Income tax --- Tax avoidance — General anti-avoidance rule (GAAR)
Income tax --- Business and property income — Capital cost allowance — Types of property — Rental properties
Impôt sur le revenu --- Évitement fiscal — Règle générale anti-évitement (RGAE)
Impôt sur le revenu --- Revenu d'entreprise et de biens — Déduction pour amortissement — Types de biens — Biens loués
1. Introduction 1 This appeal and its companion case, Mathew v. R. 2005 SCC 55 S.C.C. (hereinafter " Kaulius "), raise the issue of the interplay between the general anti-avoidance rule (the "GAAR") and the application of more

Canada Trustco Mortgage Co. v. R.

Her Majesty The Queen, Appellant v. Canada Trustco Mortgage Company, Respondent

Citation: 2005 CarswellNat 3212, 2005 SCC 54, 2005 D.T.C. 5523 (Eng.), 2005 D.T.C. 5547 (Fr.), [2005] 5 C.T.C. 215, 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601
Supreme Court of Canada
McLachlin C.J.C., Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron JJ.
Heard: March 8, 2005
Judgment: October 19, 2005
Year: 2005
Docket: 30290

Proceedings: affirming (2004), 2004 FCA 67, 2004 CarswellNat 305, [2004] 2 C.T.C. 276, 2004 CAF 67, 2004 CarswellNat 523, (sub nom. *R. v. Canada Trustco Mortgage Co.*) 2004 D.T.C. 6119 (F.C.A.), affirming *Canada Trustco Mortgage Co. v. R.* (2003), 2003 CCI 215, 2003 CarswellNat 5460, 2003 TCC 215, 2003 CarswellNat 1299, 2003 D.T.C. 587, [2003] 4 C.T.C. 2009 (T.C.C. [General Procedure])

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Subject:
Income Tax (Federal); Corporate and Commercial

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s. 245(4) — considered
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Can. *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)
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Generally — referred to

APPEAL by Minister from judgment reported at *Canada Trustco Mortgage Co. v. R.* (2004), 2004 FCA 67, 2004 CarswellNat 305, [2004] 2 C.T.C. 276, 2004 CAF 67, 2004 CarswellNat 523, (sub nom. *R. v. Canada Trustco Mortgage Co.*) 2004 D.T.C. 6119 (F.C.A.), dismissing Minister's appeal from judgment allowing taxpayer's appeal from Minister's assessment of income tax payable by taxpayer in taxation year 1997.
POURVOI du ministre à l'encontre de l'arrêt publié à *Canada Trustco Mortgage Co. v. R.* (2004), 2004 FCA 67, 2004 CarswellNat 305, [2004] 2 C.T.C. 276, 2004 CAF 67, 2004 CarswellNat 523, (sub nom. *R. v. Canada Trustco Mortgage Co.*) 2004 D.T.C. 6119 (C.A.F.), qui a rejeté son pourvoi à l'encontre du jugement qui avait accueilli le pourvoi de la contribuable à l'encontre de la cotisation établie par le ministre pour l'impôt sur le revenu dû par la contribuable pour l'année fiscale 1997.
***Per curiam*:**

1. Introduction

1 This appeal and its companion case, *Mathew v. R.*, 2005 SCC 55 (S.C.C.) (hereinafter "*Kaulius*"), raise the issue of the interplay between the general anti-avoidance rule (the "GAAR") and the application of more specific provisions of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.). The Act continues to permit legitimate tax minimization; traditionally, this has involved determining whether the taxpayer brought itself within the wording of the specific provisions relied on for the tax benefit. Onto this scheme, the GAAR has superimposed a prohibition on abusive tax avoidance, with the effect that the literal application of provisions of the Act may be seen as abusive in light of their context and purpose. The task in this appeal is to unite these two approaches in a framework that reflects the intention of Parliament in enacting the GAAR and achieves consistent, predictable and fair results.

2. Facts

2 The respondent, Canada Trustco Mortgage Company ("CTMC"), carries on business as a mortgage lender. As part of its business operations, CTMC enjoyed large revenues from leased assets. In 1996 it purchased a number of trailers which it then circuitously leased back to the vendor, in order to offset revenue from its leased assets by claiming considerable capital cost allowance ("CCA") on the trailers in the amount of $31,196,700 against $51,787,114 for the 1997 taxation year. The essence of the transaction is explained in the memorandum of Michael Lough, CTMC's officer in charge of the recommendation to proceed: "The transaction provides very attractive returns by generating CCA deductions which can be used to shelter other taxable lease income generated by Canada Trust." This arrangement allowed CTMC to defer paying taxes on the amount of profits reduced by the CCA deductions which would be subject to recapture into income when the trailers were disposed of at a future date and presumably in excess of the amount claimed as CCA.

3 The details of the transaction are complex and described in greater detail in the Appendix. Briefly stated, on December 17, 1996, the respondent, with the use of its own money and a loan of approximately $100 million from the Royal Bank of Canada ("RBC"), purchased trailers from Transamerica Leasing Inc. ("TLI") at fair market value of $120 million. CTMC leased the trailers to Maple Assets Investments Limited ("MAIL") who in turn subleased them to TLI, the original owner. TLI then prepaid all amounts due to MAIL under the sublease. MAIL placed on deposit an amount equal to the loan for purposes of making the lease payments and a bond was pledged as security to guarantee a purchase option payment to CTMC at the end of the lease. These transactions allowed CTMC to substantially minimize its financial risk. They were also accompanied by financial arrangements with various other parties, not relevant to this appeal.

4 On October 18, 2002, the Minister of National Revenue reassessed CTMC on its 1997 taxation year and denied the CCA claim of $31,196,700 on the basis that CTMC had not acquired title to the trailers and, in the alternative, that the GAAR applied to deny the deduction. CTMC appealed to the Tax Court of Canada.

5 The Crown abandoned the argument that CTMC had failed to obtain title to the trailers and the appeal before the Tax Court proceeded solely on the issue of whether the GAAR applied to deny the deduction. A similar reassessment with respect to CTMC's 1996 taxation year was statute-barred. The Tax Court found in favour of CTMC, as did the Federal Court of Appeal. For the reasons that follow, we would dismiss the Crown's appeal.

