Tax --- Income tax — Tax avoidance — General anti-avoidance rule (GAAR) — Avoidance transaction
Tax --- Income tax — Foreign income — Foreign accrual property income
Taxation --- Impôt sur le revenu — Évitement fiscal — Règle générale anti-évitement (RGAÉ) — Opération d'évitement
Taxation --- Impôt sur le revenu — Revenus de source étrangère — Revenu étranger accumulé, tiré de biens
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Copthorne Holdings Ltd. v. R.

Copthorne Holdings Ltd., Appellant and Her Majesty The Queen, Respondent

Citation: 2011 CarswellNat 5201, 2011 SCC 63, 339 D.L.R. (4th) 385, [2012] 2 C.T.C. 29, 2012 D.T.C. 5007 (Eng.), 2012 D.T.C. 5006 (Fr.), 424 N.R. 132, [2011] 3 S.C.R. 721
Supreme Court of Canada
McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ.
Heard: January 21, 2011
Judgment: December 16, 2011
Year: 2011
Docket: 33283

Proceedings: affirming *Copthorne Holdings Ltd. v. R.* (2009), 2009 D.T.C. 5101 (Eng.), [2009] 5 C.T.C. 1, 2009 CAF 163, 2009 CarswellNat 3910, (sub nom. *Copthorne Holdings Ltd. v. Minister of National Revenue*) 392 N.R. 29, 2009 FCA 163, 2009 CarswellNat 1368 (F.C.A.), affirming *Copthorne Holdings Ltd. v. R.* (2007), 2007 D.T.C. 1230 (Eng.), 2007 CarswellNat 6138, 2007 TCC 481, 2007 CarswellNat 2808, [2008] 1 C.T.C. 2001, 2007 CCI 481 (T.C.C. [General Procedure])

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Wendy Burnham, Deen Olsen, Eric Noble, for Respondent

Subject:
Income Tax (Federal)

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APPEAL by taxpayer from judgment reported at *Copthorne Holdings Ltd. v. R.* (2009), 2009 D.T.C. 5101 (Eng.), [2009] 5 C.T.C. 1, 2009 CAF 163, 2009 CarswellNat 3910, (sub nom. *Copthorne Holdings Ltd. v. Minister of National Revenue*) 392 N.R. 29, 2009 FCA 163, 2009 CarswellNat 1368 (F.C.A.), dismissing appeal from judgment dismissing appeal by taxpayer from assessment by Minister of National Revenue, finding that general anti-avoidance rule was violated in amalgamation transaction.
POURVOI de la contribuable à l'encontre d'une décision publiée à *Copthorne Holdings Ltd. v. R.* (2009), 2009 D.T.C. 5101 (Eng.), [2009] 5 C.T.C. 1, 2009 CAF 163, 2009 CarswellNat 3910, (sub nom. *Copthorne Holdings Ltd. v. Minister of National Revenue*) 392 N.R. 29, 2009 FCA 163, 2009 CarswellNat 1368 (F.C.A.), ayant rejeté un appel interjeté à l'encontre d'un jugement ayant rejeté l'appel interjeté par la contribuable à l'encontre d'un avis de cotisation du ministre du Revenu national, ayant conclu qu'on avait contrevenu à la règle générale anti-évitement à l'occasion d'une fusion d'entreprises.
***Rothstein J.*:**

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I. Introduction

1 This appeal involves paid-up capital (“PUC”) of a corporation. Under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), PUC represents capital invested in a class of shares of the corporation by its shareholders. When that class of shares is redeemed by the corporation in whole or in part, the amount paid by the corporation to the shareholders in excess of the PUC attributable to the redeemed shares is deemed to have been paid as a dividend that must be included in the income of the recipient shareholder. However, the PUC portion need not be included in the income of the recipient shareholder because it is viewed as a return of capital to shareholders.

2 As a general rule, when two corporations amalgamate, the PUC of the shares of both amalgamating corporations are aggregated to form the PUC of the shares of the amalgamated corporation. However, where the relationship between the amalgamating corporations is parent and subsidiary—a so-called “vertical” amalgamation—the PUC of the shares of both corporations are not aggregated. Rather the PUC of the shares of the subsidiary corporation which are owned by the parent is cancelled.

3 In this case, by a series of transactions, two corporations that had been parent and subsidiary became “sister” corporations—that is, corporations owned directly by the same shareholder. The sister corporations were then amalgamated—a “horizontal” amalgamation. Had they remained as parent and subsidiary, the PUC of the shares of the subsidiary would have been cancelled on amalgamation. As sister corporations, the PUC of their respective shares was aggregated to form the PUC of the shares of the amalgamated corporation.

4 The amalgamated corporation then redeemed a large portion of its shares and paid out the aggregate PUC attributable to the redeemed shares to its non-resident shareholder. That payment was not treated as taxable income to the shareholder but instead as a return of capital.

5 No provision of the *Income Tax Act* expressly required the return of PUC in this case to be treated as a taxable payment. Nonetheless, the Minister of National Revenue considered the transactions by which the parent and subsidiary became sister corporations to have circumvented certain provisions of the Act in an abusive manner and thus to have contravened s. 245 of the Act, the general anti-avoidance rule, or the "GAAR". Applying the GAAR, the Minister concluded that the PUC of the shares of the former subsidiary should have been cancelled upon amalgamation with its former parent corporation. If the PUC of the shares of the amalgamated corporation was reduced, the amount paid to the shareholder in excess of the reduced PUC would have constituted a deemed dividend subject to tax. The Minister reassessed the amalgamated corporation for unpaid withholding tax on the deemed dividend portion of the amount paid to the non-resident shareholder upon redemption. The Tax Court of Canada and Federal Court of Appeal upheld the reassessments (2007 TCC 481, [2008] 1 C.T.C. 2001 (T.C.C. [General Procedure]); 2009 FCA 163, 392 N.R. 29 (F.C.A.)).

6 Upon a textual, contextual and purposive interpretation of the relevant provisions of the Act, in my respectful view, the transactions that took place in this case were properly reassessed under the GAAR. Accordingly, I would dismiss the appeal.

II. Summary of Facts

7 The following is a summary of the facts pertinent to the issue to be decided on this appeal. The summary is essentially that set out in the reasons of the Federal Court of Appeal, which in turn is based on the agreed statement of facts submitted by the parties. The details of the complex set of transactions are contained in Appendix A.

8 Li Ka-Shing and his son, Victor Li, control a group of Canadian and nonresident companies ("Li Group"). One is VHHC Investments Ltd. in which the Li Group invested $96,736,845. VHHC Investments purchased all the shares of VHHC Holdings Ltd. for $67,401,279. At the end of 1991, the shares of VHHC Investments had a PUC of $96,736,845 and the shares of VHHC Holdings had a PUC of $67,401,279.

9 VHHC Holdings held shares in Husky Oil Ltd. directly and through a subsidiary corporation, VHSUB Holdings Inc. By 1991 the market value of the Husky shares had fallen such that VHSUB had an unrealized capital loss on those shares.

10 Copthorne Holdings Ltd. ("Copthorne I") was a wholly owned subsidiary of Big City Project Corporation B.V. ("Big City"), a Netherlands company and member of the Li Group. Copthorne I had purchased the Harbour Castle Hotel in 1981 and sold it for a substantial capital gain in 1989.

11 By the end of 1991, the VHSUB shares had nominal fair market value, but an adjusted cost base of $84.3 million reflecting the accrued capital loss on the Husky shares. In 1992, VHHC Investments sold its common shares of VHHC Holdings with a PUC of $67,401,279 to Copthorne I for a nominal price. VHHC Holdings subsequently sold the majority of its VHSUB shares to Copthorne I (inheriting the high adjusted cost base under stop-loss rules) which in turn sold the VHSUB shares to an unrelated purchaser at their fair market value, and thus realized the capital loss. This allowed Copthorne I to carry the capital loss on the VHSUB shares back to shelter the capital gains from the sale of the Harbour Castle Hotel.

12 In 1993, the Li Group decided to amalgamate Copthorne I, its wholly owned subsidiary VHHC Holdings and two other corporations. It was recognized that because VHHC Holdings was a wholly owned subsidiary of Copthorne I, without any other steps, the PUC of $67,401,279 of the shares of VHHC Holdings would be eliminated on the vertical amalgamation. However, if VHHC Holdings and Copthorne I were "sister" corporations their amalgamation would result in aggregation of the PUC of each of the companies' respective shares. To avoid the elimination of the PUC of VHHC Holdings shares, on July 7, 1993, Copthorne I sold its VHHC Holdings shares to Big City, its parent corporation, for their fair market value which was nominal. On January 1, 1994, Copthorne I, VHHC Holdings and two other corporations amalgamated under the name Copthorne Holdings Ltd. ("Copthorne II"). All the issued shares of Copthorne II were owned by Big City. The PUC of the Copthorne II shares owned by Big City was essentially the PUC of the shares of VHHC Holdings ($67,401,280) as the PUC of the shares of the other amalgamating corporations was nominal.

13 The proceeds of the 1989 Harbour Castle Hotel sale had been invested by Copthorne I in Copthorne Overseas Investment Ltd. ("COIL"), a wholly owned Barbados company that carried on an active bond-trading business in Singapore. In response

to June 1994 amendments made to the foreign accrual property income ("FAPI") provisions of the *Income Tax Act* which would have made COIL's income FAPI, the Li Group decided to dispose of the business of COIL to another entity within the Li Group and to remove some or all of the proceeds of disposition from Canada.

