the second is academic legal research on income trusts generally.

Tcherednitchenko, a former graduate student at Concordia University, wrote a Master’s thesis concerning REITs in Canada. Unlike the analysis conducted in this

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dissertation, she approached her analysis from a finance perspective, examining the performance of REIT IPOs from 1996-2004. She also identified a “paucity of literature on the performance of Canadian REITs.” She proceeded to conduct an empirical analysis of REIT IPO performance versus traditional equity performance, which yielded mixed results. Londerville also published an article concerning the financial aspects of Canadian REIT IPOs in 2002. She generally concluded that REIT IPOs in Canada are, on average, underpriced.

Legal research into income trusts is extensive. Although REITs are a subtype of income trust, the vast majority of the literature concerns business and royalty trusts, perhaps because of their sharp rise and subsequent decline over a 10-year period. Anand and Iacobucci conducted an empirical study examining the governance choices made within income trusts, comparing those made by corporate directors with those made by trustees. They also chronicle the rise of income trusts and briefly touch upon the 2007 ITA amendments. Lyons, a former graduate student at the University of Toronto, published a paper in 2008 examining the anticipated “death” of income trusts following the implementation of SIFT taxation. He concluded that the unavailability of tax advantages would likely cause mass conversion into a more preferable corporate structure. Finally, Jog and Wang assessed the growth of income trusts in 2004 and speculated as to the economic consequences that could result from their increasing

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18 Ibid at 2.
19 Ibid at 25-27.
21 Ibid at 360.
22 Anand & Iacobucci, supra note 6.
23 R Daniel Lyons, The ‘Death’ of Income Trusts (LL M paper, University of Toronto, 2008) [unpublished].
popularity. Notably, they mention that there may be income tax implications and, as is evidenced by subsequent legislative amendments, this was proven to be true.\textsuperscript{24}

This has been an overview of some of the literature that is relevant to a legal analysis of REITs in Canada. In the next section regarding methodology, it will be demonstrated that an array of additional sources was used in conducting this research, many of which would not be suitable for inclusion in a “literature review”, as they are not academic in nature.

\textit{Methodology}

In completing this research, a wide variety of primary and secondary sources were consulted. Given that the focus of this thesis is the effect of legislation on the REIT sector in Canada, one crucial primary source of information was the legislation itself – both current and previous versions. The provisions relevant to this argument are found in the federal \textit{ITA}.\textsuperscript{25} Sections 108 and 132, dealing with unit trusts and MFTs respectively, were examined in order to gain a full picture of requirements that REITs must meet in order to maintain REIT status. These sections are not, however, specific to REITs and outline requirements for all unit trusts and MFTs.

The most relevant provision to REITs is section 122.1. This section defines a number of important concepts including both a “SIFT trust” and a “real estate investment trust”. These definitions elucidate the specific requirements for SIFT and REIT


\textsuperscript{25} Supra note 4.
The section also expands upon several terms contained within those definitions, such as “eligible resale property”, “non-portfolio property”, and “qualified REIT property”. Government releases, as they pertained to the 2007 SIFT Legislation and REIT Exception, were important secondary sources shedding light on the rationale behind the implementation of section 122.1. On 31 October 2006, the Department of Finance made public a release entitled “Canada’s New Government Announces Tax Fairness Plan”, attached to this release is a thorough “Backgrounder” examining the reasoning behind the TFP and the anticipated results of its implementation.

The other key primary sources of data for this research were reports on the Toronto Stock Exchange (TSX) and the TSX Venture Exchange (TSXV) published by TSX Incorporated. Raw data was sourced from a variety of different reports produced by the Market Intelligence Group (MiG). MiG Reports and MiG Lists, produced annually and catalogued online, were used to track overall growth of the TSX and TSXV, the Real Estate Sector, income trusts, and REITs. Current industry data was sourced from separate reports, produced specifically to provide information on the Real

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26 ITA, supra note 4 at s 122.1.
27 Supra note 5.
Estate Sector and Income Trusts. Information regarding REITs was double-checked where possible through Investcom and the Canadian REIT Report.

Note that TMX data has only been made available from 2008 onwards. As such, figures from prior years were obtained from various secondary sources and verified when possible. The Canadian Financial Markets Research Centre (CFMRC) summary information database was used to obtain REIT data prior to 2007 and SEDAR was used to obtain documents filed by individual issuers.

While case law is typically an important primary source when conducting legal research, that is not the case with this area of study. There has been one case at the Tax Court of Canada dealing with the interpretation of “qualified REIT property” under section 122.1 of the ITA. There have also been a number of rulings issued by the Canada Revenue Agency regarding this statutory provision, none of which shed light onto the issues examined in this dissertation. As such, case law is not an important primary source utilised in this research project.

In addition to the above primary sources, there are a variety of important secondary sources that were used in this research project. First and foremost, a number of organizations have published comprehensive guides to Canadian REITs – Goodmans

31 TSX, “Real Estate Companies Listed”, supra note 13.
37 Barejo Holdings ULC v Canada, 2015 TCC 274.
LLP in conjunction with the Real Property Association of Canada (REALpac), 39
KPMG, 40 and Deloitte. 41 These resources proved invaluable in obtaining a full history of the REIT sector and, to the extent that they were up-to-date, valuable commentary on applicable legislative provisions. Other sources consulted included a variety of publications by participants in the industry including law firms, the Law Society of Upper Canada, 42 the Certified General Accountants Association of Canada, 43 and PricewaterhouseCoopers and the Urban Land Institute. 44 Finally, several textbooks were used as sources of information – including introductory finance texts and a number of publications in the Wiley Blackwell Real Estate Issues Series. 45

Part II: What is a REIT?

A REIT is a trust that passively holds interests in a portfolio of real properties. 46 It does not conduct an active business in the traditional sense, but rather engages in earning income from property. Instead of selling goods or services out of its property, it owns income-producing property that is leased out to third party tenants who, in turn,

39 Goodmans, 2d ed, supra note 2.
43 CGA, “Demystifying Income Trusts”, the Certified General Accountants Association of Canada (CGAAC) (Canada: CGA, 2006). Note that CGAAC is now part of Chartered Professional Accountants Canada (CPA).
46 The nature of a “passively” held interest relates to the activities that a REIT is permitted to undertake. See the description of MFT qualifications, page 15-17, and the REIT Exception, page 34-39, for further explanation.
operate a business. For example, Choice Properties REIT owns a number of real properties. The REIT leases these properties out to various operating company tenants, the largest of which is Loblaw Companies Limited, who subsequently carry out business operations, such as Loblaw grocery stores. The income of the operating company is not the income of the REIT. REITs are obligated to earn income passively. REIT activities that generate and increase income include the collection of rent and rental increases, tenant upgrades, property rehabilitation, the sale of mature property, improved management of acquired properties, or property development that is not for the purpose of resale. Given this business structure, employees of REITs are hired simply to manage, lease, and operate the portfolio of real properties or to administer the internal affairs of the REIT – not to operate any business activity per se.

There are a number of legal requirements that must be met in order for an organization to qualify as a REIT. Further, there are a variety of features that can distinguish REITs from one another. Finally, there are a number of reasons for which the REIT structure is particularly advantageous both to the investor and to the company itself. These three areas will be explored in the following section describing REITs.

**Legal Structure**

I. **Trusts**

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47 Goodmans, 2d ed, supra note 2 at 3-3.
A REIT is, first and foremost, a trust. The REIT holds property and, as with any trust, there is a separation of legal title to and beneficial interests in the property. Trustees hold the legal title while beneficiaries, known as “unitholders” in the context of REITs, hold beneficial interests in the trust property (through their ability to enforce the provisions of the trust). Trustees manage the portfolio of real property assets on behalf of the unitholders. REITs are internally governed and established by a declaration of trust. They are also subject to relevant provincial legislation, such as the Ontario Trustee Act and the Ontario Securities Act. In order to qualify as a trust, the common law test of three certainties must be satisfied; there must be certainty of intention, certainty of subject matter, and certainty of objects.

II. Unit Trusts

A REIT is also a unit trust as defined under subsection 108(2) of the ITA. In order to qualify as a unit trust, a REIT must meet three requirements. First, it must be an inter vivos trust – between living people. It cannot be a testamentary trust. Second, the beneficial interests of the trust must be described in terms of “units”. Finally, it must...

50 For further discussion, see Eugene F Fama & Michael C Jensen, “Separation of Ownership and Control” (1983) 26 JL & Econ 301.
52 RSO 1990, c T23.
53 RSO 1990, c S5.
54 Knight v Knight, (1840) 49 ER 58.
55 The settlor must have intended to create the trust.
56 The trust property must be sufficiently ascertained or ascertainable.
57 The beneficiaries of the trust must be sufficiently identified.
58 KPMG, supra note 40 at 21. A trust that is “between living people” is a trust in which the parties are alive. A trust that is “testamentary” is one in which the testator (i.e. the grantor of the property) is deceased. Testamentary trusts are often created through wills.
satisfy the conditions of either an open-end unit trust or a closed-end unit trust, depending on the REIT’s chosen structure. The primary difference between the two types of unit trust is the unitholder right of redemption – required by open-end unit trusts but not by closed-end unit trusts.\(^{59}\)

The requirements for qualifying as an open-end unit trust under subsection 108(2)(a) are far less onerous than those for qualifying as a closed-end unit trust under subsection 108(2)(b).\(^ {60}\) As an open-end unit trust, a REIT must provide a right of redemption such that 95 percent of the fair market value of the issued units is redeemable for cash upon demand by the unitholders\(^ {61}\). As will be further discussed in Part III of this thesis, the Canada Revenue Agency has ruled that modified redemption rights are also acceptable.\(^ {62}\)

While no right of redemption is required of closed-end unit trusts, six other conditions must be met in order to qualify: the trust must be resident in Canada at all times throughout the taxation year; its only undertakings must be the investing of its funds in property (other than real property) and/or “the acquiring, holding, maintaining, improving, leasing or managing of any real property or an interest in real property, or of any immovable or a real right in immovables, that is capital property of the trust”; at least 80 percent of the property must be shares, property convertible or exchangeable into

\(^{59}\) *Ibid* at 22. With a “right of redemption” a unitholder has the right to redeem its units from the entity for cash upon demand. See pages 24-27 for further discussion.

\(^{60}\) Subsection 108(2)(c) applies only to those trusts created before 1994 and essentially only requires that the majority of the unit trust’s fair market value be “primarily attributable to real property or an interest in real property….” Some of Canada’s earliest formed REITs, such as RioCan, benefit from this provision. RioCan Real Estate Investment Trust, “Annual Information Form” (30 March 2016), online: <http://www.sedar.com> at 1 [RioCan, “AIF”].

\(^{61}\) *ITA, supra* note 4 at s 108(2)(a).