3. Legislative Provisions

6 This appeal and its companion case *Kaulius* were brought and argued under s. 245 of the *Income Tax Act*. The relevant provisions of the Act, as they applied to the parties, read in part:

> **245.**(1) [Definitions] In this section,
>
> > "tax benefit" means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act;
> >
> > "transaction" includes an arrangement or event.
>
> (2) [General anti-avoidance provision] Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.
>
> (3) [Avoidance transaction] An avoidance transaction means any transaction
>
> > (a) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit; or
> >
> > (b) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.
>
> (4) [Where s. (2) does not apply] For greater certainty, subsection (2) does not apply to a transaction where it may reasonably be considered that the transaction would not result directly or indirectly in a misuse of the provisions of this Act or an abuse having regard to the provisions of this Act, other than this section, read as a whole.
>
> (5) [Determination of tax consequences] Without restricting the generality of subsection (2),
>
> > (a) any deduction in computing income, taxable income, taxable income earned in Canada or tax payable or any part thereof may be allowed or disallowed in whole or in part,

> (b) any such deduction, any income, loss or other amount or part thereof may be allocated to any person,
>
> (c) the nature of any payment or other amount may be recharacterized, and
>
> (d) the tax effects that would otherwise result from the application of other provisions of this Act may be ignored,
>
> in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction.

> **248.**(10) [Series of transactions] For the purposes of this Act, where there is a reference to a series of transactions or events, the series shall be deemed to include any related transactions or events completed in contemplation of the series.

7 A recent amendment to s. 245 (*Budget Implementation Act, 2004, No. 2*, S.C. 2005, c. 19, s. 52) has no application to the judgments under appeal. Although this amendment was enacted to apply retroactively, it cannot apply at this stage of appellate review, after the parties argued their cases and the Tax Court judge rendered his decision on the basis of the GAAR as it read prior to the amendment. Furthermore, even if this amendment were to apply, it would not warrant a different approach to the issues on appeal. In our view, this amendment to s. 245 serves *inter alia* to make it clear that the GAAR applies to tax benefits conferred by Regulations enacted under the *Income Tax Act*. The Tax Court judge in the instant case proceeded on this assumption, which was not challenged by the parties in submissions before us.

4. Judicial Decisions

4.1 Tax Court of Canada, [2003] 4 C.T.C. 2009, 2003 TCC 215 (T.C.C. [General Procedure])

8 The Tax Court judge found an avoidance transaction giving rise to a tax benefit under s. 245(1) and (3) of the Act. He inquired into the purpose of the CCA provisions of the *Income Tax Act* as applied to sale-leaseback arrangements, in order to determine if the transaction was abusive under s. 245(4) of the Act. He held that the purpose of the CCA provisions permitted the deduction of CCA based on the "cost" of the trailers, as defined by the transactions documents. He went on to conduct a detailed analysis of the legal transactions. He found that CTMC had acquired title and became the legal owner of the trailers, and declined to recharacterize the legal nature of the transaction. The transactions in issue, in his view, amounted to an ordinary sale-leaseback. The Tax Court judge found that the transaction fell within the spirit and purpose of the CCA provisions of the Act, and concluded that the GAAR did not apply to disallow the tax benefit.

4.2 Federal Court of Appeal, [2004] 2 C.T.C. 276, 2004 FCA 67 (F.C.A.)

9 The Federal Court of Appeal unanimously dismissed the appeal, relying on the reasons in *OSFC Holdings Ltd. v. R.* (2001), [2002] 2 F.C. 288, 2001 FCA 260 (Fed. C.A.) ("OSFC"), in which the court had set out a two-stage analysis for abuse under the GAAR, focussed first on interpretation of the specific provisions at issue, second on the overarching policy of the *Income Tax Act*. Evans J.A., for the court, held that the Tax Court judge had not erred in concluding that, for the purposes of s. 245(4) of the Act, the transactions at issue did not constitute a misuse of a provision of the Act or an abuse of the CCA scheme as a whole. He noted that counsel for the appellant did not seek to recharacterize the transactions and did not allege that they were a sham, but argued instead that the policy underlying s. 20(1)(*a*) and the CCA provisions as a whole was "to permit taxpayers to claim CCA in respect of the 'real' or 'economic' cost that they incurred in acquiring an asset, and not the 'legal' cost, that is, on the facts of this case, the purchase price paid by the taxpayer" (para. 2). Going on to consider policy, Evans J.A. found that there was no clear and unambiguous policy underlying s. 20(1)(*a*) or the CCA scheme read as a whole that rendered the transaction a misuse or abuse of those provisions.

5. Analysis

5.1 General Principles of Interpretation

10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. R.*, [1999] 3 S.C.R. 804 (S.C.C.), at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

11 As a result of the Duke of Westminster principle (*Inland Revenue Commissioners v. Duke of Westminster* (1935), [1936] A.C. 1 (U.K. H.L.)) that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable, Canadian tax legislation received a strict interpretation in an era of more literal statutory interpretation than the present. There is no doubt today that all statutes, including the Act, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where 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.

12 The provisions of the *Income Tax Act* must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently. As stated at para. 45 of *Shell Canada Ltd. v. R.*, [1999] 3 S.C.R. 622 (S.C.C.):

> [A]bsent a specific provision to the contrary, it is not the courts' role to prevent taxpayers from relying on the sophisticated structure of their transactions, arranged in such a way that the particular provisions of the Act are met, on the basis that it would be inequitable to those taxpayers who have not chosen to structure their transactions that way.
>
> [Emphasis added.]

See also *65302 British Columbia*, at para. 51, *per* Iacobucci J. citing P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (2nd ed. 1997), at pp. 475-76:

> It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.

13 The *Income Tax Act* remains an instrument dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation. Onto this compendium of detailed stipulations, Parliament has engrafted quite a different sort of provision, the GAAR. This is a broadly drafted provision, intended to negate arrangements that would be permissible under a literal interpretation of other provisions of the *Income Tax Act*, on the basis that they amount to abusive tax avoidance. To the extent that the GAAR constitutes a "provision to the contrary" as discussed in *Shell* (at para. 45), the Duke of Westminster principle and the emphasis on textual interpretation may be attenuated. Ultimately, as affirmed in *Shell*, "[t]he courts' role is to interpret and apply the Act as it was adopted by Parliament" (para. 45). The court must to the extent possible contemporaneously give effect to both the GAAR and the other provisions of the *Income Tax Act* relevant to a particular transaction.

5.2 Interpretation of the GAAR

14 The GAAR was enacted in 1988, principally in response to *Stubart Investments Ltd. v. R.*, [1984] 1 S.C.R. 536 (S.C.C.), which rejected a literal approach to interpreting the Act. At the same time, the Court rejected the business purpose test, which would have restricted tax reduction to transactions with a real business purpose. Instead of the business purpose test, the

Court proposed guidelines to limit unacceptable tax avoidance arrangements. Parliament deemed the decision in *Stubart* an inadequate response to the problem and enacted the GAAR.

