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THOUGHTS ON CANADIAN GAAR

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What if it's full of abusive tax avoiders?

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Introduction—Program Format

- GAAR proposed in 1987 White Paper and enacted in 1988
- GAAR almost quarter-century old
- Taking stock—introduction, lectures and case studies
- Common theme—is GAAR "workable"? From three perspectives—that of tax planner, tax litigator and comparative

Uncertainty and GAAR – Relevance of Foreign GAAR Experience

- GAAR countries' tax landscapes differ—caution about importing what has been described as "bleeding chunks of alien doctrine"
- However, GAAR lends itself to comparative treatment
- Many GAAR countries have similar legal traditions and history and tax experience
- GAAR provisions are remarkably similar in format and purpose

GAAR and Uncertainty – First Principle/Need for Taxpayer Certainty

- Fundamental, inevitable and dynamic tension exists in modern tax systems between two important and competing principles (and their concomitant needs)
- **First Principle**—taxpayers are entitled to arrange their business and personal affairs to minimize tax liability (to engage in "acceptable" tax avoidance)
  - UK judge described principle this way—"No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or property as to enable the inland revenue to put the largest possible shovel into his stores"

GAAR and Uncertainty – Second Principle/State Need to Curb Abusive Tax Avoidance

- Thus, concomitant need for certainty—tax law must be drafted, interpreted and applied with high degree of certainty
- Further, State must accept this first principle--certain types of tax avoidance are inevitable and legitimate activity

- **Second Principle**--State is permitted to enact laws to curb and deter certain types of tax avoidance (for want of better label "abusive tax avoidance")
  - Reflects State need to preserve tax base and promote sense of fairness in tax system
  - Taxpayers must recognize second principle

GAAR and Uncertainty – Balancing Competing Principles and Needs

- Fundamental problem—to balance competing principles or needs means drawing line between “acceptable” tax avoidance and “abusive” tax avoidance
- A foreign court described line as boundary where taxpayers’ basic right to reduce tax liability by using or circumventing specific tax provisions ends and abusive tax avoidance begins

GAAR and Uncertainty – Elusive Boundary between Abusive and "Acceptable" Tax Avoidance

- Drawing line difficult--precise description of "abusive" tax avoidance (or other label) is elusive
- What is "acceptable" tax avoidance—acceptable to whom?
- Generally, "abusive" tax avoidance (or other labels) used to describe category of tax avoidance with outcomes that frustrate or defeat relevant tax provisions or that Parliament did not intend or contemplate

GAAR and Uncertainty – Some Parameters

- Tax avoidance – Action within literal reading of tax provisions but which may frustrate or defeat object or spirit
- Abusive tax avoidance – Action within literal reading of tax provisions but frustrates or defeats object or spirit
- Acceptable tax avoidance – Action within literal reading of tax provisions but doesn't frustrate or defeat object or spirit

GAAR and Uncertainty – Judicial and Legislative Responses

- States have two basic responses to combat abusive tax avoidance—judicial or legislative
- US/UK primarily use SAARs and judicial response (although UK has announced its intention to enact a GAAR)
- Canada, New Zealand, Australia, Hong Kong, Ireland, South Africa and others primarily use SAARs and GAAR
- SAARs necessary but incomplete response—results in ritual described by UK judge as cycle of "anti-avoidance karate"

GAAR and Uncertainty – UK and Canadian Judicial Responses

- Contrast impact of *Ramsay* in UK and *Stubart* in Canada
- John Tiley—*Ramsay* freed UK courts of "vices" of "literal" and "blinkered" approach to tax construction established in *Duke of Westminster*—UK H.L. stated tax construction no longer "island of literal interpretation"
- In Canada, for Crown historical treatment of tax avoidance in Canadian courts not marked by much success—Canada marooned on "island of literal interpretation"
- *Stubart* (and *Johns Manville*) effectively signaled continuation of that approach in Canada—with few exceptions, confirmed in post-GAAR era in *Shell Canada* and *Canada Trustco*

GAAR and Uncertainty – Stubart Guidelines

- GAAR intended to override *Stubart* (and *Duke of Westminster)*—give CRA (and Courts) more effective tool to counter abusive tax avoidance
- Canada's judicial experience with tax avoidance and reasons for enacting GAAR mirror those of other countries (Australia, Ireland and New Zealand)
- In (*O'Flynn Construction*), Irish SC stated Irish GAAR was enacted so tax advisors are not always "one lucrative step ahead of the revenue"

GAAR and Uncertainty – Managing Inherent Uncertainty of GAAR

- A GAAR is intended to balance competing needs—taxpayer's need for certainty and State's need to counter abusive tax avoidance
- A GAAR must balance these competing needs—its enactment inevitably creates uncertainty
- Indeed, that is key objective of GAAR--how could it be otherwise?
- Canadian GAAR intended to provide a statutory framework within which stakeholders (taxpayers, CRA and Courts) can manage that inherent uncertainty

GAAR and Uncertainty – SCC Cases

- In *Canada Trustco*, SCC stated GAAR should not be applied in way that fosters taxpayer uncertainty
- Majority in *Lipson* affirmed that GAAR intended to create a degree of uncertainty – desire to avoid uncertainty not appropriate basis to deny GAAR's application
- Majority in *Lipson* stated GAAR designed in complex context of Act to restrain abusive tax avoidance and to ensure fairness of tax system is preserved
- On GAAR and certainty point, NZ SC in *Ben Nevis* stated Parliament left GAAR deliberately general and NZ Courts should strive not to create greater certainty than Parliament chose to provide

GAAR and Uncertainty – Irish SC Perspective

In *O'Flynn Construction*, the Irish SC stated Irish GAAR:

> "...permits an evaluation of particular transaction and a consideration as to whether it comes not just within the words but also within the intended scheme, or is rather, a misuse or abuse of it. The fact that such an evaluation may be difficult, and can create some uncertainty, is not a reason to avoid the task. Certainty in tax matters is difficult to achieve and the desire to provide certainty to those who wish to avoid a taxation regime which applies to others similarly situated to them, is something which ranks low in the objectives which statutory interpretation seeks to achieve. The taxpayer could, after all, receive a high level of certainty, but at the price of paying tax on the dividends received".

GAAR and Uncertainty — Is GAAR a "Smell" Test?

