GAAR AND THE WESTMINSTER PRINCIPLE

Professor Vern Krishna, CM, KC, FRSC,
University of Ottawa Law School, and KPK Law LLP (Markham, Ontario)

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There are two forms of tax avoidance:

(1) Lawful tax mitigation;[1] and
(2) "Abusive" tax avoidance.

Tax mitigation refers to lawful avoidance that complies with the tax statute, related materials, and tax treaties. The *Westminster* principle is the seminal common law authority for tax mitigation.[2] *Stubart Investments Ltd. v. Canada*, [1985] S.C.J. No. 25, [1984] 1 S.C.R. 536, applied the principle and rejected the business purpose test as a prerequisite for tax sustainability, which started the shift towards the general anti-avoidance rule (GAAR) to control "abusive" tax avoidance.

Abusive tax avoidance is that which undermines the integrity of the tax system by frustrating the object, spirit and purpose of statutory provisions through technical compliance.[3] The underlying focus of the GAAR is on transactions (or series of transactions) that technically comply with the *Income Tax Act* ("Act"), Regulations, or tax treaties but abuse the integrity of the structure. Thus, abuse requires balancing taxpayer rights under the *Westminster* principle to plan their affairs in commercially efficient forms in compliance with the statute, whilst maintaining the integrity of the tax system.

Finance distinguished between these two forms of avoidance when it initially enacted the GAAR in 1988 by balancing abusive avoidance against legitimate tax planning. The Technical Notes of June 30, 1988 (the "Technical Notes") explained the rule:

> "... [S]ection 245 of the Act is a general anti-avoidance rule which is intended to prevent abusive tax avoidance transactions or arrangements but at the same time is not intended to interfere with legitimate commercial and family transactions. Consequently, the new rule seeks to distinguish between legitimate tax planning and abusive tax avoidance and to establish a reasonable balance between the protection of the tax base and the need for certainty for taxpayers in planning their affairs."

The GAAR is essentially a supplementary rule of last resort when specific anti-avoidance rules (SAARs) do not apply. It is not intended to catch transactions that are within the object, spirit, and policy of the tax statute. As the Supreme Court said in *Stubart*:

> "Transactions that comply with the object and spirit of other provisions of the Act read as a whole will not be affected by the application of this general anti-avoidance rule.

The "object, spirit, and purpose" of provisions are the acid tests for distinguishing whether transactions abuse the Act in the context of the underlying policy of the statute. The object, spirit and purpose of provisions are the legislative rationale that underly specific or interrelated provisions of the Act. Thus, GAAR analysis requires evidentiary formulation of the legislative rationale of statutory and treaty provisions that are the subject of assessments.

It is implicit in GAAR analysis that the impugned transactions comply with the technical provisions of the Act. Otherwise, the Minister would assess based upon technical non-compliance with the statutory provision. Hence, GAAR analysis means stepping back from the technical wording of a provision to ask: what is the purpose of the rule? In this sense, the GAAR curtails the *Westminster* principle and goes beyond mere technical compliance with the words of legislative provisions.

There are three essential components to the GAAR:

> (1) a *tax benefit* resulting from a transaction or series of transactions;
> (2) that is an *avoidance transaction*; and
> (3) that is *abusive* and inconsistent with the object, spirit, or purpose of the provisions that the taxpayer relies upon.

Courts balance these requirements against the *Westminster* principle that taxpayers are entitled to order their affairs to minimize taxes payable within the structure of the Act. See, for example, *Canada Trustco Mortgage Co. v. Canada*[4] (at paras. 13 and 61):

> The *Income Tax Act* remains an instrument dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation. Onto this compendium of detailed stipulations, Parliament has engrafted quite a different sort of provision, the GAAR. This is a broadly drafted provision, intended to negate arrangements that would be permissible under a literal interpretation of other provisions of the *Income Tax Act*, on the basis that they amount to abusive tax avoidance…. Absent a specific provision to the contrary, it is not the courts' role to prevent taxpayers from relying on the sophisticated structure of their transactions, arranged in such a way that the particular provisions of the Act are met, on the basis that it would be inequitable to those taxpayers who have not chosen to structure their transactions that way. Ultimately… the courts' role is to interpret and apply the Act as it was adopted by Parliament" (para. 45). The court must to the extent possible contemporaneously give effect to both the GAAR and the other provisions of the *Income Tax Act* relevant to a particular transaction …

Hence, GAAR curtails the wings of the *Westminster* principle to the extent that mere technical compliance with statutory provisions is not always sufficient to immunize tax arrangements.