15 The *Explanatory Notes to Legislation Relating to Income Tax* issued by the Honourable Michael H. Wilson, Minister of Finance (June 1988) ("Explanatory Notes") are an aid to interpretation. The Explanatory Notes state at the outset that they "are intended for information purposes only and should not be construed as an official interpretation of the provisions they describe". They state the purpose of the GAAR at p. 461:

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

16 The GAAR draws a line between legitimate tax minimization and abusive tax avoidance. The line is far from bright. The GAAR's purpose is to deny the tax benefits of certain arrangements that comply with a literal interpretation of the provisions of the Act, but amount to an abuse of the provisions of the Act. But precisely what constitutes abusive tax avoidance remains the subject of debate. Hence these appeals.

17 The application of the GAAR involves three steps. The first step is to determine whether there is a "tax benefit" arising from a "transaction" under s. 245(1) and (2). The second step is to determine whether the transaction is an avoidance transaction under s. 245(3), in the sense of not being "arranged primarily for *bona fide* purposes other than to obtain the tax benefit". The third step is to determine whether the avoidance transaction is abusive under s. 245(4). All three requirements must be fulfilled before the GAAR can be applied to deny a tax benefit.

5.3 Tax Benefit

18 The first step in applying the GAAR is to determine whether there is a tax benefit arising from a transaction or series of transactions of which the transaction is part.

19 "Tax benefit" is defined in s. 245(1) as "a reduction, avoidance or deferral of tax" or "an increase in a refund of tax or other amount" paid under the Act. Whether a tax benefit exists is a factual determination, initially by the Minister and on review by the courts, usually the Tax Court. The magnitude of the tax benefit is not relevant at this stage of the analysis.

20 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. For example, characterization of an amount as an annuity rather than as a wage, or as a capital gain rather than as business income, will result in differential tax treatment. In such cases, the existence of a tax benefit might only be established upon a comparison between alternative arrangements. In all cases, it must be determined whether the taxpayer reduced, avoided or deferred tax payable under the Act.

5.4 Avoidance Transaction

21 The second requirement for application of the GAAR is that the transaction giving rise to the tax benefit be an avoidance transaction within s. 245(3). The function of this requirement is to remove from the ambit of the GAAR transactions or series of transactions that may reasonably be considered to have been undertaken or arranged primarily for a non-tax purpose. The majority of tax benefits claimed by taxpayers on their annual returns will be immune from the GAAR as a result of s. 245(3). The GAAR was enacted as a provision of last resort in order to address abusive tax avoidance, it was not intended to introduce uncertainty in tax planning.

22 A "transaction" is defined under s. 245(1) to include an arrangement or event. Section 245(3) specifically defines "avoidance transaction" as a transaction that results in a tax benefit, either by itself or as part of a *series of transactions*, "unless the transaction may reasonably be considered to have been undertaken or arranged *primarily for bona fide purposes* other than to obtain the tax benefit". These two underlined expressions warrant further discussion.

5.4.1. Series of Transactions

23 Section 245(2) reads:

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

24 Section 245(3) reads in part:

> (3) [Avoidance transaction] An avoidance transaction means any transaction
>
> (a) that, but for this section, would result, directly or indirectly, in a tax benefit ... or
>
> (b) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit...

25 The meaning of the expression "series of transactions" under s. 245(2) and (3) is not clear on its face. We agree with the majority of the Federal Court of Appeal in *OSFC* and endorse the test for a series of transactions as adopted by the House of Lords that a series of transactions involves 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": *Craven v. White* (1988), [1989] A.C. 398 (U.K. H.L.), at p. 514, *per* Lord Oliver; see also *W.T. Ramsay Ltd. v. Inland Revenue Commissioners*, [1981] 1 All E.R. 865 (U.K. H.L.).

26 Section 248(10) extends the meaning of "series of transactions" to include "related transactions or events completed in contemplation of the series". The Federal Court of Appeal held, at para. 36 of *OSFC*, that this occurs where the parties to the transaction "knew of the ... series, such that it could be said that they took it into account when deciding to complete the transaction". We would elaborate that "in contemplation" is read not in the sense of actual knowledge but in the broader sense of "because of" or "in relation to" the series. The phrase can be applied to events either before or after the basic avoidance transaction found under s. 245(3). As has been noted:

> It is highly unlikely that Parliament could have intended to include in the statutory definition of "series of transactions" related transactions completed in contemplation of a subsequent series of transactions, but not related transactions in the contemplation of which taxpayers completed a prior series of transactions.
>
> (D. G. Duff, "Judicial Application of the General Anti-Avoidance Rule in Canada: *OSFC Holdings Ltd. v. The Queen*", 57 I.B.F.D. Bulletin 278, at p. 287)

5.4.2. Primarily for Bona Fide Purposes

27 According to s. 245(3), the GAAR does not apply to a transaction that "may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit". If there are both tax and non-tax purposes to a transaction, it must be determined whether it was reasonable to conclude that the non-tax purpose was primary. If so, the GAAR cannot be applied to deny the tax benefit.

28 While the inquiry proceeds on the premise that both tax and non-tax purposes can be identified, these can be intertwined in the particular circumstances of the transaction at issue. It is not helpful to speak of the threshold imposed by s. 245(3) as high or low. The words of the section simply contemplate an objective assessment of the relative importance of the driving forces of the transaction.

29 Again, this is a factual inquiry. The taxpayer cannot avoid the application of the GAAR by merely stating that the transaction was undertaken or arranged primarily for a non-tax purpose. The Tax Court judge must weigh the evidence to determine whether it is reasonable to conclude that the transaction was not undertaken or arranged primarily for a non-tax purpose. The determination invokes reasonableness, suggesting that the possibility of different interpretations of the events must be objectively considered.

30 The courts must examine the relationships between the parties and the actual transactions that were executed between them. The facts of the transactions are central to determining whether there was an avoidance transaction. It is useful to consider what will not suffice to establish an avoidance transaction under s. 245(3). The Explanatory Notes state, at p. 464:

> Subsection 245(3) does not permit the "recharacterization" of a transaction for the purposes of determining whether or not it is an avoidance transaction. In other words, it does not permit a transaction to be considered to be an avoidance transaction because some alternative transaction that might have achieved an equivalent result would have resulted in higher taxes.

31 According to the Explanatory Notes, Parliament recognized the Duke of Westminster 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" (p. 464). Despite Parliament's intention to address abusive tax avoidance by enacting the GAAR, Parliament nonetheless intended to preserve predictability, certainty and fairness in Canadian tax law. Parliament intends taxpayers to take full advantage of the provisions of the *Income Tax Act* that confer tax benefits. Indeed, achieving the various policies that the *Income Tax Act* seeks to promote is dependent on taxpayers doing so.

