Sent by email to GAAR-RGAE@fin.gc.ca

September 30, 2022

Finance Canada
90 Elgin Street
Ottawa, Ontario

RE: Canadian Chamber submission on GAAR consultations

This document constitutes the response of the Canadian Chamber of Commerce (the "Chamber") to the request of the Department of Finance ("Finance") in its August 2022 discussion paper entitled "Modernizing and Strengthening the General Anti-Avoidance Rule" (the "Paper") for feedback on specific questions raised in the Paper and other issues relating to the general anti-avoidance rule ("GAAR") in s. 245 of the *Income Tax Act* (Canada) ("ITA"). The Chamber welcomes the opportunity to articulate its views on GAAR generally and the specific issues raised in the Paper, and would be pleased to continue its dialogue with Finance on this issue at any time.

Executive Summary

The Chamber endorses the importance of GAAR in Canada's tax system. It believes that GAAR in its current form is generally achieving an appropriate balance between the competing objectives of protecting the Canadian income tax base from abusive tax planning, producing reasonably predictable results, and respecting the principle that taxpayers should be able to order their affairs to pay the least tax owing under the law within acceptable limits (of which GAAR itself is one).

The Paper's premise appears to be that some structural flaw within GAAR is preventing it from generating the results the government seeks, and that an undue level of tax avoidance is occurring as a result. The Chamber does not understand what evidence this apparent premise is based on, and encourages Finance to better articulate this. To the extent that Finance believes there are specific cases that the Crown should have won and didn't, it would facilitate the discussion to identify these and why Finance believes the result was wrong from a tax policy perspective, and the cause of such result (i.e., was there a deficiency in the rules, or did the Crown simply not make its case under the existing ones). A better understanding of the problem and the reasons for it would allow for a more targeted and effective solution.

The Chamber believes that the case for significant substantive amendments to GAAR of the type suggested in the Paper (e.g., introducing an economic substance test, shifting burden of the "misuse or abuse" element onto the taxpayer) is not apparent from the Paper's contents, and the Chamber strongly recommends against them as being unfair, unnecessary and unwarranted. In this regard, the Chamber is very strongly of the view that the government is far better placed to produce and bring forth evidence of (and to establish in court) the "object, spirit and purpose" ("OSP") of relevant ITA provisions and policies than are taxpayers, and that the burden of so doing must remain on the Crown.

The Chamber strongly supports the Paper's suggestion to take additional steps to articulate the OSP of provisions in the ITA for courts, taxpayers and tax authorities. It is essential that the government provide the courts, taxpayers and tax authorities with as much helpful evidence as possible of the OSP of relevant provisions (or the ITA as a whole), to enhance the ability of taxpayers to comply with the ITA, ensure the predictability and consistency of the tax system, and reduce the likelihood of time-consuming controversies. The Chamber supports measures to do so such as those described in the Paper, as it believes a clearer articulation of OSP by the government would address most of what appears to be Finance's concerns with the results of the GAAR jurisprudence. Specific, targeted amendments to address discrete issues (such as that announced earlier this year with respect to the definition of "tax benefit" capturing increased but unused tax attributes) are an appropriate way in which to addressed perceived deficiencies in the text of GAAR. The Chamber has a shared interest with Finance in an effective GAAR.

GAAR is meant to be a provision of last resort, applicable where the presence of abuse is clear rather than where reasonable people could differ. As such, the Chamber believes it is essential to the proper functioning of GAAR that it not amount to a "smell test", but rather that a rigorous and well-understood process for establishing the OSP of the provisions in question exist, since in most cases this is what will determine whether or not GAAR applies. The Chamber's intervention in *Deans Knight Income Corporation v. The King*, being heard by the Supreme Court of Canada on November 2, offers specific suggestions in this regard (its factum is attached as Appendix A).

As a final comment, Finance is in the process of enacting substantial changes to the reportable transaction rules (s. 237.3 of the ITA) as well as adding the notifiable transaction rules (s. 237.4 of the ITA) and reporting of uncertain tax treatments (s. 237.5 of the ITA). These reporting requirements should have the dual effect of inhibiting aggressive tax transactions as well as providing both the CRA and Finance with a significant amount of information on taxpayer activities that would in turn assist in targeting anti-avoidance legislation in the future. These initiatives should help significantly to address concerns identified in the Paper for modifying the GAAR rules and in turn position Finance to better target any such legislative changes in the future.

The Canadian Chamber of Commerce

1. Founded in 1925, the Chamber is a non-partisan, not-for-profit organization that represents nearly 200,000 businesses across Canada through its network of more than 400 affiliated chambers of commerce and boards of trade, as well as its own member companies and sectoral associations. The Chamber's members include businesses of every size, from all sectors of the economy and every region of the country, constituting a significant portion of Canada's tax base.

The Role of GAAR

2. The Chamber believes that GAAR plays an important and useful role in the Canadian tax system. The Chamber's members are themselves taxpayers collectively constituting a significant portion of the Canadian tax base, and when a small minority engage in abusive tax planning, the revenue shortfall thereby created falls on the remainder of the tax base. GAAR's role is to assist in preventing the abuse of the tax system as a "provision of last resort", while not impairing the legitimate tax planning undertaken by the vast majority who seek only to pay no more tax than the statute requires of them. As such, the Chamber has a shared interest with the government in an effective GAAR that produces "fairness" across the tax base.

3. That said, the prevention of abusive tax planning was never and is not the sole criterion for measuring GAAR's effectiveness. The Explanatory Notes accompanying GAAR's enactment described it as "a reasonable balance between the protection of the tax base and the need for certainty for taxpayers in planning their affairs" (*Canada Trustco*, para. 15). At the time of GAAR's enactment, a senior Finance official described the government's objectives for GAAR as producing a rule that generates "a 'reasonably predictable result' so that taxpayers can comply with the rule, and the administration and the courts can easily apply it".[1] As such, GAAR represents a balancing of interests, one of which is respecting the basic principle "that tax planning — arranging one's affairs so as to attract the least amount of tax — is a legitimate and accepted part of Canadian tax law" (*Canada Trustco*, para. 31), and is protected ground under the Taxpayer Bill of Rights. The Chamber's understanding is that the government has not changed its view on the importance of balancing competing interests, which the Chamber believes is appropriate.

Defining the Problem

4. While the Paper includes no statistics on this point, the Crown has been successful on GAAR cases the majority of the time since the Supreme Court of Canada's first decision on this issue in 2005 (*Canada Trustco*). Of the five cases decided by the Supreme

[1] David Dodge, "A New and More Coherent Approach to Tax Avoidance" (1988) 36:1 *Canadian Tax Journal* at p. 22.

Court for example, the Crown has won three. Of the other two, very few people in the tax community believe that the Crown should have prevailed in *Canada Trustco*, and a minority would think that it should have won *Alta Energy*.[2] As the Paper points out GAAR has been an important revenue-generator as a CRA assessing provision, and the most important and unquantifiable impact of GAAR is the deterrence of potentially abusive planning that never occurred due to the presence of GAAR.