The CRA's success ratio in applying the rule is mixed.[5] Frustrated by its limited success, Finance expanded the scope of the GAAR in 2024 through more stringent requirements and penalties.

The Preamble to GAAR

Section 245 is intended to prevent abusive tax avoidance transactions or arrangements whilst not interfering with legitimate commercial and family transactions.[6] However, given the diversity of commercial and family transactions, the legal task of differentiating between transactions (or series of transactions) that are abusive and legitimate is not always easy and often involves extensive litigation costs.

Frustrated by some judicial decisions that failed to "block sophisticated strategies designed to yield tax advantages that were not intended" by the Act, Finance added a Preamble outlining the purpose and scope of the rule.[7]

> Subsection 245(0.1) provides that the general anti-avoidance rule:
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> (a) applies to deny the tax benefit of avoidance transactions that result directly or indirectly either in a misuse of provisions of the Act (or any of the enactments listed in subparagraphs (4)(a)(ii) to (v)) or an abuse having regard to those provisions read as a whole, while not preventing taxpayers from obtaining tax benefits contemplated by Parliament); and
> (b) strikes a balance between
>
> > (i) the government of Canada's responsibility to protect the tax base and the fairness of the tax system; and
> > (ii) taxpayers' need for certainty in planning their affairs.

Paragraph 245(0.1) (a) of the Preamble restates that the rule applies to transactions that misuse or abuse the Act while not preventing taxpayers obtaining tax benefits intended by Parliament or, as Finance puts it, do not interfere with "legitimate commercial and family transactions."[8]

The paragraph restates the *Westminster principle*. A taxpayer is entitled to derive benefits not precluded by Parliament and that do not misuse or abuse the Act to obtain *unintended* tax benefits.[9] It reinforces the interpretation in *Canada Trustco* that "absent a specific provision to the contrary, it is not the courts' role to prevent taxpayers from relying on the sophisticated structure of their transactions, arranged in such a way that the particular provisions of the Act are met."

However, given the diversity of commercial and family transactions, the legal task of differentiating between those that are abusive and legitimate is not always easy. As Finance notes, Parliament cannot be expected to anticipate every possible iteration of transactions or interaction among provisions of the Act that could give rise to a particular tax benefit.

Finance gives an example. In a transaction that engages rules generally intended to ensure corporate integration of income (e.g., the low/general rate income pool, eligible/non-eligible refundable dividend tax on hand or capital dividend account rules), it may be reasonable to conclude that Parliament contemplated the rules being used in a way that achieves integration and would not have contemplated the rules being used in a way that breaks integration. That may be the case, even if Parliament did not envision the specific series of transactions that use the rules to achieve a particular tax benefit. The example is not particularly helpful. The difficulty is in extracting Parliamentary intention of each provision and applying it to the specifics of each transaction.

The Preamble is aspirational and has three conjunctive components. It applies to abusive avoidance transactions; strikes a balance between the government's protection of its tax base; and taxpayers' need for certainty in planning their affairs.

Paragraph (b)(i) is novel in fiscal legislation. It calls for "fairness" in protecting the government's tax base. "Fairness" should be mainstay of all tax policy, but it is not a yardstick in statutory interpretation. The paragraph evaluates fairness in the context of the government's tax base. Finance refers to "fairness" as unfair distributional effects of tax avoidance that shifts the tax burden from those willing and able to avoid taxes to those who are not."[10] The Explanatory Notes state:

> This fairness objective is to be balanced with the taxpayer 's need for certainty in planning their affairs … This is to say, consideration of the GAAR involves an objective, thorough and step-by-step analysis. Within this analysis, principles of certainty, predictability and fairness do not play an independent role; rather, they are reflected in the carefully calibrated GAAR test that Parliament enacted in 1988.

Most tax plans have a negative effect on the tax base insofar as they reduce the taxpayer's burden and, therefore, reduce the government's tax base. Indeed, that is usually the rationale of most tax arrangements. Hence, "fairness" requires analysis of the micro and macro-economic impact of transactions on government revenues. Since money only has value in the context of time, fairness must consider the time value of money. Since all tax deferral implies benefits and costs that depend on interest rates, risk, and time, time value analysis will inject considerable uncertainty in tax planning and dispute resolution.