14 To achieve this result, in 1994, L.F. Investments (Barbados) Ltd. ("L.F. Investments") was incorporated in Barbados. L.F. Investments acquired all of the issued shares of Copthorne II and VHHC Investments. The disposition of these shares by Big City resulted in a capital gain. However, this gain was not taxable. A tax treaty between Canada and the Netherlands provides that aside from enumerated exceptions, capital gains accruing to a resident of the Netherlands (Big City) will not be taxable in Canada. Effective January 1, 1995, those two corporations and two others that were owned within the Li Group amalgamated under the name Copthorne Holdings Ltd. ("Copthorne III"). On this amalgamation, L.F. Investments received 164,138,025 Class D preferred shares ("Class D shares") having an aggregate redemption amount, fair market value and PUC of $164,138,025 or effectively $1.00 per share. In essence, the PUC of the Class D shares was the total of the PUC of the shares of VHHC Investments at the end of 1991 and the PUC of VHHC Holdings shares that was derived from the share subscriptions made by VHHC Investments.

15 Immediately following this amalgamation, Copthorne III redeemed 142,035,895 of its Class D shares that were held by L.F. Investments, a non-resident of Canada, for $142,035,895. Since the redemption amount was no more than the PUC of the Class D shares, the redemption did not give rise to a deemed dividend under the *Income Tax Act*. Accordingly, Copthorne III did not withhold or remit any tax on behalf of L.F. Investments.

16 The Minister assessed Copthorne III by applying the GAAR to reduce the PUC of its Class D shares by $67,401,280, which was the portion of the PUC that was attributable to the shares of VHHC Holdings.

17 The Minister determined that a deemed dividend arose on the redemption by Copthorne III amounting to $58,325,223, which was the proportion of the redemption attributable to the VHHC Holdings PUC, and that 15 percent of that amount should have been withheld. Accordingly, the Minister assessed Copthorne III tax of $8,748,783.40. In addition, the Minister assessed a penalty of 10 percent of that amount.

18 In an unrelated transaction that occurred in 2002, Copthorne III was amalgamated with five other corporations owned within the Li Group and continued as Copthorne Holdings Ltd., the appellant in this appeal.

19 Copthorne objected to the assessment; the Minister confirmed it; and Copthorne appealed to the Tax Court of Canada.

20 The Tax Court found in favour of the Minister but overturned the penalty assessment. The Federal Court of Appeal affirmed the decision of the Tax Court. Copthorne now appeals to this Court.

III. Tax Court of Canada

21 At the Tax Court, Campbell J. found that all elements necessary to apply the GAAR had been established: a series of transactions, a tax benefit, an avoidance transaction, and the abusiveness of the transaction.

22 Based on this Court's ruling in *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.), she found that a related transaction is part of a series of transactions if it is completed in contemplation of the series "not in the sense of actual knowledge but in the broader sense of 'because of' or 'in relation to' the series" (*Trustco*, at para. 26) and that related transactions may occur before *or* after the series.

23 In this case she found that there was a "strong nexus" between the redemption of Copthorne III shares, which she considered the related transaction, and the series of transactions, which included the sale of VHHC Holdings to Big City in 1993 to preserve its PUC and the subsequent amalgamation of Copthorne I and VHHC Holdings, because the redemption "was clearly done in contemplation of" the share sale in 1993 (paras. 39-40). She concluded that all of the relevant transactions could be considered a "series of transactions" for the purposes of the GAAR.

24 Second, she found that preserving the PUC had reduced the tax that L.F. Investments was liable to pay, and that Copthorne III was required to withhold and remit, and that this tax reduction constituted a tax benefit.

25 Third, she noted that an avoidance transaction is a transaction that is not undertaken for a "*bona fide* purpose other than to obtain a tax benefit" (para. 47). While Copthorne argued that the sale of VHHC Holdings to Big City was simply part of a reorganization to simplify the Li Group corporate structure, she concluded that it did nothing to simplify the corporate structure and thus was an "avoidance transaction".

26 As to whether the avoidance transaction was an abuse or misuse, she considered three impugned sections together: ss. 89(1), 87(3) and 84(3). She concluded that the provisions were intended "to operate to prevent the artificial increase of PUC on amalgamation and its subsequent return to shareholders on a tax-free basis" (para. 74).

27 She found that the avoidance transaction had misused these provisions "to artificially increase the PUC on amalgamation with the subsequent return of this artificial increase to shareholders on a tax-free basis, the very result that these provisions were intended to prevent" (para. 57).

28 She concluded that the Minister had properly applied the GAAR to disallow the addition of the $67,401,279 PUC of the shares of VHHC Holdings to the PUC of the shares of Copthorne III, and that the proportion of the subsequent redemption attributable to the $67,401,279 PUC from VHHC Holdings was taxable. However, she overturned the Minister's penalty assessment.

IV. Federal Court of Appeal

29 The Federal Court of Appeal affirmed the judgment of the Tax Court for the reasons written by Ryer J.A.

30 On the first three issues—the series of transactions, the tax benefit, and the avoidance transaction—Ryer J.A. deferred to the factual findings of the Tax Court judge. However, he noted that the Tax Court judge had applied too stringent a legal test to assessing the series of transactions. He concluded that a "strong nexus" need not exist between a series and a related transaction to find that the related transaction is part of the series. Instead, the series need only be a "motivating factor" for the related transaction (para. 49). Given the Tax Court judge's finding that a strong nexus existed, he concluded that this less stringent motivating factor test was clearly met.

31 Finally, he upheld the conclusion of the Tax Court judge that the avoidance transaction had been abusive, but differed in his application of the GAAR. He concluded that it was only necessary to consider one provision: s. 89(1). However, he agreed that the Tax Court judge had properly identified the purpose of s. 89(1): "... to avoid duplicative increases in computing the PUC of the amalgamated corporation" (para. 73). He confirmed the Tax Court judge's finding that the transaction had abused this provision, and that the GAAR had properly been applied by the Minister. He dismissed the appeal.

V. Analysis

A. Introduction

32 It is relatively straightforward to set out the GAAR scheme. It is much more difficult to apply it. Where a transaction is an avoidance transaction (a transaction that would result in a tax benefit and whose primary purpose was to obtain the tax benefit), the tax benefit resulting from the transaction will be denied. However, the tax benefit will not be denied if the avoidance transaction would not result in an abuse or misuse of the *Income Tax Act*. The scheme is set out in ss. 245(1) to (5) of the Act (see Appendix B).

33 In *Trustco* this Court set out the three questions to be decided in a GAAR analysis:

1. Was there a tax benefit? (para. 18);

2. Was the transaction giving rise to the tax benefit an avoidance transaction? (para. 21); and

3. Was the avoidance transaction giving rise to the tax benefit abusive? (para. 36).

I will address each in turn.

B. Was There a Tax Benefit?

34 The first question that must be answered is whether there was a tax benefit. The burden is on the taxpayer to refute the Minister's assumption of the existence of a tax benefit (*Trustco*, at para. 63). Where, as here, the Tax Court judge has made a finding of fact on the existence of a tax benefit, it is only appropriate for a reviewing court to overturn such a finding where an appellant can show a palpable and overriding error.

35 As found in *Trustco*, the existence of a tax benefit can be established by comparison of the taxpayer's situation with an alternative arrangement (para. 20). If a comparison approach is used, the alternative arrangement must be one that "might reasonably have been carried out but for the existence of the tax benefit" (D. G. Duff, et al., *Canadian Income Tax Law* (3rd ed. 2009), at p. 187). By considering what a corporation would have done if it did not stand to gain from the tax benefit, this test attempts to isolate the effect of the tax benefit from the non-tax purpose of the taxpayer.

36 Copthorne argues that an amalgamation while VHHC Holdings was owned by Copthorne I—a vertical amalgamation —"was never a live and reasonable option" and thus the Minister should not have used such a comparison (A.F., at para. 137). A vertical amalgamation would have resulted in the cancellation of the PUC of VHHC Holdings shares. This meant that a greater proportion of the funds returned as a result of the redemption would have been subject to tax as a deemed dividend. Copthorne says that a taxpayer would never have chosen this higher tax option, and thus that such option was unreasonable.

37 An amalgamation was necessary for Copthorne to achieve the outcomes it sought in 1993 when it undertook the transactions between VHHC Holdings, Copthorne I and Big City—a simplification of the corporate structure, and the ability to shelter anticipated gains with losses within the four amalgamating corporations. The only question was whether the amalgamation would be horizontal or vertical. As the Tax Court judge pointed out, the vertical amalgamation would have been the simpler course of action. It was only the cancellation of PUC that would arise upon a vertical amalgamation that led to the sale by Copthorne I of its shares in VHHC Holdings to Big City. To use the words of Professor Duff, "but for" the difference in how PUC was treated, a vertical amalgamation was reasonable.

38 The comparison was entirely appropriate. Copthorne has not satisfied its onus of showing that there was no tax benefit. I would affirm the finding of the Tax Court that there was a tax benefit.

C. Was the Transaction Giving Rise to the Tax Benefit an Avoidance Transaction?

39 According to s. 245(3) of the Act, a transaction will be an avoidance transaction if it results in a tax benefit, and is not undertaken primarily for a *bona fide* non-tax purpose. An avoidance transaction may operate alone to produce a tax benefit, or may operate as part of a series of transactions which produces a tax benefit.