32 Section 245(3) merely removes from the ambit of the GAAR transactions that may reasonably be considered to have been undertaken or arranged primarily for a non-tax purpose. Parliament did not intend s. 245(3) to operate simply as a business purpose test, which would have considered transactions that lacked an independent *bona fide* business purpose to be invalid.

33 The expression "non-tax purpose" has a broader scope than the expression "business purpose". For example, transactions that may reasonably be considered to have been undertaken or arranged primarily for family or investment purposes would be immune from the GAAR under s. 245(3). Section 245(3) does not purport to protect only transactions that have a real business purpose. Parliament wanted many schemes that do not have any business purpose to endure. Registered Retirement Savings Plans (RRSPs) are one example. Parliament recognized that many provisions of the Act confer legitimate tax benefits notwithstanding the lack of a real business purpose. This is apparent from the general language used throughout s. 245, as opposed to language which would have adopted a broad anti-avoidance test subject to exemptions for specific schemes like RRSP transactions.

34 If at least one transaction in a series of transactions is an "avoidance transaction", then the tax benefit that results from the series may be denied under the GAAR. This is apparent from the wording of s. 245(3). Conversely, if each transaction in a series was carried out primarily for *bona fide* non-tax purposes, the GAAR cannot be applied to deny a tax benefit.

35 Even if an avoidance transaction is established under the s. 245(3) inquiry, the GAAR will not apply to deny the tax benefit if it may be reasonable to consider that it did not result from abusive tax avoidance under s. 245(4), as discussed more fully below.

5.5 Abusive Tax Avoidance

36 The third requirement for application of the GAAR is that the avoidance transaction giving rise to a tax benefit be abusive. The mere existence of an avoidance transaction is not enough to permit the GAAR to be applied. The transaction must also be shown to be *abusive* under s. 245(4).

37 It is this requirement that has given rise to the most difficulty in the interpretation and application of the GAAR. A number of features have provoked judicial debate. The section is cast in terms of a double negative, stating that the GAAR does "not apply to a transaction where it may reasonably be considered that the transaction would not result directly or indirectly

in a misuse ... or an abuse". It is tempered by the word "reasonably", suggesting some ministerial and judicial leeway in determining abuse. It does not precisely define abuse or misuse. To further complicate matters, the English and French versions of s. 245(4) differ. Overarching these particular difficulties is the central issue of the relationship between the GAAR and more specific provisions of the Act.

5.5.1 "Misuse and Abuse": Two Different Concepts?

38 We turn first to the debate about "misuse" and "abuse" which has arisen from the different English and French versions of s. 245(4). This arises from the apparently disjunctive version of the subsection in English ("misuse of the provisions of this Act" or "abuse having regard to the provisions of this Act ... read as a whole") and the non-disjunctive French version ("*d'abus dans l'application des dispositions de la présente loi lue dans son ensemble*"). This discrepancy led the majority of the Federal Court of Appeal to conclude in *OSFC* that s. 245(4) mandates two different inquiries. The first was whether there was a misuse of the particular provisions of the Act that were relied upon to achieve the tax benefit. The second was whether there was an abuse of any policy of the Act read as a whole. The term policy was used to refer collectively to purpose, object, spirit, scheme or policy (*OSFC*, at para. 66).

39 With respect, we cannot agree with this interpretation of s. 245(4). Parliament could not have intended this two-step approach, which on its face raises the impossible question of how one can abuse the Act as a whole without misusing any of its provisions. We agree with the Tax Court judge, in the present case, at para. 90, that "[i]n effect, the analysis of the misuse of the provisions and the analysis of the abuse having regard to the provisions of the *Act* read as a whole are inseparable". As discussed more fully below, the interpretation of specific provisions of the Act cannot be separated from contextual considerations arising from other provisions. The various provisions of the *Income Tax Act* must be interpreted in their contextual framework, so that the Act functions as a coherent whole, with respect to the particular statutory scheme engaged by the transactions.

40 There is but one principle of interpretation: to determine the intent of the legislator having regard to the text, its context, and other indicators of legislative purpose. The policy analysis proposed as a second step by the Federal Court of Appeal in *OSFC* is properly incorporated into a unified, textual, contextual, and purposive approach to interpreting the specific provisions that give rise to the tax benefit.

41 The courts cannot search for an overriding policy of the Act that is not based on a unified, textual, contextual and purposive interpretation of the specific provisions in issue. First, such a search is incompatible with the roles of reviewing judges. The *Income Tax Act* is a compendium of highly detailed and often complex provisions. To send the courts on the search for some overarching policy and then to use such a policy to override the wording of the provisions of the *Income Tax Act* would inappropriately place the formulation of taxation policy in the hands of the judiciary, requiring judges to perform a task to which they are unaccustomed and for which they are not equipped. Did Parliament intend judges to formulate taxation policies that are not grounded in the provisions of the Act and to apply them to override the specific provisions of the Act? Notwithstanding the interpretative challenges that the GAAR presents, we cannot find a basis for concluding that such a marked departure from judicial and interpretative norms was Parliament's intent.

42 Second, to search for an overriding policy of the *Income Tax Act* that is not anchored in a textual, contextual and purposive interpretation of the specific provisions that are relied upon for the tax benefit would run counter to the overall policy of Parliament that tax law be certain, predictable and fair, so that taxpayers can intelligently order their affairs. Although Parliament's general purpose in enacting the GAAR was to preserve legitimate tax minimization schemes while prohibiting abusive tax avoidance, Parliament must also be taken to seek consistency, predictability and fairness in tax law. These three latter purposes would be frustrated if the Minister and/or the courts overrode the provisions of the *Income Tax Act* without any basis in a textual, contextual and purposive interpretation of those provisions.

43 For these reasons we conclude, as did the Tax Court judge, that the determinations of "misuse" and "abuse" under s. 245(4) are not separate inquiries. Section 245(4) requires a single, unified approach to the textual, contextual and purposive interpretation of the specific provisions of the *Income Tax Act* that are relied upon by the taxpayer in order to determine whether there was abusive tax avoidance.

5.5.2. Abusive Tax Avoidance: A Unified Interpretive Approach

44 The heart of the analysis under s. 245(4) lies in a contextual and purposive interpretation of the provisions of the Act that are relied on by the taxpayer, and the application of the properly interpreted provisions to the facts of a given case. The first task is to interpret the provisions giving rise to the tax benefit to determine their object, spirit and purpose. The next task is to determine whether the transaction falls within or frustrates that purpose. The overall inquiry thus involves a mixed question of fact and law. The textual, contextual and purposive interpretation of specific provisions of the *Income Tax Act* is essentially a question of law but the application of these provisions to the facts of a case is necessarily fact-intensive.

