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## The Importance of Family Resemblance: Series of Transactions After *Cophorne*

Benjamin Alarie and Julia Lockhart\*

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### PRÉCIS

Le concept de « série d'opérations » était un élément clé dont traitait la décision de la Cour suprême du Canada dans l'arrêt *Cophorne Holdings Ltd. c. Canada*. À la suite de cette décision, le présent article examine les commentaires précédents sur le sujet et suggère une nouvelle approche fondée sur le concept de « ressemblance familiale ». La ressemblance familiale se fonde sur le principe qu'il n'y a pas d'éléments essentiels qui soient les mêmes dans chaque série d'opérations visée par un article. En revanche, une série d'opérations devrait se définir en rapport à l'objectif de la disposition anti-évitement en question et à la série d'opérations stylisée que le Parlement tentait de cerner. Lorsqu'il y a une ressemblance familiale suffisante entre la série stylisée et les opérations effectuées, on devrait constater qu'il y a une série. Ce concept est appliqué aux règles anti-évitement spécifiques et à la règle générale anti-évitement. L'article traite de la façon dont la Loi pourrait être clarifiée par des modifications inspirées du concept de ressemblance familiale.

### ABSTRACT

The concept of a series of transactions was a key issue in the Supreme Court of Canada's decision in *Cophorne Holdings Ltd. v. Canada*. In light of that decision, this article reviews previous commentary on the topic and suggests a new approach based on the concept of family resemblance. Family resemblance recognizes that there are no core aspects that are the same in every series captured by a provision of the Income Tax Act. Rather, a series should be defined in relation to the purpose of the anti-avoidance provision in issue and the stylized set of transactions that Parliament was attempting to capture. Where there is a sufficient family resemblance between the stylized series and the transactions carried out, a series should be found. This concept is applied to both specific anti-avoidance rules and the general anti-avoidance rule. The article suggests how the Act could be clarified through amendments inspired by the concept of family resemblance.

**KEYWORDS:** SERIES OF TRANSACTIONS ■ STATUTORY INTERPRETATION ■ GAAR ■ BUTTERFLY TRANSACTIONS ■ PURPOSE

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\* Benjamin Alarie is of the Faculty of Law, University of Toronto (e-mail: ben.alarie@utoronto.ca). Julia Lockhart is a graduate of the Faculty of Law, University of Toronto (e-mail: julia.lockhart@utoronto.ca).

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**INTRODUCTION**

The concept of a “series of transactions”<sup>1</sup> is used in various Commonwealth jurisdictions and specifically, for our purposes in this article, in a number of provisions in Canada’s Income Tax Act.<sup>2</sup> The general use of the series concept in the Act is to expand the reach of anti-avoidance rules and to limit the availability of particular tax benefits that might otherwise be claimed. Currently, transactions that are found to be part of a series are accorded different (and generally less attractive) treatment than transactions that fall outside a series in a number of contexts, including the general anti-avoidance rule (GAAR), section 55, and the bump denial rules.

The concept of a series of transactions has been a challenging one for the courts and for commentators to unpack to date, not least because of the diverse contexts in which it appears in the Act. Its inclusion in so many provisions and the somewhat different roles that it is required to play in those various contexts are seemingly in

1 In this article, we use the terms “series of transactions” and “series” interchangeably, with the context indicating whether the reference is to the statutory or common-law version of the concept.

2 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as “the Act”). Unless otherwise stated, statutory references in this article are to the Act.

tension with the singular definition of “series of transactions” in subsection 248(10), which is ostensibly intended to apply for the Act as a whole.<sup>3</sup> Indeed, this issue is expected to become even more important, given that the series concept will be relied on in considerably more provisions in the future. Amendments made to the Act with the enactment of Bill C-45, in late 2012, add the phrase “series of transactions” in numerous new anti-avoidance contexts.<sup>4</sup> This increasing reliance on the series concept suggests that our article is particularly timely. If, until now, there was room to argue that the term “series of transactions” must be given a single, context-independent meaning throughout the entire Act, in accordance with the definition in subsection 248(10), the proliferation of its use in the recent amendments strongly suggests otherwise. Indeed, the importance of recognizing that the meaning of “series of transactions” must be sensitive to the context and purpose of the various statutory uses of the term has never been greater. In this article, we explain how to approach the series concept in a way that is as reliable as possible and also contextually sensitive.