5. Against that backdrop, the government's specific motivation for proposing significant (and in some cases far-reaching) changes to GAAR is not apparent from reading the Paper. Why exactly does the government believe that GAAR is not working as intended, and based on what evidence? GAAR is but one tool in the CRA's arsenal for preventing abusive tax avoidance, and the Paper seems to assume as a premise something not obvious to the reader.

6. There will always be specific cases on specific issues that the government feels strongly about and that it feels the need to react to. The recent amendment to the definition of "tax benefit" to include increased or preserved tax attributes even if not utilized is an example of this, and the Chamber takes no issue with it. However, the scope of many of the proposals included in the Paper is so far-reaching as to suggest that the government has much more fundamental concerns, without explaining what they are and how they manifest themselves. What are the government's expectations with GAAR that are not being met, and why? Is GAAR the right tool for meeting them? Which cases has it been unsuccessful in that it thinks illustrate a fundamental problem with the structure of GAAR (i.e., beyond that case) requiring major legislative surgery, and why was it unsuccessful in those cases (i.e., a structural flaw within GAAR or something else)? Presumably, the government is not defining success as prevailing in 100% of GAAR court cases. It would be helpful if the government would articulate more specifically what its expectations are of GAAR and why it feels they are not being met. A better explanation of the perceived problem enables a more focused dialogue on what the actual causes are and what potential solutions addressing those causes might be.

7. Similarly, it is not evident from reviewing the Paper what elements of the government's thinking have changed since the time that GAAR was initially proposed and enacted. Quite a bit of time and effort went into the design of GAAR in the 1980s, and the version ultimately enacted is significantly different from that initially proposed (i.e., significant refinements were made, as the government's thinking evolved). Understanding whether today's concerns are motivated by a change in thinking relative to the 1988 version of GAAR enacted versus a view that GAAR's original policy tradeoffs remain sound but are not being realized in practice for some reason would generate a more fruitful discussion of the potential for changing GAAR. To this end, it would be further helpful to the discussion to understand why the government made the changes that it did in the design

[2] A sixth case (*Deans Knight*) is currently before the Court, on which the Chamber is intervening to provide suggestions to the Court on creating a more rigorous and well-understood process for determining the OSP of relevant provisions in a GAAR analysis.

of GAAR over the period between initial announcement and ultimate enactment (e.g., why was an economic substance test initially proposed and later rejected; why was the "purpose" test determined to be "primary purpose" as opposed to the alternatives, etc.).

8. The Chamber further observes that not all perceived problems with the application of GAAR involve a lack of success by the Crown. As is discussed below under **Misuse or Abuse**, the absence of sufficient rigor and process in determining the OSP of relevant provisions has resulted in the Crown seeking to stretch the scope of GAAR beyond its intended limits in an effort to catch perceived "close calls." This phenomenon is exemplified by the pending appeal in *Deans Knight Income Corporation v. The King* before the Supreme Court of Canada, in which the Chamber is intervening. Any review of the effectiveness of GAAR should encompass cases of apparent overreach by tax authorities.

Tax Benefit/Avoidance Transaction

9. The concepts of "tax benefit" and "avoidance transactions" as performing a "filtering" function within the GAAR system are such that they can effectively be considered together. Both constitute a low bar to the application of GAAR, and to the extent that amendment or refinement of either is under active consideration, it would be interesting to have more data as to how frequently cases reviewed by the GAAR Committee are rejected on the basis of either of these bases versus abuse or misuse. The sample size of 24 cases in Annex A of the Paper is quite small and may not reflect how often determinations of "tax benefit" and "avoidance transaction" actually constitute real impediments to applying GAAR as a practical matter.[3]

10. The primary question on both of these concepts is, "compared to what?" The courts have established for example that the mere fact an alternative transaction would have achieved an equivalent result with more tax payable is not sufficient to establish an avoidance transaction. In considering potential amendments that would lower the bar on what constitutes an avoidance transaction, it would be helpful to confirm that the government does not propose to depart from this principle.

11. More generally, the version of GAAR enacted in 1988 reflected substantial tax policy discussion and refinement, much of which determined the circumstances in which the "tax benefit"/"avoidance transaction" concepts should play a "filtering" role. It would be helpful to understand the process by which the current versions of these concepts were settled upon and why others (including lower standards for the "avoidance transaction" test) were rejected at the time. It is certainly possible to lower further what already appears to be a very low bar for proceeding with an abuse/misuse analysis (i.e.,

[3] For example, in cases such as *Spruce Credit* the Court did not bother to make a determination on "abuse or misuse" (which the Tax Court judge found not to exist), and in *Loblaw Financial* the Crown was successful before the Tax Court of Canada without the need to have recourse to GAAR, and chose not to pursue GAAR before higher courts.

lowering the “purpose” standard, expanding the “avoidance transaction” standard to include differing choices within a particular transaction), but before doing so it would be useful to understand the circumstances in which Finance felt an absence of benefit or purpose should prevent a misuse or abuse from triggering GAAR back in 1988. Again, at some point the bar is being set so low that it amounts to requiring taxpayers to choose to proceed in a manner that yields the most tax payable, which seems both unlikely to be the government’s objective and to largely eliminate any practical purpose for having such concepts within GAAR.

Misuse or Abuse

12. Most GAAR determinations are made on the “misuse or abuse” element of GAAR. This test requires the OSP of the relevant provisions to be established (i.e., is there something more in their rationale beyond what is apparent from a fair reading of their text), and the taxpayer’s conduct to be measured against that OSP.

13. The Paper makes the following statements (pages 15 and 17):

> It can be difficult to ascertain the object, spirit and purpose of a provision of the Act, or the existence and relevance of a general scheme in the Act read as a whole, in order to determine whether abusive tax avoidance has occurred. Moreover, the courts have looked to the Crown to make persuasive submissions on the object, spirit and purpose of provisions and where the existence of abusive tax avoidance is uncertain, the courts have given the benefit of the doubt to the taxpayer.
>
> . . .
>
> As the determination of the object, spirit and purpose of a statutory provision gives rise to a pure question of law, the question arises as to whether the burden should be changed in the interest of improving the effectiveness of the GAAR and the fairness of the tax system.