45 This analysis will lead to a finding of abusive tax avoidance when a taxpayer relies on specific provisions of the *Income Tax Act* in order to achieve an outcome that those provisions seek to prevent. As well, abusive tax avoidance will occur when a transaction defeats the underlying rationale of the provisions that are relied upon. An abuse may also result from an arrangement that circumvents 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. By contrast, abuse is not established where it is reasonable to conclude that an avoidance transaction under s. 245(3) was within the object, spirit or purpose of the provisions that confer the tax benefit.

46 Once the provisions of the *Income Tax Act* are properly interpreted, it is a question of fact for the Tax Court judge whether the Minister, in denying the tax benefit, has established abusive tax avoidance under s. 245(4). Provided the Tax Court judge has proceeded on a proper construction of the provisions of the Act and on findings supported by the evidence, appellate tribunals should not interfere, absent a palpable and overriding error.

47 The first part of the inquiry under s. 245(4) requires the court to look beyond the mere text of the provisions and undertake a contextual and purposive approach to interpretation in order to find meaning that harmonizes the wording, object, spirit and purpose of the provisions of the *Income Tax Act*. There is nothing novel in this. Even where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities. “After all, language can never be interpreted independently of its context, and legislative purpose is part of the context. It would seem to follow that consideration of legislative purpose may not only resolve patent ambiguity, but may, on occasion, reveal ambiguity in apparently plain language.” See P.W. Hogg and J.E. Magee, *Principles of Canadian Income Tax Law* (4th ed. 2002), at p. 563. In order to reveal and resolve any latent ambiguities in the meaning of provisions of the *Income Tax Act*, the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation.

48 As previously stated, the predominant issue in this and its companion appeal is what constitutes abusive tax avoidance. The Explanatory Notes state in part, at pp. 464-65:

> Subsection 245(4) recognizes that the provisions of the Act are intended to apply to transactions with real economic substance, not to transactions intended to exploit, misuse or frustrate the Act to avoid tax. It also recognizes, however, that a number of provisions of the Act either contemplate or encourage transactions that may seem to be primarily tax-motivated.... It is not intended that section 245 will apply to deny the tax benefits that result from these transactions as long as they are carried out within the object and spirit of the provisions of the Act read as a whole. Nor is it intended that tax incentives expressly provided for in the legislation would be neutralized by this section.
>
> Where a taxpayer carries out transactions primarily in order to obtain, through the application of specific provisions of the Act, a tax benefit that is not intended by such provisions and by the Act read as a whole, section 245 should apply. This would be the case even though the strict words of the relevant specific provisions may support the tax result sought by the taxpayer. Thus, where applicable, section 245 will override other provisions of the Act since, otherwise, its object and purpose would be defeated.
>
> ...Thus, in reading the Act as a whole, specific provisions will be read in the context of and in harmony with the other provisions of the Act in order to achieve a result which is consistent with the general scheme of the Act.

> Therefore, the application of new subsection 245 must be determined by reference to the facts in a particular case in the context of the scheme of the Act.... This can be discerned from a review of the scheme of the Act, its relevant provisions and permissible extrinsic aids.

49 In all cases where the applicability of s. 245(4) is at issue, the central question is, having regard to the text, context and purpose of the provisions on which the taxpayer relies, whether the transaction frustrates or defeats the object, spirit or purpose of those provisions. The following points are noteworthy:

> (1) While the Explanatory Notes use the phrase "exploit, misuse or frustrate", we understand these three terms to be synonymous, with their sense most adequately captured by the word "frustrate".
>
> (2) The Explanatory Notes elaborate that the GAAR is intended to apply where under a literal interpretation of the provisions of the *Income Tax Act*, the object and purpose of those provisions would be defeated.
>
> (3) The Explanatory Notes specify that the application of the GAAR must be determined by reference to the facts of a particular case in the context of the scheme of the *Income Tax Act*.
>
> (4) The Explanatory Notes also elaborate that the provisions of the *Income Tax Act* are intended to apply to transactions with real economic substance.

50 As previously discussed, Parliament sought to address abusive tax avoidance while preserving consistency, predictability and fairness in tax law and the GAAR can only be applied to deny a tax benefit when the abusive nature of the transaction is clear.

51 The interpretation of the provisions giving rise to the tax benefit must, in the words of s. 245(4) of the Act, have regard to the Act "read as a whole". This means that the specific provisions at issue must be interpreted in their legislative context, together with other related and relevant provisions, in light of the purposes that are promoted by those provisions and their statutory schemes. In this respect, it should not be forgotten that the GAAR itself is part of the Act.

52 In general, Parliament confers tax benefits under the *Income Tax Act* to promote purposes related to specific activities. For example, tax benefits associated with business losses, CCA and RRSPs, are conferred for reasons intrinsic to the activities involved. Unless the Minister can establish that the avoidance transaction frustrates or defeats the purpose for which the tax benefit was intended to be conferred, it is not abusive.

53 Care must be taken in assessing the purposes for which the provisions at issue confer a tax benefit. "The [*Income Tax Act*] is a complex statute through which Parliament seeks to balance a myriad of principles" (*Shell*, at para. 43). The conferring of particular tax benefits can serve a variety of independent and interlocking purposes. These range from imposing fair business accounting principles and promoting particular kinds of commercial activity, to providing family and social benefits.

54 In interpreting the provisions of the *Income Tax Act*, the statutory language must be respected and should be interpreted according to its well-established legal meaning. In some cases, a contextual and purposive interpretation may add nuance to the well-established legal meaning of the statutory language. Section 245(4) does not rewrite the provisions of the *Income Tax Act*; it only requires that a tax benefit be consistent with the object, spirit and purpose of the provisions that are relied upon.

55 In summary, s. 245(4) imposes a two-part inquiry. The first step is to determine the object, spirit or purpose of the provisions of the *Income Tax Act* that are relied on for the tax benefit, having regard to the scheme of the Act, the relevant provisions and permissible extrinsic aids. The second step is to examine the factual context of a case in order to determine whether the avoidance transaction defeated or frustrated the object, spirit or purpose of the provisions in issue.

56 The Explanatory Notes elaborate that the provisions of the *Income Tax Act* are intended to apply to transactions with real economic substance. Although the expression "economic substance" may be open to different interpretations, this statement recognizes that the provisions of the Act were intended to apply to transactions that were executed within the object, spirit and purpose of the provisions that are relied upon for the tax benefit. The courts should not turn a blind eye to the underlying facts of a case, and become fixated on compliance with the literal meaning of the wording of the provisions of the *Income Tax Act*. Rather, the courts should in all cases interpret the provisions in their proper context in light of the purposes they intend to promote.