In the last 30 years, several cases and commentators have explored the boundaries and implications of the concept of a series of transactions. In this article, we take the opportunity afforded by the recent Supreme Court of Canada decision in *Cophthorne Holdings Ltd. v. Canada*<sup>5</sup> to reflect on and critically review that literature, as well as offer our own judgment on where things now stand in Canada with respect to the interpretation and use of the series concept. Ultimately, we argue that a key (if not *the* key) factor in determining whether or not a series exists under a textual, contextual, and purposive analysis should be whether the transactions undertaken by a taxpayer bear a “family resemblance” to the sets of transactions that Parliament can reasonably be considered to have had in mind when it enacted the provision (or provisions) at issue in a given case. We also demonstrate and explain how a family resemblance approach can be used to reach sensible legal results in the various instances in the Act in which the concept of a series of transactions is invoked, including how the family resemblance approach applies in the context of GAAR.

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3 Subsection 248(10) states, “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.”

4 Bill C-45 was enacted as the Jobs and Growth Act, 2012, SC 2012, c. 31; royal assent December 14, 2012. This legislation amends the Act to include the following provisions (among others) that invoke the concept of a series of transactions: new section 17.1 (relating to deemed interest under sections 15 and 212.3); new subsection 97(3) (denying a section 88 election to partnerships in certain circumstances); amended section 100 (addressing dispositions of partnership interests to tax-exempts or non-residents); new definitions of “advantage” and “RCA strip” in subsection 207.5(1); new section 207.63 (establishing joint liability for custodians of retirement compensation arrangements in certain circumstances); new section 207.64 (granting the minister power to waive liability to tax under new sections 207.61 through 207.63); new section 212.3 (addressing foreign affiliate dumping); new subsection 219.1(2) (relating to foreign affiliate dumping in the context of a corporate emigration); and new subsection 247(12) (relating to transfer-pricing adjustments).

5 2011 SCC 63.

The discussion that follows is divided into six parts:

- Part one sets the stage by outlining the facts in *Copthorne*.
- Part two discusses the relationship between the common-law definition of series and the explicit definition in subsection 248(10), and briefly describes the common-law meaning of the term endorsed by the Supreme Court of Canada in *Copthorne*.
- Part three addresses what we know, following *Copthorne*, about the statutorily extended meaning of series and, more specifically, the construction of the phrase “in contemplation of.”
- In light of the foregoing, part four argues that the approach of the courts to date has been too textual and narrow, and has not lived up to the requirement that the Act be given a “textual, contextual and purposive” interpretation.<sup>6</sup> In our view, the interpretive analysis should be broadened to include purposive elements that draw upon the particular work that Parliament can reasonably be taken to have wished the series concept to perform in the various contexts in which it is used. More specifically, we explain how the use of a “family resemblance” test to assist in determining the appropriate legal boundaries of a series resolves a number of conceptual issues, provides a principled way to approach the interpretation of the term, accounts for the various indicia that the courts have drawn upon to date, and avoids the theoretical menace of overinclusive and statutorily unintended series.
- Part five explores the possibility that, given the difficulty that the courts have had with the series concept to date, in the interests of “predictability, certainty and fairness”<sup>7</sup> it may be advisable for Parliament to provide additional guidance to assist courts in arriving at appropriate applications of the series concept. As we explain, although it may be possible to use the family resemblance test that we advocate through a more general exercise of textual, contextual, and purposive statutory interpretation, a more reliable possibility would be for Parliament to expand upon or revise the current statutory definition of series in subsection 248(10). The statutory amendment route may be particularly advisable in light of the new reliance on series in the recent amendments to the Act.
- Part six presents our concluding comments.

## THE FACTS IN COPTHORNE

The facts in *Copthorne* were relatively complex but may be summarized as follows. The Li family held shares in Big City Project Corporation B.V. (“BV”), a corporation constituted under the laws of the Netherlands. BV owned all of the shares of Copthorne Holdings Inc. (“Copthorne I”), an Alberta corporation. Copthorne I

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6 See *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, at paragraph 47.