- Common pattern—statutory GAARs not intended to establish certain boundary that circumscribes "abusive" tax avoidance
- Rather, intended to establish effective framework to curb and deter abusive tax avoidance on principled basis that results in acceptable limit on tax planning
- Some argue recent SCC cases reduce GAAR to exercise in judicial discretion—a "smell" test
- Application of GAAR involves exercise in evaluation and interpretation that is grounded in language, context and purpose of the relevant provisions of Act, including GAAR (see *Canada Trustco*, para. 54)

GAAR and Uncertainty – Relationship of GAAR and Other Tax Provisions

- As NZ SC stated in *Ben Nevis*, GAAR and specific tax provisions "...are meant to work in tandem. Each provides a context which assists in determining the meaning and, in particular, the scope of the other. Neither should be regarded as overriding. Rather they work together"
- NZ SC stated, although cases can be difficult at the margin, in most, it is possible "without undue difficulty, to decide on which side of the line a particular arrangement falls"
- Similar statement by SCC in *Canada Trustco* (para. 13)

GAAR and Uncertainty— GAAR Case Law Evolves

- NZ tax writer likened NZ tax community to two characters in Beckett's play "Waiting for Godot"—as it waits for Court's clear guidance as to what constitutes "abusive tax avoidance"—in the play, of course, Godot never arrives
- NZ CA stated in Penny & Hooper that "...Courts exist to resolve particular controversies. Much as professional advisers yearn for all-encompassing templates, to ask Courts to anticipate other possible situations and produce clear, bright-line rules is undesirable and impracticable in taxation law. The function of Court is to see that the legislative purpose of Parliament is not overtaken by "merely clever" manipulation of particular rules, as happened in this case. And the Court can only examine one case at a time. The certainty which tax advisers desire must continue to elude them. Taxpayers are free to structure transactions to their best advantage. They are not free, however, to do so in a way that is precluded by the [NZ GAAR]".

Taking Stock of 245(4)—Two Common Tests of GAAR: Business Purpose Test/Misuse or Abuse Test

- Most GAARs have one and often two key tests in common
- **First Test—a business purpose test** (focus on purpose of transaction) to identify "avoidance transactions"
- **Second test—a misuse or abuse test** (focus on purpose of relevant tax provisions)(instead of misuse or abuse, reference to artificial, abnormality or lack of commercial substance) to determine if outcome of "avoidance transaction" defeats object, spirit or purpose of relevant tax provisions and constitutes "abusive tax avoidance"
- GAARs of Australia, NZ, Hong Kong and Ireland embody statutory business purpose test—Courts (and, effectively, tax authority) determine limits on rule, if any

Taking Stock of 245(4)—Case for Statutory Business Purpose Test

- Countries have determined statutory business purpose test is reasonable legislative counter to abusive tax avoidance
- Main advantages—objective and factually-based test—less uncertainty as to application for taxpayers, tax authority and Courts
- Problem—approach relies on administrative (Australia) and judicial limits (NZ)
- GAAR's ambit should be circumscribed by rule of law, not administrative forbearance, and Courts should interpret and apply tax law, not make it

Taking Stock of 245(4)—Courts Limit NZ GAAR

- NZ GAAR is based on statutory business purpose test—Courts have endorsed judicial limits to its application

- GAAR limited to transaction that, when viewed realistically (from commercial or economic perspective), is contrary to relevant tax provisions, when viewed in light of what Parliament intended or contemplated—some argue NZ GAAR operates as domestic transfer-pricing rule (see *Penny and Hooper*)

- Constituent groups in NZ tax community have asked for amendment to GAAR to add misuse or abuse test like 245(4) of Canadian GAAR

Taking Stock of 245(4)-Courts Limit Australian GAAR

- Using GAAR to strike down the subject transaction "turns out to be the easy step—What is to be put in its place as the basis for taxation is proving to be the real battleground"
- Cases resulted from aggressive application of Australian GAAR to any significant corporate tax issue
- Taxpayers successful where they establish "counter-factual" alternative advanced by Australian tax authority determined unreasonable or failed to accomplish same commercial outcome
- In February 2012 press release, Australian government announced it will tighten GAAR by amendments to address recent GAAR losses

Taking Stock of 245(4)—Misuse or Abuse Test

- Second common test of statutory GAAR is misuse or abuse test—application of GAAR restricted to transactions that frustrate or defeat object, spirit or purpose of relevant provisions or whole Act
- Misuse or abuse test–serves dual role
- First—ensures that tax-encouraged behavior not subject to GAAR
- Second—recognizes not all other tax-motivated transactions are abusive and provides statutory basis for identifying tax avoidance that is “abusive”

Taking Stock of 245(4) – 1987 White Paper Draft Rule

- 245(4) late addition to GAAR
- Draft rule in 1987 White Paper was statutory business purpose test
- Sole limitation on statutory business purpose test was interpretive rule contained in 245(6)
- 245(6) provided “the purpose of this section is to counter artificial tax avoidance”
- Thus, backbone of draft rule was similar to approach in Australian, Irish and NZ GAARs—it contemplated a statutory business purpose test (limits, if any, to be fleshed out by Courts)

Taking Stock of 245(4) – Draft Rule Reformulated

- In GAAR enacted, 245(6) dropped—replaced by 245(4)
- Change response to strong criticism of statutory business purpose test by Commons and Senate Finance committees and tax community
- Senate Committee rejected rule – "[W]ith good reason, not a single voice heard in support of this proposal"
- Commons Committee rejected rule but proposed its own—former 245(1) expanded and fortified
- Main concern—245(6) did not provide substantive exemption for tax avoidance that was acceptable tax mitigation

Taking Stock of 245(4)—Role of 245(4)

- 245(4) represented deliberate tax policy choice of Parliament
- Intended to address inherent tension in modern tax systems between two competing needs—need for taxpayer certainty and need for State to create uncertainty to protect revenue base and curb abusive tax avoidance (see Binnie, J., in *Lipson*, para. 54)
- UK Tax Law Reform Commission in GAAR paper described it this way--uncertainty inherent in GAAR pulls in two directions
  - Is uncertainty sufficient to deter abusive tax avoidance?
  - Is uncertainty creating unreasonable intrusion for taxpayers' planning of business and personal affairs?