40 Where, as here, the Minister assumes that the tax benefit resulted from a series of transactions rather than a single transaction, it is necessary to determine if there was a series, which transactions make up the series, and whether the tax benefit resulted from the series. If there is a series that results, directly or indirectly, in a tax benefit, it will be caught by s. 245(3) unless each transaction within the series could "reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain [a] tax benefit". If any transaction within the series is not undertaken primarily for a *bona fide* non-tax purpose that transaction will be an avoidance transaction.

41 The first consideration is whether there was a series that resulted in a tax benefit. As I will explain below, it will be necessary to consider when a transaction which is related to a common law series of transactions is part of a series of transactions as defined in s. 248(10) of the *Income Tax Act*. The second consideration is whether any of the transactions within the purported series is an avoidance transaction.

(1) Was There a Series of Transactions That Resulted in a Tax Benefit?

42 In the agreed statement of facts, the parties agreed that the sale of VHHC Holdings to Big City, and the subsequent amalgamation of VHHC Holdings with Copthorne I to form Copthorne II were part of a series of transactions. However, these transactions themselves did not result in a tax benefit. The tax benefit was only realized when Copthorne III redeemed its shares without its shareholder incurring an immediate tax liability. Thus, it is necessary to decide whether the redemption transaction is part of the series of transactions which included the sale of VHHC Holdings to Big City and the subsequent amalgamation of Copthorne I and VHHC Holdings.

43 In *Trustco*, this Court accepted that the scheme of the Act provides for an expansive approach to the series issue. The starting point is the common law series taken from English law where "each transaction in the series [is] pre-ordained to produce a final result" (*OSFC Holdings Ltd. v. R.*, 2001 FCA 260, [2002] 2 F.C. 288 (Fed. C.A.), at para. 24). This common law series is expanded by s. 248(10) of the Act which deems any "related transactio[n]" which is completed "in contemplation of" a series to be part of that series. Section 248(10) provides:

> For the purposes of this Act, where there is a reference to a series of transactions or events, the series shall be deemed to include any related transactions or events completed in contemplation of the series.

44 The parties have agreed that the sale of VHHC Holdings to Big City, and the subsequent amalgamation were part of a series. However, the agreed facts do not address whether the redemption transaction was part of this series. The question which must be answered is whether the redemption which gave rise to the tax benefit can be considered to be a "related transaction" which was done "in contemplation of" the prior series of transactions.

45 The Minister assumed that there was a series that included the redemption transaction that led to a tax benefit. Again, Copthorne has the onus of showing that the Minister's assumption is refuted (*Trustco*, at para. 63).

46 The Tax Court judge found that there was a "strong nexus" between the redemption and the earlier series which included the 1993 sale of VHHC Holdings to Big City, and the horizontal amalgamation of Copthorne I and VHHC Holdings. The Federal Court of Appeal rightly noted that a strong nexus is not necessary to meet the series test set out in *Trustco*. The court is only required to consider whether the series was taken into account when the decision was made to undertake the related transaction in the sense that it was done "in relation to" or "because of" the series (*Trustco*, at para. 26).

47 Although the "because of" or "in relation to" test does not require a "strong nexus", it does require more than a "mere possibility" or a connection with "an extreme degree of remoteness" (see *MIL (Investments) S.A. v. R.*, 2006 TCC 460, [2006] 5 C.T.C. 2552 (T.C.C. [General Procedure]), at para. 62, aff'd 2007 FCA 236, 2007 D.T.C. 5437 (Eng.) (F.C.A.)). Each case will be decided on its own facts. For example, the length of time between the series and the related transaction may be a relevant consideration in some cases; as would intervening events taking place between the series and the completion of the related transaction. In the end, it will be the "because of" or "in relation to" test that will determine, on a balance of probabilities, whether a related transaction was completed in contemplation of a series of transactions.

48 The Tax Court judge was aware both of the intervening introduction of the FAPI rule changes, as well as the time interval between the sale and amalgamation in 1993 and 1994 and the redemption in 1995 (para. 38). Copthorne argued that these intervening events broke the purported series. The Tax Court judge agreed that the test should not catch "transactions that are only remotely connected to the common law series" (para. 39). Nonetheless, she found that there was a "strong nexus" between the series and the subsequent redemption, because "the Redemption ... was exactly the type of transaction necessary to make a tax benefit a reality based on the preservation of the PUC" (para. 40). The Federal Court of Appeal upheld this conclusion, finding that there was no palpable and overriding error of fact. I would also uphold the Tax Court judge's conclusion for the same reason.

49 Copthorne now asks the Court to revisit the interpretation of s. 248(10). It argues that a related transaction should only be part of a series where the series is "being contemplated by the parties" at the time the prior related transaction takes place (A.F., at para. 112). The argument is that the plain meaning of these words suggests that the assessment of whether the related

transaction was done "in contemplation of" the series must be done prospectively, because the definition of contemplation suggests consideration of a future event. Copthorne says that the question of whether a transaction was related must therefore be decided by determining whether a prior related transaction was completed in contemplation of a subsequent series, not by considering, with the benefit of hindsight, whether the series had been contemplated when a subsequent transaction was completed; that retrospective assessment of the connection between a series and a related transaction impermissibly expands the reach of s. 248(10); and that such consideration would create unacceptable uncertainty and trench upon the *Duke of Westminster* principle that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable (see *Inland Revenue Commissioners v. Duke of Westminster* (1935), [1936] A.C. 1 (U.K. H.L.)).

50 I acknowledge that the more common use of the term "contemplation" is likely prospective. Indeed, in the Canadian Tax Foundation's 1988 *Report of Proceedings of the Fortieth Tax Conference*, shortly after s. 248(10) and the GAAR were enacted (s. 248(10) in 1986, the GAAR in 1988), Michael Hiltz, then a Director with Revenue Canada expressed the view of the agency that s. 248(10) was to be read prospectively:

> 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 other taxpayers involved—or had lacked the ability to implement the subsequent transactions. "Section 245 of the Income Tax Act," in *Report of Proceedings of the Fortieth Tax Conference* (1989), 7:1, at p. 7:6)

51 In answer to the argument that a prospective reading of s. 248(10) unduly narrows its scope, it is said that the section will still have the utility of including a prior transaction in a series even when the prior transaction cannot be said to meet the test for inclusion in a common law series.

52 Subsequent to his earlier view on the issue, Professor Duff has more recently suggested that a more reasonable interpretation of s. 248(10) would be to read it prospectively only. He writes:

> With respect to the extended meaning of a series of transactions, however, the Court's interpretation [in *Trustco*] is less persuasive. Although the conclusion that related transactions can occur "either before or after" an avoidance transaction is likely to accord with legislative intent, it is not obvious that this interpretation is consistent with the text of subsection 248(10), which might more reasonably be interpreted to include only related transactions completed prior to an ordinary series of transactions but not related transactions completed after the series. [Footnotes omitted.]
>
> (D.G. Duff, "The Supreme Court of Canada and the General Anti-Avoidance Rule: *Canada Trustco* and *Mathew*", in D.G. Duff and H. Erlichman, eds., *Tax Avoidance in Canada After Canada Trustco and Mathew* (2007), 1, at pp. 26-27)

53 However, contemplation is defined by *The Oxford English Dictionary* (2nd ed. 1989) vol. III, at p. 811, as "[t]he action of contemplating or mentally viewing; the action of thinking about a thing continuously; attentive consideration, study." This definition does not require that the thing contemplated is either in the future or the past. Copthorne relies on the definition of "contemplation" in *Webster's Third New International Dictionary* (1986), at p. 491, which includes "the act of looking forward to an event: the act of intending or considering a future event". As I have said, contemplation often does involve looking forward. However, these words are not exhaustive of the Webster definition. More general words precede, which are not limited to looking forward: "an act of the mind in considering with attention: continued attention to a particular subject ...: something for which such consideration is asked ...: the act of viewing steadfastly and attentively: the viewing of something ... for its own sake".

54 The text and context of s. 248(10) leave open when the contemplation of the series must take place. Nothing in the text specifies when the related transaction must be completed in relation to the series. Specifically, nothing suggests that the related transaction must be completed in contemplation of a subsequent series. The context of the provision is to expand the definition of a series which is an indication against a narrow interpretation.

55 In *Trustco*, the Chief Justice and Major J. explained that it is likely more consonant with the Parliamentary intention, to read s. 248(10) both prospectively and retrospectively. And *Trustco* adopted and expanded the application of s. 248(10) as interpreted in *OSFC*, which itself involved the retrospective application of the provision. The Court in *Trustco* said,

> Section 248(10) extends the meaning of "series of transactions" to include "related transactions or events completed in contemplation of the series". The Federal Court of Appeal held, at para. 36 of *OSFC*, that this occurs where the parties to the transaction "knew of the ... series, such that it could be said that they took it into account when deciding to complete the transaction". We would elaborate that "in contemplation" is read not in the sense of actual knowledge but in the broader sense of "because of" or "in relation to" the series. The phrase can be applied to events either before or after the basic avoidance transaction found under s. 245(3). As has been noted:
>
> It is highly unlikely that Parliament could have intended to include in the statutory definition of "series of transactions" related transactions completed in contemplation of a subsequent series of transactions, but not related transactions in the contemplation of which taxpayers completed a prior series of transactions.
>
> (D. G. Duff, "Judicial Application of the General Anti-Avoidance Rule in Canada: *OSFC Holdings Ltd. v. The Queen*" (2003), 57 I.B.F.D. Bulletin 278, at p. 287) [para. 26]

56 The fact that the language of s. 248(10) allows either prospective or retrospective connection of a related transaction to a common law series and that such an interpretation accords with the Parliamentary purpose, impels me to conclude that this interpretation should be preferred to the interpretation advanced by Copthorne.