7 See *ibid.*, at paragraph 31.

had realized a significant capital gain upon the disposition of a hotel property in 1989, and the proceeds from the sale had been invested in a Barbadian corporation, Copthorne Overseas Investment Ltd. (“COIL”), which carried on a bond-trading business.

The Li family also held all of the shares of VHHCI Investments Inc. (“VHHCI”), a corporation constituted under the laws of Canada. The paid-up capital (PUC) of the shares of VHHCI was \$96.7 million, \$67.4 million of which had been used to subscribe for shares of a wholly owned subsidiary, VHH Holdings Ltd. (“VHHCH”). VHHCH had in turn used the money to invest in shares of a Canadian public company through a wholly owned subsidiary. In 1992, after the value of that investment decreased dramatically, VHHCI transferred its shares of VHHCH to Copthorne I as part of a loss-utilization transaction. By that time, the shares of VHHCH had only nominal fair market value.

In January 1993, it was decided that Copthorne I, VHHCH, and two other companies in the Li family group should be amalgamated in order to simplify the group’s structure and permit further loss utilization. Because VHHCH was Copthorne I’s subsidiary, however, an amalgamation of the two corporations would have caused the \$67.4 million of PUC in respect of VHHCH’s shares to be cancelled under the Alberta Business Corporations Act. In order to prevent this result, Copthorne I sold its VHHCH shares to BV on July 7, 1993 for nominal consideration (“the 1993 share sale”), making VHHCH Copthorne I’s sister corporation. On January 1, 1994, VHHCH, Copthorne I, and the two other corporations amalgamated, creating a new corporation (“Copthorne II”). The PUC of Copthorne II’s share capital was approximately \$67.4 million, an amount that was almost entirely attributable to the PUC of the VHHCH shares.

In late 1994, the Li family decided to repatriate the funds used by COIL to carry on its bond-trading business as a result of the Department of Finance’s proposal to introduce changes to Canada’s foreign accrual property income (FAPI) regime, which would have subjected the income from the bond-trading business to tax in Canada. The shares of VHHCI and Copthorne II were sold to a Li family corporation constituted under the laws of Barbados (“LF Investments”), and on January 1, 1995, VHHCI and Copthorne II amalgamated, forming another corporation (“Copthorne III”). Upon the amalgamation, LF Investment’s shares in VHHCI and Copthorne II were converted into 1,000 common shares of Copthorne III and 164 million class D preferred shares. Each of the common shares and the class D preferred shares had a PUC of \$1, for a total of \$164.1 million of PUC (made up of \$96.7 million of PUC attributable to VHHCI’s shares plus \$67.4 million of PUC attributable to the shares of Copthorne II), and the class D preferred share were redeemable for \$1 per share. COIL transferred \$142 million to Copthorne III in the form of a tax-free return of capital, and Copthorne III redeemed 142 million class D preferred shares held by LF Investments (“the 1995 redemption”). Since the redemption proceeds received by LF Investments in respect of each class D preferred share did not exceed the PUC of the share, Copthorne III was not deemed to have paid any dividend to LF Investments pursuant to subsection 84(3).

The minister reassessed Copthorne III on the basis that \$58 million of the redemption proceeds should be characterized as a dividend subject to withholding tax under GAAR.<sup>8</sup> According to the Crown, the avoidance transaction was the 1993 share sale. The tax benefit realized (the avoidance of tax upon the repatriation of funds by Copthorne III), however, had occurred only as a result of the 1995 redemption. Thus, subsection 245(2) could apply to the 1993 share sale only if that transaction was part of the same series of transactions as the 1995 redemption. It was agreed by both parties that the transactions carried out in 1993 (the 1993 share sale and the January 1, 1994 amalgamation of VHHCH, Copthorne I, and two other corporations) formed a series of transactions. Moreover, the Crown conceded that the 1995 redemption did not form part of that series. Thus, the only question was whether the 1995 redemption was a related transaction completed in contemplation of the series within the meaning of subsection 248(10).