\(^{62}\) See page 26 for further discussion.
shares, cash, debt securities, marketable securities, Canadian real property or interests in
Canadian real property; at least 95 percent of the trust’s income must derive from the
previously listed property or the disposition thereof; no more than ten percent of the
REIT’s property can consist of bonds, securities, or shares of any one non-Crown
corporation or debtor; and the units must be listed on a designated stock exchange in
Canada.\textsuperscript{63} These requirements are clearly more demanding than those of an open-end
unit trust and require constant monitoring to ensure compliance.\textsuperscript{64} The lack of need for a
redemption right, however, provides a significant advantage to closed-end unit trusts. As
such, it is the structure of choice for many REITs.\textsuperscript{65}

III. Mutual Fund Trusts

In addition to being unit trusts, REITs must also qualify as MFTs under
subsection 132(6) of the \textit{ITA}.\textsuperscript{66} There are five requirements that must be met in order for
a trust to qualify as an MFT. The first two requirements are simply that the trust must be
resident in Canada and that the trust must be a unit trust. The third requirement is a
restatement of a unit trust requirement – the REIT must comply with investment
restrictions limiting the permissible activities to “the acquiring, holding, maintaining,
improving, leasing or managing of any real property (or interest in real property) or of
any immovable (or real right in immovables) that is capital property of the trust”.

Essentially, this requirement acts to prevent a REIT from holding property that is not

\textsuperscript{63} \textit{ITA}, \textit{supra} note 4 at s 108(2)(b).
\textsuperscript{64} Peter Botz, “Mutual Fund Trusts and Unit Trusts: Selected Tax and Legal Issues” (1994) 42 Can Tax J
1037 at 1043.
\textsuperscript{65} See page 24-26 for further discussion regarding why closed-end structures are preferable for REITs.
\textsuperscript{66} \textit{Supra} note 4.
capital property and from conducting business that is unrelated to real estate held as capital property. For income tax purposes, capital property is property intended to be held for the long term and from which income is earned; this is in contrast to inventory, which is property held only for a short period of time and to be sold to earn income.67

This limitation can be illustrated by considering a REIT that intends to develop a parcel of real property. While a REIT is able to directly engage in development with the intention to hold the property in the long term, it cannot directly acquire property with a view to developing the property for subsequent sale. This applies equally to the development and sale of a full property and a portion of property. In order to ensure compliance with this requirement, many REITs choose to engage in development activity by contracting with third party developers who will subsequently convey the property to the REIT once the development is complete.68

The fourth condition that must be met in order to qualify as an MFT is that the REIT must meet certain distribution requirements with respect to its units. First, the REIT must have a class of units that is qualified for distribution to the public and second, the REIT must have a class consisting of at least 150 unitholders each of whom holds at least one “block” of units valued at no less than CAD $500. A “block” of units is 100 units where the fair market value is less than CAD $25 per unit, 25 units where the fair market value is

67 Goodmans, 2d ed, supra note 2 at 402.1.3. Note that this is an oversimplification for the purposes of this dissertation. For further discussion regarding the distinction between capital property and inventory, see Peter W Hogg, Joanne E Magee, & Jinyan Li, Principles of Canadian income tax law, 8th ed (Toronto: Carswell, 2013) at 247-252 and 322-327.

68 Ibid.
market value is CAD $25-100 per unit, or ten units where the fair market value is greater than CAD $100 per unit.69

Finally, pursuant to subsection 132(7), the MFT must not be established primarily for the benefit of non-residents of Canada. In practice, this means that non-residents must own less than 50 percent of all units.70

If a REIT fails to qualify as an MFT, there are a number of detrimental tax implications. As such, the trustees of the REIT must take care to ensure that the relevant requirements are met throughout any particular tax year.71

IV. Income Trusts

There are generally three types of income trusts – REITs, royalty trusts, and business trusts. The common characteristic of all income trusts is that they hold income-producing assets and trade units on various exchanges. Royalty trusts pool capital from investors in order to acquire royalty interests, largely in “energy related resource properties”, such as those involved in the production of oil, gas, coal, and iron ore.72 Investment trusts, or business trusts, are those that pool capital from investors to acquire interests in equity or debt in an operating company that engages in commercial activity. Until 2007, all income trusts benefitted from preferential tax treatment; income was

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69 Income Tax Regulations, CRC, c 945, s 4801; Income Tax Regulations, CRC, c 945, s 4803.
70 Potter et al, supra note 7 at 11.
71 MFT tax benefits include: the inapplicability of the general 21-year deemed realization of assets rule (note that this also applies to unit trusts that are not MFTs); the automatic qualification for investment in registered retirement savings plans (RRSPs), deferred profit-sharing plans (DPSPs), and registered retirement income funds (RRIFs); the inapplicability of Part XII.2 tax on “designated income”; and the ability to claim a (limited) refund for tax paid on capital gains. Botz, supra note 64 at 1039.
72 Deloitte, supra note 41 at 45.
permitted to flow through the income trust into the hands of the unitholders and, consequently, income was not taxed at the trust-level.\textsuperscript{73} As will be seen in Part III of this dissertation, both royalty trusts and business trusts are now classified as SIFTs and, unlike REITs, no longer qualify for favourable flow-through tax treatment.

\textit{Characteristics}

I. \textbf{Equity, Mortgage, and Hybrid REITs}

There are three types of REITs based on the nature of their interests held in real property – equity REITs, mortgage REITs, and hybrid REITs. Although the characterization in this respect does not have a bearing on the argument presented in this thesis, it is important to address this distinction in order to properly understand how REITs function. Equity REITs are the most common form and involve REITs acquiring equity interests in real property (for example, ownership interests). This is the primary structure that is covered by the analysis in this work – unitholders invest in REITs that own commercial property. Conversely, mortgage REITs will only acquire mortgage interests in real property. Hybrid REITs, though uncommon, acquire a combination of both equity and mortgage interests.\textsuperscript{74}

II. \textbf{Specified and Diversified REITs}

\textsuperscript{73} Anand & Iacobucci, \textit{supra} note 6 at 151.
While REITs act as a vehicle through which to invest in commercial properties, the portfolio of properties can vary significantly from REIT to REIT. Again, this distinction does not affect the argument presented in this thesis, but is important to the conceptualization of REITs themselves.

Many REITs choose to acquire a specialized portfolio of real property. The National Association of Real Estate Investments Trusts (NAREIT) in the United States (U.S.) breaks down equity REITs into a variety of property-type specialization categories, including Industrial, Office, Retail, Residential, Health Care and Lodging/Resorts. In addition to specializing by property type, REITs in Canada can also specify based on the geographic location of portfolio properties. Specializing can often create a comparative advantage for REITs in certain sectors. The converse to specialized REITs are diversified REITs, which hold a portfolio of properties that are diversified based upon property type, geographic location or both. The exact breakdown of REITs based on specialization or diversification is beyond the scope of this research, but Table 3 outlines this information for the largest REITs in Canada.

III. Public and Private REITs

The final distinction to be made with respect to REITs is between those that are private and those that are public. Private REITs are not traded on public markets and are, consequently, not as significantly affected by the legislation analysed in this thesis.

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75 The complete list of categories also includes Self Storage, Timber, Infrastructure, Data Centers, Speciality and Diversified. Mortgage REITs are broken down into Home Financing and Commercial Financing. NAREIT, “Investment Performance by Property Sector and Subsector” (31 March 2006) NAREIT, online: <https://www.reit.com/nareit>.

76 Bruggemann & Fisher, supra note 74 at 584.
Although they can obtain some beneficial tax treatment if they are able to qualify as a MFT\textsuperscript{77}, private REITs will always be open-end unit trusts and will never be SIFT entities, given that both closed-end trusts\textsuperscript{78} and SIFT trusts\textsuperscript{79} must publicly list units on an exchange. Investment in private REITs is usually restricted to those who REIT management seek out to be co-owners, such as personal contacts or institutional investors.\textsuperscript{80}

Public REITs, in contrast, are traded on public markets such as the TSX and TSXV, and are fully subject to the assessed legislation. Investment is an available option for any member of the public who can afford to purchase a unit.\textsuperscript{81} As a consequence, this thesis deals exclusively with public REITs.

**Advantages of REITs**

I. **Advantages to Investors**

There are a number of reasons for which an investor would choose to invest their money in a Canadian REIT. The three major reasons for doing so are portfolio diversification, liquidity, and the regularity of high yield distributions.

Portfolio diversification has been shown by a number of studies to be beneficial to an investor’s ability to accumulate earnings on their investments.\textsuperscript{82} This is because it allows for exposure to various types of markets, some of which will perform differently.

\textsuperscript{77} Goodmans, 2d ed, * supra* note 2 at 402.2.4.
\textsuperscript{78} *ITA*, * supra* note 4 at s 108(2)(b).
\textsuperscript{79} *ITA*, * supra* note 4 at s 122.1.
\textsuperscript{81} *Ibid*.
\textsuperscript{82} Tiwari & White, * supra* note 11 at 94.
than others. One of the easiest ways in which to diversify any given portfolio is to invest in an alternative asset class, such as real estate. The real estate market typically follows different patterns than traditional equity investments; the market, and consequent values to investors, will often have different peaks and valleys.  

Portfolio diversification into REITs is particularly beneficial for two reasons. First, acquiring REIT units allows average investors to gain interests in commercial-grade real property. These properties are expensive and were previously accessible only to those investors with sufficient capital to acquire an outright or direct interest in such real property – namely, institutional investors and high net-worth individuals. With a REIT, however, anyone who can afford the price of a unit is able to add this high-end, income-earning property to their investment portfolio. The other benefit to diversification through investment in REITs is that REIT properties are professionally managed. A REITs declaration of trust will provide for some degree of management structure – either internally to the REIT or externally by a third party manager. Regardless of the structure chosen, the average investor can benefit from the knowledge and expertise of those selected to manage these large properties.  

The second major advantage to investing in REITs is that, unlike traditional direct investment into real estate, it is an indirect investment into the same underlying assets. The unitholder does not acquire a direct interest in the property itself, but rather the ability to enforce the provisions of the trust. This is beneficial because, unlike real

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84 Meretsy, supra note 3 at 106.
85 Ibid at 107.
property, units are highly liquid.\textsuperscript{86} Real property is difficult to value and a challenge to transact.\textsuperscript{87} Units of a REIT, conversely, are easily transacted on public stock exchanges – either traded, purchased, or disposed of for cash. This affords the investor a large degree of flexibility that would be otherwise unavailable in a direct acquisition of an interest in real property.\textsuperscript{88}

The final reason for which REITs are attractive to investors is that they are high-yield entities that provide regular distributions.\textsuperscript{89} With an investment into shares of a corporation, a shareholder is not entitled to a regular return on that investment. While the share price may increase, the payment of dividends is annual and only paid at the discretion of the board of directors.\textsuperscript{90} Alternatively, as outlined in its declaration of trust,\textsuperscript{91} a REIT usually pays distributions on a monthly basis and this payment is not at the discretion of the trustees. Because a REIT wants to distribute the majority of its income in order to benefit from tax flow through status, a unitholder will normally receive regular monthly distributions.\textsuperscript{92}

II. Advantages to Companies

There are two major advantages for choosing to structure as a REIT. The first is a less restrictive legislative environment and the second is preferential tax treatment.

\begin{footnotesize}
\begin{enumerate}
\item Ibid at 105.
\item Tiwari & White, \textit{supra} note 11 at 76.
\item Meretsky, \textit{supra} note 3 at 96.
\item Deloitte, \textit{supra} note 41 at 2.
\item \textit{Ontario Business Corporations Act}, RSO 1990, c B16 at s 38(1) [\textit{OBCA}].
\item Tcherednichenko, \textit{supra} note 17 at 11.
\item There is no incentive for a REIT to retain its earned income and, as such, it is highly likely that the REIT will have sufficient capital to pay out its distributions. Goodmans, 2d ed, \textit{supra} note 2 at 403.2.1.
\end{enumerate}
\end{footnotesize}
In deciding to structure as a REIT instead of a publicly traded corporation, there are fewer statutory provisions with which the organization must comply. For instance, a corporation in Ontario must meet the requirements set out in the Ontario Business Corporations Act. A REIT, however, does not have such governing legislation and is governed by principles of contract law and trust law, in addition to the ITA and its own declaration of trust. While there are certain requirements that a given declaration must meet, it has also been held by the courts that some provisions can be contracted out of. As such, REITs are largely subject to the more flexible laws of contract and trust.