14. The Paper also makes the following statement (page 20):

> Where a taxpayer enters into an avoidance transaction purposefully to use the provisions of the Act to obtain a tax benefit, it stands to reason that taxpayers and their advisors are well placed to form and express opinions with respect to the object, spirit and purpose of the relevant provisions upon which they are relying. Yet, in *Canada Trustco*, the Supreme Court of Canada noted at paragraph 65 that:
>
> > The Minister is in a better position than the taxpayer to make submissions on legislative intent with a view to interpreting the provisions harmoniously within the broader statutory scheme that is relevant to the transaction at issue.
>
> As the object, spirit and purpose of the relevant provisions is a question of law to be determined based on the words in the Act and other permissible extrinsic aids (all of which are publicly available), it is not clear that the Crown is in a better position (or has any special knowledge) to establish that abusive tax avoidance exists than taxpayers are to establish that the tax benefits sought are consistent (or are at least not inconsistent) with the object, spirit and purpose of the provisions relied upon.

15. The Chamber strenuously disagrees with the foregoing statements. To begin with, the assertion that determining OSP is "a pure question of law" is not a consensus view, and if correct is true only from a narrow technical standpoint. An OSP determination may constitute a legal conclusion, but even if so, it is very much one that is dependent on proof using various extrinsic aids. Ultimately the object in an OSP determination is to determine what Parliament's intention was (or *Copthorne* (at para. 69) describes it, "the 'legislative rationale that underlies specific or interrelated provisions of the Act' (V. Krishna, *The Fundamentals of Income Tax Law* (2009), at p. 818)." As the submissions of the various parties participating in the *Deans Knight* case amply demonstrate, extrinsic aids are an essential element of establishing legislative rationale, which render an OSP determination very much not "a pure question of law" in the broader sense but rather a matter of legal interpretation to be established based on the relevant evidence (i.e., extrinsic aids) of legislative rationale.

16. Similarly, given that "legislative rationale" essentially amounts to "what was the government thinking when enacting the relevant provisions," it does not seem plausible to suggest that there could be any doubt as to whether taxpayers or the government itself is better placed to determine and then prove what the government was thinking. While some sources of evidence of legislative rationale are publicly available as the Paper states, others are not and would be known only to those within government,[4] and others are public only in redacted form (e.g., advance tax rulings such as those in issue in the *Deans Knight* litigation). The reaction from within the tax community to the idea that the government is no better placed than taxpayers to establish OSP has generated responses such as the following:[5]

> Here's the stated rationale: The government doesn't understand the intention of the tax law any better than taxpayers and therefore the onus to interpret that intention and build an argument for a misuse or abuse should not fall on the government's shoulders. The paper argues that taxpayers have just as much insight into the intention of the law as the government. Wow. Just, wow.

17. It must further be observed that the government enjoys various other advantages over taxpayers in researching and establishing OSP. In addition to having what are effectively limitless financial resources (certainly relative to any particular taxpayer), the government has the ability to pick which GAAR cases to litigate (and in which order). The government also drafts the relevant legislation and can generate as much supplementary explanatory material as desired (i.e., extrinsic aids for a court), and can change the rules whenever at its discretion. Moreover, since the Crown is by definition a party to virtually every tax case, it has the unique ability to re-use the OSP work product generated in one case over any number of other cases being litigated on the same (or

[4] The Chamber is not aware of any formal legal prohibition on the government using heretofore non-public evidence of legislative intent in a case dealing with GAAR, nor can a taxpayer possibly be aware of any such document that might be supportive of its position.
[5] Tim Cestnick, "Looming legal changes that will affect Canadians' ability to pay less tax" *Globe & Mail*, August 18, 2022.

similar) issues, such that it can spread the cost over a number of cases in a way no taxpayer can. The government has various advantages of scale and scope in GAAR cases, and whatever difficulty the Crown may experience in establishing OSP cannot possibly justify shifting that burden onto taxpayers who are already facing a distinctly uphill battle and are clearly less-well positioned to establish OSP than is the government.

18. Finally, from a practical perspective, in a GAAR case the government is by definition asserting the existence of a legislative rationale that is not apparent from a reading of the text of the statute. In such cases it is the government's position that there is something there that is not immediately evident, as defined and articulated by the government. It is only fair and logical that the government bear the burden of demonstrating the existence of such an unstated legislative rationale, and taxpayers cannot not reasonably be expected to bear an onus of disproving something that cannot be seen from the text, *viz.*, proving a negative. This is entirely consistent with GAAR's role as a provision of last resort applicable in cases of clear abuse. It was never intended (and should not be expected) to play a greater role than this, and if the essence of the government's concerns is to change this bedrock principle, it would be helpful for the government to articulate this clearly, as it fundamentally changes the discussion.

19. As discussed above, having a better understanding of the precise nature of the government's concerns with the results GAAR is currently producing would better inform the discussion about how it might be improved. However, the Chamber believes that the single most important thing the government could be doing to "improv[e] the effectiveness of the GAAR and the fairness of the tax system" is to do a better job of articulating and evidencing the OSP of the ITA's provisions. It is essential that the government provide the courts, taxpayers and tax authorities with as much helpful evidence as possible of the OSP of relevant provisions (or the ITA as a whole), to enhance the ability of taxpayers to comply with the ITA, ensure the predictability and consistency of the tax system, and reduce the likelihood of time-consuming controversies. The Chamber supports measures to do so such as those described in the Paper, as it believes a clearer articulation of OSP by the government would address most of what appears to be Finance's concerns with the results of the GAAR jurisprudence. Such articulation makes it easier for the vast majority of taxpayers who want to do so to remain compliant with the ITA, while making abusive tax avoidance harder for the small minority who do not. In so doing, the government will reduce the amount of time and expense spent (by itself and taxpayers) on resolving GAAR-based tax disputes, to the benefit of all.

20. With reference to the concern expressed in the Paper (page 16) with the Supreme Court's statement in *Alta Energy* to the effect that GAAR is intended to catch unforeseen tax strategies, the Chamber believes that the government may be reading too much into that one line, and doesn't think that in so saying the Court was indicating a refusal to apply GAAR to cases of foreseeable tax planning. As discussed in the Chamber's

factum in *Deans Knight* (attached as Appendix A), the foreseeability (or not) of a particular course of action taken by a taxpayer is simply one factor among many that informs someone undertaking an OSP analysis as to context. Logically, the text not explicitly addressing an issue (which occurs in every GAAR case) raises the question of whether or not this omission reflects a conscious choice by Parliament not to include something rather than a matter that Parliament would have included had its mind been turned to that matter. The foreseeability (or not) of that matter is simply one data point among many that forms part of the context in an OSP analysis, and the Chamber does not believe that a court would refuse to apply GAAR solely because the taxpayer's actions were foreseeable. Hopefully the Court's decision in *Deans Knight* will clarify this point.

21. The Chamber does not object to specific amendment instructing courts to consider the possibility of applying GAAR in a case where a taxpayer's actions constitute an abuse or misuse of the ITA as a whole (although as a practical matter this may be a difficult matter to establish).