Paragraph (b)(ii) stipulates the need for certainty in tax planning, which depends upon interpretation of "fairness" of the system. The Technical Notes of August 4, 2023 state that the aim of the preamble is to highlight the purpose and scope of the GAAR to ensure that it is applied as intended, even though it is not actually a part of the GAAR analytical framework.[11] Nevertheless, subsection 245(0.1) is an integral part of the statutory structure and, as such, must be given appropriate weight in interpretation.

The fairness requirements impose a substantial evidentiary burden. Following the usual evidentiary rule, the burden of proof should be on the party asserting unfairness and not on the usual rule that the Minister's assumptions of fact are deemed to be correct unless overturned by the taxpayer.

GAAR Analysis

GAAR analysis of the involves three steps.

Step 1: Tax Benefit

The essence of the GAAR *is that it* denies tax benefits from "abusive" avoidance transactions.[12] Hence, the first step is to determine whether the taxpayer *derives a* "tax benefit" *from the transaction or series of transactions*.

Subsection 245(1) defines "tax benefit" as:

(a) a reduction, avoidance or deferral of tax or other amount payable under the Act or an increase in a refund of tax or other amount under the Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under the Act but for a tax treaty,

(b) an increase in a refund of tax or other amount under the Act, and includes an increase in a refund of tax or other amount under the Act as a result of a tax treaty, or

(c) *a reduction, increase or preservation of an amount that could at a subsequent time*

(i) *be relevant for the purpose of computing an amount referred to in paragraph (a) or (b), and*

(ii) *result in any of the effects described in paragraph (a) or (b);*

The magnitude of the tax benefit is not relevant. However, the rule applies only when the taxpayer uses the tax attributes that give rise to the benefits [*1245989 Alberta Ltd. v. Canada*, [2018] F.C.J. No. 600, 2018 FCA 114 at paras. 30-39 and *Gladwin Realty Corp. v. Canada*, [2020] F.C.J. No. 914, 2020 FCA 142 at para. 47].

Since virtually all exchanges of goods, services, and intellectual property — domestic or international — involve tax consequences, an informed taxpayer will usually seek the least costly tax route that meshes with his or her overall business or personal objectives. Given the expansive definition of "tax benefit", every deduction or credit in the Act potentially confers a benefit because it reduces taxable income or tax payable. For example, charitable donations, RRSP contributions, gifts to the Crown and universities, all confer "tax benefits" since they reduce tax payable. However, they are not necessarily "abusive" because Parliament contemplated the benefits, and they are within the object, spirit, and purpose of the relevant legislation [para. 245(0.1)(a)].

Although in most situations, the existence of a tax benefit will be obvious, there can be circumstances where it is necessary to compare the transactions that took place to an alternative series of transactions that would have been carried out but for the desire to obtain the tax benefit. Thus, comparator analysis is part of tax benefit analysis.[13]

Burden of Proof

Whether a transaction involves a tax benefit is a question of fact. A "transaction" includes an arrangement or an event [subsection 245(1)]. Where there is a series of transactions, the burden is on the taxpayer to refute the Minister's assumptions regarding the purpose of the series and of each transaction that is part of the series. A finding that one of the main purposes of only one transaction in the series was tax avoidance is sufficient to characterize the entire undertaking as an avoidance

transaction [see *Canada Trustco* at para. 63, *Copthorne Holdings Ltd.* at para. 64 and subsection 245(3)].

The burden is on the taxpayer to refute the Minister's assumptions of fact concerning the existence of a tax benefit.[14]

An appeal to overturn a finding of fact must show a palpable and overriding error.[15] The standard of review for findings of fact is that they are not to be reversed unless the trial judge made a "palpable and overriding error". Appellate courts defer to the trial judge's findings of fact. The standard of review on a question of law is correctness.

Given the broad scope of its definition, it is virtually impossible to overturn an assumption of a "tax benefit".[16] Lord Upjohn stated it succinctly in *CIR v Brebner*, [1967] 2 AC 18:

> No commercial man in his senses is going to carry out commercial transactions except upon the footing of paying the smallest amount of tax involved.