Taking Stock of 245(4)—Role of 245(4)

- 245(4) added because Canadian government was persuaded that statutory business purpose test, limited only by an artificial rule of interpretation, pulled too much in favour of State

- Canada (along with SA and other countries) framed its GAAR to include misuse or abuse test

- Before discussing role accorded 245(4) misuse or abuse test by Canadian courts—useful to consider conventional approach to Canadian tax construction and comments on misuse or abuse test in recent report proposing UK GAAR

Taking Stock of 245(4) – Judicial Context

- Cornerstone of *Stubart* guidelines was endorsement of modern approach to tax construction where relevant tax provisions to be interpreted and applied using textual, contextual and purposive approach
- Notwithstanding, for most part Canadian courts continued to apply primarily textual approach to conventional tax construction and resolved ambiguity in favour of taxpayer
- Primarily textual approach confirmed in *Shell Canada* and *Canada Trustco* (SCC stated in latter, tax statute is "dominated by explicit provisions dictating specific consequences inviting largely textual interpretation"(para. 13))

Taking Stock of 245(4)—Proposed UK GAAR

- In 2010, UK Treasury appointed barrister (Graham Aaronson) to report on benefit of UK GAAR
- In November 2011 Report, Aaronson recommended UK enact "narrowly-focused statutory UK GAAR that will target artificial and abusive tax avoidance that represents an intolerable assault on integrity of UK tax system, will not affect sensible and responsible tax planning and will lead to a fairer, more principled and ultimately simpler tax system"
- Report contains proposed UK GAAR, guidance note to be given legislative authority and recommends novel administrative protocol—HMRC must request opinion from non-government advisory panel before applying UK GAAR

Taking Stock of 245(4)—Proposed UK GAAR

- Report recognizes need for second test because, where it applies, GAAR overrides result under relevant tax provisions
- However, concludes that purposive-based misuse or abuse test (like 245(4)) is not the answer
- Report reasons purposive-based misuse or abuse test only appropriate where, before GAAR, conventional interpretation of relevant tax provisions is based on literal (not purposive-based) approach (presumably like Canada)
- Report concludes purposive-based second test has no place in country where, before GAAR, relevant tax provisions interpreted on purposive basis (such as UK post-*Ramsay*)

Taking Stock of 245(4)—Proposed UK GAAR

- For these countries to base GAAR's application on yet another purposive-based reading of relevant tax provision creates inherent paradox
- Report observes that paradox is not avoided where second test is based on some discerned "scheme or intention of the Act, when read as a whole"
- Report reasons that because conventional and purposive tax construction includes context this approach doesn't work
- Report settles on second test that limits proposed UK GAAR to tax-motivated "abnormal arrangements" that do not represent "reasonable choice" in tax planning

Taking Stock of 245(4)—Rule of Construction or Exemption

- Courts have struggled with 245(4) but basic tax policy objective seems plain enough—to limit statutory business purpose test
- Less certain, however, is how limitation was to be interpreted and applied
- Specifically, was 245(4) intended to operate as rule of construction (like "purpose provision" in 245(6)) or as a stand-alone rule of exemption?
- Some support that 245(4) intended as rule of construction-- "For greater certainty" language, avoids "paradox" problem if modern approach applied to conventional tax construction and some commentary in Finance explanatory notes
- However, from the start, Courts treated 245(4) as stand-alone rule of exemption—effectively as "description" of abusive tax avoidance
- Why did this happen?

Taking Stock of 245(4)—Rule of Construction or Exemption

- Paradox (referred to in UK report) is if 245(4) is rule of construction it effectively duplicates purposive interpretation of relevant tax provisions before GAAR
- 245(4) treated as rule of exemption that compels primarily purposive reading of relevant tax provisions in GAAR determination
- This approach to 245(4) helps explains convergence described by Judith Freedman in judicial approach to tax avoidance cases in UK post-*Ramsay* (ie., *Barclays Mercantile*) and in Canada post-GAAR (ie., *Canada Trustco*)

Taking Stock of 245(4)—Rule of Construction or Exemption

- Primarily textual approach to Canadian conventional tax construction helps explain role for 245(4) accorded by Courts
- First, explains why 245(4) treated as a rule of exemption not construction
- Second, explains why 245(4) is applied to fill some, but not all, gaps in primarily textual interpretation--245(4) compels Courts to apply primarily purposive interpretation of relevant tax provisions
- Third, explains reluctance of Courts to treat GAAR as embodying overarching rule or requiring search for overriding policy or scheme of Act (as recommended for proposed UK GAAR and rejected in *Canada Trustco* and *Copthorne*)

Taking Stock of 245(4)—Role of 245(4)

- Basic tax policy objective of statutory GAAR is not to usurp Courts; instead, to establish framework that allows the courts, with full constitutional legitimacy, to flesh out framework by going further than conventional tax construction permits—whatever that happens to be in particular country
- In Canada, conventional tax construction based on primarily textual approach—that is where Canadian courts start from, before GAAR, and that starting point explains role courts have assigned to GAAR and, in particular, 245(4)
- In apt description of what has happened to GAAR to date, Tim Edgar describes that GAAR operates as formal mechanism to force reluctant judiciary to adopt purposive interpretation to tax construction
- In GAAR, Canadian courts have been given statutory permission to go beyond conventional tax construction—that is, beyond a primarily textual construction of the relevant provisions of the Act

Taking Stock of 245(4)—Role of 245(4)

- For reasons similar to NZ experience, based on 245(4) Canadian courts regard GAAR as requiring more in-depth consideration of context and purpose of relevant provisions that is different than applying provisions before GAAR (see *Copthorne*, para. 52)
- Criticism of 245(4) role—on the one hand, disguised and unconstitutional judicial discretion; on the other, chronic under-inclusiveness
- Shoe to drop—a marked divergence with GAAR experience of other countries is that, for the most part, Canadian courts have not interpreted and applied 245(4) with regard to commercial or economic result of transactions--contrast NZ, where courts require it, or Australia, Ireland or SA, where GAAR requires it
- *Canada Trustco*, *Lipson* and *12707192* confirm that economic result may be relevant in applying 245(4) in establishing whether avoidance transaction frustrates purpose of relevant provisions

GAAR and Penalties

- 1987 White Paper suggested GAAR might have penalty—perhaps percentage of tax avoided
- Potential penalty provoked hostile reaction—GAAR applied to tax avoidance, not tax evasion, GAAR could not be self-assessed and GAAR's application uncertain
- GAAR enacted with no penalty
- Result—only taxpayer "risk" is tax avoided, "regular" interest and transaction and dispute costs

GAAR and Penalties

- In most GAAR countries (and Quebec), penalty may be imposed where GAAR applies
- In some, penalty is reduced (or eliminated) where “adequate” disclosure of GAAR issue
- Australia has 50% penalty reduced to 20% if reasonably arguable GAAR doesn’t apply
- Quebec has 25% penalty which is eliminated if disclosure is made (mandatory or voluntary) or by virtue of due diligence defence