57 *Trustco* is a recent decision of this Court. Reversing a recent decision "is a step not to be lightly undertaken" (*Fraser v. Ontario (Attorney General)*, 2011 SCC 20, [2011] 2 S.C.R. 3 (S.C.C.), at paras. 56-57, *per* McLachlin C.J. and LeBel J.). Before a Court will entertain reversing a recently decided decision, there must be substantial reasons to believe the precedent was wrongly decided. In this case, Copthorne has not met the "high threshold for reversing a precedent" (*Fraser*, at para. 60) and it is appropriate to reaffirm the *Trustco* interpretation of s. 248(10).

58 I would therefore agree with the Tax Court and the Federal Court of Appeal that the redemption transaction was part of the same series as the prior sale and amalgamation, and that the series, including the redemption transaction, resulted in the tax benefit.

(2) Was Any Transaction Within the Purported Series an Avoidance Transaction?

59 The determination of whether a transaction is undertaken primarily for a non-tax purpose and is therefore not an avoidance transaction is to be objectively considered, and must be based on all of the evidence available to the court (*Trustco*, at paras. 28-29).

60 The Tax Court judge found that the 1993 sale of VHHC Holdings shares from Copthorne I to Big City was an avoidance transaction. The Federal Court of Appeal agreed.

61 The sale preserved the PUC of the VHHC Holdings shares when VHHC Holdings and Copthorne I were amalgamated to form Copthorne II, which allowed for the subsequent redemption of Copthorne III shares without liability for tax. This is a tax purpose.

62 Copthorne argues that the transactions were undertaken for the purposes of simplifying the Li Group companies and using the losses within the four amalgamated companies to shelter gains also within the four amalgamated companies. While

simplification and sheltering gains may apply to the other transactions, they do not explain the sale of VHHC Holdings shares to Big City. As the Tax Court judge found, the share sale introduced an additional step into a process of simplification and consolidation. A vertical amalgamation would have resulted in the same simplification and consolidation. Moreover, Copthorne has not shown why sheltering gains using losses within the four companies would not have been possible if the companies were amalgamated vertically.

63 I see no error in the finding of the Tax Court judge that the sale of the VHHC Holdings shares from Copthorne I to Big City was not primarily undertaken for a *bona fide* non-tax purpose. The burden was upon Copthorne to prove the existence of a *bona fide* non-tax purpose (*Trustco* at para. 66), which it failed to do. Thus, I would affirm her finding that the sale of the VHHC Holdings shares to Big City was an avoidance transaction.

64 Because there was a series of transactions which resulted in a tax benefit, the finding that one transaction in the series was an avoidance transaction satisfies the requirements of s. 245(3).

D. Was the Avoidance Transaction Giving Rise to the Tax Benefit Abusive?

65 The most difficult issue in this case is whether the avoidance transaction was an abuse or misuse of the Act. The terms abuse or misuse might be viewed as implying moral opprobrium regarding the actions of a taxpayer to minimize tax liability utilizing the provisions of the *Income Tax Act* in a creative way. That would be inappropriate. Taxpayers are entitled to select courses of action or enter into transactions that will minimize their tax liability (see *Duke of Westminster*).

66 The GAAR is a legal mechanism whereby Parliament has conferred on the court the unusual duty of going behind the words of the legislation to determine the object, spirit or purpose of the provision or provisions relied upon by the taxpayer. While the taxpayer's transactions will be in strict compliance with the text of the relevant provisions relied upon, they may not necessarily be in accord with their object, spirit or purpose. In such cases, the GAAR may be invoked by the Minister. The GAAR does create some uncertainty for taxpayers. Courts, however, must remember that s. 245 was enacted "as a provision of last resort" (*Trustco*, at para. 21).

67 A court must be mindful that a decision supporting a GAAR assessment in a particular case may have implications for innumerable "everyday" transactions of taxpayers. A decision affecting PUC is a good example. There are undoubtedly hundreds, and perhaps thousands of share transactions each year in which the PUC of a certain class of shares may be a relevant consideration. Because of the potential to affect so many transactions, the court must approach a GAAR decision cautiously. It is necessary to remember that "Parliament must ... be taken to seek consistency, predictability and fairness in tax law" (*Trustco*, at para. 42). As this Court stated in *Trustco*:

> Parliament intends taxpayers to take full advantage of the provisions of the *Income Tax Act* that confer tax benefits. Indeed, achieving the various policies that the *Income Tax Act* seeks to promote is dependent on taxpayers doing so. [para. 31]

68 For this reason, "the GAAR can only be applied to deny a tax benefit when the abusive nature of the transaction is clear" (*Trustco*, at para. 50). The court's role must therefore be to conduct an objective, thorough and step-by-step analysis and explain the reasons for its conclusion.

69 In order to determine whether a transaction is an abuse or misuse of the Act, a court must first determine the "object, spirit or purpose of the provisions ... that are relied on for the tax benefit, having regard to the scheme of the Act, the relevant provisions and permissible extrinsic aids" (*Trustco*, at para. 55). The object, spirit or purpose of the provisions has been referred to as the "legislative rationale that underlies specific or interrelated provisions of the Act" (V. Krishna, *The Fundamentals of Income Tax Law* (2009), at p. 818).

70 The object, spirit or purpose can be identified by applying the same interpretive approach employed by this Court in all questions of statutory interpretation—a "unified textual, contextual and purposive approach" (*Trustco*, at para. 47; *Lipson v. R.*, 2009 SCC 1, [2009] 1 S.C.R. 3 (S.C.C.), at para. 26). While the approach is the same as in all statutory interpretation, the analysis seeks to determine a different aspect of the statute than in other cases. In a traditional statutory interpretation

approach the court applies the textual, contextual and purposive analysis to determine what the words of the statute mean. In a GAAR analysis the textual, contextual and purposive analysis is employed to determine the object, spirit or purpose of a provision. Here the meaning of the words of the statute may be clear enough. The search is for the rationale that underlies the words that may not be captured by the bare meaning of the words themselves. However, determining the rationale of the relevant provisions of the Act should not be conflated with a value judgment of what is right or wrong nor with theories about what tax law ought to be or ought to do.

71 Second, a court must consider whether the transaction falls within or frustrates the identified purpose (*Trustco*, at para. 44). As earlier stated, while an avoidance transaction may operate alone to produce a tax benefit, it may also operate as part of a series of transactions that results in the tax benefit. While the focus must be on the transaction, where it is part of a series, it must be viewed in the context of the series to enable the court to determine whether abusive tax avoidance has occurred. In such a case, whether a transaction is abusive will only become apparent when it is considered in the context of the series of which it is a part and the overall result that is achieved (*Lipson*, at para. 34, *per* LeBel J.).

72 The analysis will then lead to a finding of abusive tax avoidance: (1) where the transaction achieves an outcome the statutory provision was intended to prevent; (2) where the transaction defeats the underlying rationale of the provision; or (3) where the transaction circumvents the provision in a manner that frustrates or defeats its object, spirit or purpose (*Trustco*, at para. 45; *Lipson*, at para. 40). These considerations are not independent of one another and may overlap. At this stage, the Minister must clearly demonstrate that the transaction is an abuse of the Act, and the benefit of the doubt is given to the taxpayer.

73 When applying this test, there is no distinction between an "abuse" and a "misuse". Instead, there is a single unified approach (*Trustco*, at para. 43). In the balance of these reasons, I will therefore only use the term "abuse".

(1) The Relevant Sections

74 The three sections of the Act that are alleged to have been abused are ss. 89(1), 87(3) and 84(3). Section 89(1) defines PUC. The relevant portion reads:

> "paid-up capital" at any particular time means,
>
> > (a) in respect of a share of any class of the capital stock of a corporation, an amount equal to the paid-up capital at that time, in respect of the class of shares of the capital stock of the corporation to which that share belongs, divided by the number of issued shares of that class outstanding at that time,
> >
> > (b) in respect of a class of shares of the capital stock of a corporation,
> >
> > > (iii) where the particular time is after March 31, 1977, an amount equal to the paid-up capital in respect of that class of shares at the particular time, computed without reference to the provisions of this Act except subsections 51(3) and 66.3(2) and (4), sections 84.1 and 84.2, subsections 85(2.1), 85.1(2.1), 86(2.1), 87(3) and (9), 128.1(2) and (3), 138(11.7), 192(4.1) and 194(4.1) and section 212.1,

75 This definition is unusual. It does not provide an express positive definition. Instead, it states that PUC shall be calculated initially "without reference to the provisions of this Act". In practice this means that the PUC calculation begins with reference to the stated capital of a class of shares, determined under corporate law. This is explained in para. 2 of the Income Tax Interpretation Bulletin IT-463R2 "Paid-up Capital" (September 8, 1995):

> Since subparagraph (b)(iii) of the definition of "paid-up capital" provides that the amount of the paid-up capital of a class of shares is initially determined without reference to the provisions of the *Income*

> *Tax Act*, the calculation is based on the relevant corporate law rather than tax law. The amount calculated under corporate law is usually referred to as the “stated capital” of the class of shares.
>
> (See also Krishna, at p. 621.)