22. The Chamber believes that courts undertaking a GAAR analysis are already well attuned to the concept of fairness from the perspective of both individual taxpayers and to taxpayers as a whole, and that the Paper's reference to an excerpt from paragraph 1 of *Alta Energy* imputes to it a meaning that it does not have. GAAR cannot apply without a misuse or abuse of relevant ITA provisions, which is a standard that Parliament has established as the threshold at which fairness to other taxpayers takes precedence over the fairness in allowing any individual taxpayer to reduce their own taxes owing. Hence, the "abuse or misuse" concept is inherently a reference to "fairness" for taxpayers generally, exactly as the Supreme Court of Canada described its design in *Lipson* (para. 52):

> The GAAR is neither a penal provision nor a hammer to pound taxpayers into submission. It is designed, in the complex context of the *ITA*, to restrain abusive tax avoidance and to make sure that the fairness of the tax system is preserved. A desire to avoid uncertainty cannot justify ignoring a provision of the *ITA* that is clearly intended to apply to transactions that would otherwise be valid on their face.

Again, the Court's decision in *Deans Knight* may address this concern.

23. With reference to *Alta Energy* specifically, the Crown's failure to win that case arose not because the Court's majority gave insufficient weight to the concept of "fairness" to the tax system as a whole (i.e., other taxpayers), but rather because the majority concluded (correctly, in the Chamber's view) that the OSP of the tax treaty in question simply did not include a pre-condition not evidenced in the text of the treaty or in its context (or arguably its purpose). The government could have negotiated a treaty that included such a provision, or amended the *Income Tax Conventions Interpretation Act* to have included such a provision, or issued its own treaty guidance; or sought to terminate the treaty unless satisfactory changes were made. The Court quite properly declined to do what

the government chose not to do itself, not because it elevated "fairness" to the taxpayer at hand over "fairness" to the tax system as a whole, but rather because after reviewing the relevant context and extrinsic aids it was satisfied that the unstated pre-condition was simply not part of the bargain the treaty signatories had struck:

> [94] The *Treaty* makes it clear that Canada and Luxembourg agreed that the power to tax would be allocated to Luxembourg where the conditions of the carve-out were met. There is nothing in the *Treaty* suggesting that a single-purpose conduit corporation resident in Luxembourg cannot avail itself of the benefits of the *Treaty* or should be denied these benefits due to some other consideration such as its shareholders not being themselves residents of Luxembourg. In this case, the provisions operated as they were intended to operate; there was no abuse, and, therefore, the GAAR cannot be applied to deny the tax benefit claimed.

24. For these reasons, the Chamber does not believe that an absence of "fairness" to the tax system as a whole is evident in the GAAR jurisprudence to date: rather, such fairness will best be ensured by the government articulating to the best of its ability the OSP of the ITA's provisions (and if Finance deems appropriate the ITA as a whole).

Economic Substance

25. The Paper raises the issue of whether or not GAAR "sufficiently tales into consideration the economic substance of transactions." It observes that in *Canada Trustco* the Supreme Court "went on to say that economic substance is relevant only if, and to the extent that, the text of the law says that it is relevant", and notes a reference in the Explanatory Notes accompanying GAAR's enactment to the effect that GAAR (together with other provisions) should "require economic substance in addition to literal compliance with the words of the Act." It concludes that "this limited or *ad hoc* role for economic substance is unsatisfying from a policy perspective."

26. Once again, the Chamber is unclear as to exactly what the government perceives the problem to be, or how it is that an explicit "economic substance" test that the government proposes to introduce would address that problem:

> does the government believe that *Canada Trustco* (a case decided almost 20 years ago) was wrongly decided, either on the law as it then was or from a policy perspective? If so, there is a very wide variance between what the government and the business community considers abusive.
> what does the government mean by "economic substance"?
> what other GAAR cases does the government believe it should have won and didn't that were lacking in "economic substance" and would have turned out differently had an economic substance test existed?

what “pervasive impact on the tax system” is the Paper referring to?
why exactly is the present role of economic substance “unsatisfying from a policy perspective?” “Unsatisfying” in what way, and how does that manifest itself (i.e., with what results)?

Without greater clarity as to the perceived problem, it is difficult to comment on the proposed solution.

27. In general, the Chamber believes that the courts are already applying principles that are practically equivalent to “economic substance” (at least in its simplest and most easily-understood form) where appropriate to do so. For example, in *Copthorne* a unanimous Supreme Court concluded that transactions generating paid-up capital “in excess of amounts invested in the amalgamating corporations with tax-paid funds.” (para. 122) were abusive. It is hard to see appellate-level decisions such as these as anything other than the application of economic substance where the OSP of the relevant provisions or statutory scheme are clearly based on such. The Chamber therefore disagrees with the Paper’s assertion that “the courts have limited the role of economic substance to one of ascertaining the relevant factual context of transactions and have not considered it in determining how the provisions of the Act should be interpreted and applied in particular cases.” Where economic substance is relevant to the OSP of ITA provisions, the courts have proven themselves ready to consider that concept in a substantive way, whether or not using the actual words “economic substance.”

28. As the Paper notes, there are various forms of tax-motivated planning that are considered perfectly acceptable from a tax policy perspective but which ostensibly have little or no “economic substance” in the sense of leaving the participants in a materially different position (ignoring tax). Intra-group loss consolidation transactions are the obvious example, although others could conceivably qualify as well, depending on the meaning of “economic substance” (e.g., butterfly divisive reorganizations, post-mortem “pipeline” planning, etc.). By its very nature as a rule that applies across the entire statute, GAAR is a somewhat blunt instrument.[6] It is not clear how the government would be able to preserve the non-application of GAAR to acceptable tax planning that lacks significant economic substance, while embedding an economic substance requirement within GAAR beyond how the courts already consider and apply it in appropriate circumstances (which the government for some reason finds “unsatisfying”). Again, this issue highlights the difficulty the Chamber has in perceiving the exact problem the government feels an economic substance test would address. If the government is looking for something that would have reversed *Canada Trustco* for example, that is a very different discussion (and GAAR may not be the right place to

[6] For the same reasons (i.e., the exceptionally broad scope of GAAR combined with the varying circumstances in which it potentially applies), the Chamber does not believe that amending GAAR to incorporate greater reliance on accounting treatment or testing for pre-tax profit will achieve acceptable results: not all relevant transactions are profit-seeking, nor do accounting rules (which have various objectives) consistently reflect economic “reality.”

achieve something that would result in such a dramatic change). Not everything that has economic substance is acceptable, nor is everything that lacks it abusive.

29. The Paper notes that "the avoidance transaction test is, in a sense, a form of economic substance test." The Chamber agrees, in that transactions without meaningful economic substance seem almost certain to constitute avoidance transactions. As such, combined with the "where appropriate" use of economic substance concepts by the courts as part of the OSP analysis, the Chamber believes that economic substance is sufficiently represented in the application of GAAR. To the extent that specific instances where an absence of economic substance (or some element thereof) is producing material abusive tax avoidance, the Chamber believes that identifying those specifically and formulating a potential solution based on those circumstances is the proper way to deal with them.