57 Courts have to be careful not to conclude too hastily that simply because a non-tax purpose is not evident, the avoidance transaction is the result of abusive tax avoidance. Although the Explanatory Notes make reference to the expression "economic substance", s. 245(4) does not consider a transaction to result in abusive tax avoidance merely because an economic or commercial purpose is not evident. As previously stated, the GAAR was not intended to outlaw all tax benefits; Parliament intended for many to endure. The central inquiry is focussed on whether the transaction was consistent with the purpose of the provisions of the *Income Tax Act* that are relied upon by the taxpayer, when those provisions are properly interpreted in light of their context. Abusive tax avoidance will be established if the transactions frustrate or defeat those purposes.

58 Whether the transactions were motivated by any economic, commercial, family or other non-tax purpose may form part of the factual context that the courts may consider in the analysis of abusive tax avoidance allegations under s. 245(4). However, any finding in this respect would form only one part of the underlying facts of a case, and would be 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. When properly interpreted, the statutory provisions at issue in a given case may dictate that a particular tax benefit may apply only to transactions with a certain economic, commercial, family or other non-tax purpose. The absence of such considerations may then become a relevant factor towards the inference that the transactions abused the provisions at issue, but there is no golden rule in this respect.

59 Similarly, courts have on occasion discussed transactions in terms of their "lack of substance" or requiring "recharacterization". However, such terms have no meaning in isolation from the proper interpretation of specific provisions of the *Income Tax Act*. The analysis under s. 245(4) requires a close examination of the facts in order to determine whether allowing a tax benefit would be within the object, spirit or purpose of the provisions relied upon by the taxpayer, when those provisions are interpreted textually, contextually and purposively. Only after first, properly construing the provisions to determine their scope and second, examining all of the relevant facts, can a proper conclusion regarding abusive tax avoidance under s. 245(4) be reached.

60 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. We should reject any analysis under s. 245(4) that depends entirely on "substance" viewed in isolation from the proper interpretation of specific provisions of the *Income Tax Act* or the relevant factual context of a case. However, 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.

61 A proper approach to the wording of the provisions of the *Income Tax Act* together with the relevant factual context of a given case achieve balance between the need to address abusive tax avoidance while preserving certainty, predictability and fairness in tax law so that taxpayers may manage their affairs accordingly. Parliament intends taxpayers to take full advantage of the provisions of the Act that confer tax benefits. Parliament did not intend the GAAR to undermine this basic tenet of tax law.

62 The GAAR may be applied to deny a tax benefit only after it is determined that it was not reasonable to consider the tax benefit to be within the object, spirit or purpose of the provisions relied upon by the taxpayer. The negative language in which

s. 245(4) is cast indicates that the starting point for the analysis is the assumption that a tax benefit that would be conferred by the plain words of the Act is not abusive. This means that 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. In other words, the abusive nature of the transaction must be clear. The GAAR will not apply to deny a tax benefit where it may reasonably be considered that the transactions were carried out in a manner consistent with the object, spirit or purpose of the provisions of the Act, as interpreted textually, contextually and purposively.

5.6. Burden of Proof

63 The determination of the existence of a tax benefit and an avoidance transaction under s. 245(1), (2) and (3) involves factual decisions. As such, the burden of proof is the same as in any tax proceeding where the taxpayer disputes the Minister's assessment and its underlying assumptions of facts. The initial obligation is on the taxpayer to "refute" or challenge the Minister's factual assumptions by contesting the existence of a tax benefit or by showing that a *bona fide* non-tax purpose primarily drove the transaction: see *Hickman Motors Ltd. v. R.*, [1997] 2 S.C.R. 336 (S.C.C.), at para. 92. It is not unfair to impose this burden, as the taxpayer would presumably have knowledge of the factual background of the transaction.

64 By contrast, the inquiry into abusive tax avoidance under s. 245(4) involves a textual, contextual and purposive analysis of the provisions on which the tax benefit is based. We see no reason to maintain the distinction between a theoretical and practical perspective on the burden of proof, adopted by the majority of the Federal Court of Appeal in *OSFC*. The Federal Court of Appeal held that there is no burden on either party at the stage of interpreting the provisions at issue, since this is a question of law, which is ultimately for the court to decide. It went on to state at para. 68 that "from a practical perspective, ... [t]he Minister should set out the policy with reference to the provisions of the Act or extrinsic aids upon which he relies".

65 For practical purposes, the last statement is the important one. The taxpayer, once he or she has shown compliance with the wording of a provision, should not be required to disprove that he or she has thereby violated the object, spirit or purpose of the provision. It is for the Minister who seeks to rely on the GAAR to identify the object, spirit or purpose of the provisions that are claimed to have been frustrated or defeated, when the provisions of the Act are interpreted in a textual, contextual and purposive manner. 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.

5.7. Summary

66 The approach to s. 245 of the *Income Tax Act* may be summarized as follows.

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* in the sense 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 or 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.

4. The courts proceed by conducting 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. Whether the transactions were motivated by any economic, commercial, family or other non-tax purpose may form part of the factual context that the courts may consider in the analysis of abusive tax avoidance allegations under s. 245(4). However, any finding in this respect would form only one part of the underlying facts of a case, and would be 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.

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.

7. 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.

6. Application to the Facts of this Case

67 The appellant Crown agreed with the finding of the Tax Court judge that there was a tax benefit and an avoidance transaction. Therefore, the only issue is whether there was abusive tax avoidance under s. 245(4).

68 The respondent purchased and leased trailers in order to generate CCA deductions, which were then used to shelter other taxable lease income generated by CTMC. It is common ground that on their face, the CCA provisions permit the deductions claimed. It is also common ground that a standard sale-leaseback transaction, involving qualifying assets, where the vendor is also the lessee, is consistent with the object, spirit or purpose of the CCA provisions. However, the appellant submits that the manner in which the respondent structured and financed the purchase, lease and sublease of the trailers contravened the object, spirit or purpose of the CCA regime and resulted in abusive tax avoidance under s. 245(4) of the *Income Tax Act*.

69 As discussed above, the practical burden of showing that there was abusive tax avoidance lies on the Minister. The abuse of the Act must be clear, with the result that doubts must be resolved in favour of the taxpayer. The analysis focuses on the purpose of the particular provisions that on their face give rise to the benefit, and on whether the transaction frustrates or defeats the object, spirit or purpose of those provisions.