The primary advantage, however, for structuring as a REIT is preferential tax treatment. A REIT that distributes the majority of its income to its unitholders will not be subject to entity-level income tax. Instead, the income is taxed in the hands of the unitholders. This is a major financial incentive for both unitholders and companies with large real estate portfolios and is the subject of the remainder of this dissertation.

Part III: The History of REIT Legislation in Canada

A) 1995

Prior to 1995, there were no ITA provisions specifically applicable to Canadian REITs. There were two structural options available:

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93 OBCA, supra note 90.
94 Tcherednichenko, supra note 17 at 2.
95 Anand & Iacobucci, supra note 6 at 150.
96 Goodmans, 2d ed, supra note 2 at 403.2.1.
(i) A REIT could structure as an open-end mutual fund, providing a right of redemption to all unitholders, and be preferentially taxed as a MFT;\textsuperscript{97} or

(ii) A REIT could structure as a closed-end mutual fund, not providing a right of redemption, and be taxed as a commercial trust under the standard tax rules applicable to all non-personal\textsuperscript{98} inter vivos trusts.\textsuperscript{99}

There was no option for a REIT to structure as a closed-end MFT because real property was not listed as an eligible investment for such a classification.\textsuperscript{100}

Many REIT-like entities were originally established as open-end real estate mutual funds.\textsuperscript{101} The requirement that a right of redemption be provided to unitholders was particularly problematic for real estate mutual funds at this time. The real estate market experienced a downturn in the early 1990s and, unsurprisingly, property portfolios decreased in value. The time lag between annual appraisal of the property’s actual value and the daily trading price of units on the public markets created an issue; unitholders began redeeming units in large quantities and real estate funds were required to comply with these requests, regardless of the actual value of the real property in question. This was a problem with disparity of liquidity – mutual fund units were highly liquid, while the underlying real property was highly illiquid. Because the values of the two assets did not correspond, problems ensued. This led to a number of real estate

\textsuperscript{97} ITA, supra note 4 at s 132(a). Note that this also applies to unit trusts that are not MFTs.

\textsuperscript{98} The definition of personal trust is set out under the ITA, supra note 4 at s 248(1).

\textsuperscript{99} These provisions are found in Part I, Division B, Subdivision k “Trusts and their Beneficiaries” of the ITA, supra note 4.


\textsuperscript{101} Ibid at 3.
mutual funds being forced to sell off properties in order to fund unitholder redemptions, which ultimately led to the demise of these funds.\textsuperscript{102}

Wary of the obligatory redemption right, three of the largest Canadian real estate mutual funds—Counsel REIT,\textsuperscript{103} RealFund REIT,\textsuperscript{104} and Canadian REIT (CREIT)—chose to structure as closed-end funds taxed as commercial trusts. Only Lantower REIT chose to structure as an open-end MFT, obtaining an advance tax ruling that allowed for a modified right of redemption.\textsuperscript{105} The Lantower REIT offering was subsequently terminated.\textsuperscript{106}

Although the three aforementioned real estate mutual funds officially restructured into mutual fund trusts in 1993, adopting the American term “REIT” in order to describe their organizations,\textsuperscript{107} it was only with a 1994 announcement that they were acknowledged as deserving of special unit trust and MFT tax treatment.\textsuperscript{108} On 27 May 1994, the Federal Department of Finance announced that there would be amendments to the \textit{ITA} effective in 1995.\textsuperscript{109}

The 1995 amendments altered the requirements to qualify as a unit trust and as a MFT. These provisions were amended to allow the passive holding of real estate interests in a closed-end MFT. The wording as it is now allows for “the acquiring, holding,
maintaining, improving, leasing or managing of any real property (or interest in real property) or of any immovable (or real right in immovables) that is capital property of the trust..." These additions were specifically targeted at REITs and allowed them to qualify for closed-end unit trust and MFT status, thereby granting the tax advantageous treatments that accompany such qualifications. As is demonstrated by the seven REIT IPOs that occurred in 1997, this shift in tax treatment was hugely beneficial to REITs in Canada.

It must be mentioned that, while the availability of closed-end MFT status for REITs was certainly advantageous and arguably allowed the REIT industry to develop in an unprecedented fashion, the open-end structure remained available. In fact, the Canada Revenue Agency ruled in the late 1990s that modified redemption rights were acceptable in order to qualify for open-end unit trust status. This allowed REITs to satisfy the “redemption on demand” requirement of the ITA while also addressing previous issues of liquidity. As such, the current REIT market consists of a mix of both closed-end and open-end structures. The typical open-end redemption right states that the units are redeemable for the lesser of (a) 90 percent of their market price as of the date the units were surrendered for redemption (the “Redemption Date”); or (b) 100 percent of their closing market price on the Redemption Date. There are also typically three overarching limitations: (i) the total monthly amount payable by the REIT to satisfy unit

110 ITA, supra note 4 at s 108(2)(b); ITA, supra note 4 at 132(6)(b)(ii).
111 See note 70.
112 CIPPREC, supra note 101 at 7. The seven IPOs were Canadian Apartment Properties REIT, CPL Long Term Care REIT, Canadian Hotel Income Properties REIT, Avista REIT, Morguard REIT, Legacy Hotels REIT, and Royal Host REIT.
114 Both “market price” and “closing market price” are typically defined terms.
redemptions cannot exceed CAD $50,000 (the “Monthly Limit”); (ii) at the time of redemption, the units must be publicly trading on an exchange; and (iii) the normal trading of units must not be suspended or halted on any exchange upon which the units are listed. Large Canadian REITs that employ such modified redemption rights include SmartREIT, Choice Properties REIT, and H&R REIT. Large closed-end REITs include RioCan REIT, CREIT, and Allied Properties REIT.

B) The 2007 Tax Fairness Plan – SIFT Legislation and the REIT Exception

In 2006, the Government of Canada found itself dealing with a problematic situation – the popularity of income trusts as a preferred structure of business organization had reached peak levels. In 2001, there were 70 income trusts in Canada, comprising a market capitalization of approximately CAD $14 billion. By 2006, that figured had ballooned to 245 income trusts, the market value of which was over CAD $210 billion. The industry had come to represent more than ten percent of the total market capitalization of the TSX. Further, in 2006 alone almost CAD $70 billion in new income trust proposals were announced, both via initial public offering (IPO) and

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115 Smart Real Estate Investment Trust, “Annual Information Form: For the Year Ended December 31, 2015” (10 February 2016), online: <http://www.sedar.com> at 12 and 66 [SmartREIT, “AIF”].
118 RioCan, “AIF”, supra note 60 at 1.
121 Juneja, supra note 42 at 3-1.
122 Anand & Iacobucci, supra note 6 at 148.
conversion of existing corporations. Both Bell Canada Enterprises Incorporated and Telus Incorporated, for example, had announced intentions to convert from corporations into income trusts.

It is important to note that many REITs at this time were also business income trusts. In the early 2000s, there were two types of REITs present in the market – business REITs and non-business REITs. Business REITs, as with traditional non-business REITs, owned a portfolio of income producing properties, which were in turn leased to third party operating companies. In departing from the traditional passive structure, these operating companies were owned wholly or in part by the REIT itself. Income earned by the operating companies was subsequently distributed to the REIT as interest or dividends; thus, the income of the operating company was the income of the REIT.

This differs drastically from the preceding description of REIT activities in Part II of this dissertation because, as will be explained below, business REITs are no longer permitted in Canada.

The growth of income trusts posed a significant problem for the federal Department of Finance because of the primary rationale behind the popularity of this organizational structure: corporate tax avoidance. In general, income trusts and their investors were benefiting from substantially more favourable tax treatment than corporations and their investors, despite the fact that publicly traded business income trusts.

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124 Anand & Iacobucci, supra note 6 at 153.
125 Deloitte, supra note 41 at 48.
126 Ibid at 50.
trusts and publicly traded corporations were, on their face, virtually identical entities. As stated by then Minister of Finance Jim Flaherty, “[t]he current situation is not right and is not fair. It is the responsibility of the Government of Canada to set our nation’s tax policy, not corporate tax planners.”

While this rationale has been debated by some academics, see Arya for example, the purpose of this dissertation is not to examine the validity of this claim made by the Government. The arguments presented here assume that the Government was correct in claiming that the growing use of income trusts presented a problem for Canada by reducing corporate tax revenues and that this problem could be largely eradicated by changing the taxation of these trusts.

I. Taxation of Income Trusts vs. Taxation of Corporations – Prior to 2007

While, again, this thesis will not seek to delve into the intricacies of Canadian tax law, the basic differences between corporate taxation and the taxation of income trusts as they were in 2006 must be understood. This understanding will demonstrate why the Minister of Finance deemed this a situation in need of rectification and serves as necessary background knowledge with respect to the current legislation applicable to REITs.

Publicly traded corporations and income trusts both distribute income to investors. Corporations provide shareholders with revenue in the form of dividends,

128 Ibid.
while income trusts provide unitholders with revenue in the form of distributions. In paying dividends, corporations use income that has already been subject to taxation at the corporate level. Shareholders are then also required to include dividends when computing personal income, although there are mechanisms in place for tax relief on these dividend payments.\textsuperscript{130} In contrast, any distributions paid out to unitholders by the trust are deductible, and therefore not subject to taxation at the trust level. Instead, tax liability is transferred to the unitholders. In essence, the income “flows through” to the investors, thus explaining the Government of Canada’s preferred terminology of income trusts as “flow-through entities”, or FTEs.\textsuperscript{131} “If a trust pays out all the interest payments and dividend from the operating corporation in distributions to its unitholders, the trust pays no income tax. That is, the trust is a flow-through entity for tax purposes.”\textsuperscript{132}

Prior to 2006, with companies preferring to use FTE structures in lieu of corporate structures, the Federal Government was losing large amounts of entity-level tax revenue. Instead of income being taxed at the corporate level, companies were restructuring into income trusts and distributing the majority of their income to investors, thus not paying tax at the trust-level. The combination of federal and provincial taxation on both corporate income tax and shareholder dividends was significantly greater than the taxation on an income trust and their virtually identical unitholders.\textsuperscript{133}

II. The 2006 Federal Budget

\textsuperscript{130} These include dividend “gross up” and the dividend tax credit. Department of Finance, “Backgrounder”, \textit{supra} note 28 at 6.
\textsuperscript{131} \textit{Ibid} at 1.
\textsuperscript{132} Anand & Iacobucci, \textit{supra} note 6 at 151.
\textsuperscript{133} Department of Finance, “Backgrounder”, \textit{supra} note 28 at 2.
This situation was partially remedied by the 2006 federal Budget, which reduced the rate of federal tax payable on dividends from large corporations to resident Canadian investors. Under the new Budget, both distributions from FTEs and dividends from large corporations were taxable on the resident Canadian investor at approximately the same rate. There remained, however, still a significant tax advantage to other FTE investors – specifically to non-resident Canadians and tax-exempt entities such as pension plans, which are currently some of the largest investors in FTEs. In 2006, tax-exempt Canadian entities were effectively taxed at rates of zero percent and 32 percent on distributions from FTEs and dividends from corporations, respectively. Non-resident investors were effectively taxed at 15 percent on distributions from FTEs and at 42 percent on dividends.