Step 2: Tax Avoidance

The GAAR applies only to "tax avoidance" transactions [subsection 245(2)]. Prior to 2024, subsection 245(3) defined "avoidance transaction" as one that conferred a tax benefit unless it could reasonably be considered to have been undertaken *primarily* for bona fide purposes other than to obtain the tax benefit.

The 'primary' purpose test implied that a transaction could have intertwined tax and non-tax purposes [*Spruce Credit Union* v. *Canada*, [2012] T.C.J. No. 285, 2012 TCC 357, aff'd [2014] F.C.J. No. 824, 2014 FCA 143]. The Supreme Court in *Canada Trustco* stated that "where there is an avoidance transaction a Tax Court judge must consider and weigh all the evidence to determine whether it is reasonable to conclude that the transaction was not undertaken or arranged primarily for a non-tax purpose."

Finance and the CRA did not like this evidentiary test. Hence, Finance amended subsection 245(3) in 2024 to lower the threshold for tax avoidance from the "primary" test to "one of the main purposes" tests.

One of the Main Purposes

Subsection 245(3) states:

> Unless it may reasonably be considered that obtaining the tax benefit is not one of the main purposes for undertaking or arranging a transaction, the transaction is an avoidance transaction if the transaction
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> (a) but for this section, would result, directly or indirectly, in a tax benefit ; or
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> (b) is part of a series of transactions , which series, but for this section, would result, directly or indirectly, in a tax benefit.

The original intention underlying GAAR in 1988 was that the rule would not apply to transactions merely because they did not have a business purpose. Hence, the rule was crafted to protect most of the business, family or investment transactions as having *bona fide* non-tax purposes.[17] The Supreme Court recognized this principle in *Canada Trustco*, at para. 21:

> The majority of tax benefits claimed by taxpayers on their annual returns will be immune from the GAAR as a result of s. 245(3).

However, Finance expanded the test in 2024 by providing that even "one of the main purposes" of a transaction could contaminate a transaction as an "avoidance transaction". Since both foreign and domestic taxes can be one of the main purposes under GAAR, the new test also applies to avoidance of foreign taxes.[18]

The definition of "avoidance transaction" in subsection 245(3) has two components: result and purpose. The taxpayer must, directly or indirectly, derive a tax benefit. Given the broad definition of "tax benefit", this is an almost inevitable finding of fact in most arrangements. Second, *one* of the main purposes of the transaction must be to obtain the tax benefit.

Finance borrowed main purpose test from the OECD's final report BEPS Action 6, which uses a similar principal purpose test for international tax treaty purposes:

> Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was *one* of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.

The OECD test, however, has an exit clause where the benefit accords with the "object and purpose" of the relevant provisions of the Convention, which are typically negotiated between the treaty partners.

Finance suggested that the main purpose test was "consistent with the standard used in many modern anti-avoidance rules and strikes a reasonable balance, as it would apply to transactions with a significant tax avoidance purpose but not to transactions where tax was simply *a* consideration". That is not quite the universal interpretation of the test. In *CIR v Brebner*, [1967] 2 AC 18, per Lord Upjohn, for example:

> "[W]hen the question of carrying out a genuine commercial transaction ... is considered, the fact that there are two ways of carrying it out—one by paying the maximum amount of tax, the other by paying no, or much less, tax—it would be quite wrong as a necessary consequence to draw the inference that in adopting the latter course one of the main objects is, for the purposes of the section, avoidance of tax."

The Supreme Court addressed the purpose test in *Stubart* where it endorsed the views of Ward and Cullity ["Abuse of Rights and the Business Purpose Test as Applied to Taxing Statutes" (1981) 29 Can. Tax J. 451 at 473-74] in answer to the question: can it be a legitimate business purpose *of* a transaction to minimize or postpone taxes?

> If taxes are minimized or postponed, more capital will be available to run the business and more profit will result. Surely, in the penultimate decade of the twentieth century it would be naive to suggest that businessmen can, or should, conduct and manage their business affairs without regard to the incidence of taxation or that they are not, or should not, be attracted to transactions or investments or forms of doing business that provide reduced burdens of taxation.

