Docket: 2009-3121(IT)G

BETWEEN:

SPRUCE CREDIT UNION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 14, 15, 16 and 17, 2011, at Vancouver, British Columbia.
Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Peter L. Rubin Robert Alan Kopstein Edward Rowe Luke W. Mlynarczyk
Counsel for the Respondent:	Robert Carvalho Bruce Senkpiel David Everett

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JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* with respect to the Appellant's 2005 taxation year is allowed, with costs, in accordance with the reasons for judgment attached hereto.

Signed at Ottawa, Canada, this 15th day of October 2012.

"Patrick Boyle"

Boyle J.

Citation: 2012 TCC 357
Date: 20121015
Docket: 2009-3121(IT)G

BETWEEN:

SPRUCE CREDIT UNION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] The Appellant in this case is a British Columbia ("BC") credit union. There are forty other BC credit unions with appeals or with outstanding objections which have agreed to be bound by the result of this lead case. In the year in question there were 54 credit unions in BC.

I. The Issues to be Addressed

[2] There are two issues to be decided in this case. The first is whether a dividend received by the Appellant from a BC deposit insurance corporation is deductible under the section 112 inter-corporate dividend deduction in the *Income Tax Act* ("the *Act*"). It is the Respondent's position that, notwithstanding that the amount was declared and paid as a dividend, it is not deductible under section 112 by virtue of section 137.1 of the *Act*. The Respondent's position is that (i) the dividend amounts were paid to the credit unions as allocations in proportion to assessments received by the deposit insurance corporation from the credit unions, and required to be included in the credit unions' incomes under paragraph 137.1(10)(*a*); and (ii) section 137.1 is a complete code with respect to such amounts and does not permit them to then be deducted.

[3] The second, alternative issue is whether the section 245 General Anti-Avoidance Rule (the "GAAR") applies to the transactions giving rise to the receipt of the dividend. It is the Respondent's position that, to the extent the amount of the dividend was also an amount described in paragraph 137.1(10)(*a*), the GAAR applies and the dividend amounts should be re-characterized pursuant to the GAAR as a refund of premiums required to be included in the Appellant's income by virtue of subsection 137.1(10) of the *Act*, not to be a dividend, and not thereafter deductible.

II. The Regulation of BC Credit Unions

[4] In the years in question, the regulation of BC credit unions was governed principally by the BC *Financial Institutions Act* (the "*FI Act*") and the principal regulator was the Financial Institutions Commission (the "FI Commission"), an agency of the BC government.

[5] Since 1989, the regulation of credit unions in BC involved two distinct deposit insurance corporations, the Credit Union Deposit Insurance Corporation ("CUDIC") and Stabilization Central Credit Union of British Columbia ("STAB"). It is not disputed that both CUDIC and STAB were deposit insurance corporations for purposes of the *Act*.

A. *CUDIC*

[6] CUDIC is a taxable Canadian corporation controlled and operated by the FI Commission. It is an arm of the BC government. It is responsible for protecting consumers against losses on their deposits and non-equity shares. The *FI Act* requires that CUDIC maintain a deposit insurance fund guaranteeing deposits and non-equity shares up to prescribed limits. Pursuant to the *FI Act*, each member of the FI Commission was also a director of CUDIC, and the only members of CUDIC were its directors.

[7] CUDIC has been funded primarily by assessments paid to it by BC credit unions. Assessment payments to CUDIC were deductible by the credit unions pursuant to section 9 and subsection 137.1(11) of the *Act*. The amounts were not taxable to CUDIC by virtue of subsection 137.1(2). CUDIC assessments were levied from time to time based on the size of the deposit accounts maintained and non-equity shares issued by each credit union. As at December 31, 2003, CUDIC had accumulated a deposit insurance fund of approximately 44 basis points (0.44%) of the aggregate of credit unions' deposit accounts and non-equity shares.

B. *STAB*

[8] STAB is a taxable Canadian corporation. It is a central credit union under the *Credit Union Incorporation Act* of BC. Under the *FI Act*, STAB is the designated stabilization authority and required to supervise credit unions as delegated by the FI Commission. Each BC credit union is required to be a member of STAB and to hold Class A shares as determined by STAB's board of directors. In 2005, 54 BC credit unions, including the Appellant, were members and shareholders of STAB.

[9] STAB was also funded by assessments paid to it by BC credit unions. Assessments were levied based on the size of the assets of each credit union. These premium payments were also deductible by the credit unions under section 9 and subsection 137.1(11) and excluded from STAB's income pursuant to subsection 137.1(2). From its establishment in 1989 to the end of 2002, STAB had assessed cumulative premiums of $82,900,000 against BC credit unions, including $205,000 paid by the Appellant, Spruce Credit Union. Individual credit unions' pro rata share of STAB's annual assessments changed each year as a result of relative performance and industry consolidation.

[10] In 2003, STAB's deposit protection fund was approximately $108,000,000.

[11] From time to time STAB would rebalance its members' shareholdings to reflect the current relative size of members.

C. *Shared Custody of the Deposit Insurance and Protection Funds*

[12] Under the *FI Act*, the responsibility for maintaining the deposit insurance fund rested solely with CUDIC. The deposit insurance fund was to be used to guarantee the amount of deposits and non-equity shares up to prescribed limits in the event of default or failure of the credit union.

[13] STAB's statutory responsibility was to maintain the stability of BC credit unions, that is, to prevent runs on the credit unions, failure or default. Stabilization may take the form of financial injections to a troubled credit union. Obviously, successful stabilization of a credit union obviates the needs to pay out on insured deposits. For this reason, STAB often described its responsibility and activities as deposit protection and not deposit insurance.

[14] In the period up to 2005, there had been limited need for stabilization interventions by STAB. Since STAB was established there had been no credit union defaults in BC and thus no payouts to insured depositors.

[15] At the end of each fiscal year, STAB's assessment income and investment income, less the total of its operating expenses, the financial support it advanced to credit unions and its taxes went into its retained earnings. As a practical matter STAB's deposit protection fund was reflected in its retained earnings.