70 The appellant submits that the object and spirit of the CCA provisions are “to provide for the recognition of money spent to acquire qualifying assets to the extent that they are consumed in the income-earning process”, relying on the reasons of Noël J.A. in *Duncan v. R.* (2002), [2003] 2 F.C. 25, 2002 FCA 291 (Fed. C.A.), at para. 44. The appellant submits that the transaction involved no real risk and that CTMC thus did not actually spend $120 million to purchase the trailers from TLI. In the appellant's view, CTMC created a “cost for CCA purposes that is an illusion” without incurring any “real” expense. This, the appellant argues, contravenes the object and spirit of the CCA provisions and constitutes abusive tax avoidance within s. 245(4) of the Act. The appellant summarizes its main submission as follows:

> In this case, the pre-ordained series of transactions misuses and abuses the CCA regime because it manufactures a cost for CCA purposes that does not represent the real economic cost to CTMC of the trailers. CTMC borrowed $97.4 million from the Royal Bank, but ... the loan was effectively repaid in its entirety on the day it was made. The assignment by CTMC to the Bank of MAIL's rent payments under the lease continued the circular flow of money.... There was no risk at all that the rent payments would

> not be made. Even the $5.9 million that CTMC apparently paid in fees was fully covered as it, along with the rest of CTMC's contribution of $24.9 million in funding, will be reimbursed when the $19 million bond pledged to CTMC matures in December 2005 at $33.5 million.
>
> CTMC incurred no real economic cost, and thus was not entitled to any "recognition for money spent to acquire qualifying assets"....
>
> [Emphasis added; paras. 80-81.]

71 The respondent takes a different view of the purpose of the CCA provisions and the transaction. It relies on the Tax Court judge's conclusion that the transaction was a profitable commercial investment and fully consistent with the object and spirit of the Act. The respondent submits that its deductions were permitted under the "Leasing Property Rules" and the "Specified Leasing Property Rules" of the Act. It argues that the specific rules enacted by Parliament to address CCA on leased assets are plainly a vital part of the statutory scheme, and that the GAAR cannot be utilized to change the scope of those rules. The respondent submits that it is the policy of the Act that "cost" means the price that the taxpayer gave up in order to get the asset, except in specific and precisely prescribed circumstances not here applicable. The respondent argues that the GAAR cannot be used to override Parliament's explicit policy decision to limit the scope of the rules.

72 The respondent argues that the transaction was consistent with the object and spirit of the legislation. The Act's inclusion of specific provisions that take "cost" to mean the amount "at risk" in limited circumstances illustrates the general policy of the Act that the term "cost" outside of those specific provisions means cost as understood at law, namely the amount paid. A cost is not reduced to reflect a mitigation of economic risk. In the result, the respondent argues that on the facts of this case "it may reasonably be considered that the transaction would not result directly or indirectly in a misuse ... or an abuse ..." under s. 245(4).

73 We are of the view that the appellant's arguments do not reflect a proper interpretation of the GAAR and that the respondent's position should prevail. We are led to this conclusion by a textual, contextual and purposive interpretation of the relevant provisions of the *Income Tax Act*.

74 Textually, the CCA provisions use "cost" in the well-established sense of the amount paid to acquire the assets. Contextually, other provisions of the Act support this interpretation. Finally, the purpose of the CCA provisions of the Act, as applied to sale-leaseback transactions, was, as found by the Tax Court judge, to permit deduction of CCA based on the cost of the assets acquired. This purpose emerges clearly from the scheme of the CCA provisions within the Act as a whole. The appellant's argument was not that the purpose of these provisions was unclear, but rather that the GAAR ought to override their accepted purpose and effect, for reasons external to the provisions themselves.

75 The appellant suggests that the usual result of the CCA provisions of the Act should be overridden in the absence of real financial risk or "economic cost" in the transaction. However, this suggestion distorts the purpose of the CCA provisions by reducing them to apply only when sums of money are at economic risk. The applicable CCA provisions of the Act do not refer to economic risk. They refer only to "cost". Where Parliament wanted to introduce economic risk into the meaning of cost related to CCA provisions, it did so expressly, as, for instance, in s. 13(7.1) and (7.2) of the Act, which makes adjustments to the cost of depreciable property when a taxpayer receives government assistance. "Cost" in the context of CCA is a well-understood legal concept. It has been carefully defined by the Act and the jurisprudence. Like the Tax Court judge, we see nothing in the GAAR or the object of the CCA provisions that permits us to rewrite them to interpret "cost" to mean "amount economically at risk" in the applicable provisions. To do so would be to invite inconsistent results. The result would vary with the degree of risk in each case. This would offend the goal of the Act to provide sufficient certainty and predictability to permit taxpayers to intelligently order their affairs. For all these reasons, we agree with the Tax Court judge's conclusion that the "cost" was $120 million, not zero as argued by the appellant.

76 The appellant's submissions on this point amount to a narrow consideration of the "economic substance" of the transaction, viewed in isolation from a textual, contextual and purposive interpretation of the CCA provisions. It did not focus

on the purpose of the CCA provisions read in the context of the Act as a whole, to determine whether the tax benefit fell outside the object, spirit or purpose of the relevant provisions. Instead, it simply argued that since there was (as it alleged) no "real economic cost", the GAAR must apply. As discussed earlier, the application of the GAAR is a complex matter of statutory interpretation in which the object, spirit and purpose of the provisions giving rise to the tax benefit are assessed in light of the requirements and wording of the GAAR. While the "economic substance" of the transaction may be relevant at various stages of the analysis, this expression has little meaning in isolation from the proper interpretation of specific provisions of the Act. Any "economic substance" must be considered in relation to the proper interpretation of the specific provisions that are relied upon for the tax benefit.

77 The appellant originally suggested that the GAAR should be used to override the usual effect of the CCA provisions for a second reason - namely that the relationships and transactions that are expressed in the documents are abusive of the provisions of the Act and should be set aside. It properly abandoned this argument and the submission that the transaction was a sham before the Federal Court of Appeal. Here the documents detailing the transaction left no uncertainty as to the relationships between the parties. CTMC paid $120 million to TLI for the equipment, partly with borrowed funds and partly with its own money. Having become the owner of the equipment, it leased it to MAIL. MAIL then subleased it back to the vendor, TLI. The relationships between the parties as expressed in the relevant documentation were not superfluous elements; they were the very essence of the transaction.

78 As the Tax Court judge concluded, under the CCA scheme, "[l]eases of such [exempt] properties will continue to be viewed as acceptable means of providing lower cost financing" (para. 67). TLI's use of the money ultimately reduced the risk, but a company in the financing business is expected to do what it can to reduce risk. Therefore, the way the borrowed money was used provided no grounds for concluding that there was abusive tax avoidance. The Tax Court judge, after considering all the circumstances, found that the transaction was not so dissimilar from an ordinary sale-leaseback to take it outside the object, spirit or purpose of the relevant CCA provisions of the Act and Regulations.

79 In determining the result in this appeal, the Tax Court judge's conclusions on matters of fact should not be displaced provided that they are based on the correct legal analysis and find support in the evidence.