## COMMON-LAW SERIES

It is generally accepted that there are two aspects of the definition of series for the purposes of the Act: the common-law definition and the statutory expansion under the definition offered in subsection 248(10).<sup>9</sup> While some commentators have questioned whether the definition in subsection 248(10) does in fact expand upon the common-law meaning of series of transactions,<sup>10</sup> the Supreme Court in *Copthorne* has confirmed the distinct existence of both the common-law series and the expanded statutory series. In this part of the article, we trace the development of this distinction through the cases and the commentary before briefly concluding on the current understanding of the common-law meaning of series.

The earliest cases on series of transactions did not refer to common-law series and subsection 248(10) series, in part because subsection 248(10) was only enacted in 1985. In *OSFC Holdings Ltd. v. Canada*, however, Rothstein JA (at that time serving on the Federal Court of Appeal) became the first to draw a distinction between the two concepts.<sup>11</sup> He defined a common-law series as a sequence of transactions each of which

must be pre-ordained to produce a final result. Pre-ordination means that when the first transaction of the series is implemented, all essential features of the subsequent

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8 The minister took the view that the total PUC attributed to the 164 million class D preferred shares should have been \$96.7 million (that is, that no amount attributable to the shares of VHHCH should have been included). As a result, each of the 164 million class D preferred shares had a PUC of approximately \$0.59, resulting in a deemed dividend of \$0.41 (that is, \$1 – \$0.59) per share, or \$58 million (\$0.41\*142 million shares) in total.

9 See supra note 3.

10 Michael Kandeve, Brian Bloom, and Olivier Fournier, “The Meaning of ‘Series of Transactions’ as Disclosed by a Unified Textual, Contextual, and Purposive Analysis” (2010) 58:2 *Canadian Tax Journal* 277-330, at 279.

11 2001 FCA 260. Rothstein JA was joined in his reasons for judgment by Stone JA; Letourneau JA wrote separate dissenting reasons.

transaction or transactions are determined by persons who have the firm intention and ability to implement them. That is, there must be no practical likelihood that the subsequent transaction or transactions will not take place.<sup>12</sup>

According to Rothstein JA, the effect of subsection 248(10) was to expand this definition. While one could read subsection 248(10) as merely restating the common-law test for a series of transactions, Rothstein JA concluded that a broader reading was more appropriate.<sup>13</sup> In his view, reading subsection 248(10) as an expansion was preferable for three reasons:

- First, the language included in the definition did not track the language used in the cases from the United Kingdom that he held were the jurisprudential basis of the common-law definition. Since Parliament was aware of those cases and officials involved in the drafting had made explicit reference to them, Rothstein JA concluded that the choice of different language reflected a deliberate effort to expand the definition.<sup>14</sup>
- Second, Rothstein JA considered the effect of certain transitional rules with respect to the implementation of GAAR. Those rules excluded transactions from the scope of GAAR so long as the transactions were part of a series that predated GAAR, but also excluded the application of subsection 248(10) in determining that series. Rothstein JA held that it would be inconsistent to read subsection 248(10) as merely restating the common-law test, since the exclusion of that provision from the application of the transitional rules would then be meaningless.<sup>15</sup>
- Finally, Rothstein JA held that Parliament's decision to use the word "deem" in subsection 248(10) made that subsection a deeming provision, and deeming provisions usually play "a function of enlargement."<sup>16</sup>

The Supreme Court of Canada endorsed this reading of subsection 248(10) when the court considered GAAR in *Canada Trustco Mortgage Co. v. Canada*,<sup>17</sup> prior to Rothstein JA's elevation to that court. More specifically, the Supreme Court in *Canada Trustco* affirmed the reasoning of Rothstein JA in *OSFC Holdings* that the effect of subsection 248(10) was to "extend" the common-law definition of series.<sup>18</sup>

Kandev, Bloom, and Fournier have argued that reading subsection 248(10) as expanding the common-law definition of series is incorrect.<sup>19</sup> Their criticism is based

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12 *OSFC*, supra note 11, at paragraph 24.

13 *Ibid.*, at paragraph 34.

14 *Ibid.*, at paragraph 31.

15 *Ibid.*, at paragraph 32.

16 *Ibid.*, at paragraph 33.

17 *Supra* note 6.

18 *Ibid.*, at paragraph 26.