GAAR and Penalties

- Recent US codification of economic substance doctrine includes a 40% penalty that reduces to 20% if adequate disclosure
- Brian Arnold and others make case for penalty—absent a penalty, tax avoidance schemes will continue to flourish
- Arguably, abusive tax avoidance presents the possibility of significant tax savings with insufficient downside risk
- Good case can perhaps be made that taxpayers should have more skin in the game

GAAR and Tax Treaties

- 2004 amendments ensure GAAR overrides Canada's tax treaties
- To date, Crown has fared poorly using GAAR to deny treaty benefits
- Notwithstanding, in the absence of any consideration by SCC of GAAR in treaty context (perhaps in *St. Michael Trust*), predicting whether GAAR applies to deny treaty benefits is difficult
- To date, in cases like *MIL Investments* and *St. Michael Trust* Courts have held that where person meets textual requirements for treaty benefits, GAAR should not deny the benefits
- Relationship between GAAR and tax treaties at early stage
- Difficult to predict outcome

GAAR and Tax Treaties

- High water mark for taxpayers is FCA decision in *MIL Investments*—represents important GAAR loss for Crown
- But FCA decision was short, perfunctory and contained no substantive analysis of what constitutes abusive tax avoidance in treaty context.
- In recent paper, Angelo Nikolakakis and Marc Darmo argue need for recent LOB in Article XXIX A of Canada-US Treaty was debatable in challenging back-to-back or stepping-stone interest arrangements
- They posit that although *MIL Investments* and *Prévost Car* were important losses for Crown, Canadian courts have yet to fully elaborate and explore limits of existing treaty shopping weapons

GAAR and Tax Treaties

- Their caution seems warranted
- Notwithstanding recent cases, difficult to feel confident these cases provide reliable predictive value of GAAR's application to deny treaty benefits
- In particular, these cases seem out-of-step with basic approach to treaty interpretation endorsed by SCC in *Crown Forest*
- Crown Forest confirmed treaty provisions are read from a common-sense rather than literal perspective to achieve treaty purposes
- In this interpretive process, Courts should give equal weight to words and purpose of treaty provisions

GAAR and Tax Treaties

- Consistent with that process, SCC noted that while the establishment of treaty nexus to minimize tax was not improper behaviour, "...tax treaties should not be read to encourage or promote such behaviour".
- Approach of SCC in *Crown Forest*, the SCC's decisions in *Lipson* and *Copthorne*, and changed composition of the SCC may signal SCC's application of GAAR to tax treaties may be different than has been case to date in lower Courts

GAAR and Canada-US Tax Treaty

- In 1995, Third Protocol to Canada-US Tax Treaty added Article XXIX A—a non-reciprocal LOB provision in favour of US
- Article XXIX A included former paragraph (7), an explicit provision not to construe one-way nature of LOB to restrict Canada (or US) right to deny treaty benefits that result in abuse of treaty provisions
- TE explained Canada free to apply applicable anti-abuse rules to counter abusive arrangements of "treaty shopping" through US involving US residents and US free to apply substance-over-form and anti-conduit rules involving Canadian residents

GAAR and Canada-US Tax Treaty

- Former paragraph (7) provided weak platform for GAAR to deny treaty benefits
- 2004 amendments clarified GAAR applied to treaties and Fifth Protocol added new Article XXIX A containing reciprocal LOB and new paragraph (7)
- TE explains new paragraph (7) preserves Canada's right to apply GAAR to override LOB provisions to counter arrangements involving "treaty shopping" through US and US may apply its substance over form and anti-conduit rules in relation to Canadian residents

GAAR and Canada-US Tax Treaty

- TE replaces imprecise reference to preserving Canada's right to invoke "anti-abuse rules" with specific reference to GAAR
- In some respects, juxtaposition of new LOB and paragraph (7) difficult to reconcile
- Some argue that where specific rules in paragraphs (3) to (6) of LOB are met, no basis for GAAR or other domestic anti-abuse rules to apply

GAAR and Canada-US Tax Treaty

- Argument seems flawed—ascribes no real ambit to paragraph (7)
- Counter-argument is focus of paragraph (7) is on nature of transaction that results in treaty benefits rather than nexus that is focus of LOB provisions
- Paragraph (7) reserves right to deny treaty benefits because of particular transaction or arrangement that gives rise to treaty benefit

GAAR and Canada-US Tax Treaty

- This interpretation of new paragraph (7) consistent with Article 22 of US Model and related TE commentary
- LOB provisions are “residence-based” anti-abuse rules and paragraph (7) contemplates “transaction-based” anti-abuse rules (like GAAR)
- Also noted, is the relevance of principle of reciprocity in treaty construction—that the contracting states intend there should be a concordant (but not identical) interpretation of treaty provisions

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GAAR from a Planner's Perspective – Giving GAAR opinions

What is an opinion?

> *It is a statement by the opinion giver that expresses conclusions reached by applying legal rules or principles to a given set of facts. The conclusions are those which the opinion giver, after appropriate investigation and research and the exercise of informed professional judgment, honestly believes that a properly instructed court of law should reach. …[A]n opinion is not a prediction of a court's decision according to how well the case is argued or the characteristics or temperament of individual judges. An opinion is a prediction of what a court "should" decide, ignoring any of those extraneous factors. An opinion is not a prediction of the decision of government officials who have responsibility for administering the taxing statute.*

David Smith, 1994

Pre-Canada Trustco

- Technical Notes
- Information Circular 88-2 and Supplement 1
- Old cases on section 245 and 55(1)
- Early GAAR cases – some losses by taxpayers on alleged surplus stripping (*McNichol*, *RMM*, *Nadeau*); some wins on alleged surplus stripping (*Geransky*, *Brouillette*)
- Except for *OSFC* and *Water's Edge*, taxpayers successful in FCA – *Canadian Pacific* (weak currency borrowing not an avoidance transaction); *Donohue* (ABIL share disposition where taxpayer retained interest in corporate assets); *Jabin* (debt parking); *Imperial Oil* (investment allowance for LCT)

The Canada Trustco Guidelines – Procedural

1. Three requirements must be established to permit application of the GAAR:

   (1) A *tax benefit resulting from a transaction* or part of a series of transactions (s. 245(1) and (2));

   (2) that the transaction is an avoidance transaction , i.e. that it cannot be said to have been reasonably undertaken or arranged primarily for a *bona fide* purpose other than to obtain a tax benefit; and

   (3) that there was *abusive tax avoidance* in the sense that it cannot be reasonably concluded that a tax benefit would be consistent with the object, spirit and purpose of the provisions relied upon by the taxpayer.