[16] With full knowledge and blessing of the FI Commission, from 1989 until 2005 the statutory deposit insurance fund was levied and maintained in part by CUDIC and in part by STAB. A 1991 agreement set the target aggregate fund at 55 basis points of credit union deposits and non-equity shares, and specified that one half of the fund should be held by each of CUDIC and STAB. The STAB and CUDIC annual assessments were discussed and coordinated between the two. In some years, only CUDIC assessed and STAB did not. In other years both CUDIC and STAB assessed the BC credit unions. STAB never made any unnecessary assessments.

[17] Throughout this time a deposit protection agreement (secured at times by a general security agreement or letter of credit) was in place pursuant to which STAB committed to make a portion of its deposit protection fund available to CUDIC in the event CUDIC needed to replenish its deposit insurance fund.

III. Regulatory Review of Size and Ownership of the Deposit Insurance Fund

[18] This shared custody/holding/ownership of the deposit insurance and protection funds continued without concern until 2000. At that time, following a change in senior personnel at the FI Commission, discussions were held between the FI Commission, CUDIC and STAB with respect to the appropriate amount of the aggregate deposit insurance fund and the need for the whole deposit insurance fund to be held directly by CUDIC. A joint committee was established to address the concerns in 2000 among Credit Union Central of BC, CUDIC and STAB. (Credit Union Central functioned as a central banker and clearing house etc.. It was a member of STAB. It did not pay STAB or CUDIC assessments.)

[19] The FI Commission, following the usual consultations, consulting reports and its own review, determined in 2003 that CUDIC required exclusive control of a fund of 85 basis points (0.85%) in order to satisfy its statutory deposit protection obligations. This was communicated to STAB by CUDIC.

[20] In order to fund the FI Commission mandated 85 basis point CUDIC deposit insurance fund, almost double the amount of CUDIC's then existing fund, it was recognized that as a practical matter it was required and necessary for the balance to somehow come from some form of transfer of the deposit protection funds hitherto held by STAB and pledged to CUDIC to support its statutory deposit insurance obligations if and when needed. There was no other readily available source for the funds to increase the size of CUDIC's deposit insurance fund to the new level mandated by the FI Commission. Given the pledge and historical understandings and reasons for the STAB assessments and the STAB deposit protection fund, STAB had no other available or needed use for that portion of its funds once CUDIC increased its deposit insurance fund by a like amount.

[21] Funds had to be transferred directly or indirectly out of STAB and into CUDIC. CUDIC did not control STAB in any way and had no legal claim apart from the pledge to any of STAB's assets. CUDIC was not a shareholder or member of STAB and STAB had no obligation or ability to transfer its assets to CUDIC apart from the pledge or for value. CUDIC had no power to assess premiums against STAB, although it had the power to assess STAB's members − the BC credit unions − directly.

[22] Within this context, alternatives were considered by the FI Commission, CUDIC, STAB and the joint committee, to achieve the government mandated result. A direct transfer of funds from STAB to CUDIC was considered. There was no ability to justify such a payment, there being no shareholdings and no obligations between them. The release of the pledge obligation could not support a transfer of 100% of the amount pledged given the low historically-based probability that it would ever be called upon. There was no control by CUDIC of STAB to require STAB to transfer the funds to it. CUDIC had no statutory power to assess STAB.

[23] Presumably, a direct transfer might have been done by agreement of all interested parties including CUDIC and its members and STAB and its members. Presumably, legislation could have been introduced by the BC government to accomplish this as well.

[24] The tax result of a direct transfer would be most unclear or unsatisfactory. The amount transferred would not be expected to be deductible by STAB. However, it would seemingly be income to CUDIC and this was confirmed at the time by the Canada Revenue Agency (the "CRA") and supported implicitly by the fact that the Department of Finance proposed amendments to the *Act* (which have never been enacted) to permit certain direct transfers between deposit insurance corporations to be accomplished tax-free.

[25] CUDIC had the statutory power, and arguably the obligation, to make further assessments of the BC credit unions. In order to help credit unions fund additional and further CUDIC assessments, STAB could decide to, or perhaps be required by its members to, make a distribution from STAB to its member credit unions. STAB had the power and ability to make such distributions by way of dividends or by way of refunds of premiums to its members. Different considerations limited the amount of dividends that could be distributed to a member credit union and the amount that could be returned as a refund of premiums. It is unclear and doubtful that STAB had any other means to distribute money to the members.

[26] These were the two principal alternative methods considered.

IV. Regulatory Change Mandated by the BC Regulator

[27] It is clear from the evidence that STAB, whose member shareholders were the credit unions, did not agree with or support CUDIC's position that it needed to have sole custody and control of an 85 basis point deposit insurance fund. Relations between CUDIC and STAB deteriorated after 2001 and the joint committee was entirely unable to deliver a final report that was accepted or endorsed by the three parties.

[28] STAB was not at any time a supporter of CUDIC's proposal and strongly resisted it. One of the obvious results of CUDIC's proposal was that it would effectively move tens of millions of dollars out of STAB, which was owned by the credit unions, and these monies would thereafter belong to the provincial government over which the credit unions had no claim, control or financial interest.

[29] In the end STAB capitulated to the reality that CUDIC would exercise its statutory authority to assess the credit unions for the amount CUDIC sought. The credit unions would be required by law to pay these assessments. As a practical matter, if nothing else was done, the aggregate deposit insurance and protection funds would be greatly in excess of what everyone agreed was reasonably required, and this excess would come out of the credit unions' operating funds. Hence, STAB began considering how to reduce its deposit protection fund by the appropriate and corresponding amount and to advance those funds to the credit unions to best help them pay the new pending CUDIC assessments. CUDIC was willing to delay issuing its assessments somewhat until STAB could resolve how best to accomplish this.

[30] There was clearly no other reason for a direct or indirect transfer of a portion of the deposit insurance funds from STAB to CUDIC other than the requirements of BC law as applied and interpreted by the FI Commission.

V. The Transactions Undertaken to Comply with the Regulatory Change Mandated by the BC Government

[31] By 2005, CUDIC had a deposit insurance fund of approximately $110 million. STAB's assets comprising its deposit protection fund in 2005 was approximately $110 million. In the end, CUDIC resolved to increase its deposit insurance fund by assessing the credit unions. Obviously CUDIC knew that the credit unions would need to somehow fund the new assessment with amounts to be received from STAB. Otherwise the combined funds would exceed what was needed at considerable unnecessary cost to the credit unions, and this might be expected to place some in a degree of financial difficulty.