Table 1: Simplified Comparison of Investor Tax Rates under the 2006 Budget

<table>
<thead>
<tr>
<th>Investor</th>
<th>FTE (Distribution)</th>
<th>Large Corporation (Dividend)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taxable Canadian</td>
<td>46%</td>
<td>46%</td>
</tr>
<tr>
<td>Canadian Tax-Exempt</td>
<td>0%</td>
<td>32%</td>
</tr>
<tr>
<td>Taxable Non-Resident Investor</td>
<td>15%</td>
<td>42%</td>
</tr>
</tbody>
</table>

Despite the changes implemented by the 2006 Budget, the pace of income trust formation did not abate. As such, the federal government was able to draw two

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134 Ibid.
135 Tcherednichenko, supra note 17 at 2.
136 In addition, capital distributions by trusts are generally treated as tax-free returns of capital; capital distributions by public corporations are generally taxable. ITA, supra note 4 at s 84 (9.1).
138 These are the Canadian tax rates. These rates do not account for the particulars of various tax treaties or taxation in the non-resident’s home country.
conclusions: first, that the driving forces behind the popularity of FTEs were tax-exempt investors and non-resident investors and second, that further action needed to be taken.\(^{139}\)

III. The 2007 Tax Fairness Plan & SIFT Legislation

On 31 October 2006, action was taken to remedy this continued taxation imbalance between income trusts and corporations. The Tax Fairness Plan (TFP) was announced by the Government of Canada, proposing two changes.\(^{140}\) First, the government sought to decrease the corporate income tax rate from 21 percent to 19 percent by 2010, and subsequently decrease the rate to 18.5 percent by 2011. This was done under the rationale that it would “further enhance the competitiveness of Canada’s corporate income tax system.”\(^{141}\)

Second, and more importantly for this thesis, the federal government sought to make drastic changes to the tax treatment of FTEs and their investors.\(^{142}\) The TFP proposed that FTEs would be taxed more similarly to corporations and unitholders would be subject to typical shareholder taxations rates. As a result, distributions made by FTEs would no longer be deductible for the purposes of computing entity-level income and FTE income would be taxed at corporate rates; distributions would be further taxed in the hands of unitholders as if they were dividends paid to shareholders of a corporation. The new taxation regime would apply to resident Canadian investors as well as non-resident and tax-exempt investors.

\(^{139}\) Department of Finance, “Backgrounder”, supra note 28 at 2.
\(^{140}\) There were other provisions in the TFP not relevant to remedying this tax imbalance, including an age credit enhancement and pension income splitting. As they are no relevant to this thesis, they will not be discussed. Ibid.
\(^{141}\) Ibid at 4. This rate has been, in fact, further reduced to 15%.
\(^{142}\) Ibid at 3.
In proposing these rules, the federal government stated that they would be applicable only to “specified investment flow through” entities (SIFTs) that were to be fully defined in legislation. SIFTs, however, essentially comprise of all publicly traded income trusts except for those engaged primarily in passive real estate investment. The Department of Finance stated that, with the implementation of this new SIFT Legislation, “the legal form a given business takes – whether as a corporation, a trust, or a partnership\textsuperscript{143} – will come to depend less on the peculiarities of the tax law, and more on the substantive business attributes of each of those structures.”\textsuperscript{144}

**Table 2: Simplified Comparison of Investor Effective Tax Rates in 2011 under the TFP\textsuperscript{145}**

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td></td>
<td>SIFT (Distribution)</td>
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<td>42%</td>
</tr>
</tbody>
</table>

As is illustrated in Table 2, all taxable Canadians, tax-exempt Canadians, and taxable non-resident investors are taxed at the same rate, regardless of whether the

\textsuperscript{143} Partnerships, similar to income trusts, were also proving problematic for the federal government from a taxation perspective. However, because REITs utilize the trust structure, the tax treatment of partnerships is not addressed in this thesis. Department of Finance, “Backgrounder”, supra note 28 at 10.

\textsuperscript{144} Ibid at 3.

\textsuperscript{145} Ibid at 4.

\textsuperscript{146} These are the Canadian tax rates. These rates do not account for the particulars of various tax treaties or taxation in the non-resident’s home country.
income is a distribution from an income trust or a dividend from corporation. Taking these figures into account in addition to the fact that distributions would not longer be deductible at the entity-level for the purposes of calculating income, any tax advantage previously enjoyed by income trusts is removed under the amendments proposed by the TFP.

The new legislation, Bill C-52, received Royal Assent on 22 June 2007 and applied to taxation years beginning in 2007.\textsuperscript{147} Existing income trusts were given a four-year grace period within which to prepare to pay corporate tax rates and/or restructure into an entity not subject to SIFT Legislation. No retroactive application was proposed. The new SIFT rules were in full effect as of 1 January 2011.\textsuperscript{148} Note that during the grace period, growth of existing SIFTs was limited, so as to prevent the organizations from taking advantage of the tax loophole for a full four years.\textsuperscript{149}

A “SIFT trust”, as found in section 122.1 of the federal \textit{Income Tax Act}, is defined by three requirements.\textsuperscript{150} First, the trust must be resident in Canada. Second, the trust’s units must be listed on a stock exchange or public market. Third, the trust must hold at least one non-portfolio property, a term which is also defined in section 122.1 and will be discussed further in terms of the REIT Exception.

\textbf{IV. The REIT Exception}

\textsuperscript{147} KPMG, \textit{supra} note 40 at 27.
\textsuperscript{148} Department of Finance, \textit{TFP, supra} note 5.
\textsuperscript{149} Arya, \textit{supra} note 130 at 42. Permissible growth of an SIFT entity was capped at CAD 50 million per year.
\textsuperscript{150} See Appendix B for the full text. This definition has been amended slightly since 2007, but the amendment does not affect the substantive requirements. As such, the current version of the \textit{ITA} is cited.
In developing the new SIFT Legislation, the federal government committed to providing for a REIT Exception, based on the nature of the FTE’s income and investments; “…this exception from the SIFT measures recognizes the unique history or role of collective real estate investment vehicles.” The exception is intended to prevent SIFT taxation rates from applying to passive FTEs that derive income primarily from interests in real property.

In the TFP, the Government of Canada stipulated four requirements that an FTE would need to meet in order to benefit from the REIT Exception from SIFT taxation. This was the first legislation in Canada that specifically referenced REITs and was found in section 122.1 of the ITA under the definition for “real estate investment trust”. In addition to being resident in Canada and meeting stringent requirements for MFTs and unit trust status as previously discussed, the REIT was obliged to pass a series of enumerated tests at all times throughout each taxation year in order to qualify for REIT status: The Property Test; The 95 Percent Passive Revenue Test; The 75 Percent Real Property Test; and The Qualifying Property Value Test.

Failure to pass even one portion of these tests would result in the loss of qualifying REIT tax status. The REIT would become subject to taxation rates under the

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153 ITA, supra note 4 at s 122.1. See Appendix B for full legislative text of the REIT exception as it was in 2007.
154 KPMG, supra note 40 28-29.
SIFT Legislation – a substantial negative tax consequence – and unitholders would also be taxed differently.\textsuperscript{155}

(i) The Property Test

This is the first, and most onerous, requirement implemented by the Government of Canada in 2007. In order to qualify for REIT status, the REIT must not have owned, at any time throughout a given taxation year, any “non-portfolio property” other than “qualified REIT property”. Non-portfolio property was defined broadly as: (i) any property used in the course of a business; (ii) Canadian real or resource property where the fair market value was greater than 50 percent of the REIT’s total equity value; or (iii) securities of a Canadian entity\textsuperscript{156} where the value of the securities was greater than 10 percent of the entity’s total equity value or where the value of the securities was greater than 50 percent of the REIT’s total equity value.\textsuperscript{157}

This requirement was perceived as being onerous because the holding of even one non-portfolio property tainted the entire REIT and made it subject to SIFT taxation. The change in tax treatment had the potential to be dire. Parking lots, for example, could potentially qualify as property used in the course of business if it could not be proven by the REIT that it was ancillary property to the earning of rent (which is permissible under

\textsuperscript{155} Goodmans, 2d ed, supra note 2 at 403.2.3. Although distributions would not be treated as deemed dividends from a corporation, tax treatment would depend on the nature of the distribution. For example, a distribution of rental income by the REIT would be treated differently than a distribution of an otherwise taxable capital gain in the hands of the unitholder. See the explanation of the taxation of distributions from capital cost allowance, capital gains, dividend income, rental income, and losses.

\textsuperscript{156} Or non-resident entity where the income is primarily Canadian-sourced.

\textsuperscript{157} Juneja, supra note 42 at 3-4.
the exception). As will be shown, subsequent amendments allowed for this strict limitation to be somewhat relieved.

(ii) The 95 Percent Passive Revenue Test

This test required that at least 95 percent of the REIT’s income be from rents from real or immovable property, interest, capital gains from dispositions of real or immovable property, dividends, and/or royalties. The effect of this requirement was to prevent REITs from earning active income while still benefitting from the REIT Exception. This test precluded REITs from engaging in activity such as development of real property for the purpose of sale or operating hotels or full-service rental properties. Given the rationale behind the SIFT Legislation, it stands to reason that the federal government sought to tax those trusts with real estate portfolios which were engaging in commercial activities in the same manner as corporations (i.e. active management and operation of the properties as a business). Thus, business REITs are no longer permitted to benefit from advantageous flow-through tax treatment.

(iii) The 75 Percent Real Property Test

This test required that at least 75 percent of the REIT’s revenues be from (a) rent from, or mortgage interest on, real or immovable properties; or (b) capital gains from dispositions of such properties. The requirement worked in conjunction with the 95 Percent Passive Revenue Test in that “[the test] can only be satisfied where the additional

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158 Ibid.
159 Juneja, supra note 42 at 3-3.
sources of revenue allowed under the 95% passive revenue test...is less than 25% of the REIT’s total revenue.”\textsuperscript{160} This test ensured that the majority of revenue is derived from the REIT’s portfolio real property and not other non-real estate sources.