76 Stated capital is “the full amount that [a corporation] receives in respect of any shares it issues” (K. P. McGuinness, *Canadian Business Corporations Law* (2nd ed. 2007), at §7.231). Where an investment is made in a corporation in consideration for shares, the stated capital of the corporation increases. Professor Krishna refers to stated capital as “the amount of money a shareholder ‘commits’ to the corporation” (p. 610). The calculation of stated capital is set out at s. 26 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (“*CBCA*”) and at s. 28 of the Alberta *Business Corporations Act*, R.S.A. 2000, c. B-9 (“*ABCA*”).

77 Because the Act relies on the corporate law concept of stated capital, the computation of PUC will be based on the statute in the jurisdiction in which a corporation is registered. In this case, the amalgamation of Copthorne I and VHHC Holdings occurred under the *ABCA*.

78 Where the PUC of a corporation diverges from the stated capital it is “because of subsequent adjustments for tax purposes” (Krishna, at p. 621). The adjustments made to compute PUC are those enumerated in subparagraph (*b*)(iii) of the definition of PUC in s. 89(1). Thus, while stated capital and PUC may be the same in some cases, the two may differ substantially. The adjustment relevant in this case is found in s. 87(3).

79 Section 87(3) ensures that the PUC of the shares of an amalgamated corporation shall not exceed the PUC of the shares of the amalgamating corporations. In effect, it means that when companies amalgamate, it is the PUC of the shares of the amalgamating corporations, not their stated capital, that is used to determine the PUC of the shares of the amalgamated corporation. The relevant portion of the section reads:

> **87**. …
>
> (3) Subject to subsection 87(3.1), where there is an amalgamation or a merger of 2 or more Canadian corporations, in computing at any particular time the paid-up capital in respect of any particular class of shares of the capital stock of the new corporation,
>
>> (a) there shall be deducted that proportion of the amount, if any, by which the paid-up capital, determined without reference to this subsection, in respect of all the shares of the capital stock of the new corporation immediately after the amalgamation or merger exceeds the total of all amounts each of which is the paid-up capital in respect of a share (<u>except a share held by any other predecessor corporation</u>) of the capital stock of a predecessor corporation. ...

80 Section 87(3) provides that the PUC of the shares of the amalgamated corporation will be reduced if it exceeds the PUC of the shares of the amalgamating corporations. If there is more than one class of shares, the reduction will be applied proportionally to each class.

81 However, s. 87(3) has an additional effect which is at the centre of this appeal. It ensures that the total PUC of the shares of the amalgamating corporations will be aggregated “except a share held by any other predecessor corporation”. The effect of this short additional parenthetical clause is that, on amalgamation, any PUC of the shares of an amalgamating corporation, where its shares were held *by* another amalgamating corporation, will be cancelled rather than being aggregated. Thus, where an amalgamation is vertical—that is, where shares of one amalgamating corporation are held by another amalgamating corporation as in a parent-subsidiary relationship—the PUC of the shares of the subsidiary will not be aggregated, but will be cancelled. In the case of a wholly owned subsidiary, the resulting PUC will be that of the shares of the parent corporation only. (Where shares of a subsidiary are held partially by a parent corporation and partially by other shareholders, it will only be the PUC of the shares of the subsidiary held by the parent corporation that will be cancelled.)

82 This may be contrasted with a horizontal amalgamation where the companies being amalgamated do not own shares in one another (although they may both be owned by the same parent, as was the case here). In a horizontal amalgamation no PUC is attributable to shares that are "held by any other predecessor corporation", and thus the text of s. 87(3) would result in an aggregation and not a cancellation of PUC of the shares of the amalgamating corporations.

83 The third section relied upon by the Minister is s. 84(3). It reads:

> **84**. …
>
> (3) Where at any time after December 31, 1977 a corporation resident in Canada has redeemed, acquired or cancelled in any manner whatever (otherwise than by way of a transaction described in subsection 84(2)) any of the shares of any class of its capital stock,
>
>> (a) the corporation shall be deemed to have paid at that time a dividend on a separate class of shares comprising the shares so redeemed, acquired or cancelled equal to the amount, if any, by which the amount paid by the corporation on the redemption, acquisition or cancellation, as the case may be, of those shares exceeds the paid-up capital in respect of those shares immediately before that time; and
>>
>> (b) a dividend shall be deemed to have been received at that time by each person who held any of the shares of that separate class at that time equal to that portion of the amount of the excess determined under paragraph 84(3)(*a*) that the number of those shares held by the person immediately before that time is of the total number of shares of that separate class that the corporation has redeemed, acquired or cancelled, at that time.

84 Section 84(3) is a deeming provision. It splits the amount paid on a share redemption between the PUC and the excess over PUC. To the extent a shareholder receives an amount less than or equal to the PUC it will be considered a non-taxable return of capital. However, where the payment exceeds the PUC, s. 84(3) deems the excess to be a dividend subject to tax. In effect, s. 84(3) merely takes the PUC, determined pursuant to s. 89(1) including any adjustments such as required by s. 87(3), and deems any amount paid in excess of the resulting PUC a dividend subject to tax.

(2) Which Provisions Are Abused?

85 The issue in this appeal involves the computation of PUC on amalgamation. Section 84(3) does not alter the computation of PUC. It merely accepts and applies the PUC computations made pursuant to other provisions.

86 Sections 89(1) and 87(3) do deal with the computation of PUC on amalgamation. As noted above, the definition of PUC in s. 89(1) provides a baseline reliance on stated capital for the calculation of PUC, with subsequent adjustments. Section 87(3) provides for a reduction that may apply on amalgamations. To determine if there was abuse in this case, it is s. 87(3) that must be at the centre of the analysis.

(3) The Object, Spirit and Purpose of Section 87(3)

87 To assess the underlying rationale of s. 87(3) it is necessary to consider its text, context and purpose. As with all statutory interpretation, these three elements are not entirely separate, and at times they will overlap.

(a) The Text of the Provision

88 In any GAAR case the text of the provisions at issue will not literally preclude a tax benefit the taxpayer seeks by entering into the transaction or series. This is not surprising. If the tax benefit of the transaction or series was prohibited by the text, on reassessing the taxpayer, the Minister would only have to rely on the text and not resort to the GAAR. However, this does not mean that the text is irrelevant. In a GAAR assessment the text is considered to see if it sheds light on what the provision was intended to do.

89 The text of s. 87(3) ensures that in a horizontal amalgamation the PUC of the shares of the amalgamated corporation does not exceed the total of the PUC of the shares of the amalgamating corporations. The question is why s. 87(3) is concerned with limiting PUC in this way. Since PUC may be withdrawn from a corporation without inclusion in the income of the shareholder, it seems evident that the intent is that PUC be limited such that it is not inappropriately increased merely through the device of an amalgamation.

90 Section 87(3) also provides, in its parenthetical clause, that the PUC of the shares of an amalgamating corporation held by another amalgamating corporation is cancelled. In other words, in a vertical amalgamation, the PUC of inter-corporate shareholdings, such as exists in the case of a parent-subsidiary relationship, is not to be aggregated. Again, having regard to the fact that PUC may be withdrawn from a corporation not as a dividend subject to tax but as a non-taxable return of capital, the indication is that the parenthetical clause is intended to limit PUC of the shares of the amalgamated corporation to the PUC of the shares of the amalgamating parent corporation. While the creation of PUC in the shares of downstream corporations is valid, its preservation on amalgamation may be seen as a means of enabling the withdrawal of funds in excess of the capital invested as a return of capital rather than as a deemed dividend to the shareholder subject to tax.

(b) The Context of the Provision

91 The consideration of context involves an examination of other sections of the Act, as well as permissible extrinsic aids (*Trustco*, at para. 55). However, not every other section of the Act will be relevant in understanding the context of the provision at issue. Rather, relevant provisions are related “because they are grouped together” or because they “work together to give effect to a plausible and coherent plan” (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 361 and 364).

(i) The PUC Scheme of the Act

92 The first contextual consideration is the PUC scheme in the Act, including s. 84(3) and s. 89(1).

93 In oral argument, counsel for Copthorne conceded that s. 84(3) provides for payment of PUC to shareholders on redemption of shares by the corporation without liability for tax in recognition of the fact that the initial investment is made with tax-paid funds.

94 I agree that this is why s. 84(3) provides that any payment on redemption of shares is only deemed to be a dividend where the amount paid is in excess of PUC. Section 84(3) helps to explain why, in s. 87(3), PUC is limited to the PUC of the shares of the amalgamating corporations in a horizontal amalgamation and why the PUC of the shares of a subsidiary held by a parent will be cancelled on a vertical amalgamation. Without limiting or cancelling PUC as provided in s. 87(3), payments to shareholders on redemption of their shares in excess of the investment made with tax-paid funds could be made without liability for tax by the shareholder.

95 Section 89(1) incorporates by reference provisions which reduce the PUC of the shares of a corporation. They are colloquially referred to as “grinds”. For example, ss. 84.1 and 212.1 both grind PUC in non-arm's length transactions. These sections have been described as “anti-avoidance” provisions aimed at “dividend stripping” (*Collins & Aikman Products Co. v. R.*, 2009 TCC 299, 2009 D.T.C. 1179 (Eng.) (T.C.C. [General Procedure]), at paras. 55 and 105, aff'd 2010 FCA 251, [2011] 1 C.T.C. 250 (F.C.A.)) because such non-arm's length transactions may provide an opportunity for corporations to return funds in excess of the initial investment made with tax-paid funds to a shareholder as a non-taxable return of capital, rather than as a taxable dividend.