19 Kandev et al., supra note 10, at 279.

on (1) the context in which the common-law series definition was developed, (2) the words in the Act, and (3) the policy implications of having such a broad definition of series. With respect to the first of these, Kandeve et al. note that the definition of series that was developed in the United Kingdom was developed in the course of a judicial anti-avoidance doctrine. This, they observe, is in contrast to the Canadian definition, which applies throughout the Act and not just with respect to GAAR.<sup>20</sup> The judicially designed rule in the United Kingdom was intended to fit within a specific test, whereas the Canadian series concept is intended to be more versatile, since it is relevant to multiple sections of the Act. The distinctive context of the UK rule has been addressed by the Canadian courts, notably in *Canada v. Canadian Utilities Ltd.*<sup>21</sup> In that case, the Federal Court of Appeal rejected the taxpayer's argument that because a transaction had an independent life, it could not form part of a series of transactions. Rothstein JA noted that the UK approach was not to be imported in its entirety to Canada since "[t]he Canadian approach is one of statutory rather than judicial anti-avoidance measures."<sup>22</sup>

With respect to the second basis for criticism, the textual one, the argument put forward by Kandeve et al. is weaker. It relies on the distinction between the text of subsection 248(10) ("where there is a reference to a series of transactions or events, the series shall be deemed to include") and what Kandeve et al. refer to as the more typical deeming language ("a series of transactions or events shall be deemed to include").<sup>23</sup> The difference between these two constructions is minimal, and the use of the word "deem" strongly suggests an intention on the part of Parliament to include in the meaning of series facts or circumstances that would not be captured by the common-law meaning.<sup>24</sup>

With respect to the third objection, Kandeve et al. argue that the purpose of subsection 248(10) is merely to bring into the Act the common-law meaning of series;<sup>25</sup> however, that view is not one that is widely held. Duff has endorsed the distinction between the common-law series and the extended series under subsection 248(10).<sup>26</sup> Similarly Carr and Milot's commentary on the series concept accepts the distinction

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20 Ibid., at 285.

21 2004 FCA 234.

22 Ibid., at paragraph 56.

23 Kandeve et al., supra note 10, at 310.

24 "The most important use of 'deems' is to create a legal fiction: a given fact 'x' is declared to be 'y' or is to be dealt with as if it were 'y' for some or all purposes." Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis Canada, 2008), at 86.

25 Kandeve et al., supra note 10, at 309-12.

26 David G. Duff, "Judicial Application of the General Anti-Avoidance Rule in Canada: OSFC Holdings Ltd. v. The Queen" (2003) 57:7 *IBFD Bulletin* 278-88, at 286; and David G. Duff, "The Supreme Court of Canada and the General Anti-Avoidance Rule: Canada Trustco and Mathew," in David G. Duff and Harry Erlichman, eds., *Tax Avoidance in Canada After Canada Trustco and Mathew* (Toronto: Irwin Law, 2007), 1-46, at 25-26.

between the common-law series and the expanded definition of series of transactions in subsection 248(10).<sup>27</sup> Our own view, shared by these commentators as well as by the Supreme Court of Canada in *Canada Trustco*, is that the purpose of subsection 248(10) is to expand upon the common-law concept of series of transactions.

In *Copthorne*, the Supreme Court again stated that the “common law series is expanded by s. 248(10) of the Act.”<sup>28</sup> Accordingly, the two-part structure of the definition of series in Canadian tax law seems certain to persist, despite the force one might accord to Kandeve et al.’s criticism. This is perhaps even more likely given the elevation of Rothstein J to the Supreme Court of Canada and the court’s historically strong reliance on its tax experts to guide the development of its approach to tax appeals.<sup>29</sup> The court in *Copthorne* also confirmed the definition that it had accorded to the definition of series from the early cases. Thus, after the decision in *Copthorne*, the common-law test for a series of transactions should be regarded as remaining unchanged from *OSFC* and *Canada Trustco*.<sup>30</sup>

## STATUTORILY EXTENDED DEFINITION OF “SERIES”

The Supreme Court’s discussion about a series of transactions in *Copthorne* was concerned primarily with the interpretation of subsection 248(10). Subsection 248(10) deems a series of transactions to include “related transactions or events completed in contemplation of the series.”<sup>31</sup> Given the relative lack of controversy over the meaning of a common-law series (essentially, that of “preordination”), much of the recent case law and commentary since *OSFC* has focused on how subsection 248(10) should be applied and what meaning should be given to the expressions “related transactions or events” and “in contemplation of.” This part of the article discusses the impact that the Supreme Court’s judgment in *Copthorne* is likely to have on these interpretive questions.