2. The burden is on the taxpayer to refute (1) and (2), and on the Minister to establish (3).

3. If the existence of abusive tax avoidance is unclear, the benefit of the doubt goes to the taxpayer.

Canada Trustco Guidelines – Procedural (Standard of Review)

SCC stated in the last "guideline" that:

Where the Tax Court judge has proceeded on a proper construction of the provisions of the *Income Tax Act* and on findings supported by the evidence, appellate tribunals should not interfere, absent a palpable and overriding error.

Canada Trustco Guidelines – Interpretive Approach (paraphrased)

4. The court must conduct a unified textual, contextual and purposive analysis of the provisions giving rise to the tax benefit in order to determine why they were put in place and why the benefit was conferred. The goal is to arrive at a purposive interpretation that is harmonious with the provisions of the Act that confer the tax benefit, read in the context of the whole Act.

5. The taxpayer's motivation in undertaking the transactions is insufficient by itself to establish abusive tax avoidance. The central issue is the proper interpretation of the relevant provisions in light of their context and purpose.

Canada Trustco Guidelines

6. Abusive tax avoidance may be found where the relationships and transactions as expressed in the relevant documentation lack a proper basis relative to the object, spirit or purpose of the provisions that are purported to confer the tax benefit, or where they are wholly dissimilar to the relationships or transactions that are contemplated by the provisions.

Tax Benefit

- *Canada Trustco* and other jurisprudence says that in determining the presence of a "tax benefit", we may be conducting an "absolute" or a "normative" exercise. SCC said:

> *If a deduction against taxable income is claimed, the existence of a tax benefit is clear, since a deduction results in a reduction of tax. In some other instances, it may be that the existence of a tax benefit can only be established by comparison with an alternative arrangement.*

- Practical reality is that most often we are considering other transactions that the taxpayer might or might not have done or hypothesizing the absence of a particular transaction. (Couzin, 1997)

Avoidance Transaction –

- Can be negated (onus on the taxpayer) by demonstrating a primary *bona fide* purpose, other than to obtain the tax benefit
- Case law establishes (*Canada Trustco*, *Mackay*) that an overall commercial purpose for a series of transactions does not give each transaction in that series that overall purpose – each transaction has to be evaluated
- In a simple transaction (say, a borrowing) it may be difficult to disassociate the overall commercial purpose from a feature of the borrowing (for example, its currency) – see *Canadian Pacific*
- Despite some suggestions to the contrary in certain cases (eg. *RMM*) a non-Canadian tax objective should be capable of establishing a primary *bona fide* purpose other than to obtain a tax benefit, as defined for GAAR purposes. Compare CRA in ITTN-36 on 95(6)

Series – Common law meaning and extended definition in 248(10)

- Accepted definition of "common law" series established in *OSFC* (FCA) and endorsed in *Canada Trustco*:
  - *a number of transactions that are "pre-ordained in order to produce a given result" with "no practical likelihood that the pre-planned events would not take place in the order ordained"*
- Subsection 248(10) provides that a reference to a series is deemed to include any related transactions or events completed in contemplation of the series.
- It seems clear that 248(10) expands the common law definition (despite arguments that it is merely a "clarifying" provision – see Kandev, Bloom and Fournier's argument in 2010 CTJ 2)

248(10) Series - Related Transactions Done in Contemplation of other Transactions

- *Copthorne* makes it completely clear (if it was not before) that "in contemplation of" may be both forward and backward looking.
- It seems that there has to be a causal connection – one transaction or series is done "because of" or "in relation to"
- As to the degree of connection to earlier or later transactions that is required, Rothstein J. wrote:

  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."

- Not much focus in the case law on what it means for a transaction to be "related" and whether this is a separate test.

Abuse

- Since *Canada Trustco*, it seems clear that "misuse" and "abuse" aren't separate concepts. *Canada Trustco*, *Lipson* and *Copthorne* all adopted the following test of abuse:

  > *The analysis will...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.*

- The analysis must be grounded in the provisions of the Act itself, either by analyzing specific provisions that have been relied on or "circumvented" (that is, they technically do not apply) or by analyzing a set of provisions that might be said to form a "scheme" that is relevant to the issues at hand.

What does Copthorne add to Canada Trustco Guidelines?

- It might be argued that despite what is said about the onus on the Crown to establish abuse, the ground has shifted slightly in the Crown's favour.
- In *Canada Trustco*, the SCC said we start with the presumption that if the words fit, the taxpayer was intended to get the tax benefit conferred **- a finding of abuse is only warranted where the opposite conclusion—that the avoidance transaction was consistent with the object, spirit or purpose of the provisions of the Act that are relied on by the taxpayer—cannot be reasonably entertained.**
- Arguably, if this is the standard, the taxpayer should have succeeded in *Copthorne* based on its argument that PUC is an *in rem* share attribute and not an attribute of the shareholder – instead, the SCC focused on 87(3) in the context of a larger set of PUC grind rules

What does Copthorne add to Canada Trustco Guidelines?

The SCC seems to signal that it is incumbent on the Court to undertake a "deeper and wider" consideration of the purpose behind the statutory provisions and any "scheme" of which they are a part in order to determine whether there has been abuse:

> *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.***

The role of artificiality – is artificiality a reason for GAAR to apply in and of itself?

May depend – recent cases on "value shifts" suggest that if a loss is involved, its characterization as "artificial" may be sufficient for GAAR to apply; in other cases, the "artificiality" or "contrived" nature of the transactions is not necessarily fatal but may confirm why GAAR applies.

Canada Trustco:

> *A transaction may be considered to be "artificial" or to "lack substance" with respect to specific provisions of the Income Tax Act, if allowing a tax benefit would not be consistent with the object, spirit or purpose of those provisions.*

Kaulius:

> *The abusive nature of the transactions is confirmed by the* ***vacuity and artificiality*** *of the non-arm's length aspect of the initial relationship between Partnership A and STC.*

The role of artificiality

In *Copthorne*, Justice Rothstein wrote (para 127) :

> *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 value-shift cases

- *Triad Gestco* - "the recognition of artificial losses realized within the same economic unit is contrary to the object, spirit and purpose of those provisions" [sections 3, 38, 39 and 40, and their interplay with certain stop-loss rules, former subsection 55(1) and section 251.1]
- *1207192 Ontario* - purpose of the capital loss provisions in the Act, and paragraph 38(b) in particular, is "to allow capital losses only to the extent that they reflect an underlying economic loss" (at paragraph 90). Finding based on former subsection 55(1), which prevented taxpayers from claiming artificially-created losses.
- *Global Equity Fund* - Woods J. acknowledged that a policy of denying artificially-created business losses might be reasonable, but found that the Crown had not proven that such a policy existed

The FCA Decisions in Landrus, Lehigh and Collins & Aikman

- *Landrus* – FCA (Noel J.A.) said:

  I agree with the appellant that the fact that specific anti-avoidance provisions can be demonstrated not to be applicable to a particular fact situation does not, in and of itself, indicate that the result was condoned by Parliament.…However, where it can be shown that an anti-avoidance provision has been carefully crafted to include some situations and exclude others, it is reasonable to infer that Parliament chose to limit their scope accordingly.