[32] The board of directors of CUDIC passed a resolution on September 8, 2005 to assess deposit insurance premiums against its members in the amount of 28 to 29 basis points of total deposits. The Appellant was assessed $198,859. The aggregate assessment was $83,131,608.

[33] The board of directors of STAB declared two dividends to its shareholders on September 21, 2005. This was done by STAB entirely independently from CUDIC and the FI Commission and without consultation with them. The first dividend was in the amount of $1,047.43 per share payable on October 31, 2005. The second dividend was in the amount of $1,526.21 per share payable on November 7, 2005. The Appellant's share of the first dividend was $78,557 and its share of the second dividend was $114,466, for a total of $193,023. The aggregate amount of the dividends paid by STAB to its shareholders was $83,131,145, comprised of $33,833,036 in respect of the first dividend (known as the A dividend), and $49,298,109 in respect of the second dividend (known as the B dividend).

[34] The reason for the dividend amount being split into the A dividend and the B dividend arose from the fact that the Rulings Directorate and GAAR Committee of CRA had indicated they would have no technical or GAAR concern with respect to a dividend that reflected STAB's aggregate accumulated investment income. Thus, STAB decided to split the dividend distribution amount into the A and B dividends based upon the ratio of its aggregate cumulative investment income and its aggregate cumulative assessment income. The former became the A dividend and the latter the B dividend. This approach was followed by STAB to provide greater certainty to the

tax consequences of the A dividend, and to permit its individual members to decide how to report their B dividend income for tax purposes.

[35] The Appellant included the amount of dividends received from STAB in its 2005 income. The Appellant deducted the amount of dividends received by it in computing its 2005 taxable income pursuant to section 112 of the *Act*.

VI. The Witnesses

[36] The principal material witness was Mr. Corsbie, a chartered accountant. He was very knowledgeable about the regulation of BC credit unions. He was in private practice for a decade through the mid-1980s and was involved in the audits of credit unions, Credit Union Central and the Credit Union Reserve Board. He also worked with financially-troubled credit unions. He was a supervisory officer at CUDIC from 1986 until it was put under the FI Commission in 1990. At CUDIC he was responsible for a portfolio of credit unions under regulatory supervision, usually because of financial difficulty. From 1990 to 1998, he was the FI Commission's Deputy Superintendent of Credit Unions. In 1998, Mr. Corsbie became Chief Executive Officer of STAB, a position he held until 2006. Mr. Corsbie was a thoroughly knowledgeable and credible witness whose testimony I accept without question.

[37] The only other witness was the General Manager of the Appellant, Spruce Credit Union. General Manager is the most senior staff position at Spruce Credit Union. He first joined Spruce Credit Union as General Manager in March 2005 and only first became aware of the STAB dividends in October of 2005. The evidence of this witness was also entirely clear, credible and unshaken.

VII. Law and Analysis

A. *The Merits: Sections 112 and 137.1 of the Act*

[38] The relevant portions of subsection 112(1) of the *Act* provide:

(1) Where a corporation in a taxation year has received a taxable dividend from

(*a*) a taxable Canadian corporation,

…

an amount equal to the dividend may be deducted from the income of the receiving corporation for the year for the purpose of computing its taxable income.

(1) Lorsqu'une société a reçu, au cours d'une année d'imposition, un dividende imposable :

a) soit d'une société canadienne imposable;

…

une somme égale au dividende peut être déduite du revenu pour l'année de la société qui le reçoit, dans le calcul de son revenu imposable.

[39] "Taxable dividend" is defined in subsection 89(1) as follows:

"taxable dividend"
« dividende imposable »

"taxable dividend" means a dividend other than

(*a*) [not applicable]

(*b*) [not applicable]

« dividende imposable »
"taxable dividend"

« dividende imposable » Dividende autre :

a) [non admissible]

b) [non admissible]

[40] Division F of the *Act* is headed "*Special Rules Applicable in Certain Circumstances*" and includes section 137.1. Sections 137 and 137.1 have the subheading "Credit Unions, Savings and Credit Unions and Deposit Insurance Corporations". The relevant portions of section 137.1 provide as follows:

137.1 (1) For the purpose of computing the income for a taxation year of a taxpayer that is a deposit insurance corporation, the following rules apply:

(*a*) the corporation's income shall, except as otherwise

137.1 (1) Pour le calcul du revenu d'un contribuable qui est une compagnie d'assurance-dépôts, pour une année d'imposition, les règles suivantes s'appliquent :

a) le revenu de la compagnie est calculé, sauf disposition contraire du

provided in this section, be computed in accordance with the rules applicable in computing income for the purposes of this Part [1]; and

. . .

(2) The amount of any premiums or assessments received or receivable by a taxpayer that is a deposit insurance corporation from its member institutions in a taxation year shall not be included in computing its income.

. . .

(4) No deduction shall be made in computing the income for a taxation year of a taxpayer that is a deposit insurance corporation in respect of

. . .

(*c*) any amounts paid to its member institutions as allocations in proportion to any amounts described in subsection 137.1(2); or

. . .

(10) Where in a taxation year a taxpayer is a member institution, there shall be included in computing its income for the year the total of all amounts each of which is

(*a*) an amount received by the taxpayer in the year from a deposit insurance corporation that is an amount described in any of paragraphs 137.1(4)(*a*) to 137.1(4)(*c*), to the extent that the

présent article, conformément aux règles applicables au calcul du revenu dans le cadre de la présente partie [1];

. . .

(2) Le montant de toute prime ou cotisation reçue ou à recevoir de ses institutions membres, au cours d'une année d'imposition, par un contribuable qui est une compagnie d'assurance-dépôts n'est pas inclus dans le calcul de son revenu.

. . .

(4) Aucune déduction ne peut être faite, dans le calcul du revenu, pour une année d'imposition, d'un contribuable qui est une compagnie d'assurance-dépôts, à l'égard :

. . .

(*c*) de tout montant versé à ses institutions membres à titre d'allocations proportionnelles aux montants visés au paragraphe (2);

. . .

(10) Le contribuable qui est une institution membre au cours d'une année d'imposition doit inclure dans le calcul de son revenu pour cette année le total des montants suivants :

a) tout montant visé à l'un desalinéas (4)*a*) à *c*) et qu'il a reçu au cours de l'année d'une compagnie d'assurance-dépôts, dans la mesure où il n'a pas remboursé ce montant à la compagnie au cours de l'année;

> taxpayer has not repaid the amount to the deposit insurance corporation in the year, . . .
>
> . . .