**(iv) The Qualifying Property Value Test**

The final test stipulated required that the fair market value of all of the REIT’s property be no less than 75 percent of the REIT’s equity value. This is a relatively lenient test that likely would not pose any issues for a REIT given the requirements of the three previous tests.\textsuperscript{161}

**Summary of the REIT Exception**

Together, these four tests illustrate what was required of a REIT in order to qualify for an exception to the SIFT Legislation. Though the requirements were strict, they were fairly clear and most key terms contained within the tests were defined. Broken down simply, the tests govern a REIT’s permissible activities and property interests as follows:

- (i) The Property Test stipulates the type of property that the REIT can hold;
- (ii) The Passive Revenue Test stipulates *how* revenue must be generated by the REIT;

\textsuperscript{160} Ibid at 3-4.
\textsuperscript{161} Ibid at 3-5.
(iii) The Real Property Test stipulates *from which assets* the REIT’s revenue must be generated; and

(iv) The Qualifying Property Value Test stipulates how much of the REIT’s equity value must derive from the REIT’s real property holdings.

A further point worth restating is that business REITs were no longer permitted to benefit from advantageous tax treatment. In order to qualify for the REIT Exception, only the generation of passive income was permitted.

**Implementation of the REIT Exception**

Alongside the SIFT taxation legislation, the REIT Exception received Royal Assent on 22 June 2007. It applied to taxation years beginning in 2007 for new REITs and to pre-existing REITs as of 2011 – the same four-year grandfathering period afforded to SIFTs. Although the new legislation provided much needed clarity to the REIT industry, there were a number of glaring issues with which the sector took issue. As such, from 2007 to 2013, a number of proposals were submitted and amendments made in order to better serve the REIT sector.

**C) 2010-2013**

From the time that the SIFT Legislation and accompanying REIT Exception were announced in 2006, actors in the real estate industry sought to amend the exception in order to better allow REITs to thrive. Many actors had concerns about the requirements
needing to be met, from issues regarding lack of clarity in defined terms to the thresholds being too onerous.\textsuperscript{162}

On 16 December 2010, prior to the end of the grandfathering period for the 2007 REIT Exception, amendments to the original legislation were announced by the Department of Finance.\textsuperscript{163} Though the 2010 proposed amendments were originally planned for implementation in 2011\textsuperscript{164}, the Government proposed further amendments that were eventually tabled in 2012 as part of Bill C-48, the \textit{Technical Tax Amendments Act, 2012}.\textsuperscript{165} The new provisions received Royal Assent on 26 June 2013.\textsuperscript{166}

In responding to criticisms by actors in the real estate industry, the Department of Finance reduced two of the more onerous requirements of the REIT Exception and also added definitions in order to increase clarity.

With respect to changing the conditions that must be met to achieve qualifying REIT status, the major amendment was to The Property Test, which required that the REIT not possess any “non-portfolio property”; 100 percent of its assets were required to be “qualified REIT property”.\textsuperscript{167} With the most recent amendments, this threshold has been reduced to a 90 percent requirement. A REIT is now permitted to hold up to 10

\begin{footnotesize}\begin{itemize}
\item \textsuperscript{162} REALpac, “REALpac Government Submission: Proposed Amendments to the Rel Estate Investment Trust Rules: Minister of Finance Jim Flaherty” (31 January 2011) \textit{Real Property Association of Canada}, online: <http://www.realpac.ca>.
\item \textsuperscript{163} Canada, Department of Finance, \textit{Archived – Government of Canada Announces Amendments to the Real Estate Investment Trust Rules}, (Ottawa: Department of Finance, 2010), online: Department of Finance Canada <http://www.fin.gc.ca>.
\item \textsuperscript{164} Canada, Department of Finance, “Backgrounder” \textit{Archived – Government of Canada Announces Amendments to the Real Estate Investment Trust Rules}, (Ottawa: Department of Finance, 2010) online: Department of Finance Canada <http://www.fin.gc.ca>.
\item \textsuperscript{166} Goodmans, 2d ed. \textit{supra} note 2 at 403.1. See Appendix B for the full legislative text.
\item \textsuperscript{167} See Appendix B for the definitions of “non-portfolio property” and “qualified REIT property” under the \textit{ITA}, \textit{supra} note 4 at 122.1.
\end{itemize}\end{footnotesize}
percent non-portfolio property, providing some much needed breathing room. The other change to REIT Exception requirements was to The 95 Percent Passive Revenue Test, which was also decreased to a 90 percent threshold. This offers REITs more flexibility with respect to the commercial activities in which it is permitted to engage. Finally, a fifth requirement was added stating that units of the REIT must be publicly traded in order to qualify for the Exception.168

A number of definitions were also added to section 122.1, allowing for easier interpretation of the conditions required to be met. A definition of “gross REIT revenue”, for instance, was added in order to better understand the sources of income that must be considered under The 90 Percent Passive Revenue Test and the 75 Percent Property Revenue Test.169

D) Present

The current conditions that must be met in order to qualify for the REIT Exception are as follows:

(i) The 90 Percent Property Test;
(ii) The 90 Percent Passive Revenue Test;
(iii) The 75 Percent Property Revenue Test;
(iv) The Qualifying Property Value Test; and
(v) The Public Trading Test.170

168 ITA, supra note 4 at s 122.1
169 See Appendix B for the definition of “gross REIT revenue” the ITA, supra note 4 at 122.1.
170 ITA, supra note 4 at s 122.1. In addition to unit trust and MFT requirements.
If any requirement fails to be met at any point throughout a given taxation year, the REIT will fail to qualify for the REIT Exception and will be taxed pursuant to SIFT Legislation in a manner identical to publicly traded Canadian corporations.

**Outstanding Issues**

While the legislation enacted in 2007 and subsequently amended in 2013 represents a significant evolution of the law with respect to REITs, there are some outstanding issues that remain. The most problematic issue, identified repeatedly by industry actors, is the lack of curative mechanism in the REIT Exception.\(^{171}\) As previously stated, in order to qualify for favourable tax treatment, a REIT must meet the stated requirements at all times throughout each taxation year. Even the minor acquisition of a non-qualifying property or brief engagement in a non-qualifying commercial activity puts a REIT in contravention of the legislation and thus subject to SIFT taxation. This is an extreme consequence for violations that can be both unintentional and *de minimus* in nature. Although the 2013 amendment allowing for 10 percent non-portfolio property was helpful, industry experts continue to identify this as a problem.

Another issue identified, particularly with respect to parking lots, is the continued lack of definition for “ancillary property” in terms of what assets constitute “qualified REIT property”. The Real Property Association of Canada (REALpac) identifies parking

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lots as being particularly problematic, as there is very little interpretive guidance regarding whether their operation constitutes independent commercial activity.\footnote{REALpac, \textit{Changes to REIT Rules}, supra note 171.}

These issues are illustrative of the fact that the REIT Exception, while certainly a positive advancement in the law, is far from foolproof. REITs must actively take care to ensure continued compliance with the legislative requirements or risk being subject to much higher rates of taxation. That said, the requirements have been sufficiently clear so as to not inhibit the significant growth of REITs since 2006.

**Part IV: The Current Canadian REIT Sector**

After the above amendments to the ITA were enacted, many income trusts and REITs found themselves in a difficult situation. Few initially qualified for the REIT Exception and, consequently, most were required to either convert into corporations\footnote{Though outside of the scope of this research, there are a number of differences between income trusts and corporations, some of which make corporations a more attractive form of organization. The Department of Finance permitted income trusts to convert into corporate structures during this time without any tax consequences. Juneja, \textit{supra} note 42 at 3-2.} or restructure in order to meet the conditions necessary to continue benefitting from advantageous tax treatment. Some REITs were required to dispose of certain assets while others needed to restructure so as to meet the conditions required for the REIT Exception.\footnote{\textit{Ibid} at 3-5. Of the 31 REITs in existence in 2010, only 14 initially qualified for the REIT Exemption.}

The final portion of this dissertation will examine the Canadian REIT sector as it stands in 2015. It will advance the argument that the legislative evolution outlined in the preceding section, particularly the REIT Exception enacted in 2007 and subsequently
amended in 2013, has been a contributing factor to the significant growth of the industry. Two preliminary notes, however, must be made – the first regarding methodology and the second concerning the status of Canadian income trusts generally.

**Methodology**

Certain notes regarding the methodology in this portion of the dissertation must be re-stated prior to engaging in substantive analysis. The analysis in this thesis relies heavily on data from the TSX and TSXV.\(^{175}\) This data is used to track the progress of various issuers, both in terms of number of issuers and overall quoted market value (QMV), or market capitalization.\(^{176}\) The Market Intelligence Group (MiG) has made available online comprehensive data from 2008-2015. All data falling within these dates is sourced from a number of MiG reports.

Data from years prior to 2008, seen in the analysis of REITs from 1995-2015, was obtained from a variety of sources. The number of REIT issuers from 1995-2007 was sourced from CFMRC summary information database\(^{177}\), but only data regarding the TSX was available. As such, Figure 3 is a summary of the TSX alone, not including the TSXV. Given the previously stated lack of literature concerning Canadian REITs, it is unsurprising that pre-2008 data is fairly incomplete, particularly with respect to market capitalization of the industry. All pre-2008 market capitalization figures were located individually within other sources consulted and confirmed where possible. As such,

\(^{175}\) See Footnote 179 for a description of these stock exchanges.

\(^{176}\) The TSX and TSXV primary sources use the term “QMV” but, for the purposes of this dissertation, the more ubiquitous terminology of “market capitalization” will be used.

\(^{177}\) Supra note 35.
specific data is cited where it was available but overall trends are examined where specific data was unavailable.

Furthermore, the following analysis of business and royalty income trusts also reflects data solely from the TSX, not the TSXV. Figures regarding the overall decline of income trusts from 2008 onward were unavailable with respect to the TSXV. The TSX trend of sharp decline, however, is likely reflected on the TSXV.¹⁷⁸

**Income Trusts in Canada**

The SIFT Legislation enacted in 2007 has, in large part, been tremendously effective in accomplishing the Government’s goal of eradicating the income trust structure. Since the announcement of the new provisions in 2006, the income trust market has slowed significantly. In only three years following the announcement, the market capitalization of income trusts decreased from CAD $210 billion to CAD $121.6 billion.¹⁷⁹ Both Bell Canada Enterprises Incorporated and Telus Incorporated withdrew their proposals to convert into income trusts and, with the exception of Extendicare on 10 November 2006, there were no IPO or conversion announcements between 2006 and 2011.¹⁸⁰ As of 31 December 2015, there were 54 income trusts trading on the TSX, with a market capitalization of approximately CAD $61.8 billion.¹⁸¹ Of the income trusts listed, only 13

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¹⁷⁸ The purpose of the TSXV is to allow smaller companies to raise capital by trading on a public market. Many TSXV issuers go through a regulated process wherein they eventually graduate to listing on the TSX. If income trusts have declined in popularity, it is unlikely that new income trusts would seek to list on the TSXV. Therefore, it is possible to conclude that the likelihood that income trusts on the TSXV followed a similar downward trajectory to income trusts on the TSX is high. TSX, “Income Trusts Listed”, *supra* note 32.