- FCA was unable to find in the mesh of stop-loss rules a policy that a terminal loss could not be claimed if there was a disposition between parties that were part of the same economic unit.

The FCA Decisions in Landrus, Lehigh and Collins & Aikman

Lehigh - Sharlow J.A. focussed on whether the Crown had met its onus:

> *...the Crown has produced no authority that supports, expressly or by necessary implication, its proposition that a transaction that splits the interest and principal obligation between separate creditors, as was done in this case, would have been considered in 1975 or at any later time to have offended the fiscal policy objective of subparagraph 212(1)(b)(vii).*
>
> *...the fact that an exemption may be claimed in an unforeseen or novel manner, as may have occurred in this case, does not necessarily mean that the claim is a misuse of the exemption. ...the Crown cannot discharge the burden of establishing that a transaction results in the misuse of an exemption merely by asserting that the transaction was not foreseen or that it exploits a previously unnoticed legislative gap.*

The FCA Decisions in Landrus, Lehigh and Collins & Aikman

Collins & Aikman – Sharlow J.A. said:

> *...We have not been persuaded that we should reach a different conclusion [from the TCC decision] based on the Crown's argument, raised for the first time in this appeal, relying on the specific anti-avoidance rule in section 212.1 of the Income Tax Act as part of the relevant statutory scheme for determining the issue of abuse or misuse.*
>
> *Nor are we persuaded that, for the purposes of applying GAAR, the scheme of the Income Tax Act should be interpreted effectively to bar a foreign corporation...from dealing as it liked with shares of a corporation [CAHL] that was outside the reach of the Income Tax Act because, for reasons that have nothing to do with GAAR or the series of transactions upon which the Crown relied in applying GAAR, CAHL was not resident in Canada at the relevant time.*

The FCA Decisions in Landrus, Lehigh and Collins & Aikman -

- In *Lehigh* and *Collins & Aikman* FCA was very focused on how Crown pleaded and argued its case and on the standard of review
- Despite the result in *Landrus*, it is not the case that the GAAR will never be used to fill a legislative gap – it should however be more difficult for the Crown where there is a complex set of technical rules that can be said to form a scheme of their own
- Where the taxpayer relies on a very simple rule involving a "bright line test" it seems more likely that the Minister will not be successful unless it is clear that allowing the taxpayer to rely on the bright line test frustrates a statutory scheme that can be demonstrated to exist
- Query whether *Copthorne* direction that a deep analysis of the object and spirit of the relevant provisions must be undertaken will be reflected in FCA approach to value-shift cases

Possible GAAR Analysis Approach – Identifying Tax Benefits

1. Identify the potential tax benefits, which may include:
   - Benefits that flow from a particular tax status or tax attribute (eg. achieving mutual fund trust status, CCPC status, preservation of losses, PUC, step-up in basis)
   - Deductions or credits
   - Reduction or elimination of withholding tax
2. Identify what provisions are relied on and/or what provisions are "circumvented" (i.e. do not apply) in order to achieve the identified tax benefits.

Possible GAAR Analysis Approach – Avoidance Transaction Analysis

4. Consider the non-tax purposes of the transactions, including any non-Canadian tax objectives served and any legal and economic impact of the transactions.

5. Consider any non-tax purpose of particular steps in the series that are instrumental in bringing about a particular tax benefit.

6. Consider possible “normative” transactions, what consequences would have followed from such transactions, and whether the tax benefit could have been achieved in any other way.

Conducting the Abuse Analysis – The Questions to be answered based on the case law

1. Does the planning rely on specific provisions of the Act to achieve an outcome that those provisions seek to prevent?
2. Does the planning defeat the underlying rationale of the provisions that are relied upon?
3. Does the arrangement circumvent the application of certain provisions, such as specific anti-avoidance rules, in a manner that frustrates or defeats the object, spirit or purpose of those provisions?

Conducting the Abuse Analysis – Some other questions to ask

1. Is it reasonable to conclude that the transactions were within the object, spirit or purpose of the provisions that confer the tax benefit?
2. Are there aspects of the planning that are "artificial" in the various senses of that word (uncommercial, circular, self-cancelling, generate a tax benefit not commensurate with economic results, etc.)?

Possible GAAR Analysis Approach – Determining the Purpose of the Provisions Relied on or Avoided

1. Review the legislative history, any relevant commentary, any relevant amendments, purpose of such amendments, immediate context and any larger identifiable "scheme" within the Act of which they may be said to be a part.

2. Consider whether there is a clear policy in the provisions or in the scheme of the Act of which they are a part.

3. Consider whether there are other provisions in the Act that appear to be part of a scheme that evidences a different possibly competing policy.

Possible GAAR Analysis Approach – Testing the Case

4. Consider the arguments that support why the particular step might be considered to result in an abuse of the underlying policy of the provision or any policy in the Act.

5. Consider the arguments that support why the tax benefit achieved by the step is consistent with the underlying policy of the provision or other policies that can be discerned within the Act.

6. Consider how simply the case might be stated that the GAAR applies. That is, how complicated will the Crown's arguments have to be to convince a Court that the GAAR should apply? How simple will your argument be that it does not apply?

7. How reliant is the planning on a legislative gap or a particular case in which the taxpayer had a successful outcome?

GAAR Analysis Approach – the Reality Check – a few questions you should ask

1. How likely is the planning to be challenged by CRA or a provincial tax authority?
2. How likely is it that a number of taxpayers are going to be doing similar transactions and that attacking them will be a CRA "project"?
3. If the client's financial statements are required to be audited, what is the position of the audit firm?
4. What is the client's tolerance for risk? If challenged, would the client litigate? Does the client understand the costs of litigation and is the client prepared /able to pay to defend the planning?

"Should" vs. "More likely than not"

- The following is my attempt to put more words around the term "should":

  In rendering the Opinions set out in this letter, the use of the word "should" expresses that we believe that a Canadian Court properly informed regarding all relevant facts and principles of law, and properly applying such principles to the facts, should agree with our Opinions. There can be no assurance that a Canadian Court or the CRA will agree with our analysis and opinions rendered herein.