Penalties

30. The Chamber notes the Paper's reference to GAAR's role as a deterrent to abusive tax planning, and to concerns that "there appears to be some judicial reticence to impose a penalty in the context of a rule that only the Minister can apply."

31. As the Paper notes, the ITA already contains various penalty provisions, and it is not obvious to the Chamber that a new one is necessary or appropriate for when GAAR applies, or why the "gross negligence" standard applicable to existing penalty provisions is not equally appropriate for GAAR cases. Indeed, the Paper cites only one case as evidence of the perceived "judicial reticence" to imposing penalties in a situation where GAAR applies.

32. Given that the Paper's focus is clearly directed towards making it easier to apply GAAR, the Chamber believes that it is premature to discuss changes to the existing rules as to when penalties should result for a taxpayer to whom GAAR has been successfully applied. As such, the Chamber reserves comment on GAAR-related penalties until we can see where the bar for applying GAAR has been set. In general however, the Chamber is strongly opposed to applying penalties in cases where legitimate interpretational uncertainty exists.

Conclusion

33. The Chamber thanks Finance for the opportunity to express its views on the Paper, and welcomes the possibility of continued dialogue on this topic. As noted above, the Chamber's membership constitutes a significant element of Canada's tax base, and its interests are therefore aligned with the government in a GAAR that prevents abusive tax avoidance (as Parliament defines it) and gives those taxpayers who wish to be compliant a reasonably clear (but not necessarily "certain") demarcation of the line between permissible and legitimate tax planning and abusive behavior that imposes an unfair burden on the rest of us.

Court File No. 39869

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

DEANS KNIGHT INCOME CORPORATION

Appellant
(Respondent)

-and-

HER MAJESTY THE QUEEN

Respondent
(Appellant)

-and-

CANADIAN CHAMBER OF COMMERCE, TAX EXECUTIVES INSTITUTE, INC, ATTORNEY GENERAL OF ONTARIO and AGENCE DU REVENU DU QUÉBEC

Interveners

FACTUM OF THE INTERVENER, CANADIAN CHAMBER OF COMMERCE

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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Table of Contents

Page

PART I – OVERVIEW

1. The general anti-avoidance rule in s. 245 ("**GAAR**") of the *Income Tax Act* (Canada) ("**ITA**") applies broadly across the ITA. Its application depends on whether a provision's object, spirit and purpose ("**OSP**") includes a "rationale that underlies the words that may not be captured by the bare meaning of the words themselves"[1] (an "**Unstated Policy**").

2. This case considers s. 111(5), which limits a corporation's use of its losses if *de jure* control of the corporation is acquired, either under general principles or an ITA provision that deems a *de jure* acquisition of control to occur for this purpose (in either case a "***de jure* AOC**").

3. The issues before this Court create uncertainty for the business community, reduce the tax system's predictability and consistency, and increase the number of costly, time-consuming disputes. First, as to the scope of GAAR generally, a rigorous process for conducting an OSP analysis is essential to ensure that (i) its application respects Parliament's choices rather than being a "smell test," and (ii) the tax system is consistent, predictable and fair. Second, guidance is needed on whether the OSP of s. 111(5) is (consistent with its text and that of its supporting provisions) based on factors affecting the direct or indirect ability to control the corporate law voting mechanisms that determine who has legal authority to direct and bind a corporation, or if it instead contradicts that text and context to encompass contractual economic incentives and similar factors which the ITA's *de facto* control test used in other provisions exists to capture.

PART II – POSITION ON THE QUESTION IN ISSUE

4. The Canadian Chamber of Commerce (the "**Chamber**") intervenes to ask this Court to:

a) provide further guidance on the process for determining whether a provision's OSP includes an Unstated Policy;

b) adopt additional relevant factors to guide an OSP analysis; and

c) as to the OSP of s. 111(5), and based on those relevant factors as applied to s. 111(5) and the extrinsic evidence on the legislative rationale of s. 111(5) discussed below, maintain the long-standing distinction between those factors relevant to the *de jure* control standard for

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[1] *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63 (*Copthorne*).

s. 111(5) chosen by Parliament and the broader and different factors relevant to *de facto* control, by refusing to adopt an essentially *de facto* control standard renamed as "actual control".

PART III – STATEMENT OF ARGUMENT

A. Factors Relevant to Establishing OSP: Existing Jurisprudence

5. In prior GAAR cases[2] this Court has articulated various factors relevant in determining if a provision's OSP includes an Unstated Policy, including the following:

- Avoiding value judgments: "determining the rationale of the relevant provisions of the *Act* should not be conflated with a value judgment of what is right or wrong nor with theories about what tax law ought to be or ought to do" (*Copthorne*, para. 70);

- Reasonably predictable results: the objectives of "consistency, predictability and fairness . . . would be frustrated if the Minister and/or the courts overrode the provisions of the [ITA] without any basis in a textual, contextual and purposive interpretation of those provisions" (*Canada Trustco*, para. 42);

- Tax reduction is legitimate: there is nothing *per se* objectionable about taxpayers arranging their affairs to minimize their tax burden within the limits set out in the ITA, which Parliament expressly reconfirmed when enacting GAAR (*Canada Trustco*, para. 31);

- Compatibility with the text: any Unstated Policy alleged to exist must be reconcilable with the text, failing which an OSP analysis risks becoming "a purposive one in search of a vague policy objective disconnected from the text" (*Alta Energy*, para. 58);

- Textual omissions and how readily Parliament could have addressed the issue: the Court's prior decisions on textual omissions differentiate between conscious choices by Parliament not to capture something that it was likely aware of and could have readily included in the text had it wished (*Canada Trustco*, *Alta Energy*), versus text not capturing something unforeseen that Parliament likely would have addressed had it been aware of the issue (*Mathew*, para. 58). Similarly, this Court has rejected adding as Unstated Policy concepts that Parliament has expressly provided for elsewhere in the text of the same legislative

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[2] *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 (*Alta Energy)*; *Copthorne*; *Lipson v. Canada*, 2009 SCC 1 (*Lipson*); *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 (*Canada Trustco*); and *Mathew v. Canada*, 2005 SCC 55 (*Mathew*).

regime when it wished to do so (*Canada Trustco*, para. 75). Implied exclusion is permissible, when supported by context and/or purpose: *Copthorne*, para. 111; and

- Foreseeability: the use of provisions to achieve results significantly different from those Parliament contemplated when enacting them has been held to offend the OSP of those provisions (*Lipson*, *Mathew*), while conversely a taxpayer applying those provisions and acting in a foreseeable manner has been found not to do so (*Canada Trustco*, para. 78; *Alta Energy*, paras. 80 and 82 ("GAAR was enacted to catch unforeseen tax strategies")).

B. Factors Relevant to Establishing OSP: Suggested Additions

6. The Chamber submits several other factors (being logical extensions of those already established in the caselaw) should be considered in an OSP analysis, particularly as to context.