¹⁸⁰ *Ibid* at 153.

¹⁸¹ TSX, “Income Trusts Listed”, *supra* note 32.
are business trusts or royalty trusts and the remainder are REITs. Of the total income trust market capitalization on the TSX, non-REITs represent a mere CAD $9.6 billion.\textsuperscript{182} It is clear that while REITs have thrived in the wake of the SIFT Legislation, other income trusts have faltered such that REITs now make up the vast majority of all publicly traded income trusts, both in terms of issuers and market value (see Figure 1).\textsuperscript{183}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{Income Trust Issuers on the TSX in 2015}
\end{figure}

The decrease in the popularity of business and royalty income trusts can be seen even more starkly in an analysis of non-REIT income trust issuers and market capitalization. By removing REITs from the analysis, a dramatic drop becomes clearly evident, as seen in Figure 2. This is particularly true once the legislation became fully effective in 2011 – illustrated by a sharp decline in both the number of non-REIT income trust issuers (from 102 to 25) and market capitalization (from CAD $105.3 billion to CAD $14.7 billion).

\textsuperscript{182} Ibid.

\textsuperscript{183} It is worth noting that this situation in not unique to Canada. Both the United States and Australia dealt with unequal income tax treatment between corporations and FTEs by eliminating the tax advantages afforded to the latter, except where passive real estate investment. As previously stated, these countries have the largest REIT markets in the world. Department of Finance, “Backgrounder” supra note 28 at 3.
Now that the effectiveness of the SIFT Legislation has been considered, this dissertation will turn to the effectiveness of its accompanying REIT Exception.

**REITs in Canada**

Unlike the income trust sector generally, the Canadian REIT industry has grown substantially over the past two decades. From consisting of three REITs in 1995\textsuperscript{185} to 48 REITs presently trading on the TSX and TSXV,\textsuperscript{186} it is undeniable that the sector has progressed into a substantial area of the Canadian economy. In fact, the largest REITs in

\textsuperscript{184} TSX, “Income Trusts Listed”, supra note 32.

\textsuperscript{185} CHASS, supra note 35.

\textsuperscript{186} TSX, “Real Estate Companies Listed”, supra note 13. See Appendix A.
Canada have expanded such that at least nine REITs have an individual market capitalization over CAD $2 billion (See Table 3).
Table 3: REITs in Canada with a Market Capitalization of at least CAD 2 billion

<table>
<thead>
<tr>
<th>Name</th>
<th>Market Capitalization (CAD)</th>
<th>Open-End or Closed-End Unit Trust</th>
<th>Property Portfolio Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>RioCan REIT</td>
<td>7 815 713 865</td>
<td>Closed-End&lt;sup&gt;188&lt;/sup&gt;</td>
<td>Retail – Canada &amp; U.S.&lt;sup&gt;189&lt;/sup&gt;</td>
</tr>
<tr>
<td>H&amp;R REIT</td>
<td>5 849 984 377</td>
<td>Open-End&lt;sup&gt;190&lt;/sup&gt;</td>
<td>Diversified – Canada &amp; U.S.&lt;sup&gt;191&lt;/sup&gt;</td>
</tr>
<tr>
<td>SmartREIT</td>
<td>3 877 259 223</td>
<td>Open-End&lt;sup&gt;192&lt;/sup&gt;</td>
<td>Retail – Canada&lt;sup&gt;193&lt;/sup&gt;</td>
</tr>
<tr>
<td>Canadian Apartment REIT (CAPREIT)</td>
<td>3 442 166 872</td>
<td>Open-End&lt;sup&gt;194&lt;/sup&gt;</td>
<td>Residential – Canada&lt;sup&gt;195&lt;/sup&gt;</td>
</tr>
<tr>
<td>Canadian REIT (CREIT)</td>
<td>3 067 457 755</td>
<td>Closed-End&lt;sup&gt;196&lt;/sup&gt;</td>
<td>Diversified – Canada &amp; U.S.&lt;sup&gt;197&lt;/sup&gt;</td>
</tr>
<tr>
<td>Cominar REIT</td>
<td>2 509 859 711</td>
<td>Closed-End&lt;sup&gt;198&lt;/sup&gt;</td>
<td>Diversified – Canada (largely Quebec)&lt;sup&gt;199&lt;/sup&gt;</td>
</tr>
<tr>
<td>Allied Properties REIT</td>
<td>2 472 712 294</td>
<td>Closed-End&lt;sup&gt;200&lt;/sup&gt;</td>
<td>Office – Canada&lt;sup&gt;201&lt;/sup&gt;</td>
</tr>
<tr>
<td>Boardwalk REIT</td>
<td>2 243 218 062</td>
<td>Open-End&lt;sup&gt;202&lt;/sup&gt;</td>
<td>Residential – Canada&lt;sup&gt;203&lt;/sup&gt;</td>
</tr>
<tr>
<td>Artis REIT</td>
<td>2 175 799 833</td>
<td>Closed-End&lt;sup&gt;204&lt;/sup&gt;</td>
<td>Diversified – Canada &amp; U.S.&lt;sup&gt;205&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

<sup>188</sup> RioCan, “AIF”, supra note 60 at 1.
<sup>189</sup> Ibid at 32.
<sup>190</sup> H&R, “AIF”, supra note 118 at 8.
<sup>191</sup> Ibid at 22-40.
<sup>192</sup> SmartREIT, “AIF”, supra note 116 at 12.
<sup>193</sup> Ibid at 23.
<sup>194</sup> Canadian Apartment Properties Real Estate Investment Trust, “Annual Information Form: For the year ended December 31, 2015” (30 March 2016), online: <http://www.sedar.com> at 5.
<sup>195</sup> Ibid at 15.
<sup>196</sup> CREIT, “AIF”, supra note 120 at 1.
<sup>197</sup> Ibid at 10.
<sup>199</sup> Ibid at 13.
<sup>200</sup> Allied Properties, “AIF”, supra note 121 at 14.
<sup>201</sup> Ibid at 19-25.
<sup>202</sup> Boardwalk Real Estate Investment Trust, “Annual Information Form: For the Year Ended December 31, 2015” (18 February 2016), online: <http://www.sedar.com> at 5.
<sup>203</sup> Ibid at 21.
<sup>205</sup> Ibid at 9.
Progression to this stage did not occur instantaneously and, in fact, is the result of twenty years of growth in the REIT sector. Further, the expansion of the Canadian REIT industry has been affected by a number of factors over that twenty-year period. This has caused REIT growth to ebb and flow throughout the overall expansion industry, illustrated in Figure 3.

**Figure 3: REITs on the TSX & TSXV, 1995 – 2015**

In assessing the growth of REITs over the last two decades, certain trends can be explained by examining legislative and market factors that likely affected REIT development at the given time. The sharp upswing in number of IPOs between 1995 and 1998, for example, is likely a result of both improving economic conditions in the real estate sector and the aforementioned 1995 legislative amendments which allowed REITs to qualify as closed-end unit trusts and obtain mutual fund trust status. These new *ITA* provisions would have acted as significant incentives for new companies to issue IPOs as
REITs and also for existing companies to restructure into REITs so as to benefit from this newly available preferential tax treatment.\textsuperscript{206}

This period of growth is followed by relative stagnation from 1998 to 2000. This is likely due, in large part, to the technology bubble that was occurring during this time. The technology sector was particularly attractive and, as such, investors were more inclined to purchase shares in companies engaged in the development of such products, rather than purchasing REIT units.\textsuperscript{207} Interest in REITs was once again renewed starting in 2001 when the technology bubble burst.\textsuperscript{208}

From 2001 through to 2006, REIT growth reflects the previously explained increasing popularity of income trusts. As with all income trusts, REITs were becoming an attractive form of organizational structure – both for companies and investors alike. Their popularity reached peak level in 2006 which is, not coincidentally, the year in which the Federal Government identified the prevalence of income trusts as being problematic. The expansion of the REIT market during this period is also a result of economic conditions – namely, the real estate bubble.\textsuperscript{209}

There is a noticeable decline that begins in 2007, both in the number of REIT issuers and in their market capitalization. This is likely due to each of the above factors. With the announcement of the 2007 SIFT Legislation, REITs, being a subset of income trusts, were thrust into a state of uncertainty. Industry actors immediately sought amendments to the REIT Exception requirements and, as a result, the necessary

\begin{flushleft}
\textsuperscript{206} Meretsky, \textit{supra} note 3 at 128. \\
\textsuperscript{207} Goodmans, 1st ed, \textit{supra} note 51 at 1-10. \\
\textsuperscript{208} \textit{Ibid} at 1-11. \\
\end{flushleft}
conditions to be met in order to qualify for the Exception were unclear. This caused two reactions: (i) companies entering the market were less inclined to do so using the REIT structure because the requirements to obtain preferential tax treatment were unclear and; (ii) some existing REITs that did not qualify for the REIT exception opted to convert into corporations rather than restructuring so as to qualify.\footnote{Juneja, supra note 42 at 3-5 – 3-6.} Further, the 2007 Financial Crisis had a huge effect on the REIT market – particularly given that REITs represent the intersection between finance and real estate. The Financial Crisis involved a global collapse of both the stock market and the real estate market; some Canadian REITs saw their unit prices fall by over 50 percent.\footnote{Goodmans, 2d ed, supra note 2 at 1-23.}

The Canadian REIT market rebounded quickly and, by 2009, had already improved significantly. Moreover, with greater clarity and understanding of the new REIT Exception and less global panic regarding real estate values, REITs were in a position to capitalize on potential growth prospects and, as is demonstrated in Figure 3 and Figure 4, this is what occurred.

In order to better assess effects of the 2007 legislative amendments on the Canadian REIT industry, this dissertation will use 2008-2015 data for the remainder of the analysis. There are two reasons for this. First, this is the time period in which the effects of the legislation would become evident, therefore data from prior years is unnecessary. Second, this is the time period for which data was available from the TSX and TSXV. This was the most reliable and consistent source consulted throughout the
duration of this research and therefore provides the best data upon which to build an argument. The growth of the REIT sector during this period can be seen in Figure 4.

Figure 4: REITs on the TSX & TSXV, 2008 – 2015

As is clear from Figure 4, the REIT market in Canada has grown substantially since the REIT Exception was implemented, both in terms of number of issuers and market capitalization. Although market conditions are partially responsible – the low interest rate, for instance, creates an investment environment that is favourable to REITs\(^{212}\) – amendments to the \textit{ITA} have also worked to create an environment in which REITs may expand.

Particularly in the wake of the proposed amendments to the REIT Exception that were announced in 2010, a dramatic increase in the market capitalization of REITs can

\(^{212}\) Meretsky, \textit{supra} note 3 at 106.
be seen. The amended conditions provided relaxed requirements such that it became easier to qualify as a REIT under the *ITA*. Moreover, the additional clarity provided by new definitions also made it easier to manage the required consistent compliance with the conditions throughout the taxation year.