The Supreme Court restated the principle in *Canada Trustco* in the context of the GAAR:[19]

> The function [of 245(3)] is to remove from the ambit of the GAAR transactions or series of transactions that may reasonably be considered to have been undertaken or arranged primarily for a non-tax purpose. The majority of tax benefits claimed by taxpayers on their annual returns, will be immune from the, GAAR as a result of s. 245(3). The GAAR was enacted as a provision of last resort in order to address abusive tax avoidance, it was not intended to introduce uncertainty in tax planning (para. 21).
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> … If there are both tax and non-tax purposes to a transaction, it must be determined whether it was reasonable to conclude that the non-tax purpose was primary. If so, the GAAR cannot be applied to deny the tax benefit (para. 27).

However, unlike U.K. jurisprudence, Canadian courts have typically enlarged the reach of tax provisions by interpreting the phrase "one of the main purposes" as meaning "any" purpose. See, for example, *Groupe Honco Inc.* v *Canada*, [2013] F.C.J. No. 554, 2013 FCA 128:

> The phrase "one of the main purposes" is unambiguous and implies that a taxpayer may have more than one main motive in acquiring shares. With respect, it seems to me that counsel for the appellants is ignoring the purpose and spirit of … the Act in attempting to persuade us that the word "main" does not leave open the possibility of having two or three motivations that explain a transaction or series of transactions.… I am unable to agree with this interpretation. The fact that the taxpayer has provided reasons for getting involved in a transaction or series of transactions in no way excludes a finding that one of the main purposes—one generally not disclosed by the taxpayer—is to obtain a tax advantage (para. 24).

The main purpose test in paragraph 245(3)(b) lowers the threshold for "avoidance transaction" from the primary purpose test.[20] This varies from Finance's position in its Supplementary Information (March 28, 2023) where it states that the GAAR "would apply to transactions with a *significant* tax avoidance purpose but not to transactions where tax was simply *a* consideration." Hence, the legislative intention of the new provision would appear to be that even where one of the main purposes of a transaction is to derive a tax benefit under subsection 245(3), the GAAR

should not apply unless the avoidance purpose was "significant"?

Series of Transactions

An avoidance transaction includes transactions where one of the main purposes is to obtain a tax benefit through a series of transactions. In such circumstances, one considers the series as a composite the existence of which depends upon whether the interlocking, interdependent, and predetermined transactions are preordained in a sequence of events.

A preordained series of transactions is a composite where the individual steps have no commercial purpose other than to reduce tax payable.[21] There are two prerequisites. There must be (1) a pre-ordained series of transactions or one single composite transaction, which may or may not include the achievement of a legitimate business purpose; and (2) steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax.

A series of transactions involves transactions that are pre-ordained to produce a given result with no practical likelihood that the pre-planned events would not take place in the order ordained.[22] In these circumstances, a court may disregard the inserted steps for fiscal purposes and look at the result. As Lord Fraser explained in *Furness* v. *Dawson*[23], the fiscal consequences of a preordained series of transactions, intended to operate as such, are generally to be ascertained by considering the result of the series, and not by dissecting the scheme and considering each individual transaction separately.

The Supreme Court adopted this approach in *Canada Trustco*:

> "a series of transactions involves a number of transactions that are 'preordained in order to produce a given result' with 'no practical likelihood that the preplanned events would not take place in the order ordained'".[24]

Subsection 248(10) deems a "series of transactions" to include any related transaction that is "completed in contemplation of" a series to be part of that series. Hence, series of transactions also includes "related transactions or events . . . in contemplation of the series", which refers to transactions or events before or after the series which were undertaken "'in relation to' or 'because of' the series."[25]

The legislative comments and notes of the CRA suggested the term "contemplation" was prospective, and not retrospective:

> "In the view of Revenue Canada, a preliminary transaction will form part of a series determined with reference to subsection 248(10) if, at the time the preliminary transaction is carried out, the taxpayer intends to implement *the subsequent transactions* constituting the series… even though at the time of the completion of the preliminary transaction the taxpayer either had not determined all the important elements of the subsequent transactions – including, possibly, the identity of the other taxpayers involved – or had lacked the ability to implement the subsequent transactions."[26]

The Technical Notes to the amending bill stated that the legislative intention underlying the subsection was merely to "clarify" the meaning of "series of transactions".[27] As David A. Dodge, Senior Assistant Deputy Minister of the Department of Finance, stated:

> "The step transaction doctrine, however, when completed by the business purpose test as suggested in *Burmah* and *Furniss v. Dawson*, represents a coherent and orthodox approach. For that reason, this doctrine has been included in proposed section 245 in the form suggested by these cases."[28]

However, the Supreme Court interpreted "series of transactions" in subsection 248(10) to mean more than the *Furniss v. Dawson* formulation and, instead, adopted the Federal Court of Appeal's interpretation in *OSFC Holdings Ltd. v. Canada* that "contemplation" applies both prospectively and retrospectively.[29] The Supreme Court refused to overrule its own earlier decision in *Canada Trustco*: "Reversing a recent decision "is a step not to be lightly undertaken."[30] Hence, an avoidance transaction that occurs after a transaction that did not contemplate avoidance at the time can coalesce to form a "series".[31]

A series of transactions constitutes tax avoidance if even one transaction in the series is an "avoidance transaction" (*Canada Trustco* at paras. 33-34). Hence, one should consider the purpose of arrangements through the entire series of transactions to determine whether they constitute tax avoidance.[32] As Justice Rothstein said in *OSFC Holdings Ltd.*:

> "Once it is determined that a series of transactions results in a tax benefit, any transaction that is part of the series may be found to be an avoidance transaction."[33]

*[**Vern Krishna**, CM, KC, FRSC is Professor of Common Law at the University of Ottawa, and Tax Counsel, KPK Law LLP (Markham, Ontario). He is a member of the Order of Canada, King's Counsel, a Fellow of the Royal Society of Canada, and a Fellow of the Chartered Professional Accountants of Canada. His practice encompasses tax litigation and dispute resolution, international tax, wealth management, and tax planning. He acts as counsel in income tax matters, representing corporate and individual clients.]*

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[1] See, *C.I.R. v. Challenge Corporation Ltd.*, [1986] NZTC 5219 (PC).
[2] Finance accepted tax mitigation as "legitimate tax planning" in its Technical Notes, June 30, 1988 ("Technical Notes").
[3] See, *Deans Knight Income Corp. v. Canada*, [2023] S.C.J. No. 16, 2023 SCC 16. See, generally, *Lipson v. Canada*, [2009] S.C.J. No. 1, 2009 SCC 1 at para. 2; *Copthorne Holdings Ltd. v. Canada*, [2011] S.C.J. No. 63, 2011 SCC 63 at paras. 71-72; see also *Gladwin Realty Corp. v. Canada*, [2020] F.C.J. No. 914, 2020 FCA 142 at para. 85.
[4] *Canada Trustco Mortgage Co. v. Canada*, [2005] S.C.J. No. 56, 2005 SCC 54.
[5] The win/loss ratio for the CRA as of 2023 was approximately 54:46 percent. See: GAAR Consultation Paper, Canada, Department of Finance, *Budget 2021: A Recovery Plan for Jobs, Growth, and Resilience* (Ottawa: Department of Finance, 2021); Canada, Office of the Prime Minister, *Deputy Prime Minister, and Minister of Finance Mandate Letter* (Ottawa: Office of the Prime Minister, 2021) [Mandate Letter].
[6] See Technical Notes, August 4, 2023 to draft legislation.
[7] *Supplementary Information Relating to Tax Reform Measures* tabled in House of Commons on December 16, 1987.
[8] See: Technical Notes, August 4, 2023, draft legislation, Budget.
[9] This essentially restates the Supplementary Information Relating to Tax Reform Measures tabled in the House of