### Meaning of “Related Transactions or Events”

Subsection 248(10) contains two key textual elements: “related transactions or events” and “in contemplation of.” Most of the cases have focused on the meaning of “in contemplation of,” while paying comparatively little attention to the meaning

27 Brian R. Carr and Duane R. Milot, “Copthorne: Series of Transactions Revisited,” Corporate Tax Planning feature (2008) 56:1 *Canadian Tax Journal* 243-68, at 246.

28 *Copthorne*, supra note 5, at paragraph 43.

29 See Benjamin R.D. Alarie and Andrew Green, “The Reasonable Justice: An Empirical Analysis of Frank Iacobucci’s Career on the Supreme Court of Canada” (2007) 57:2 *University of Toronto Law Journal* 195-226.

30 See *OSFC*, supra note 11, and the text accompanying note 12, supra; and *Canada Trustco*, supra note 6, at paragraph 25 (citing *Craven v. White*, [1989] AC 398, at 514 (HL), per Lord Oliver; and *W.T. Ramsay v. Inland Revenue Commissioners*, [1981] 1 All ER 865 (HL)).

31 See supra note 3.

of “related transactions or events.” Indeed, none of the cases involving subsection 248(10) explicitly purports to define “related transactions or events” as an independent element.<sup>32</sup> The courts seem to have simply taken the view that a transaction is related to a series where it is carried out in contemplation of that series. In other words, the courts appear to have effectively read subsection 248(10) as though it had used the words “related *in the sense of* having been completed in contemplation of the series.”

This interpretation is arguably inconsistent with the principle of statutory interpretation to the effect that Parliament does not speak without reason.<sup>33</sup> It effectively leaves no work to be done by the word “related.” Nevertheless, given the absence of any comment on the issue by the court in *Coptborne*, for now at least, “in contemplation of” appears to be the standard required for transactions to be “related” under subsection 248(10). The meaning that the courts have ascribed to “in contemplation of” is therefore critical to understanding the subsection.

### Meaning of “in Contemplation of”

As discussed in more detail below, “contemplation” has been given various meanings by the courts. In *OSFC*, the Federal Court of Appeal adopted a test based on knowledge and taking the series into account. The Supreme Court in *Canada Trustco* revised this test to focus on whether the transaction was done “because of” or “in relation to” a series. This “because of or in relation to” standard has been further interpreted by the courts using, variously, a “strong nexus” test, a “motivating factor” test, and a “more than a mere possibility” test.

### Knowledge and Taking into Account

Rothstein JA in *OSFC* was the first to interpret the phrase “in contemplation of” in a detailed way. He held that a transaction was completed in contemplation of a common-law series if “the parties to the transaction knew of the common law series, such that it could be said that they took it into account when deciding to complete the transaction.”<sup>34</sup> This test appears to rely on two findings: (1) that there was knowledge of the transactions making up the common-law series, and (2) that the knowledge of the transactions making up the common-law series was taken into account by the

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32 On the other hand, it should be noted that in *OSFC*, supra note 11, at paragraph 36, Rothstein JA wrote, “As long as the transaction has *some connection* with the common law series, it will, if it was completed *in contemplation of* the common law series, be included in the series by reason of the deeming effect of subsection 248(10) [emphasis added].” This may suggest that Rothstein JA was of the view that the word “related” should be interpreted as “bearing some connection.” This would not appear to leave a large role to play for the word “related,” since presumably the fact that a transaction is carried out in contemplation of a series connects it with that series.