7. Is the Unstated Policy Itself Clear and Unambiguous? This Court has held that "the GAAR can only be applied to deny a tax benefit when the abusive nature of the transaction is clear" (*Canada Trustco*, para. 50). It logically follows that any Unstated Policy alleged to exist must itself be "clear and unambiguous."[3]

8. Where applicable, s. 111(5) restricts a corporation's use of *its own losses* that it incurred, unlike *Mathew* and *Lipson* where one taxpayer used losses incurred by another. Since no actual transfer of losses occurs, Parliament defined what shareholder-level events constitute a deemed s. 111(5) loss "transfer," using a *de jure* AOC test whose rationale looks exclusively to direct or indirect power over rights derived from the voting of shares, and rejecting *de facto* control.

9. Parliament could have created an absolute bar on corporate loss "transfers", such as a sliding-scale rule applying to changes in shareholdings, e.g., transferring 10% of a corporation's shares restricts 10% of its pre-transfer losses. Instead, it chose a bright-line all-or-nothing threshold (*de jure* AOC) defining which shareholder-level events trigger s. 111(5), and short of which *no* restriction applies. Unlike an actual loss transfer between two taxpayers, the ITA's

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[3] Rothstein J., "A Judge's Perspective on the General Anti-Avoidance Rule," in *The General Anti-Avoidance Rule*, Brian Arnold (Canadian Tax Foundation, 2021), at p. 559. See also at p. 563: ". . . the object, spirit and purpose of the provision or provisions in question must themselves be clear in order for the abusive nature of the transaction to also be clear."

prohibitions on corporate loss "transfers" are limited: the indirect benefit of a corporation's losses may shift from one set of shareholders to another with no restriction if no *de jure* AOC occurs. For example, new shareholders can acquire all of a corporation's shares (existing ones or ones newly-issued on a public offering) without s. 111(5) applying so long as no one person or "group" acquires *de jure* control, thus completely refuting the Crown's "new owners" theory.

10. Are Contraventions of the Unstated Policy Readily Observable? Any "clear" policy not expressed in a provision's text should be one that is readily determinable, definable and observable. It is clear if one taxpayer is using a loss incurred by another (*Lipson* and *Mathew*), or if the paid-up capital of a corporation's shares exceeds the amount invested (*Copthorne*). Conversely, a policy that is vague or expressed in generalities does not meet the government's own GAAR standard of producing "a 'reasonably predictable result' so that taxpayers can comply with the rule, and the administration and the courts can easily apply it".[4] "I can't define it but I know it when I see it" is not the standard Parliament set for applying GAAR.

11. Would the Unstated Policy Effectively Amend a Bright-Line Test? This Court has stated that "[w]here Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe" (*Canada Trustco*, para. 11). A bright-line test strongly infers that it fully expresses Parliament's intent as to the test's subject-matter. For example, the rule in s. 40(3.3) denying recognition of a loss on property repurchased within 30 days strongly infers that a repurchase on day 31 is acceptable. Taxpayers can contribute to their RRSP right up to the very dollar limit in the ITA. Establishing an OSP that effectively contradicts (rather than adds to) the text or "moves the goalposts" should be extremely difficult.

12. How Fully-Formed is the Legislative Regime? Similarly, the more detailed and fully developed the text of the legislative regime is, the more likely that text fully reflects Parliament's intent. Legislative regimes that are extensive, contain numerous express inclusions or exclusions from the general rule, and/or have been amended frequently over time are less likely to contain an Unstated Policy: e.g., *Canada v. Landrus*, 2009 FCA 113, at paras. 44-47.

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[4] David Dodge, "A New and More Coherent Approach to Tax Avoidance" (1988) 36:1 *Canadian Tax Journal* at p. 22.

13. The indirect loss "transfer" rules that include s.111(5) are a comprehensive fully-formed regime that Parliament has frequently amended, including to adjust the *de jure* AOC threshold for invoking them. Provisions such as ss. 256(7), 256(8) and 256.1 deem a *de jure* AOC to occur (or not) for purposes of s. 111(5) in various circumstances where it otherwise would not (or would) occur, including for public companies. Similar to the rules in *Canada Trustco*, Parliament has often amended the text when it wished to expand or contract the threshold for triggering s. 111(5), and has made no changes that support applying an "actual control" concept.

14. Is the Unstated Policy Competing with Other, Explicit, Policies? The Explanatory Notes accompanying GAAR's enactment described it as "a reasonable balance between the protection of the tax base and the need for certainty for taxpayers in planning their affairs" (*Canada Trustco*, para. 15) that also incorporates the basic principle "that tax planning — arranging one's affairs so as to attract the least amount of tax — is a legitimate and accepted part of Canadian tax law" (*Canada Trustco*, para. 31). Any OSP analysis of a provision incorporating more than one policy representing a compromise amongst "the myriad of purposes promoted by the Act" (*Copthorne*, para. 113) should expressly identify and reconcile all such legislative rationales and their different objectives, especially where one policy (especially an Unstated Policy) constitutes an exception to another one that is explicit in the text of the ITA.

15. Critically, unlike provisions preventing one taxpayer from deducting losses incurred by another, s. 111(5) constitutes an exception to the more fundamental principle in s. 111(1) netting a taxpayer's *own* income and losses. The OSP of s. 111(5) is thus different than the OSP of rules preventing losses incurred by one taxpayer from being deducted by *a completely different* taxpayer, as in *Mathew* and *Lipson*. This context is fundamental to any s. 111(5) OSP analysis.

16. A core principle of fairness within the ITA is that tax is payable on income net of losses. In computing a taxpayer's taxable income, income from one source or year is generally reduced by the same taxpayer's losses from another source or year. Over time Parliament has expanded the rules incorporating this core principle of fairness to (1) extend the period over which losses may be carried forward or back, (2) eliminate the requirement that the activity generating the loss (the "loss business") be carried on in the year the loss is used, and (3) expand the sources of income (e.g., business, property, etc.) netted against one another under s. 111(1) to determine "taxable income", to which the rate of tax is applied. Deducting a taxpayer's losses from its

income from other sources or years ensures as a point of basic fairness that the Canada Revenue Agency ("**CRA**") can't share in a taxpayer's winners while ignoring *the same taxpayer's* losers.

17. S. 111(5) and related provisions are an exception to this general principle where "control of [a] corporation is acquired by a person or group of persons". In that event, (1) the corporation has a deemed year-end, (2) its accrued but unrealized losses are deemed to be realized, and (3) s. 111(5) makes its pre-acquisition of control ("**AOC**") losses (including those in (2)) unusable (e.g., capital losses) or restricted (e.g., business losses). Thereafter, a corporation may use its own pre-AOC business losses in the post-AOC period only (1) if the loss business continues to be carried on in the post-AOC period, and (2) to the extent of income from the loss business or a business of selling the same or similar goods or services as in the loss business (a "same or similar business"). Even if s. 111(5) applies, a company can acquire and merge with another in the same industry to use the other's losses against income from its own "similar business".