80 The Tax Court judge's analysis on the issue of abuse under s. 245(4) is largely consistent with the approach to the application of the GAAR we have adopted. He rejected the two-stage overriding-policy approach to abuse and misuse. He went on to inquire into the policy or purpose underlying the CCA treatment in sale-leaseback arrangements. Construing the CCA provisions as a whole, he rejected the submission that "cost" in the relevant provisions of the Act should be reread as "money at risk", and he also rejected the argument that the "economic substance" of the transaction determined that there was abusive tax avoidance. He conducted a detailed analysis of the transactions to determine whether they fell within the object, spirit or purpose of the CCA provisions. In the end, he concluded that a tax benefit was consistent with the object, spirit and purpose of the CCA provisions and held that the GAAR could not apply to disallow the tax benefit. These conclusions were based on a correct view of the law and were grounded in the evidence. They should be confirmed.

7. Conclusion

81 We would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

Appendix

I. The following parties weave through the multiple transactions at one point or another:

Canada Trustco Mortgage Company ("CTMC" or "Purchaser" or "Lessor" or "Borrower"), respondent, was a large diversified financial institution carrying on business in Canada.

Royal Bank of Canada (Canadian branch) ("RBC" or "Lender").

Transamerica Leasing Inc. ("TLI" or "Vendor" or "Sublessee"), a corporation in the United States.

Maple Assets Investments Limited ("MAIL" or "Lessee" or "Sublessor"), a limited liability company incorporated under the laws of England.

Maple Assets Charitable Trust ("MACT" or "Trust"), constituted by an instrument of trust dated December 17, 1996, owns 100 percent of the shares in MAIL.

Royal Bank of Canada Trust Company (Jersey) Limited ("RBC Jersey" or "Trustee") is the trustee of MACT and is a wholly owned subsidiary of RBC, incorporated in Jersey.

Royal Bank of Canada Trust Corporation Limited ("RBCTC" or "Manager"), a company incorporated in England, undertook to manage and fulfil the affairs and obligations of MAIL under the relevant transactions and to provide the directors and officers of MAIL.

Transamerica Finance Corporation ("TFC" or "Guarantor"), the parent corporation of TLI, who guaranteed to MAIL the performance of all TLI's obligations under the sublease agreement and to CTMC all TLI's obligations under the "Equipment Purchase Agreement".

Macquarie Corporate Finance (USA) Inc. ("Lease Arranger").

II. CTMC held as part of its ongoing business a portfolio of loans and leases to generally larger corporations and government agencies. CTMC testified that it was looking for a leasing arrangement in the range of $100 million. It specified the type of equipment (long-term assets that were easy to value, such as tractors or trailers), the duration of the lease and the strength of the proposed lessee. The structure of the leasing arrangement was left to the Lease Arranger. The trailers remained in the possession of TLI and CTMC continued to own the trailers, to lease them out, and to earn income from them. CTMC previously entered into similar arrangements to the one implemented in this case. The Lease Arranger arranged the TLI deal which was approved by CTMC's Board of Directors. The key transactions proceeded as follows:

The Purchase and Sale of the Trailers

III. On December 17, 1996, CTMC and TLI entered into an agreement for the purchase and sale of trailers at a fair market value of $120 million. TLI agreed to sell and CTMC agreed to purchase the trailers absolutely and ownership in the trailers passed from TLI to CTMC.

IV. On December 17, 1996, for administrative convenience, CTMC appointed TLI as trustee and agent of CTMC to hold in TLI's name, the certificate of title, certificate of ownership, registration and like documentation in respect of the trailers.

Lease of the Trailers to MAIL and the Option to Purchase

V. The terms of the Lease between CTMC and MAIL included the following:

1. the term was for an initial period ending December 1, 2014;

2. the rent payments under the Lease were based upon an effective interest rate of 8.5 percent;

3. MAIL, as lessee, was required to make semi-annual payments to CTMC; and

4. MAIL was provided with an option to purchase the trailers, $84 million being the First Option Value on December 1, 2005 and another option exercisable at the fair market value on December 1, 2014.

Sublease of the Trailers to TLI

VI. Most of the terms of the Sublease to TLI are similar to those in the Lease to MAIL. The Sublease provided TLI with purchase options similar to those provided to MAIL.

Security for the Sublease

VII. On December 17, 1996, pursuant to the terms of the Sublease, TLI prepaid all amounts due to MAIL under the Sublease (approximately $120 million). As a result of the prepayment, TLI had no ongoing Sublease payment obligations and there was no credit risk to MAIL under the terms of the Sublease. TLI maintained certain obligations with respect to indemnities and early termination. TLI retained a net present value benefit of 3.35 percent of the cost of the trailers being the difference between the payment TLI received from CTMC for the sale of the trailers and the prepayment of rent TLI paid to MAIL.

Security for the Lease

VIII. On December 17, 1996, MAIL applied the prepayment it received from TLI as follows:

1. MAIL placed on deposit with the RBC an amount equal to the Loan (approximately $100 million); and

2. MAIL paid the balance of the prepayment (approximately $20 million) to RBC Jersey on the condition that RBC Jersey use these funds to purchase a Government of Ontario Bond (the “Bond”), maturing on December 1, 2005.

IX. On December 17, 1996, the Bond was pledged to CTMC as security for MAIL's obligation to pay the Purchase Option Payments or the Termination Values under the Lease. The risk of the inability of MAIL to pay the First Option Value was removed by the acquisition of the Bond and the provision to CTMC of a security interest in the Bond.

Security for the Loan

X. On December 17, 1996, CTMC assigned to RBC the rent payments owed to CTMC from MAIL under the Lease. CTMC also provided MAIL with an irrevocable instruction to pay the assigned rent payments to RBC such that RBC would apply the rent payments directly to the installment payments due by CTMC to RBC under the terms of the Loan Agreement. RBC's recourse under the Loan was limited to the rent payments assigned to it by CTMC.

XI. The rent payments under the Lease and a portion of the First Option Value would be applied to pay off the RBC loan and the remainder of the purchase option price would be covered by the Bond.

The Effect of Non-Recourse Debt on Regulatory Capital Requirements

XII. The use of non-recourse debt to finance the purchase of the trailers significantly improved CTMC's management of regulatory capital requirements.

Guarantees

XIII. On December 18, 1996, TFC, the parent corporation of TLI, unconditionally and irrevocably guaranteed to MAIL and to CTMC the performance of TLI's obligations under the relevant transactions.

Reversibility of the Transactions

XIV. The transactions in issue could be unwound if there were adverse changes affecting CTMC.

Return on Investment

XV. CTMC would realize a before-tax return of approximately $8.5 million from the transactions.

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