96 The existence of such grinds is an indication that the subsections enumerated in s. 89(1) are mostly intended to prevent the preservation of PUC in instances where bare reliance on stated capital would not achieve Parliament's intended tax purpose of allowing only for a return of tax-paid investment without inclusion in income. Because s. 87(3) is one provision within this series of grinds, it is reasonable to conclude that it shares the same purpose of precluding the preservation of PUC where such preservation would allow for a withdrawal, without liability for tax, of an amount in excess of the investment made with tax-paid funds.

(ii) The Principle of Non-Consolidation

97 I turn now from the immediate PUC scheme to other related provisions in the Act. Copthorne points out that the Act does not generally consolidate the financial results of separate corporations for tax purposes. Section 2(1) of the Act states that income tax is computed "for each taxation year of every person resident in Canada". Because each corporation is a separate taxpayer for the purposes of the Act, the tax computation for each corporation is separate. Copthorne refers to this as a policy of corporate "non-consolidation".

98 In the context of PUC, this means that the shares of a corporation have their own PUC, and that this PUC exists independently from the PUC of the shares of other corporations, whether or not the corporations are related. For example, an investment may be made by an individual in a parent company, by the parent in a subsidiary, and by the subsidiary in a further subsidiary, with PUC created at each step. This non-consolidation of PUC results from the non-consolidation of stated capital. In corporate law stated capital is determined by reference to each corporation, whether related to one another or not, and is based on the consideration received for shares issued by the corporation (see: *CBCA*, s. 26(2), and *ABCA*, s. 28(2)).

99 This context suggests that the creation of PUC of the shares in a downstream corporation is not contrary to any policy of the Act. However, this point speaks to the creation of PUC, rather than the preservation of PUC. Simply because PUC was validly created does not mean that it may be validly preserved. Section 87(3) does not speak to creation, but instead to limitation or cancellation of PUC upon amalgamation. In amalgamations, two unconsolidated corporations become one consolidated corporation. Section 87(3) provides a bridge connecting the PUC of the shares of the prior unconsolidated corporations and the subsequent consolidated corporation. In horizontal amalgamation, the PUC of the shares of the amalgamated corporation cannot exceed the PUC of the shares of the amalgamating corporations. Upon a vertical amalgamation, all PUC of shares held by a parent corporation in a subsidiary will be cancelled. The principle of non-consolidation recognizes the valid creation of PUC in a subsidiary corporation, but does not justify preservation of PUC when parent and subsidiary are amalgamated.

(iii) The Relevance of the Capital Gains Scheme

100 Copthorne argues that the provisions of the Act relating to capital gains and PUC are part of a single integrated scheme that "provides a complete solution to this situation" and ensures that tax eventually is applied to shareholder returns, either as a deemed dividend or as a capital gain (A.F., at para. 69).

101 On the basis of the arguments made, I have not been convinced to accept Copthorne's position. Capital gains or losses are calculated in relation to the adjusted cost base ("ACB") of a share, not its PUC. While PUC relates to shares, ACB relates to a specific taxpayer. PUC depends on the amount initially invested as capital, whereas the ACB reflects the amount the current shareholder paid for the shares. In some cases the ACB and PUC may be the same, but in others they may not be. In the case of shares acquired from a prior shareholder it will be unlikely that the ACB will be equal to the PUC.

102 I would hesitate to conclude that the Act contains a "complete solution" whereby any withdrawal that would not be caught under the PUC-deemed dividend scheme would be caught instead by the capital gains scheme. An amount returned to a shareholder on a share redemption may be considered a return of capital rather than a deemed dividend under s. 84(3). However, the return of capital may reflect either a capital gain or a capital loss, which would be determined in relation to the ACB of the shareholder.

103 Further, the tax rates applicable to dividends and capital gains are not identical. With respect to non-resident shareholders, tax treaties may exempt capital gains from tax but not dividends. This suggests that the capital gains scheme is not an automatic proxy for the PUC-deemed dividend scheme, whereby a taxpayer will always be liable for the same tax under one tax scheme or the other on a redemption. Copthorne did not cite any sources directly on point. The capital gains issue was not addressed by either the Tax Court judge or the Federal Court of Appeal. In the circumstances, Copthorne has not substantiated this argument sufficiently that it can be accepted in this case.

(iv) The "In Rem" Nature of PUC

104 Copthorne says that PUC is *in rem*, and as a result should not be "traced" back to an initial investment. It is true that PUC is a tax attribute of a share that does not generally change with a change of shareholder, and thus can be considered in some ways to be *in rem*. Copthorne argues that the courts below only found that the preservation of PUC was inappropriate because it was "traced" to the same initial investment of funds. It argues that the PUC should have been treated in the same way, regardless of how it was created.

105 The difficulty is that s. 87(3) is an example of where the treatment of PUC *does* depend on who owns the shares, because PUC associated with inter-corporate shareholdings *is* cancelled on vertical amalgamation. In this circumstance, the PUC is not exclusively *in rem*. Thus, it cannot be said that the treatment of PUC is never dependent on the identity of the owner of the shares. Instead, under s. 87(3) where shares of an amalgamating corporation are owned by another amalgamating corporation the PUC of those shares is cancelled.

(v) Stop-PUC Rules in the Act

106 Copthorne says that the absence of specific stop-PUC rules, similar to stop-loss rules, suggests that the Act does not have a policy against PUC preservation. Thus, Copthorne argues, the object, spirit and purpose of s. 87(3) cannot be against the preservation of PUC. A stop-loss rule is a "non-recognition rul[e] that prevent[s] the realization of a loss on the disposition of a particular property .... The purpose ... is to prevent the realization of accrued losses when a taxpayer's economic interest in the property is not actually relinquished" (Duff, *Canadian Income Tax Law*, at pp. 1109-10).

107 However, the grinds set out in s. 89(1), including s. 87(3), act to cancel or limit PUC in situations where it is considered inappropriate for tax purposes for it to be preserved. While s. 87(3) is not a "stop-loss" rule, it can be viewed as a "stop-PUC" rule intended to stop the aggregation of PUC in vertical amalgamations and to limit the aggregation upon horizontal amalgamation so that PUC of an amalgamated corporation does not exceed the total of the tax-paid investment in the amalgamating corporations.

(vi) Expressio Unius Est Exclusio Alterius

108 Copthorne argues that Parliament has enacted a number of PUC provisions which are intended to prevent taxpayers from inappropriately increasing or preserving PUC. It argues that the detail of the PUC provisions, such as s. 87(3), suggests that where the taxpayer's actions are not caught by a provision, the actions cannot abuse the purpose of the provision. I interpret this argument as what Professor Sullivan calls "implied exclusion". In essence the argument is that "there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly" (Sullivan, at p. 244). Section 89(1) is a definition section. As such, I would agree with Copthorne that when the definition lists a series of "grinds", without any indication of the possibility of making additions to that list, that it may be assumed that the list is exhaustive. Thus, if this were a case of traditional statutory interpretation, an argument that the series of transactions here are somehow contemplated by the listed grinds could fail.

109 However, that is not the nature of a GAAR analysis. When the Minister invokes the GAAR, he is conceding that the words of the statute do not cover the series of transactions at issue. Rather, he argues that although he cannot rely on the text of the statute, he may rely on the underlying rationale or object, spirit and purpose of the legislation to support his position.

110 I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.

111 However, the implied exclusion argument is misplaced where it relies exclusively on the text of the PUC provisions without regard to their underlying rationale. If such an approach were accepted, it would be a full response in all GAAR cases, because the actions of a taxpayer will always be permitted by the text of the Act. As noted in *OSFC*, if the Court is confined to a consideration of the language of the provisions in question, without regard to their underlying rationale, it would seem inevitable that the GAAR would be rendered meaningless (para. 63).

(vii) Conclusion of Contextual Considerations

112 Having regard to the PUC scheme and the principle of non-consolidation and the other arguments made by Copthorne, the necessary conclusion remains that one rationale for s. 87(3) is that payments to shareholders from an amalgamated corporation on a share redemption should not be taxable as a deemed dividend, only to the extent that such payments reflect investment made with tax-paid funds. The objective of this exemption is to recognize PUC as a return of capital to shareholders.

(c) The Purpose of the Provisions

113 Tax provisions are intended to “promote purposes related to specific activities” (*Trustco*, at para. 52). This step seeks to ascertain what outcome Parliament intended a provision or provisions to achieve, amidst the myriad of purposes promoted by the Act.

114 Copthorne claims that the purpose of these provisions is to compute PUC based on stated capital in most cases, except where a specific exception exists. It argues that s. 87(3) represents one exception, which is intended to ensure continuity or to “preven[t] corporate law increases to stated capital on horizontal amalgamations” (A.F., at para. 82 (emphasis deleted)).