Commons on December 16, 1987, that the GAAR was intended "to block sophisticated strategies designed to yield tax advantages that were not intended by Parliament."
[10] Federal Budget, Supplementary Information, March 28, 2023.
[11] Aug. 4, 2023 draft legislation (Budget—General Anti-Avoidance Rule), subsection 3(1), adding subsection 245(0.1). The Preamble comes into force on Royal Assent.
[12] Subsection 245(2).
[13] *Canada Trustco Mortgage Co. v. Canada*, [2005] S.C.J. No. 56, 2005 SCC 54 at para. 20 and *Copthorne Holdings Ltd. v. Canada*, [2011] S.C.J. No. 63, 2011 SCC 63 at para. 35.
[14] *Hickman Motors Ltd. v. Canada*, [1997] S.C.J. No. 62, [1997] 2 S.C.R. 336.
[15] *Housen v. Nikolaisen*, [2002] S.C.J. No. 31, 2002 SCC 33; *Copthorne Holdings Ltd.*, [2011] S.C.J. No. 632011 SCC 63 at para. 34.
[16] E. Kroft, "Disputing the Existence of a "Tax Benefit" in GAAR Litigation", *Blakes on Canadian Tax Controversy & Tax Litigation* (*Taxnet Pro Tax Disputes & Resolution Centre*), Aug. 2018, pp. 1-6; S. Nurmohamed, "Tax benefit for GAAR: The Defences", 11:1 Can. Tax Focus 1-2 (Feb. 2021); M. Kraemer, "Revisiting the Tax Benefit Component of the GAAR", XXIV(1) *Tax Litigation* (Federated Press) 2-12 (2021); "When is there a Tax Benefit", in Taylor et al., "The Most Important Cases of the Year", 2020 Canadian Tax Foundation conference report at 1:1-12 (re *Bank of Montreal* , *Gladwin* and *Rogers*).
[17] See Technical Explanatory Notes (June 30, 2021, 1988).
[18] *Alta Energy Luxembourg S.A.R.L. v, Canada*, [2018] T.C.J. No. 124, 2018 TCC 152 para. 75 (aff'd on other grounds [2020] F.C.J No. 204, 2020 FCA 43, aff'd [2021] S.C.J. No. 49, 2021 SCC 49.
[19] [2005] S.C.J. No. 56, 2005 SCC 54.
[20] See, for example: N. Boidman, "One of the Main Purposes Test" (May 2014) 22:5 *Canadian Tax Highlights* 9, online: ctf.ca; Angelo Nikolakakis, "Purpose," in Report of Proceedings of the Seventy-first Tax Conference, 2019 Conference Report (Toronto: Canadian Tax Foundation, 2019), 21:1-33; "Policy Forum: Who, What, Where, When, Why, and How - Discerning an Avoidance Transaction" (2009) 57:2 Canadian Tax Journal 294-306.
[21] *Furness (Inspector of Taxes) v. Dawson*, [1984] 1 All ER 530 (HL); *W.T. Ramsey* v. *IRC*, [1982] AC 300 (HL). See also: At common law the phrase meant a sequence of transactions where "each transaction in the series is pre-ordained to produce a result, *OSFC Holdings Ltd. v. Canada*, [2001] F.C.J. No. 1381, 2001 FCA 260.
[22] *Craven v. White*, [1989] AC 398 at 514 (HL), per Lord Oliver.
[23] *Furness (Inspector of Taxes) v. Dawson*, [1984] 1 All ER 530 (HL).
[24] *Canada Trustco Mortgage Co. v. Canada*, [2005] S.C.J. No. 56, 2005 SCC 54 at paras. 25-26.
[25] *Copthorne Holdings Ltd. v. Canada*, [2011] S.C.J. No. 63, 2011 SCC 63 at para. 46, citing *Canada Trustco Mortgage Co. v. Canada,* [2005] S.C.J. No. 56, 2005 SCC 54 at para. 26.
[26] 1988 *Report of Proceedings of the Fortieth Tax Conference* (1989), 7:1, p. 7:6.
[27] See Bill C-84; S.C. 1986, c. 6, s. 126(6): New subsection 248(10) of the Act clarifies that a reference in the Act to a series of transactions or events includes any related transaction or event completed in contemplation of the series.
[28] David A. Dodge, "A New and More Coherent Approach to Tax Avoidance" (1988) 36 Can. Tax J. 1 at 15.
[29] *Copthorne Holdings Ltd. v. Canada,* [2011] S.C.J. No. 63, 2011 SCC 63 at para. 55.
[30] *Copthorne Holdings Ltd. v. Canada,* [2011] S.C.J. No. 63, 2011 SCC 63 at para. 57, citing *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, 2011 SCC 20 at paras. 56-57.
[31] *Copthorne Holdings Ltd. v. Canada*, [2011] 3 SCR 721.
[32] *OSFC Holdings Ltd. v. Canada,* [2001] F.C.J. No. 1381, 2001 FCA 260 at para. 46.
[33] *OSFC Holdings Ltd. v. Canada,* [2001] F.C.J. No. 1381, 2001 FCA 260 at para. 45.