[41] Clearly, all of the requirements of the inter-corporate dividend deduction in section 112 of the *Act* appear to be met with respect to the dividends received by the Appellant, Spruce Credit Union. Section 112 does not require that the amount of the dividend received by a taxpayer have been included in its income under subsection 82(1), although in the typical case, that subsection is what would bring the amount of taxable dividends into income. There does not appear to be any basis in section 112 to treat the B dividends any different from the A dividends in this regard.

[42] The A and B dividends were clearly in fact and in law dividends. This is not disputed by the Respondent. Indeed, this is set out in the Partial Agreed Statement of Facts.

[43] This would appear to be an appropriate result. The Appellant received both dividends as taxable dividends. The amount of taxable dividends received is required to be included in a taxpayer's income under subsection 82(1) of the *Act*. The purpose of the section 112 inter-corporate dividends received deduction is to avoid double taxation of the after-tax profits of a corporation as they are paid by way of dividends to shareholder corporations. This forms part of the *Act*'s approach to achieving a degree of integration of corporate and personal taxation of income earned through a corporation.

[44] It is the Respondent's position that the amount of the B dividend is nonetheless not deductible under subsection 112(1) because:

(i) the B dividend was an amount described in, and required to be included in the Appellant's income under, paragraph 137.1(10)(*a*), being an amount received by the member credit union from a deposit insurance corporation paid as an allocation to its member credit unions in proportion to the amount of assessments received from its member credit unions; and

(ii) section 137.1 is a complete code with respect to the tax treatment of such amounts.

[45] The evidence in this case does not support the Respondent's position that the amount of the B dividend was an amount paid by STAB to the Appellant and its other members as an allocation in proportion to assessments received from them.

[46] The paragraph uses the word "as". It does not use the broader phrase "in respect of" or "as, on account, or in lieu of", or similar more expansive language. It does not speak of amounts that could reasonably be considered to relate to, or directly or indirectly be funded by, assessments previously received. The form or nature of the amount of the payment is specifically described given the use of the word "as" in English and the words "à titre de" in French.

[47] It does appear possible that an amount paid as a dividend could also be an amount described in paragraph 137.1(10)(*a*). In this case, the dividend was paid to each of STAB's shareholders, as one would expect, in proportion to that shareholder's shareholdings. Shareholdings in STAB were a function of each member credit union's current asset size (and had been recently rebalanced to reflect current asset size).

[48] The dividends in question in this case were not also paid by STAB in proportion to the assessments received from its members, either in 2005, nor in the years 1989 through 2005 being the term of STAB's existence, nor in the years in which particular member credit unions were shareholders. Relative current asset size differed from relative cumulative aggregate assessments paid for a number of reasons, most obviously because of differing annual assessment rates, differing annual relative performance, as well as consolidation and other changes in the sector.

[49] The meaning of the term "in proportion to" is neither unclear nor ambiguous. A proportion is a comparative ratio that is a part considered in comparative relation to a whole. For two things to be in proportion to one another there must be an equality of ratios. For an amount to be paid to persons in proportion to their assessments, it is a requirement that the person receive that portion of the aggregate amount paid that assessments received from them is of the total of all assessments received. That is, there must be an equality of ratios. That the amount paid to them was arguably funded by the payer in whole or in part directly or indirectly, with assessments received, or income earned on such assessments, is clearly not sufficient. That position would require that the meaning of the words "in proportion to" be ignored. Similarly, the fact that a member received a portion of the pool paid out does not lead in any way to the conclusion it was paid proportionate to their assessments. For the Respondent's position to be correct on the facts of this case, I would have to read "shareholdings" for the word "assessments" used in the legislation.

[50] This plain meaning of proportionate allocation is consistent with the statutory definition of "allocation in proportion to borrowing" in subsection 137(6) applicable to cooperative corporations.

[51] This meaning is not inconsistent with the decision of this Court in *Civil Service Co-operative Credit Society Ltd.* v. *The Queen*, 2001 DTC 790 ("*CS Coop*"). I do not have to decide whether, overall, that case was properly argued or properly decided. The issues put to and decided by the Court in *CS Coop* were whether the amounts collected were "assessments" and whether the amounts paid were "allocations" and the argument focused on the particular Ontario statutory regime. The Court was not asked to, and did not address the issue of proportionate allocations. The judge makes only a fleeting reference in the last sentence of paragraph 53 to proportionality which, at best, suggests that, in the case of an allocation to less than all members, proportionality might best be tested against a hypothetical distribution to all members. That paragraph is clearly only addressing the meaning of allocation, and the Court had to deal with the issues as framed by the parties. In contrast, in this case there is no issue of whether STAB owned the money collected as assessments and later paid to its members.

[52] On the facts of this case, the B dividend amounts were not amounts described in paragraph 137.1(10)(*a*). They were not paid in proportion to assessments received. I do not need to decide whether they were or were not "allocations". The Respondent's position cannot succeed.

[53] In the circumstances I do not need to deal with the question of whether section 137.1 is a complete code with respect to amounts paid as allocations in proportion to assessments received.

[54] Therefore, but for the possible application of GAAR, the Appellant is entitled to deduct under subsection 112(1) the amount of the B dividend received by it and included in its income.

B. *The General Anti-Avoidance Rule (GAAR)*

Generally

[55] The analytical framework applicable to the GAAR has been clearly and consistently set out by the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, 2005 DTC 5523 and in *Lipson v.*

Canada, 2009 SCC 1, [2009] 1 S.C.R. 3, 2009 DTC 5015, and most recently reaffirmed in *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, 2012 DTC 5006. A court must conduct an objective and thorough analysis following the Supreme Court's step-by-step framework and explain the reasons for its GAAR conclusion.[1]

[56] But for the possible application of the GAAR, taxpayers are entitled to select courses of action or to enter into transactions that will minimize their tax liability relying upon the *Duke of Westminster* principle[2]. Taxpayers are entitled to know with a degree of certainty that the provisions of the *Act* apply to transactions with real economic substance[3].