115 However, while continuity may explain part of s. 87(3), it is not a tax rationale for the parenthetical exception for vertical amalgamations. As discussed above, s. 87(3) ensures that the PUC of the shares of an amalgamated corporation does not exceed the PUC of the shares of the amalgamating corporations in a horizontal amalgamation. For this reason, I would agree that continuity is one of the purposes promoted by s. 87(3). However, as noted by this Court in *Trustco*, a provision “can serve a variety of independent and interlocking purposes” (para. 53). The words of s. 87(3), other than the parenthetical words, are directed at continuity in a horizontal amalgamation. The parenthetical portion, dealing with vertical amalgamations, functions to cancel the PUC of the shares of an amalgamating subsidiary corporation. By cancelling the PUC of shares held by a parent corporation, rather than simply continuing the PUC of those shares, the parenthetical portion reflects an additional purpose in s. 87(3). The parenthetical portion seeks to preclude corporations from preserving PUC of the shares of a subsidiary corporation on amalgamation with the parent corporation as that PUC reflects investment of the same tax-paid dollars as in the parent corporation.

116 It has also been argued that s. 87(3) is simply intended to maintain consistency between corporate law and tax law, and that s. 87(3) takes its purpose from the corporate law cancellation of shares upon a vertical amalgamation. Under s. 182(2) of the *CBCA*, the shares held by one amalgamating corporation in another must be cancelled on amalgamation (s. 182(2) of the *ABCA* has the same effect). While neither explicitly requires the cancellation of the stated capital in those shares, it is generally accepted that the stated capital is cancelled along with the shares (see C. Cardarelli, “Transactions Involving Paid-Up Capital”, in the Canadian Tax Foundation's *Report of Proceedings of the Fifty-Sixth Tax Conference* (2005), 26:1, at p. 26:20). In this way, corporate law treats horizontal amalgamations differently than vertical amalgamations. Similarly, s. 87(3) treats horizontal amalgamations and vertical amalgamations differently. The argument is that on vertical amalgamations, the purpose of s. 87(3) is simply to cancel PUC because shares and therefore stated capital are cancelled. As I understand the argument, cancellation of PUC on vertical amalgamations is to align PUC with corporate law. Therefore, there is no tax reason to cancel PUC of the shares of a corporation that was a subsidiary if through a series of transactions it was no longer a subsidiary.

117 The difficulty with this rationale is that in corporate law, shares held by one amalgamating corporation in another are cancelled to prevent an inappropriate dilution of the shares of a corporation upon amalgamation (R. W. V. Dickerson, J. L. Howard and L. Getz, *Proposals for a New Business Corporations Law for Canada* vol. I, at para. 362). However, the aggregation of PUC would not dilute the share capital of a corporation, and thus the purpose of s. 87(3) cannot be taken directly from the purpose for the cancellation of shares in corporate law, because the two are not aimed at the same concern. Instead, the independent cancellation of the PUC under the *Income Tax Act* attributable to shares held by an amalgamating corporation in a subsidiary suggests that Parliament believed that aggregating PUC upon a vertical amalgamation would result in an excessive preservation for a tax reason.

118 Copthorne submits that such a conclusion could only rest upon a *general* policy against surplus stripping. It argues that no such general policy exists and therefore the object, spirit and purpose of s. 87(3) cannot be to prevent surplus stripping

by the aggregation of PUC. This argument is based upon this Court's admonition in *Trustco* that "courts cannot search for an overriding policy of the Act that is not based on a unified, textual, contextual and purposive interpretation of the specific provisions in issue" (para. 41). What is not permissible is basing a finding of abuse on some broad statement of policy, such as anti-surplus stripping, which is not attached to the provisions at issue. However, the tax purpose identified in these reasons is based upon an examination of the PUC sections of the Act, not a broadly stated policy. The approach addresses the rationale of the PUC scheme specifically in relation to amalgamation and redemption and not a general policy unrelated to the scheme under consideration.

119 Copthorne argues that upholding the decision of the Tax Court would leave taxpayers under the "Damoclesian menace of the GAAR" (A.F., at para. 57). It suggests that taxpayers would not be able to determine whether PUC which had been validly created in a downstream investment would be subject to cancellation if it was sold to a third party or to an unrelated non-resident party. Copthorne says that this will leave taxpayers in a state of impermissible uncertainty. However, before the GAAR may be applied in any circumstance, there must be an avoidance transaction which results in a tax benefit. In the absence of a specific transaction undertaken primarily to obtain a tax benefit, a sale of shares to a third party or to an unrelated non-resident party primarily for a *bona fide* non-tax purpose will not trigger the GAAR. In such a case, PUC will continue to be a valid attribute which allows for a return of an amount equivalent to PUC to be paid to new shareholders without inclusion in their income.

120 I should emphasize that the purchase of shares may have a tax purpose, but that does not necessarily mean that the tax purpose will always be the primary reason for the transaction. In the numerous share transactions taking place each year, the party acquiring shares of a corporation will likely be aware of the tax implications of the existing PUC. However, where a transaction takes place primarily for a nontax purpose, there will be no avoidance transaction. In the absence of an avoidance transaction, the fact that a transaction may have a secondary tax benefit purpose will not trigger the GAAR. Whether the transactions are between parties at arm's length or not at arm's length should be immaterial (*Stubart Investments Ltd. v. R.*, [1984] 1 S.C.R. 536 (S.C.C.)).

121 Copthorne also argues that the Act does not contain a policy that parent and subsidiary corporations must always remain as parent and subsidiary. I agree. There is no general principle against corporate reorganization. Where corporate reorganization takes place, the GAAR does not apply unless there is an avoidance transaction that is found to constitute an abuse. Even where corporate reorganization takes place for a tax reason, the GAAR may still not apply. It is only when a reorganization is primarily for a tax purpose *and* is done in a manner found to circumvent a provision of the *Income Tax Act* that it may be found to abuse that provision. And it is only where there is a finding of abuse that the corporate reorganization may be caught by the GAAR.

(d) Conclusion on the Object, Spirit and Purpose of the Parenthetical Portion of Section 87(3)

122 Having regard to the text, context and purpose of s. 87(3), I would conclude that the object, spirit and purpose of the parenthetical portion of the section is to preclude preservation of PUC of the shares of a subsidiary corporation upon amalgamation of the parent and subsidiary where such preservation would permit shareholders, on a redemption of shares by the amalgamated corporation, to be paid amounts as a return of capital without liability for tax, in excess of the amounts invested in the amalgamating corporations with tax-paid funds. Having identified the object, spirit and purpose of s. 87(3), it is now necessary to determine whether the provision has been abused in this case.

(4) Was There an Abuse of the Provisions of the Act?

123 While Parliament's intent is to seek consistency, predictability and fairness in tax law, in enacting the GAAR, it must be acknowledged that it has created an unavoidable degree of uncertainty for taxpayers. This uncertainty underlines the obligation of the Minister who wishes to overcome the countervailing obligations of consistency and predictability to demonstrate clearly the abuse he alleges.

124 Copthorne agrees that s. 87(3) would have led to a cancellation of the PUC of the VHHC Holdings shares if it had been vertically amalgamated with Copthorne I. Instead of amalgamating the two companies, Copthorne I sold its VHHC Holdings shares to Big City, in order to avoid the vertical amalgamation and cancellation of the PUC of the shares of VHHC Holdings.

The transaction obviously circumvented application of the parenthetical words of s. 87(3) upon the later amalgamation of Copthorne I and VHHC Holdings.

125 The question is whether this was done in a way that "frustrates or defeats the object, spirit or purpose" of the parenthetical words of s. 87(3) (*Trustco*, at para. 45). In oral argument, Copthorne argued that by leaving VHHC Holdings and Copthorne in a vertical structure would be "throwing away" the PUC upon amalgamation. It argued that the purpose of s. 87(3) cannot require shareholders to throw away valuable assets. However, it must be remembered that there has been a finding of tax benefit (protecting the PUC of the shares of VHHC Holdings of $67,401,279 from withholding tax upon Copthorne III redeeming a large portion of its shares) and an avoidance transaction (the sale of VHHC Holdings from Copthorne I to Big City). The GAAR analysis looks to determine whether the avoidance of a vertical amalgamation and preservation of the VHHC Holdings' PUC of $67,401,279 circumvented s. 87(3), achieves an outcome s. 87(3) was intended to prevent or defeats the underlying rationale of s. 87(3). If such a finding is made, the taxpayer is not "throwing away" a valuable asset. It is the application of the GAAR that applies to deny the benefit of that "asset" to the taxpayer.

126 It is true that the text of s. 87(3) recognizes two options, the horizontal and vertical forms of amalgamations. It is also true that the text does not expressly preclude a taxpayer from selecting one or the other option. However, I have concluded that the object, spirit and purpose of s. 87(3) is to preclude the preservation of PUC, upon amalgamation, where such preservation would allow a shareholder, on a redemption of shares by the amalgamated corporation, to be paid amounts without liability for tax in excess of the investment of tax-paid funds.

127 I am of the opinion that the sale by Copthorne I of its VHHC Holdings shares to Big City, which was undertaken to protect $67,401,279 of PUC from cancellation, while not contrary to the text of s. 87(3), does frustrate and defeat its purpose. The tax-paid investment here was in total $96,736,845. To allow the aggregation of an additional $67,401,279 to this amount would enable payment, without liability for tax by the shareholders, of amounts well in excess of the investment of tax-paid funds, contrary to the object, spirit and purpose or the underlying rationale of s. 87(3). While a series of transactions that results in the "double counting" of PUC is not in itself evidence of abuse, this outcome may not be foreclosed in some circumstances. I agree with the Tax Court's finding that the taxpayer's "double counting" of PUC was abusive in this case, where the taxpayer structured the transactions so as to "artificially" preserve the PUC in a way that frustrated the purpose of s. 87(3) governing the treatment of PUC upon vertical amalgamation. The sale of VHHC Holdings shares to Big City circumvented the parenthetical words of s. 87(3) and in the context of the series of which it was a part, achieved a result the section was intended to prevent and thus defeated its underlying rationale. The transaction was therefore abusive and the assessment based on application of the GAAR was appropriate.