Another indication that legislation has helped to increase the popularity of the REIT structure is the high number of mergers, acquisitions, and restructuring of existing REITs. It appears that, once a REIT qualifies for the Exception, a major source of growth is to take advantage of this preferential tax treatment by acquiring other entities that have also already obtained qualifying REIT status. For example, the only drop seen in the number of REIT issuers occurs between 2014 and 2015. This decline, however, is not what it initially appears to be on its face. In fact, the decreased from 51 issuers to 48 issuers can be explained as follows:

(i) Boulevard Industrial REIT, listed on the TSXV in 2014, was acquired by a pre-existing TSX REIT, PRO REIT, in September 2015;

(ii) NorthWest International Healthcare Properties REIT, listed on the TSXV in 2014, was acquired by a pre-existing TSX REIT, NorthWest Healthcare Properties REIT, in May 2015;

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213 PRO Real Estate Investment Trust, “2015 Annual Information Form” (20 April 2016), online: <http://www.sedar.com> at 11-12.

(iii) Chartwell Retirement Residences REIT, listed on the TSX in 2014, now trades as Chartwell Retirement Residences and is no longer classified as a “REIT” for TSX purposes.215

During this time period, a number of other REITs underwent structural changes from acquiring pre-existing REITs to adopting new names. Northern Property REIT, for example, acquired True North Apartment REIT and subsequently changed its name to Northview Apartment REIT.216 Between 2010 and 2015, a number of other high profile acquisitions were completed, including the CAD 900 million acquisition of Canmarc REIT by Cominar REIT,217 the CAD 600 million acquisition of Whiterock REIT by Dundee REIT,218 later renamed Dream Office REIT,219 and the CAD 1.16 billion acquisition of SmartCentres by Calloway REIT,220 subsequently renamed SmartREIT.221

Further evidence of the popularity of the REIT structure is that a number of large companies have opted to form multiple REITs; instead of having one diversified REIT, there is a trend towards operating more than one publicly traded REIT each with a specialized portfolio. In doing so, each REIT can benefit from sector-specific management expertise while also continuing to enjoy advantageous tax treatment.

215 Chartwell Retirement Residences, “Annual Information Form: For the Year Ended December 31, 2015” (25 February 2016), online: <http://www.sedar.com> at 53. This is likely because, while still operating as a REIT, Chartwell does not qualify for the REIT Exception. Presumably because the operation of seniors’ housing is critical to their business model, they continue to operate as a business REIT and are, consequently, subject to SIFT taxation.


219 Ibid at 16.


221 SmartREIT, “AIF”, supra note 117 at 17.
Examples of REITs that have adopted such structures include Dream, Morguard, and Slate.

The final method of business operation that is illustrative of increasing REIT popularity in the post-2007 legislative environment is the prevalence of “spin-off” REITs. These REITs are established by publicly traded corporations in order to crystallize the value of extensive real estate portfolios. Two noteworthy examples of this occurred in 2013 with the establishment of CT REIT by Canadian Tire Corporation and Choice Properties REIT by Loblaw Companies Limited. In fact, Choice Properties completed the largest REIT IPO in Canadian history, raising approximately CAD 400 million. These types of REITs represent a new phase for the REIT sector in Canada, one in which real estate portfolios are recognized as having independent value upon which capital can be raised. It is unlikely that corporations would have the incentive to take these steps in bringing new REITs into the Canadian markets without the REIT Exception and the tax benefits it provides.

REITs in Comparison

An analysis of the growth of REITs and their activities is insufficient in and of itself to suggest either that the growth has been noteworthy or that it has, in part, been the result of legislative changes. It is easy to argue that market conditions are responsible for the above evidence of the increasing popularity of REITs. In order to more thoroughly

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222 Dream Global REIT, Dream Industrial REIT, Dream Office REIT.
223 Morguard North American Residential REIT, Morguard REIT.
224 Slate Office REIT, Slate Retail REIT.
225 Goodmans, 2d ed, supra note 2 at 1-23.
226 Ibid.
advance the argument that legislative amendments are partly responsible for this expansion, the growth of REITs can be compared to non-REIT income trusts, the TSX and TSXV generally and the market’s Real Estate Sector. An full analysis of this industry expansion must compare it against a variety of factors.

i. **REITs and Non-REIT Income Trusts**

The previously discussed changes to the non-REIT income trust sector are illustrative of the effects that the 2007 SIFT Legislation have had in Canadian markets. Given the sharp decline in the use of the structure that has occurred in the wake of the amendments, preferential tax treatment was obviously a significant factor incentivizing companies to structure as income trusts. It logically follows that companies have a continued inclination to structure as real estate holding entities, as they may continue to benefit from preferential tax treatment through the clear and, since 2013, relatively broad REIT Exception.

ii. **REITs and the TSX/TSXV**

Outside of the realm of income trusts, the first question that must be asked is whether the growth of REITs is simply reflective of general market growth in Canada. In order to answer this question, the growth of REITs must be charted against the progression of the TSX/TSXV generally.

In Figure 5 it can clearly be seen that while the number of issuers on the TSX and TSXV has, in general, decreased over the past seven years, the number of REIT issuers

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227 The “Real Estate Sector” is an enumerated industry sector categorization used by the TSX and TSXV. It contains both publicly traded real estate corporations and REITs. Other enumerated sectors include the Clean Technology and Renewable Energy Sector, the Financial Services Sector, and the Oil and Gas Sector.
has steadily increased. Moreover, Figure 6 unmistakeably depicts a sharper increase in the market capitalization of REITs versus the stock exchange as a whole. While the TSX/TSXV market capitalization has increased 79 percent since 2008, REIT market capitalization has increased 246 percent. This suggests that REIT growth has been particularly noteworthy beyond generally favourable market conditions.

Figure 5: Comparison of REIT Issuers and Total TSX & TSXV Issuers, 2008 – 2015
iii. REITs and the Real Estate Sector

If the growth of REITs has, as the above figures suggest, outpaced growth of the TSX and TSXV as a whole, the next question that must be asked is regarding how the REIT market has performed in relation to the Real Estate Sector. As previously stated, the real estate market typically operates differently than that of the traditional equities markets. Due to the nature of real property assets, the real estate market will often have different periods of growth, stagnation, and decline than the market as a whole. Thus, in order to make the assertion that REIT growth has been unique, it must be analysed in comparison to the Real Estate Sector of the TSX and TSXV, which also includes publicly traded real estate corporations.
Figure 7 compares the growth of the REIT industry to the overall development of the Real Estate Sector on the TSX and TSXV. Both the number of issuers and the market capitalization exhibit similar trends, suggesting that perhaps the growth of REITs has simply been a product of general expansion of the Real Estate Sector.

**Figure 7: The Real Estate Sector, 2008 – 2015**

This analysis, however, is incomplete. In order to properly compare REITs and the Real Estate Sector, REITs must be analysed in comparison to non-REIT issuers in the Sector. Once this is done, as is shown in Figure 8, a very different conclusion can be drawn.
The trends shown in Figure 8 suggest that, rather than simply following the growth of the Real Estate Sector, REITs have been a driving force behind the overall expansion. The gradual convergence in the number of REIT and non-REIT issuers suggests that REITs are comprising an ever-increasing portion of the sector. This becomes even more evident if the proportion of REITs as a percentage of the Real Estate Sector is charted, as is shown in Figure 9.
In Figure 9 it is clearly demonstrated that, since 2008, REITs have been making up an increasingly large proportion of the public Real Estate Sector. Although the market capitalization ratio has remained relatively constant, with REITs comprising of approximately 60 percent of the of the total real estate market capitalization, the proportion of REIT issuers has increased significantly from 30 percent to almost half of all issuers. The number of issuers is more demonstrative of the popularity of the REIT structure, as it has become increasingly attractive to larger companies with mature real estate portfolios in addition to smaller companies, many of whom enter the market through the TSXV.\textsuperscript{228}

\textsuperscript{228} There are currently 7 REITs on the TSXV. See Appendix A.
Something is driving the expansion of the REIT market that is not reflected in either the TSX and TSXV as a whole or the Real Estate Sector generally. The conclusion that can be drawn is that changes to the regulatory and legislative environments have helped REITs to become more attractive public investment vehicles. The REIT Exception has permitted these structures to continue to benefit from truly exceptional tax treatment and, as a consequence, REITs have grown into a multi-billion-dollar industry with almost 50 issuers on the public markets.

**Part V: Conclusion**

Throughout the past two decades there have been significant changes in Canadian capital markets, real estate markets, and legislative landscapes. The REIT sector represents the intersection of these three elements and, consequently, has undergone a noteworthy evolution over this time period. This evolution has been scarcely assessed in legal academia, which is problematic given the impact that REITs have on the Canadian economy and the substantial legislative reform that has occurred regarding their regulation in the public markets. Although the rise and decline of income trusts generally has been well-documented and a number of industry players have published practical REIT guides, this dissertation has sought to fill a gap in legal academic literature. It has sought to reconceptualise the REIT from being a mere footnote in the realm of income trust research into a tax-efficient structure deserving of analysis in its own right.

Without academic analysis, there cannot be academic understanding. It is only through understanding the history of REITs in Canada and how they function both in
today’s legal landscape and in financial markets that one can hope to drive further growth in the industry. REITs provide an exciting investment opportunity for both institutional and individual investors. As the sectors grows and increases its legitimacy to the average investor, it is important that academic insight into the structures be made available, so as to provide more comprehensive information as to how and, more importantly, why REITs are a strong addition to any investment portfolio.

REITs are a unique structure, both in the way in which they function as a commercial entity and the way in which they are taxed. Understanding how the industry got to this point may also provide future guidance with respect to further developing these structures, in the real estate context and beyond.

Summary

In progressing towards an analysis of the REIT market as it stands in 2015, an initial description of the REIT as an investment vehicle was provided. Public knowledge of REITs is limited, despite the sheer amount of commercial real estate managed by these entities. As such, it is important to make clear that, with respect to this dissertation in particular, REITs are publicly traded investment vehicles that hold passive interests in a portfolio of commercial real property, leases to which are subsequently contracted out to third party operating companies. REITs are also tax-efficient entities that benefit from having legal status as unit trust and mutual fund trusts under the federal ITA; tax liability “flows through” the REIT in that any income paid out as distributions to the REIT’s unitholders is deductible and therefore not taxed at the entity-level. The tax treatment is
hugely beneficial to the entity and to unitholders (particularly Canadian non-taxable and non-resident investors).

Proper analysis of the current REIT sector also required an exploration into the history of REIT legislation. It is difficult to understand why REITs have grown in such a consistent manner without knowledge of the relevant surrounding legislative environment. This history began in 1995 when the *ITA* was amended allowing REITs to qualify as closed-end unit trusts and gain mutual fund status. This was particularly advantageous to REITs because it allowed them access to preferential tax treatment without being required to provide unitholders with a redemption right, which had proved problematic due to the highly illiquid nature of the underlying real property assets.