[57] The GAAR is an exceptional provision of last resort that may be invoked by the Minister of National Revenue (the "Minister") if he believes that the taxpayer's chosen transactions, notwithstanding that they comply with the literal requirements of the provisions in question, are not in accord with the object, spirit, rationale or purpose of the provisions and indeed frustrate and abuse them[4]. The GAAR creates an unavoidable degree of uncertainty for taxpayers and, for this reason, a court must undertake its analysis cautiously[5]. It is the obligation of the Minister to demonstrate clearly the abuse he alleges[6]. Any residual doubt is resolved in favour of the taxpayer[7].

C. *The GAAR Legislative Provisions*

[58] The relevant subsections of the GAAR in section 245 of the *Act* provide as follows:

245(1) In this section,	245(1) Les définitions qui suivent s'appliquent au présent article.
"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	« attribut fiscal » S'agissant des attributs fiscaux d'une personne, revenu, revenu imposable ou revenu imposable gagné au Canada de cette personne, impôt ou autre montant payable par cette personne, ou

1 *Copthorne*, paragraph 68.
2 *Copthorne*, paragraph 65.
3 *Trustco*, paragraphs 49 and 57.
4 *Copthorne*, paragraphs 66 and 109.
5 *Copthorne*, paragraph 66 and 67.
6 *Copthorne*, paragraph 123.
7 *Copthorne*, paragraph 72.

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) 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) 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

montant qui lui est remboursable, en application de la présente loi, ainsi que tout montant à prendre en compte pour calculer, en application de la présente loi, le revenu, le revenu imposable, le revenu imposable gagné au Canada de cette personne ou l'impôt ou l'autre montant payable par cette personne ou le montant qui lui est remboursable.

« avantage fiscal » Réduction, évitement ou report d'impôt ou d'un autre montant exigible en application de la présente loi ou augmentation d'un remboursement d'impôt ou d'un autre montant visé par la présente loi. Y sont assimilés la réduction, l'évitement ou le report d'impôt ou d'un autre montant qui serait exigible en application de la présente loi en l'absence d'un traité fiscal ainsi que l'augmentation d'un remboursement d'impôt ou d'un autre montant visé par la présente loi qui découle d'un traité fiscal.

« opération » Sont assimilés à une opération une convention, un mécanisme ou un événement.

(2) En cas d'opération d'évitement, les attributs fiscaux d'une personne doivent être déterminés de façon raisonnable dans les circonstances de façon à supprimer un avantage fiscal qui, sans le présent article, découlerait, directement ou indirectement, de cette opération ou d'une série d'opérations dont cette opération fait partie.

(3) L'opération d'évitement s'entend :

a) soit de l'opération dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s'il est raisonnable de considérer que

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) 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.

. . .

l'opération est principalement effectuée pour des objets véritables — l'obtention de l'avantage fiscal n'étant pas considérée comme un objet véritable;

b) soit de l'opération qui fait partie d'une série d'opérations dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s'il est raisonnable de considérer que l'opération est principalement effectuée pour des objets véritables — l'obtention de l'avantage fiscal n'étant pas considérée comme un objet véritable.

(4) Le paragraphe (2) ne s'applique qu'à l'opération dont il est raisonnable de considérer, selon le cas :

a) qu'elle entraînerait, directement ou indirectement, s'il n'était pas tenu compte du présent article, un abus dans l'application des dispositions d'un ou de plusieurs des textes suivants :

(i) la présente loi,

(ii) le *Règlement de l'impôt sur le revenu*,

(iii) les *Règles concernant l'application de l'impôt sur le revenu*,

(iv) un traité fiscal,

(v) tout autre texte législatif qui est utile soit pour le calcul d'un impôt ou de toute autre somme exigible ou remboursable sous le régime de la présente loi, soit pour la détermination de toute somme à

prendre en compte dans ce calcul;

b) qu'elle entraînerait, directement ou indirectement, un abus dans l'application de ces dispositions compte non tenu du présent article lues dans leur ensemble.

. . .

[59] The Supreme Court of Canada in *Trustco*, *Lipson* and *Copthorne* observed that, upon a plain reading of the GAAR provision, a proper GAAR analysis requires a court to answer three questions:

1) Was there a tax benefit?

2) Was the transaction giving rise to the tax benefit an avoidance transaction? and

3) Was the avoidance transaction giving rise to the tax benefit abusive?

D. *Tax Benefit*

[60] The analysis begins by identifying and isolating the tax benefit from the non-tax purposes of the taxpayer's chosen transactions.

[61] If a deduction against taxable income is claimed in the impugned transaction or series of transactions, the existence of a tax benefit is clear since a deduction results in a reduction of tax[8].

[62] Alternatively, the existence of a tax benefit can be established by comparing the taxpayer's chosen transactions with an alternative transaction that might reasonably have been carried out but for the existence of the tax benefit[9].

[63] The burden is on the taxpayer to refute the Minister's assumption of the existence of a tax benefit[10].

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8 *Trustco*, paragraph 20.

9 *Copthorne*, paragraph 35; *Trustco*, paragraph 20.

10 *Copthorne*, paragraph 34; *Trustco*, paragraph 63.

[64] Whether or not there is a tax benefit is a question of fact, subject to review on the basis of palpable and overriding error[11].

E. *Avoidance Transaction*

[65] Before the GAAR may be applied in any circumstance, there must be an "avoidance transaction" which gives rise to the tax benefit[12].

[66] A transaction giving rise to a tax benefit will be an avoidance transaction unless it is undertaken primarily for *bona fide* non-tax purposes. If there is a series of transactions that results directly or indirectly in a tax benefit, any transaction or step in the series will be an avoidance transaction if that step is not undertaken primarily for a *bona fide* non-tax purpose.

[67] The determination of whether a transaction is undertaken primarily for a non-tax purpose is to be objectively considered and based on all of the evidence available to the Court[13]. The burden is on the taxpayer to prove the existence of a *bona fide* non-tax purpose[14]. It is also a question of fact to be determined by the trial judge and generally entitled to deference subject to palpable and overriding error[15].

[68] The courts must at this stage examine the relationship between the parties and the actual transactions that were executed between them. A transaction cannot be an avoidance transaction because some alternative transaction that might have achieved an equivalent result would have resulted in more tax. That will not suffice to establish an avoidance transaction[16], though, as summarized above, it may suffice to establish a tax benefit.