18. Hence, part of the context of the OSP of the indirect loss "transfer" rule in s. 111(5) is the compromise that it constitutes between two competing tax policies, one of which (taxation of income net of *the same taxpayer's* losses from other years) is fundamental to the fairness of Canada's tax system and the other of which (s. 111(5)) is an exception thereto.

19. Is the Unstated Policy Consistent with Subsequent Amendments? Subsequent amendments to the ITA constituting a change in tax policy indicate that such policy was not part of the pre-amendment OSP of the relevant provisions. In 2013 Parliament enacted s. 256.1, which deems an AOC to occur for s. 111(5) purposes where a person acquires shares representing more than 75% of the value of all of the corporation's shares and a purpose test is met. The Crown's Response to the Appellant's leave application acknowledged that "[t]he amendment adding s. 256.1 to the *Act* renders 'high equity-low vote' loss trading structures like the applicant's ineffective for transactions undertaken after March 20, 2013" (para. 61). The inclusion of grandfathering rules proves beyond doubt this was a deliberate tax policy change.[5]

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[5] Rothstein J., *supra* fn.3 at p.558 on the role of grandfathering rules: "it seemed to me that such a grandfathering rule would be needed only if the new provision changed the prior law . . . ."

20. Is CRA Practice Consistent With the Unstated Policy? CRA administrative policies that are inconsistent with an Unstated Policy are strong (if not conclusive) evidence that such policy falls far short of the "clear" or "reasonably predictable result" standards. The CRA issued three formal advance tax rulings that GAAR did not apply to the 2004 MDS-Hemosol transactions, a series of steps constructed to avoid a *de jure* AOC of a publicly-traded loss corporation that received $16 million from an arm's-length public company with a 12% ownership interest to access $300 million of the former's losses and other tax attributes.[6] The CRA's rulings blessing arm's-length loss trading designed to avoid a *de jure* AOC are fatal to the existence of an Unwritten Policy against "loss trading" occurring below the *de jure* AOC threshold in s. 111(5).

21. The table below illustrates how the foregoing factors relevant to the context of the OSP of s. 111(5) assist in determining whether it includes an Unstated Policy, as the Crown asserts.

Relevant Factor	**Application to OSP of s. 111(5)**
Would the Unstated Policy alleged to exist yield "reasonably predictable results"?	No: unclear how *de facto* control economic criteria applicable to OSP of *de jure* AOC vote-based test
Does the Unstated Policy expand the subject matter the text already addresses explicitly?	Yes: the text already defines when s. 111(5) applies, in various provisions based on share voting rights
How foreseeable was this interpretational issue?	Very foreseeable that taxpayers would seek to substitute shareholders without a *de jure* AOC
Is the Unstated Policy alleged to exist "clear and unambiguous?"	No: contradicts text that uses voting rights-based factors as threshold to limit deemed loss "transfers"
Would the Unstated Policy alleged to exist effectively amend a bright-line test?	Yes: it would "move the goalposts," not merely prevent an end run around the existing ones
Are contraventions of the Unstated Policy alleged to exist readily observable?	No: unclear what "actual control" means or how to observe when it has been acquired or lost; amounts to "I know it when I see it" standard
How fully-formed is the legislative regime?	Very: detailed provisions, frequently amended, numerous *de jure* AOC vote-based deeming rules

[6] See CRA rulings 2003-0031823, 2004-0056501 and 2004-0069151R3, and Hemosol Inc. Management Information Circular dated March 10, 2004: "As you may be aware, Hemosol Inc. has signed an agreement with MDS Inc. regarding a proposed reorganization of Hemosol's business that will allow Hemosol's business to exchange, in effect, a significant portion of its existing and unutilized income tax losses and other tax assets for a $16 million cash infusion."

Relevant Factor	Application to OSP of s. 111(5)
Would the Unstated Policy alleged to exist compete with other, explicit, policies?	Yes: infringes on the explicit "income net of losses" basic fairness principle in s. 111(1)
Is the Unstated Policy alleged to exist consistent with subsequent amendments?	No: inconsistent with the change in 2013 enacting s. 256.1; grandfathering rule proves change in law
Is CRA practice consistent with the Unstated Policy alleged to exist?	No: see formal CRA rulings GAAR not applicable in 2004 arm's-length MDS-Hemosol transaction

C. Extrinsic Evidence of the Object, Spirit and Purpose of s. 111(5)

22. In 1988, two senior Department of Finance officials described the policy behind a major overhaul of the corporate loss "transfer" rules in s. 111(5) and related provisions as follows:[7]

> The underlying policy of the new loss rules should be apparent, given that the new rules, at least in terms of their overall approach, are an expansion or elaboration of the old. Simply expressed, the policy is that no losses incurred while a corporation is controlled by one person or group should be deductible against income earned while the corporation is controlled by another unrelated person or group. . . . we do not consider the purpose or motive for acquiring control of a loss corporation to be particularly relevant, since the loss to the fisc is precisely the same whether losses do or do not drive the acquisition. In other words, this is not anti-avoidance legislation *per se* . . . .

They further stated that the government's response to "the volume of loss trading activity by the end of 1986" was to enact specific technical amendments to the s. 111(5) regime (at 4:52):

> [M]uch of the potential for leakage was attributable, not to general policy exceptions in the loss transfer rules as they read prior to January 1987, but rather to a number of technical deficiencies of which everyone was largely aware but which were not viewed, either by legislators or by practitioners, as being of sufficient concern to warrant substantive changes to the Act.

23. Nothing in this extensive discussion of these amendments producing the version of s. 111(5) before this Court, nor in the Explanatory Notes or Finance press release accompanying them,[8] nor elsewhere, offers any support for using any alternative basis (e.g., "actual control," economic ownership, continuity of shareholdings, "new owners") beyond the *de jure* AOC standard for invoking s. 111(5), or that the OSP of s. 111(5) includes non-voting right criteria

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[7] William Strain, David Dodge and Victor Peters, "Tax Simplification: The Elusive Goal," in *Report of Proceedings of the Fortieth Tax Conference*, 1988 Conference Report (Toronto: Canadian Tax Foundation, 1989), 4:1-63, at 4:53.

[8] Finance, *Draft Income Tax Amendments and Technical Notes, Special Release, Acquisitions of Gains and Losses*, De Boo, January 1987.

the *de facto* control concept exists to capture and not impacting who has legal rights to control how a corporation's shares are voted. Shareholder-level events not giving a new person that degree of legal certainty, authority and power over a corporation's affairs derived from actual or indirect control of a majority of its voting rights are simply not intended to restrict a corporation's use of its losses (lesser degrees of control are *de facto* control). This is proven conclusively by the fact that issuing any number of new widely-held shares to new shareholders (i.e., swamping existing shareholders) clearly does not and is not intended to trigger s. 111(5).