REITs and other income trusts continued to expand for the next decade until, in 2006, the Department of Finance announced their intention to curb the popularity of income trust structures in order to rectify the significant tax avoidance that was occurring. SIFT Legislation consequently came into effect in 2007, in addition to its accompanying REIT Exception; this Exception allowed qualifying REITs to continue receiving preferential tax treatment. Despite initial uncertainty and the 2007 collapse of the financial and real estate markets, the REIT Exception allowed the sector to continue along its trajectory of growth. This was further enhanced by amendments to the REIT Exception that enhanced clarity and lowered certain onerous requirements. These amendments were announced in 2010 and came into effect in 2013, bringing the legislation to where it stands today.

Finally, this thesis arrived at an analysis of the REIT industry in 2015 and the effects that the 2007 amendments to the *ITA* have had on the sector. The increased clarity
and reduction of qualifying conditions have created a legislative environment in which REITs are both permitted and encouraged to grow. Focusing particularly on the period of 2008-2015, the REIT industry has experienced significant growth both in terms of the number of issuers on the public markets and overall market capitalization. In addition to the actual figures taken from the TSX and TSXV, a number of industry trends are suggestive of growth, including substantial mergers and acquisitions between REITs, the separation into specialized REITs, and the advent of large “spin-off” REITs.

While the growth of REITs is suggestive of a positive impact created by the new legislation, it is insufficient to assess REITs in isolation. There are also a number of factors at play in the financial market, including overall conditions of growth or decline, that can be cited as reasons for REIT growth. While these financial and economic factors are certainly relevant and likely have played some role in the expansion of the REIT sector, their effects can be downplayed by analysing REITs against other areas in the public markets.

First, one must look to the rapid decline of income trusts in the wake of the 2007 SIFT Legislation. This suggests that preferential tax treatment was, as the government had suspected, the primary driving force behind the popularity of the income trust structure. Given this fact, it can be logically concluded that tax advantages afforded by the REIT Exception will also serve to keep the REIT income trust structure popular.

Second, a comparison of the REIT sector and the TSX and TSXV demonstrates that the growth of REITs has not been simply a result of overall favourable market conditions. The number of REIT issuers has increased while the number of total issuers
on the market has decreased. Furthermore, the rate of market capitalization growth in the REIT sector far exceeds that of the market generally.

Finally, the REITs must be compared to the Real Estate Sector issuers on the TSX and TSXV. The real estate market often operates under very different trends from the traditional equities markets. As such, it could be simply that REITs have grown because conditions have been favourable for the real estate market generally. This comparison, however, illustrates that REIT growth has been unique. REITs comprise of an ever-increasing proportion of the Real Estate Sector and have, in large part, been responsible for the sector’s growth.

While there are undoubtedly a number of factors that have contributed to the growth of REITs, including economic conditions, low interest rates, and structural advantages such as the ability of REITs to return capital as part of high-yield distributions, a framework of legislation is a necessary backdrop. REITs are unable to take advantage of such factors without legislative incentive for which to structure as an income trust. REITs are becoming an increasingly popular investment vehicle because they allow average, individual investors to invest in high grade real estate in essentially the same way as acquiring a direct interest in such real property assets.

The Future of the Canadian REIT Industry

The future of the REIT industry in Canada will be interesting to follow. Although the SIFT Legislation has been in force for almost a decade, the most recent amendments to the accompanying REIT Exception have only been in effect since 2013. It is likely that the trend of growth will continue as more actors realize the tax advantages of adopting
this structure. Already in 2016 one new REIT has entered the market, with Killam Properties Incorporated completing a conversion into Killam Apartments Real Estate Investment Trust in January.\textsuperscript{229} Further, over a four-month period alone (31 December 2015 – 30 April 2016), REIT market capitalization has ballooned from CAD 53 billion to CAD 59 billion.\textsuperscript{230} It is expected that Canadian REITs will continue to grow following a similar trajectory to that of their U.S. counterparts, given the similarities between the markets.\textsuperscript{231}

There is also an opportunity for greater research into the Canadian REIT sector, particularly from a legal perspective. While this dissertation has undertaken to provide a comprehensive overview of REITs and their governing legislation, there is ample space to engage in research concerning the more detailed aspects of REIT law. The intricate details of relevant tax law, for instance, would be an appropriate area of legal research. For now, however, this introduction into REITs and the current state of the REIT market in Canada should serve to illustrate that REITs add significant value to the capital markets and do so because they are such unique public investment vehicles. It is for these reasons that they are worthy of academic attention and, hopefully, this thesis has demonstrated that changes to Canadian legislation have contributed to their expansion into a formidable sector of the economy.

\textsuperscript{231} Deloitte, \textit{supra} note 41 at 57.
Appendices

Appendix A: REITs Trading on the TSX & TSXV, 31 December 2015

<table>
<thead>
<tr>
<th>TSX ISSUERS</th>
<th>Root Ticker</th>
<th>Market Capitalization (CAD)</th>
<th>Date of TSX Listing DD/MM/YY</th>
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<td>Lanesborough Real Estate Investment Trust</td>
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<td>Northwest Healthcare Properties Real Estate Investment Trust</td>
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<td>TransGlobe Apartment Real Estate Investment Trust</td>
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<td>True North Commercial Real Estate Investment Trust</td>
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## TSXV ISSUERS

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### TSX & TSXV TOTAL

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<td>TSXV</td>
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<td>Total</td>
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Appendix B: *Income Tax Act, Current to 23 November 2015*

*Income Tax Act, RSC 1985, c 1 (5th Supp), s 122.1.*

122.1 (1) The following definitions apply in this section and in sections 104 and 122.

**gross REIT revenue**, of an entity for a taxation year, means the amount, if any, by which the total of all amounts received or receivable in the year (depending on the method regularly followed by the entity in computing the entity’s income) by the entity exceeds the total of all amounts each of which is the cost to the entity of a property disposed of in the year.

**non-portfolio property**, of a particular entity for a taxation year, means a property, held by the particular entity at any time in the taxation year, that is

- **(a)** a security of a subject entity (other than a portfolio investment entity), if at that time the particular entity holds
  - **(i)** securities of the subject entity that have a total fair market value that is greater than 10% of the equity value of the subject entity, or
  - **(ii)** securities of the subject entity that, together with all the securities that the particular entity holds of entities affiliated with the subject entity, have a total fair market value that is greater than 50% of the equity value of the particular entity;
- **(b)** a Canadian real, immovable or resource property, if at any time in the taxation year the total fair market value of all properties held by the particular
entity that are Canadian real, immovable or resource properties is greater than 50% of the equity value of the particular entity; or

- (c) a property that the particular entity, or a person or partnership with whom the particular entity does not deal at arm’s length, uses at that time in the course of carrying on a business in Canada.

qualified REIT property, of a trust at any time, means a property that, at that time, is held by the trust and is

- (a) a real or immovable property that is capital property, an eligible resale property, an indebtedness of a Canadian corporation represented by a bankers’ acceptance, a property described by paragraph (a) or (b) of the definition qualified investment in section 204 or a deposit with a credit union;

- (b) a security of a subject entity all or substantially all of the gross REIT revenue of which, for its taxation year that ends in the trust’s taxation year that includes that time, is from maintaining, improving, leasing or managing real or immovable properties that are capital properties of the trust or of an entity of which the trust holds a share or an interest, including real or immovable properties that the trust, or an entity of which the trust holds a share or an interest, holds together with one or more other persons or partnerships;

- (c) a security of a subject entity, if the entity holds no property other than
(i) legal title to real or immovable property of the trust or of another subject entity all of the securities of which are held by the trust (including real or immovable property that the trust or the other subject entity holds together with one or more other persons or partnerships), and

(ii) property described in paragraph (d); or

(d) ancillary to the earning by the trust of amounts described in subparagraphs (b)(i) and (iii) of the definition real estate investment trust, other than

(i) an equity of an entity, or

(ii) a mortgage, hypothecary claim, mezzanine loan or similar obligation.

real estate investment trust, for a taxation year, means a trust that is resident in Canada throughout the taxation year, if

(a) at each time in the taxation year the total fair market value at that time of all non-portfolio properties that are qualified REIT properties held by the trust is at least 90% of the total fair market value at that time of all non-portfolio properties held by the trust;

(b) not less than 90% of the trust’s gross REIT revenue for the taxation year is from one or more of the following:

(i) rent from real or immovable properties,

(ii) interest,
(iii) dispositions of real or immovable properties that are capital properties,

(iv) dividends,

(v) royalties, and

(vi) dispositions of eligible resale properties;

(c) not less than 75% of the trust’s gross REIT revenue for the taxation year is from one or more of the following:

(i) rent from real or immovable properties,

(ii) interest from mortgages, or hypothecs, on real or immovable properties, and

(iii) dispositions of real or immovable properties that are capital properties;

(d) at each time in the taxation year an amount, that is equal to 75% or more of the equity value of the trust at that time, is the amount that is the total fair market value of all properties held by the trust each of which is a real or immovable property that is capital property, an eligible resale property, an indebtedness of a Canadian corporation represented by a bankers’ acceptance, a property described by paragraph (a) or (b) of the definition qualified investment in section 204 or a deposit with a credit union; and

(e) investments in the trust are, at any time in the taxation year, listed or traded on a stock exchange or other public market. (fiducie de placement immobilier)
SIFT trust, being a specified investment flow-through trust, for a taxation year means a trust (other than an excluded subsidiary entity, or a real estate investment trust, for the taxation year) that meets the following conditions at any time during the taxation year:

(a) the trust is resident in Canada;

(b) investments in the trust are listed or traded on a stock exchange or other public market; and

(c) the trust holds one or more non-portfolio properties.
Appendix C: Income Tax Act, 22 June 2007


122.1 (1) The following definitions apply in this section and in sections 104 and 122.

real estate investment trust, for a taxation year, means a trust that is resident in Canada throughout the taxation year, if

(a) the trust at no time in the taxation year holds any non-portfolio property other than qualified REIT properties;

(b) not less than 95% of the trust’s revenues for the taxation year are derived from one or more of the following:

(i) rent from real or immovable properties,

(ii) interest,

(iii) capital gains from dispositions of real or immovable properties,

(iv) dividends, and

(v) royalties;

(c) not less than 75% of the trust’s revenues for the taxation year are derived from one or more of the following:

(i) rent from real or immovable properties, to the extent that it is derived from real or immovable properties situated in Canada,

(ii) interest from mortgages, or hypothecs, on real or immovable properties situated in Canada, and

(iii) capital gains from dispositions of real or immovable properties situated in Canada; and

(d) at no time in the taxation year is the total fair market value of all properties held by the trust, each of which is a real or immovable property situated in Canada, cash, or a property described in clause 212(1)(b)(ii)(C), less than 75% of the equity value of the trust at that time. (fiducie de placement immobilier)
Curriculum Vitae

Name: Samita Pachai

Post-secondary Education and Degrees:
Queen’s University
Kingston, Ontario, Canada
2008 – 2012 B.A.H.

Western University
London, Ontario, Canada
2012 – 2015 J.D.

Western University
London, Ontario, Canada
2015 – 2016 LL.M.

Honours and Awards:
Queen’s University Entrance Scholarship
2008 – 2009

Dean’s Honour List
2010 – 2012