[69] Consistent with its decision in *Trustco,* the Supreme Court of Canada in *Copthorne* does not suggest that it is appropriate at the avoidance transaction stage of the analysis to compare the taxpayer's chosen transaction or series to other available structures to see if the taxpayer chose among the alternatives primarily based on tax considerations or consequences. This makes sense. If it were otherwise, taxpayers would be obliged to choose a more taxable alternative and the *Duke of Westminster* principle would be completely for naught. It appears to be at least to this extent that

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11 *Copthorne*, paragraph 34.
12 *Copthorne*, paragraph 119.
13 *Copthorne*, paragraph 59; *Trustco*, paragraphs 28 and 29.
14 *Copthorne*, paragraph 63; *Trustco*, paragraphs 63 and 66
15 *Trustco*, paragraph 66.
16 *Trustco,* paragraph 30.

the Supreme Court of Canada repeatedly sets out that the *Duke of Westminster* principle co-exists with the GAAR.

[70] A transaction may have a tax purpose, and the taxpayer will likely be aware of the tax implications of a transaction, but neither of these necessarily means that the tax purpose is the primary reason for the transaction. If the transaction actually undertaken (or each step in the series) takes place primarily for a non-tax purpose, there will be no avoidance transaction and the GAAR cannot apply, even though there may be a secondary tax benefit purpose[17].

[71] Similarly, it follows that tax considerations may play a primary role in a taxpayer's choice of available structuring options to implement a transaction or series of transactions without necessarily making the transaction itself primarily tax motivated.

F. *Series of Transactions*

[72] Given the inclusive nature of the meaning to be given to series of transactions in subsection 248(10), the Supreme Court of Canada mandates an expansive approach to the issue of series. The starting point is the common law series in which each transaction in the series is preordained to produce a final result. Then, subsection 248(10) deems any related transaction completed in contemplation of a series to be part of that series.

[73] The factual question to be decided under subsection 248(10) is whether the decision to undertake the related transaction was done in relation to or because of the series. This is less than a strong nexus but more than a mere possibility or a connection with an extreme degree of remoteness. Each case will be decided on its own facts; the length of time between steps and any intervening events may be relevant considerations[18].

[74] The phrase "in contemplation of" in subsection 248(10) allows either prospective or retrospective connection of a related transaction to a common law series. The phrase can be applied to events either before or after the basic avoidance transaction. Series of transactions includes both related transactions completed in contemplation of a subsequent series of transactions, as well as related transactions which the taxpayer completed while contemplating a prior series of transactions. The

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17 *Copthorne*, paragraphs 119 and 120.

18 *Copthorne*, paragraph 47.

phrase "in contemplation of" is not read in the sense of actual knowledge of the series but in the broader sense of because of or in relation to the series[19].

[75] In deciding if a step or transaction in a series of transactions constitutes an avoidance transaction, i.e. whether it has a *bona fide* non-tax purpose, the Supreme Court of Canada, in *Copthorne*, compares the series with that step or transaction to the series without that step or transaction[20]. This is significantly different to comparing the chosen series with alternative transactions or series of transactions available to the taxpayer.

[76] The determination of the existence of a series and its constituent transactions is a question of fact to be determined on a balance of probabilities and the taxpayer has the onus of refuting the Minister's assumptions regarding the series of transactions[21].

G. *Abuse or Misuse.*

[77] There is no difference between the two terms "abuse" and "misuse". The GAAR will apply if an avoidance transaction is abusive. Given the significance of the *Duke of Westminster* principle in Canadian tax law, the GAAR does not authorize or require a search for reproachably or disgracefully obtained tax savings, and the term abusive is not used in the sense of implying any other moral opprobrium. Canadians are free to be creative in their pursuit of tax savings[22].

(1) Identify the Object, Spirit or Purpose of the Provisions:

[78] The Supreme Court of Canada mandates a two-part analysis for abuse. First, the Court must determine the object, spirit or purpose of the provisions that are relied on by the taxpayer to obtain the tax benefit[23]. This is to be done having regard to the scheme of the *Act*, the relevant provisions and permissible extrinsic aids.

[79] The object, spirit or purpose, or legislative rationale underlying the specific and/or interrelated provisions of the *Act*, is to be identified by the Court applying the unified textual, contextual and purposive interpretive approach used in statutory interpretation generally[24].There is a difference however between statutory

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19 *Copthorne*, paragraphs 55 and 56; *Trustco*, paragraph 26.
20 *Copthorne*, paragraphs 62 and 63.
21 *Copthorne*, paragraphs 45 and 47; *Trustco*, paragraph 63.
22 *Copthorne*, paragraph 65.
23 *Copthorne*, paragraph 69; *Trustco*, paragraph 55.
24 *Copthorne*, paragraph 70; *Trustco*, paragraph 47; *Lipson*, paragraph 26.

interpretation which is aimed at discerning the meaning of statutory language and the textual, contextual and purposive GAAR analysis aimed at discerning the object, spirit or purpose of a provision. In a GAAR analysis the words of the statute may be clear but the rationale that underlies the wording of a provision may not be captured by the bare meaning of the chosen words themselves. It is not however open to a judge to be Humpty Dumpty-like in causing words to mean whatever he or she wants, in order to achieve what he or she perceives to be the right or appropriate result.

[80] The text of the provision is to be considered to see if it sheds light on what the provision was intended to do, even though it is a given in a GAAR analysis that the wording of the provision does not disallow the tax benefit[25].

[81] The consideration of the context of a provision involves examination of other sections of the *Act*, as well as permissible extrinsic aids[26]. The other provisions of the *Act* that should be considered are those that are grouped together or that work together to give effect to a plausible and coherent plan[27].

[82] The policy or rationale or purpose for the provisions must be grounded in a textual, contextual and purposive interpretation of the specific provisions in issue. A court is not to undertake a tax policy review nor to look for an overarching purpose, policy or rationale that is not anchored in, or attached to, a textual, contextual and purposive analysis of the specific provisions of the *Act*[28]. A provision can have a variety of independent and interlocking purposes[29]. Determining the rationale of the relevant provisions should not be conflated with a value judgment of what is right or wrong, nor with what tax law ought to be or ought to do[30].