VI. Conclusion

128 I would affirm the findings of the Tax Court and Federal Court of Appeal and dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

AppendixA

I. The companies involved in this case are all controlled by Mr. Li Ka-Shing, and his son, Victor Li (the "Li Family"). They are:

> a. *Copthorne Holdings Ltd. ("Copthorne")*. The case involves *three* companies named Copthorne Holdings Ltd.. While each has the same name, they are not the same, nor are they the same as the appellant in this Court. The first Copthorne was incorporated under the laws of Ontario in 1981, with one share owned by Big City. The second and third companies are amalgamated successor companies that continued business using the name Copthorne Holdings Ltd. I refer to the three companies as Copthorne I, II and III. The appellant in this case is actually the product of a third amalgamation that also continued under the same name.

b. *VHHC Investments Ltd. ("VHHC Investments")*, an Ontario company incorporated in 1987, owned directly and indirectly by Victor Li, son of Li Ka-Shing.

c. *VHHC Holdings Ltd. ("VHHC Holdings")*, an Ontario corporation incorporated in 1987, initially owned entirely by VHHC Investments.

d. *Big City Project Corporation B.V. ("Big City")*, a Netherlands company indirectly controlled by Li Ka-Shing.

e. *Copthorne Overseas Investment Ltd. ("COIL")*, a Barbados company incorporated and owned by Copthorne I.

f. *Asfield B.V. ("Asfield")*, a Netherlands company indirectly owned by a trust whose primary beneficiary was Victor Li.

g. *L.F. Holdings Ltd. ("L.F. Holdings")*, a Barbados company controlled by Li Ka-Shing.

h. *VHSUB Holdings Inc. ("VHSUB")*, a Canadian company owned by VHHC Holdings.

i. *Husky Oil Ltd. ("Husky")*, a Canadian company owned in part by the Li Family companies that carried on the business of oil and gas production, refining and distribution.

j. *Copthorne International Investment Ltd. ("CIIL")*, a British Virgin Islands Company incorporated in 1994.

k. *L.F. Investments (Barbados) Ltd. ("L.F. Investments")*, a Barbados company incorporated in 1994 by L.F Holdings.

Background

II. Copthorne I was first incorporated as an Ontario corporation in 1981. It purchased the Toronto Harbour Castle Hotel in 1981 and sold it in 1989 for a substantial capital gain. Its only share was owned by another company within the Li Family group, Big City.

III. After selling the hotel, Copthorne I incorporated a new company, COIL. COIL carried on a bond-trading business in Singapore.

The Creation of the VHHC Companies

IV. In 1987, VHHC Investments was incorporated in Ontario. Victor Li owned the Class A voting common shares, which had a PUC of $100. He also held 18.75% of the Class B non-voting common shares. The rest of the Class B shares were owned by Asfield which was indirectly owned by Victor Li.

V. In 1987, 1988 and 1991, Victor Li, Asfield, and L.F. Holdings further invested in shares of VHHC Investments. As a result of these investments the common and preference shares of VHHC Investments had a total PUC $96,736,845.

VI. During this time VHHC Investments in turn used $67,401,279 of the invested funds to purchase common shares of VHHC Holdings. As a result, the shares of VHHC Holdings had a PUC of $67,401,279.

The VHHC Companies' Losses From Husky Investments

VII. VHHC Holdings, in turn, invested in Husky directly and through a subsidiary VHSUB. By the end of 1991 the Husky shares had lost substantial value, and as a result VHHC Holdings had suffered a substantial capital loss.

VHHC Holdings Sold to Copthorne

VIII. In 1992, VHHC Investments sold all of its common shares in VHHC Holdings, which still had a PUC of $67.4 million to Copthorne I for 1 Class A special share of Copthorne I valued at $1,000. This was done in order to shift the capital loss from the Husky investment suffered by VHHC Holdings to Copthorne I to shelter the capital gains from the sale of the hotel.

As a result of this sale Copthorne I owned the shares in VHHC Holdings, with the $67.4 million PUC but only a nominal fair market value.

The First Series—Amalgamating Copthorne and VHHC Holdings

IX. In 1993, the Li Family decided to amalgamate Copthorne I, VHHC Holdings and two other corporations which it controlled. This was done to simplify the structure of the group of companies and to allow the losses from each of the predecessor corporations' businesses to shelter the profits of others.

X. However, a direct vertical amalgamation of VHHC Holdings and its parent company, Copthorne I, would result in a cancellation of the $67.4 million PUC in the shares of VHHC Holdings under s. 87(3) of the *Income Tax Act*. To avoid this result, the Li Family decided to engage in a number of transactions to protect the PUC.

XI. In July 1993, Copthorne I sold its VHHC Holdings common shares to Big City, Copthorne I's parent company for $1,000. This is referred to as the “1993 Share Sale”. This meant that any amalgamation between Copthorne I and VHHC Holdings was “horizontal” not “vertical”. This share sale is the transaction that the Minister found was an “avoidance transaction”.

XII. On January 1, 1994, Copthorne I, VHHC Holdings, and two other corporations amalgamated to form “Copthorne II”. The PUC from the common shares of VHHC Holdings was added to $1 of PUC from the single common share of Copthorne I, resulting in a total PUC of approximately $67.4 million distributed evenly between the 20,001,000 common shares of Copthorne II. All of these shares were owned by Big City.

XIII. Both the 1993 Share Sale and the subsequent amalgamation are agreed to be part of a first series of transactions.

The Second Series—Amalgamating VHHC Investments With Copthorne II

XIV. In 1994, legislative amendments were proposed to the Foreign Accrual Property Income (“FAPI”) rules of the Act which stood to negatively affect COIL's business. In response to these proposed changes, the Li Family decided to dispose of some of COIL's assets.

XV. A new company, CIIL, was incorporated, to purchase the bond-trading business from COIL. A new Barbados company, L.F. Investments was incorporated to purchase all of the shares of Copthorne II from Big City and VHHC Investments from L.F. Holdings. The two purchased companies were then amalgamated with two other companies to form “Copthorne III”.

XVI. Upon amalgamation, L.F. Investments received Class D shares of Copthorne III with a PUC that was the sum of the PUC in the common shares of Copthorne II (approximately $67.4 million) and the PUC in the common and preferred shares of VHHC Investments (approximately $96.7 million), for a total PUC of $164,138,025. This PUC was held in 164,138,025 Class D preference shares each having a PUC of $1.

The Redemption

XVII. Copthorne III then redeemed 142,035,895 of its Class D preference shares held by L.F. Investments for $142,035,895. As the redemption amount was no more than the total PUC in the shares redeemed by Copthorne III, it was not deemed to be a dividend. Nor did the redemption give rise to a capital gain.

XVIII. Thus, Copthorne did not withhold or remit any tax on behalf of L.F. Investments pursuant to s. 215(1) of the Act.

XIX. The transactions beginning with the incorporation of CIIL and ending with the redemption are agreed to be part of the second series of transactions.

XX. On February 1, 2000, the Minister assessed Copthorne for unwithheld tax under the GAAR. He concluded that Copthorne III was liable for unremitted taxes because the PUC in the shares of Copthorne III should have been calculated to be $96 million, not $164 million. This amounted to $8,748,783.40 in tax which Copthorne III had been obligated to withhold and remit on behalf of L.F. Investments. Given that Copthorne had not withheld any tax, the Minister assessed this amount against Copthorne III.

AppendixB

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

245. (1) In this section,

“tax benefit” means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this Act but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty;

“tax consequences” to a person means the amount of income, taxable income, or taxable income earned in Canada of, tax or other amount payable by or refundable to the person under this Act, or any other amount that is relevant for the purposes of computing that amount;

“transaction” includes an arrangement or event.

(2) [General anti-avoidance provision] Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.

(3) [Avoidance transaction] An avoidance transaction means any transaction

> (a) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit; or
>
> (b) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.

(4) [Application of subsection (2)] Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction

> (a) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of
>
> > (i) this Act,
> >
> > (ii) the *Income Tax Regulations*,
> >
> > (iii) the *Income Tax Application Rules*,
> >
> > (iv) a tax treaty, or
> >
> > (v) any other enactment that is relevant in computing tax or any other amount payable by or refundable to a person under this Act or in determining any amount that is relevant for the purposes of that computation; or

(b) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.

(5) [Determination of tax consequences] Without restricting the generality of subsection (2), and notwithstanding any other enactment,

(a) any deduction, exemption or exclusion in computing income, taxable income, taxable income earned in Canada or tax payable or any part thereof may be allowed or disallowed in whole or in part,

(b) any such deduction, exemption or exclusion, any income, loss or other amount or part thereof may be allocated to any person,

(c) the nature of any payment or other amount may be recharacterized, and

(d) the tax effects that would otherwise result from the application of other provisions of this Act may be ignored,

in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction.

248. …

(10) [Series of transactions] For the purposes of this Act, where there is a reference to a series of transactions or events, the series shall be deemed to include any related transactions or events completed in contemplation of the series.

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