- On the other hand, "more likely than not" is appropriate where due to lack of jurisprudence, or perhaps competing "purposive" interpretations, it is necessary to convey that our assessment of the likelihood of success is that the odds are better than even, but the Crown would not be without credible arguments to the contrary.

Final Advice

Never give a GAAR opinion alone!

Ed Kroft, Q.C.
Blake, Cassels & Graydon LLP

Thinking Ahead: What can you do at the planning stage in anticipation of a challenge on audit?

- How will you "reasonably inform" a court to win the case or persuade the CRA not to proceed?
- Anticipate what a TCC hearing will involve (costs, time, effort, stress)
- Deal with expectations and absence of knowledge: Prepare people for what a challenge will involve
- Anticipate how a TCC hearing will transpire or what it requires

Thinking Ahead: What can you do at the planning stage in anticipation of a challenge on audit?

- Anticipate witnesses and documents required
- Assumptions in opinions are useless
- Preserve documents and determine availability of witnesses and willingness to testify (e.g. document retention policies, consultancy)
- Is any of this necessary if the GAAR defence is strictly based on subsection 245(4)?

Submissions at the Audit and Appeals stages: Is it worth doing?

- Appeals submissions on GAAR will end up as HO referrals
- Audit submissions on GAAR will end up in referral package to the GAAR Committee
- Benefits of submissions on facts
  - may cause transaction or series not to be regarded as “avoidance transaction”
  - may facilitate agreement on some facts or authenticity of evidence pertaining to disputed facts to shorten length of dispute at time
  - causes parties to focus at an earlier stage

Submissions at the Audit and Appeals stages: Is it worth doing?

- Disadvantages of submissions on facts
  - accelerated/unnecessary (?) costs
  - taxpayers may not spend time needed to "rediscover" facts so submissions may be inaccurate (based on faulty memory, failure to access/retrieve relevant docs/e-mails)
- Benefits of submissions on law
  - may reveal that no abusive transaction exists
  - causes taxpayer and Crown to focus arguments

Submissions at the Audit and Appeals stages: Is it worth doing?

- Detriment of submissions on law
  - may cause Crown to raise alternative arguments
  - may be a premature expenditure of funds
- The inability to sway: “group” audits/appeals and “retail” transactions
- The ability to sway: procedural defences (e.g. limitation periods)

Planning a GAAR Appeal: From Pleadings to the Courtroom

- Overview of Tax Court proceedings
  - Pleadings (Notice of Appeal, Reply, Answer, amendments)
  - Discovery (lists, examinations, undertakings)
  - Motions
  - Pre-trial activity (litigation conferences, agreements, requests to admit)
  - Appeal

Planning a GAAR Appeal: From Pleadings to the Courtroom (cont'd)

- Need to plan: Why? Surprises
  - lengthy lead time to define game plan and arguments
  - how many defences? How many issues?
  - GAAR may be a primary or secondary assessing position
  - location of hearing and length of hearing need to be determined
  - large corp. objection (section 165(1.11)) and collection rules (section 225.1) may apply
  - witnesses and documents may not be available for many reasons (need for document retention policies, subpoenas)

Planning a GAAR Appeal: From Pleadings to the Courtroom (cont'd)

- Crown may raise new positions (subsection 152(9))
- non-tax issues may dictate when proceedings can/should be held

- How quickly do you want to proceed? Advantages and disadvantages
- Costs may exceed estimates
  - attempts to define issues and facts with the Crown may take awhile

Planning a GAAR Appeal: From Pleadings to the Courtroom (cont'd)

- Courtroom process
  - visual aids
  - written opening statements
  - set out clear definition of the differences between the parties (facts, issues, law)

Planning a GAAR Appeal: From Pleadings to the Courtroom (cont'd)

- Dealing with Crown assumptions (what is the factual basis of the Crown's case? Why were these facts assumed?)
  - review of T20 Report
  - review of T401 Report
  - review of CRA proposal letter
  - review of CRA position letter
- Group appeals and taxpayers with comparable/same issue

Planning a GAAR Appeal: From Pleadings to the Courtroom (cont'd)

- Importance of the trial record for the Appellate Courts
- Provincial GAAR Appeals
  - location
  - procedure
  - burden of proof

Onus of Proof and the Burden of Persuasion in GAAR Appeals

- *Copthorne* (paras. 34 and 59); *Canada Trustco* (para. 28-29, 63)
- Judges weigh evidence and hear arguments
- Taxpayer must prove no tax benefit and no avoidance transaction
- Crown must clearly persuade that abusive transaction exists
- Burden for taxpayers on a balance of probabilities

Onus of Proof and the Burden of Persuasion in GAAR Appeals

- Burden for Crown is higher (*Copthorne*, para. 72)
- Some have suggested that *Lipson* lowered bar for Crown
- Some have suggested that *Copthorne* eliminated burden for Crown if Judges decide that transaction is abusive based on a textual, contextual and purposive analysis
- Is “burden” or “onus” just a tool to justify a “results-oriented” approach? Language in *Copthorne* (para. 70) suggests otherwise

The Importance of Procedure in Conducting GAAR Appeals (e.g. limitation periods, application of subsections 245(6) – (8))

- Limitation Periods
  - Must a taxpayer self-assess under GAAR?
    - Subsection 245(7)? – *Copthorne* (TCC)
  - Will paragraph 152(4)(b) automatically apply if taxpayers do not self-assess under GAAR? (misrepresentation attributable to carelessness, neglect or wilful default)
    - *Kebet Holdings*
  - CRA argues *STB Holdings* decision 2002 FCA 386 provides justification and overrides *Copthorne* 2007 TCC 481 (paras. 75 – 78)

The Importance of Procedure in Conducting GAAR Appeals (e.g. limitation periods, application of subsections 245(6) – (8))

- Limitation Periods (cont'd)
  - Providing waivers for GAAR? Is it a good idea?
  - Is no limitation period applicable if CRA applies GAAR to impose Part XIII withholding tax?
    - subsections 227(10) and 152(4) – *mutatis mutandis* provisions
    - treaty-based limitation periods
  - Impact of subsection 152(4.3)? Will a GAAR finding affect "balances" for future years?