24. Nothing in any of these sources of additional legislative intent, nor in the Explanatory Notes accompanying GAAR, nor elsewhere, support the Respondent's claim that "GAAR is Parliament's legislative response to abusive arm's-length loss trading activity" (Respondent's Factum, at 112), nor does anything referenced in the Respondent's factum evidence an actual statement of such by the government.[9] Rather, the evidence shows that the government's concerns with corporate loss trading when GAAR was enacted were (1) technical deficiencies of moderate concern, (2) fully addressed by extensive technical amendments that produced the version of s. 111(5) before this Court, and (3) not themselves the reason GAAR was enacted. In any case, even if the Respondent was correct that loss trading was the reason why GAAR was enacted (which is clearly not the case), that would be irrelevant and the Respondent's reasoning circular: why GAAR was *enacted* tells us nothing about which shareholder-level events Parliament has deemed to be the rationale of s. 111(5) required to *invoke* it. The issue at hand is not whether arm's-length loss transfers are abusive, but rather what constitutes an arm's-length loss "transfer" where no actual transfer between taxpayers occurs and Parliament has therefore had to articulate when a corporation should be restricted in using *its own* losses. Whatever the OSP of s. 111(5) is (and whatever the Respondent alleges it to be, which is not clear), it plainly does not include the incremental *de facto* control criteria the Crown has applied.

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[9] Dodge, *supra* fn. 4, at fn. 7: "Canada, Department of Finance, Budget Speech, February 18, 1987, 12. In this speech (at 11), the minister expressly indicated his intention to propose improved general anti-avoidance rules as part of tax reform, in response to abusive tax avoidance transactions that represented a significant factor in eroding corporate tax revenues." The use of loss carryforwards specifically was described as "unexpected," not "abusive."

D. Conclusion

25. The issue before the Court is what shareholder-level events Parliament intended to trigger the loss restrictions of s. 111(5). Stripped of its verbiage, the Respondent's position asks this Court (in the guise of GAAR) to apply the factors that a *de facto* control test exists to capture to an *entire regime of provisions* to which Parliament has chosen to apply a *de jure* control test based on a much narrower set of criteria focussed on direct or indirect control of the corporate-law ability to choose the persons who can legally bind a corporation, as established in *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 SCR 795. In so doing, the Crown seeks not merely to supplement the text of s. 111(5) as in *Copthorne*, but contradict it. "Looking behind" the text in an OSP analysis is not a licence to ignore or contradict it. The evidence on *context* (i.e., other ITA provisions and extrinsic aids: *Copthorne*, para. 91) completely opposes the Crown's position: the factors listed in paragraph 21, the Respondent's own administrative rulings and grandfathering legislation, the consistent use throughout s.111(5) and its many supporting provisions of *de jure* control and its share-voting-based criteria, and the deliberate reservation to other ITA provisions using the *de facto* control test of the broader economic criteria the Respondent's proposed OSP would apply to s. 111(5).

26. This leaves the Crown's position reliant solely on sweeping generalizations about the *purpose* of the loss "transfer" rules that ignore how Parliament actually defined what constitutes a loss "transfer," and thus easily debunked (e.g. the example in Paragraphs 9 and 23). By elevating speculative claims as to the purpose of the loss "transfer" provisions over their text and context, the Respondent violates this Court's ruling that "The proper approach is one that *unifies* the text, context, and purpose, not a purposive one in search of a vague policy objective disconnected from the text (*Canada Trustco*, at para. 41)" (*Alta Energy*, para. 58). GAAR is meant to prevent circumvention of a provision's rationale, not to be wielded as a sword to substitute a broader one. The Respondent's OSP approach reduces GAAR to a no-rules smell test, impermissibly stretching GAAR beyond its intended scope to catch a perceived close call.

PART IV – SUBMISSIONS ON COSTS & PART V – ORDER

27. The Chamber undertakes not to seek any costs and asks that no costs be awarded against the Chamber. The Chamber takes no position on the outcome of this appeal.

PART VI – SUBMISSIONS ON PUBLICATION

N/A

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of September 2022.

Per:

Steve Suarez

Laurie A. Goldbach

Elizabeth Egberts

Elizabeth Egberts
Counsel for the Intervener,
Canadian Chamber of Commerce

PART VII – TABLE OF AUTHORITIES

Caselaw

No.	Authority	Paragraph Reference
1.	*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54	5, 7, 11, 13, 14, 26
2.	*Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49	5, 26
3.	*Canada v. Landrus*, 2009 FCA 113	12
4.	*Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63	1, 5, 10, 14, 25
5.	*Duha Printers (Western) Ltd. v. Canada,* [1998] 1 SCR 795	25
6.	*Lipson v. Canada*, 2009 SCC 1	5, 8, 10, 15
7.	*Mathew v. Canada*, 2005 SCC 55	5, 8, 10, 15

Secondary Sources

No.	Secondary Source	Paragraph Reference
1.	CRA Advance Income Tax Ruling, 2003-0031823 Transfer of a Business by a Shareholder, January 21, 2003	20
2.	CRA Advance Income Tax Ruling, 2004-0056501 Transfer of Business, April 7, 2004	20
3.	CRA Advance Income Tax Ruling, 2004-0069151R3 Transfer of a business	20
4.	David Dodge, "A New and More Coherent Approach to Tax Avoidance" (1988) 361 Canadian Tax Journal	10, 24
5.	Finance, *Draft Income Tax Amendments and Technical Notes, Special Release, Acquisitions of Gains and Losses*, De Boo, January 1987	24

No.	Secondary Source	Paragraph Reference
6.	Hemosol Inc. Management Information Circular dated March 10, 2004	20
7.	Rothstein J. "A Judge's Perspective on the General Anti-Avoidance Rule," in *The General Anti-Avoidance Rule*, Brian Arnold (Canadian Tax Foundation, 2021)	7, 19
8.	William Strain, David Dodge and Victor Peters, "Tax Simplification: The Elusive Goal," in *Report of Proceedings of the Fortieth Tax Conference*, 1988 Conference Report (Toronto: Canadian Tax Foundation, 1989)	22

Statutes, Regulations, Rules, etc.

No.	Statute, Regulation, Rule, etc.	Section, Rule, Etc.
1.	*Income Tax Act*, RSC 1985, c1 (5th Supp)	s. 13(7.1) s. 13(7.2) s. 111(1) s. 111(5) s.245 s. 256.1 s. 256(7) s. 256(8)
	Loi de l'impôt sur le revenu, LRC 1985, c 1 (5e suppl)	s. 13(7.1) s. 13(7.2) s. 111(1) s. 111(5) s.245 s. 256.1 s. 256(7) s. 256(8)