(2) Determine if the Avoidance Transaction Undertaken by the Taxpayer Frustrates or Defeats the Identified Purpose:

[83] The second step is for the Court to consider whether the avoidance transaction undertaken by the taxpayer falls within the identified purpose of the provision or provisions that the taxpayer relies on, or frustrates or defeats it[31].

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25 *Copthorne*, paragraph 88.
26 *Copthorne*, paragraph 91; *Trustco*, paragraph 55.
27 *Copthorne*, paragraph 91.
28 *Trustco*, paragraphs 41 and 42.
29 *Copthorne*, paragraph 115; *Trustco*, paragraph 53.
30 *Copthorne*, paragraph 70.
31 *Copthorne*, paragraphs 71 and 125; *Trustco*, paragraphs 44 and 45.

[84] The avoidance transaction will fall outside the identified purpose, will defeat or frustrate that purpose, and will be abusive if: 1) the transaction achieves an outcome the statutory provision was intended to prevent, 2) the transaction defeats the underlying rationale of the provision; or 3) the transaction circumvents the provision in a manner that frustrates or defeats its object, spirit or purpose[32].
[85] This step is avoidance transaction-specific and, in the case of a series of transactions, it is specific to the avoidance transaction step. However, that transaction or step should be considered in the context of the overall series and the overall result obtained[33].

[86] This step in the analysis is to be completed by focussing on the specific avoidance transaction and considering its tax results[34]. The Supreme Court does not suggest this can be accomplished by considering other transactions potentially available to the taxpayer.

[87] At this stage, the abusive nature of the transaction must be clear to the Court. The GAAR will not apply where it may reasonably be considered that the transaction or series of transactions was carried out in a manner consistent with the object, spirit or purpose of the provisions relied on[35].

[88] The onus to satisfy the Court that an avoidance transaction is clearly abusive is on the Minister[36]. The taxpayer does not have to prove that, in complying with the provisions of the *Act* as worded, he or she has not violated the object, spirit or purpose of the provisions. The Minister should identify the object, spirit or purpose of the provisions which are alleged to have been abused, set out the policy with reference to those provisions, and identify the extrinsic aids relied upon[37].

VIII. The Application of the GAAR to the Facts in this Case

A. *Tax Benefit*

[89] The Appellant concedes that a tax benefit resulted from obtaining the inter-corporate dividend under section 112 of the *Act*.

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32 *Copthorne*, paragraph 72; *Trustco*, paragraph 45; *Lipson*, paragraph 40.
33 *Copthorne*, paragraph 71; *Lipson*, paragraph 34.
34 *Copthorne*, paragraph 71.
35 *Copthorne*, paragraphs 68 and 72; *Trustco*, paragraph 62.
36 *Copthorne*, paragraphs 72 and 123.
37 *Trustco*, paragraph 65.

B. *Avoidance Transaction*

[90] An avoidance transaction requires that the transaction, or one step or transaction in a series of transactions, not have been undertaken primarily for *bona fide* non-tax purposes. Rephrased in the positive or affirmative, a transaction, or a step or transaction in a series of transactions, will be an avoidance transaction if it is undertaken or inserted primarily for tax purposes.

[91] In this case, the overall transaction of STAB paying dividend amounts to its member credit unions was clearly done for the purpose of putting the member credit unions in funds to pay the CUDIC assessments and reducing STAB's deposit protection and stabilization funds to the lesser required level following CUDIC's extraordinary assessment. That is clearly a *bona fide* non-tax purpose[38] An "overall non-tax objective of transferring funds from STAB to CUDIC" is admitted by the Respondent.

[92] Unlike in *Copthorne,* in this case no step was inserted or undertaken primarily for the purpose of being able to obtain a desired or preferred tax result.

[93] The act of choosing or deciding between or among alternative available transactions or structures to accomplish a non-tax purpose, based in whole or in part upon the differing tax results of each, is not a transaction. Making a decision can not be an avoidance transaction.

[94] In this case, STAB, of which the Appellant was a member, set out to put its members in funds to pay the CUDIC extraordinary assessment. It considered alternative available methods of doing that and chose the one which was the most tax effective – the one that involved the member credit unions potentially paying the least amount of tax. That is making a decision that is consistent with the *Duke of Westminster* principle. Making such a decision can not be considered a transaction for GAAR purposes.

[95] This is an example of a case where a taxpayer:

(i) decides to do something for entirely business or other non-tax purposes – (that is, put money in its shareholders' hands to allow them to pay

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[38] This determination of the purpose of the transaction is consistent with that of former Chief Justice Bowman in *Evans* v. *The Queen*, 2005 DTC 1762 at paragraphs 19 and 20.

their business obligations and to recalibrate the level of the deposit insurance and stabilisation fund maintained for their benefit to the level now needed);

(ii) considers the alternatives available to them to accomplish what is needed to be done, including a consideration of the tax consequences and costs of each; and

(iii) chooses an available option that is not the one with the greatest tax cost and may be the one with the least tax cost or no tax cost at all.

[96] Provided no steps or transactions were inserted into the commercial transactions implementing the chosen structure primarily to obtain the tax benefit, neither the taxpayer's choice nor its implementation can meet the statutory definition of "avoidance transaction" as interpreted by the Supreme Court of Canada.

[97] A comparable example (uncluttered by the fact that in this case it was STAB who chose and implemented the decision to pay dividends to its members including the Appellant, and that the decision arose as a result of a government assessed obligation imposed unilaterally upon the credit unions including the Appellant) would be as follows: a company has two distinct operating divisions, Division A and Division B. It decides to sell Division A to an arm's-length party for fair market value. It intends to keep Division B and continue to operate it. In order to implement and complete such a sale, the shareholders of the company have at least three obvious alternatives. The company can sell the Division A assets to the buyer. The company can transfer Division A to a new sister company to be offered for sale and keep the Division B assets. The company can transfer the Division B assets to a new sister company owned by the shareholders and have the shareholders of that company offer to sell their shares of that company to the buyer whose assets now would only include the Division A assets. One of Division A or Division B has to be transferred out of the company in order for the business of Division A to be sold. Asset sales invariably have different tax consequences than share sales. If the buyer wants to buy shares, the shareholders of the company can not be faulted for choosing a more tax efficient option available to them. Provided the structure of the transactions used to implement their choice does not include any step the primary purpose of which is to position themselves to obtain the desired tax benefit, or is otherwise primarily tax driven, their tax benefit can not result from an avoidance transaction and the GAAR by its terms can not apply. See, for example, former Chief Justice Bowman's decision in *Geransky v. Canada*, 2001 DTC 243.