The Importance of Procedure in Conducting GAAR Appeals (e.g. limitation periods, application of subsections 245(6) – (8))

- Penalties and GAAR
  - Sections 162, 163
  - Subsection 215(1)
  - Subsection 227(8)
  - *Copthorne* and self-assessment
- Notice of GAAR Determination under subsection 152(1.11)
  - Determination of amounts relevant to computation of income, tax or refunds (e.g. PUC)
  - Determination gives rise to objection and appeal rights

The Importance of Procedure in Conducting GAAR Appeals (e.g. limitation periods, application of subsections 245(6) – (8))

- Subsection 245(6): Collateral Adjustments
  - 180 days for affected party to request written assessment applying GAAR or a GAAR determination
- Subsection 245(7)
  - GAAR can only be applied through assessment, reassessment or determination
- Subsection 245(8)
  - CRA shall consider subsection 245(6) request (no limitations period) and shall assess, reassess or determine

The Importance of Procedure in Conducting GAAR Appeals (e.g. limitation periods, application of subsections 245(6) – (8))

- Competent authority relief and GAAR
  - CRA has indicated no relief (para. 27 of IC 71-17R5)

Reasonable Consequences of a GAAR Assessment (Subsection 245(5)) – How Reasonable?

- How does one determine “reasonable consequences”? At least 4 scenarios listed in 245(5)
- Starting point is the Crown assessing position
- Normally Crown position is accepted if GAAR determined to apply
- Limited judicial guidance (*Lipson*, paras. 49-51) for adopting a different position

Reasonable Consequences of a GAAR Assessment (Subsection 245(5)) – How Reasonable?

- What is "reasonable"?
  - The tax results absent the avoidance transaction?
  - The tax results if no tax planning done at all?
- Can parties determine "reasonable" results to effect a "principled" settlement? (e.g. sale of shares vs. sale of underlying property; sale of depreciable property or resource property vs. sale of capital property)

Pressure Points for Trying to Effect the Settlement of a GAAR Appeal

- Times for settlement?
- Ways to settle (facts, law, process)
- Impact of taxpayer relief provisions
- Consent to judgment? Withdrawal of appeal? Minutes of settlement?
- Drafting settlement offers
- Costs and settlement offers
- Effect on subsequent tax years – subsection 169(3)

Pressure Points for Trying to Effect the Settlement of a GAAR Appeal

- Possible areas for common ground:
  - facts
  - “reasonable consequences”
  - procedural issues (e.g. limitation periods)
- Role and possible impact of Tax Court settlement conferences
- Pro tanto judgments if GAAR only one issue
- Collection issues for related parties (e.g. section 160)

Evidentiary Issues in GAAR Appeals

- Gathering information
  - CRA auditors may gather under various powers
  - Documents/information may be gathered through TCC discover process
  - May serve as evidence = proof of facts
  - Evidence may be inadmissible in Court
  - Hearsay in GAAR audits
  - Need for witnesses: legal opinions or affidavits don't work
  - Need to subpoena witnesses
  - Need to prepare witnesses

Perspectives of Judges in GAAR Appeals

- All over the map
- Guidance from SCC (*Copthorne*) on role of judges in deciding GAAR cases (para. 70)
- Trial Judges may run GAAR trials differently
  - views on objections and admissibility of evidence
  - views on interrupting/questioning witnesses
  - views on writing legal submissions
  - views on questioning counsel

Perspectives of Judges in GAAR Appeals

- Appellate judges require:
  - well written memorandum of fact and law
  - point first presentation
  - outline of the applicable standard of review
  - brief summary of facts
  - direction of what the appellate court is to do with the GAAR argument and why

Perspectives of Judges in GAAR Appeals

- Only two GAAR cases have been overturned on appeal (*Mackay*, *Lehigh*)
- Stresses importance of TCC process and being prepared for trial
- Expectation should be that GAAR result will be appealed unless factually driven (e.g. *Univar*, *Evans*)

Perspectives of Judges in GAAR Appeals

- Recent GAAR cases going to FCA after TCC (*Collins and Aikman*, *Copthorne*, *Triad Gestco*, *1207192 Ontario*, *Global Equities*, *Garron/St. Michael Trust*, *Antle*, *Marechaux*, *Envision*, *Husky*, *Canada Safeway*)

GAAR Court Decisions Pending

- *Kossow* (TCC) – leveraged donations (May 20, 2011)
- *Spruce Credit Union* (TCC) – alleged abuse of intercorporate dividend deduction and "double" deduction of deposit insurance premiums
- *Robert Macdonald* (TCC) – surplus stripping (November, 2011)

GAAR Cases in Court Process

- Approximately 32 lead cases before the Courts, GAAR primary in about half
- Some areas involve many taxpayers:
  - RRSP strips
  - Barbados trusts
  - leveraged donations
  - capital loss creations
  - kiddie tax

Some GAAR Cases in Court Process

- *Edwards* – leveraged donations – discovery process
- *GTE Venezuela* – alleged surplus PUC stripping following sale of foreign holding company to Canadian OPCO – discovery process
- *Lehigh Cement* – second tier financing – GAAR dropped – 95(6) issue

GAAR Cases in Court Process (cont'd)

- *SSI Investments* – alleged abuse of 97(2) rollover on sale of assets to income trust structure – discovery process
- *Pieces Automobile Lecavalier* – section 80 – discovery process
- *Jobin*, *Gendron* – section 47 ACB averaging – discovery process

GAAR Cases in Court Process (cont'd)

- *Schiesser* – RRSP Strips – discovery process
- *Metrus Properties* – sham/56(2)/103 – use of a "mutual fund trust" and partnership to shift income – discovery process
- *6024530 Canada Inc.* – Brazilian tax sparing – discovery process / motion heard

GAAR Cases in Court Process (cont'd)

- *Oxford Properties Group Inc.* – package and bump – pleadings
- *Kern Family Trust* – subsection 75(2) – trial scheduled June 19, 2012
- *Placements Rimalou* – value shifts – April 23, 2012 hearing

GAAR Cases in Court Process (cont'd)

- *Swirsky* – attribution rules – trial continuing
- *Cameron* – value shifts – May 30, 2012 hearing
- *Kyall Investments* - BC GAAR – Québec Truffles
- *Pip Peri Pembo Ventures* - BC GAAR – Québec Truffles

Some GAAR Areas Under Review

- Leveraged donations
- RRSP strips
- Tax attributes/value shifts/artificial capital losses
- Foreign tax credits and foreign accrual tax usage
- Provincial tax arrangements (Québec trusts, Ontario NRO, Québec year ends)

Some GAAR Areas Under Review (cont'd)

- Tax deferrals using partnerships
- 88(1)(d) bumps – package and bump transactions
- "Profitco" transactions - partnership income allocated from a partnership with profit sheltered by deductions/losses of a party who acquires the partnership interest before year end
- Brazil tax sparing