[98] The Respondent regards the tax benefit resulting to the Appellant credit unions as an abuse or misuse of the provisions relied upon. This may arguably be the case. However, the Respondent has throughout been unable to identify an avoidance transaction as defined by the GAAR and interpreted by the Supreme Court of Canada. Identifying an avoidance transaction is a prerequisite to the application of the GAAR. The Supreme Court stresses that the GAAR does not allow one to jump from resulting tax benefit to abusive tax results. The Supreme Court explains why that would not be consistent with the text of the GAAR nor would it be otherwise appropriate.

[99] In the reply, the Respondent's position is that the following are avoidance transactions:

1. The decision by STAB to return premiums in the form of a dividends;

2. The decision by STAB to pay the A and B dividend;

3. CUDIC's assessment of the extraordinary premiums;

4. The payment by STAB of the dividends declared; and

5. The payment by the credit unions of the CUDIC assessments.

In argument, the Respondent's GAAR position that STAB's decision to distribute funds by way of dividends was refined to: STAB's choice, from the options it in fact did consider, of a structure for implementing the overall transaction because it provided a tax benefit, resulted in it being an avoidance transaction.

[100] I do not accept these positions of the Respondent on avoidance transactions:

1. A decision to choose between options is not a transaction. Similarly, a decision to choose to do something or not is not a transaction. A decision is not considered a transaction as that term is commonly understood nor is it within the extended, inclusive definition of transaction in subsection 245(1).

2. Whether STAB had paid a single dividend or split the dividend into the two A and B dividends did not affect the tax consequences of the B dividend received by the Appellant in this case. The tax results and analysis would have been the same.

3. CUDIC's assessment of the extraordinary premium was entirely non-tax motivated and was considered adverse and contrary to the wishes and interests of the BC credit unions. It is clear on the facts of this case that the assessment was made entirely for non-tax purposes.

4. The payment of the dividends by STAB had a primary non-tax purpose – the distribution of funds to its members. That it was decided to make the distribution as a dividend because of tax considerations does not make tax the primary purpose of the dividends.

5. The payment by the credit unions of the CUDIC assessments were the payment by them of legal obligations owed to the provincial government in order to allow them to continue to operate. One does not pay an entirely non-discretionary business expense primarily to get the tax deduction.

[101] Overall, I am unable to identify any step or transaction undertaken other than for a primarily non-tax purpose. This is in contrast with, for example *Copthorne*, where the Appellant had to convert its pre-existing parent subsidiary structure to a sister company structure as a preliminary or intervening separate step in order to position itself to obtain the tax benefit sought. In this case there was no such step or transaction done primarily for such a purpose.

[102] Separating the dividend into two tranches, the A dividend and the B dividend, did not change the tax results of the B dividend. As discussed above, it simply gave the individual member credit unions the opportunity to choose to avoid the dispute with CRA that the Appellant was prepared to take on. Similarly, the rebalancing of members' shareholdings in 2005 did not affect the Appellant's entitlement to the tax benefit of deducting the full amount of the dividends received by it from STAB. As discussed above, rebalancing needed to be and was done periodically to ensure credit unions' shareholdings aligned with their current relative asset sizes. It could only affect the amount of the dividends paid to the Appellant and other individual credit unions, not the tax consequences thereof.

[103] Following the release by the Supreme Court of Canada of its decision in *Copthorne*, the parties made further written submissions in this case. Notwithstanding the clear comments of the Supreme Court of Canada on the prerequisite of an avoidance transaction before GAAR can apply and before conducting an abuse analysis, the Respondent did not specifically address the issue of avoidance transaction but wanted to jump from tax benefit to abuse.

[104] The GAAR can not be applied in this case because the overall transaction and each transaction undertaken to complete it were done for primarily *bona fide* non-tax purposes. In the words of the Supreme Court of Canada:

> . . . However, before the GAAR may be applied in any circumstance, there must be an avoidance transaction which results in a tax benefit.[39] . . .
>
> . . . However, where a transaction takes place primarily for a non-tax 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.[40] . . .
>
> The second requirement for application of the GAAR is that the transaction giving rise to the tax benefit be an avoidance transaction within s. 245(3). The function of this requirement 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.[41]
>
> . . . Conversely, if each transaction in a series was carried out primarily for *bona fide* non-tax purposes, the GAAR can not be applied to deny a tax benefit.[42]

C. *Abuse or Misuse*

[105] In the absence of a finding that there was an avoidance transaction, and following the rigorous analytic approach mandated by the Supreme Court of Canada, it is unnecessary to go on and consider the issue of abuse or misuse in this case.

IX. Conclusion

[106] As a general rule, it is not the Court's role to read things in to or out of the *Act* or any provision thereof, including GAAR. This case is not one of the extraordinary situations in which the proper interpretation of a provision of the *Act* would allow or require that.

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39 *Copthorne*, Paragraph 119.
40 *Copthorne*, Paragraph 120.
41 *Trustco*, paragraph 21.
42 *Trustco*, paragraph 34.

[107] The provisions of the *Act* are clear in this case. The Appellant qualifies for the section 112 dividend deduction. The B dividend is not an amount described in paragraph 137(10.1)(*a*) because it was not distributed proportionate to assessments paid.

[108] It is the function of this Court to only apply the GAAR by following the rigorous analytic approach to it mandated by the Supreme Court of Canada. It is not open to this Court to depart from that approach.

[109] The requirements of the GAAR require there to be an avoidance transaction, regardless of an arguably abusive result. In this case, I can find no avoidance transaction. The overall transaction and each constituent step or transaction can reasonably be considered to have been undertaken primarily for *bona fide* non-tax purposes.

[110] It does not matter whether or not the tax result of the chosen transaction appears appropriate to me or not. As a judge, I can no more add to the *Act* as written by Parliament when I think something is missing and needed to obtain what I might consider the appropriate result from a policy point of view, than I can overlook any provision Parliament has written because I disagree with it from a policy point of view.

[111] The appeal is allowed, with costs.

Signed at Ottawa, Canada, this 15th day of October 2012.

"Patrick Boyle"

Boyle J.

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