33 See, for example, *R v. D.A.I.*, 2012 SCC 5, at paragraph 31.

34 *OSFC*, supra note 11, at paragraph 36.

taxpayer. The first aspect seems fairly straightforward as a simple knowledge requirement. The second aspect appears to be a type of purpose or linkage test, of the same kind that Brender has suggested is required for a common-law series.<sup>35</sup>

When *OSFC* was decided, the first aspect of the test, the knowledge requirement, proved to be especially controversial. Duff argued that an expanded test for series that relied on an actual knowledge threshold would be too narrow, since a party who was involved in only some (rather than all) of the transactions could argue that he did not have knowledge of the earlier series.<sup>36</sup> Accordingly, in Duff's view, the actual knowledge threshold was too demanding. By contrast, Brender argued that knowledge alone is too low a threshold.<sup>37</sup> He would prefer a test that established a standard based on a common purpose.<sup>38</sup> Similarly, Kandev et al. viewed the knowledge test as overly broad, since people can be assumed to always have knowledge of all their prior transactions;<sup>39</sup> in other words, a knowledge test would effectively incorporate all prior transactions into a series.

The contrast among these commentaries is striking. To some extent it has to do with the perspective from which one is assessing the transactions: Which party must have knowledge of which transactions in order for transactions to constitute a series? Duff, who was focused on the facts in *OSFC*, was concerned with cases where two parties were involved and one party had undertaken a number of packaging transactions in order to permit the second party to access a tax benefit.<sup>40</sup> On those facts, it is possible to imagine that if an actual knowledge test were to apply, the second party might lack the degree of knowledge required with respect to the earlier transactions. By contrast, both Brender and Kandev et al. were more concerned with situations where all the transactions were carried out by the same taxpayer. In those circumstances, the knowledge threshold would be easily established in every (or almost every) case, assuming that the test was applied retrospectively (as the courts have permitted, including, recently, the Supreme Court in *Copthorne*).

Perspective of application (that is, which party must have the knowledge) is an issue that the courts have not confronted directly in any of the decisions on the meaning of series. Largely this is because the knowledge requirement that was first described in *OSFC* has been effectively subsumed into the linkage or connection test. Indeed, as the Supreme Court stated in *Canada Trustco*, “‘in contemplation’ is read not in the sense of actual knowledge but in the broader sense of ‘because of’ or ‘in

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35 Mark D. Brender, “Series of Transactions: A Case for a Purposive Interpretation,” *Corporate Tax Planning* feature (2007) 55:1 *Canadian Tax Journal* 210-34.

36 Duff, “Judicial Application of the General Anti-Avoidance Rule,” *supra* note 26, at 287.

37 Brender, *supra* note 35, at 226.

38 *Ibid.*

39 Kandev et al., *supra* note 10, at 314.

40 Duff, “Judicial Application of the General Anti-Avoidance Rule,” *supra* note 26, at 287.

relation to' the series."<sup>41</sup> Nonetheless, the question of timing alluded to by the commentators above continues to be a significant issue in applying the concept of a series of transactions. While there is no knowledge requirement in the current formulation of the test, the retrospective application of the contemplation standard raises many of the same issues that concerned both Brender and Kandeve et al. In particular, since past transactions are always more than mere possibilities and since most taxpayers can generally be considered to be aware of their past actions, it becomes more difficult to assert that a transaction occurring after a common-law series of transactions was not done in contemplation of that series. The issues related to timing and retrospective contemplation are discussed further below.

### ***“Because of” or “in Relation to”***

Rothstein JA's definition of the subsection 248(10) series as set out in *OSFC* was considered briefly by the Supreme Court in *Canada Trustco*. As noted above, the court held 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.”<sup>42</sup> Courts since *Canada Trustco* have struggled to enunciate a test for what level of connection constitutes “because of” or “in relation to” with respect to a series of transactions. In trying to determine what standard should be applied, courts have used a “strong nexus” test, a “motivating factor” test, and a “more than a mere possibility” test. All of these have been attempts to further define and refine the “because of” or “in relation to” standard. The Supreme Court commented on several of these approaches in *Coptborne*.

Before reviewing the court's analysis of the meaning of “because of” or “in relation to,” it is worth noting the circularity in the approach that the Supreme Court has used so far in its interpretation of subsection 248(10). As mentioned above, the courts appear to have taken the view that the phrase “in contemplation of” is intended to guide taxpayers in determining which transactions are related and which are not. It seems unhelpful, therefore, to use the phrase “in relation to” in interpreting the meaning of “in contemplation of.” However, even if the word “related” in subsection 248(10) had an independent meaning, the “in relation to” test would mostly be redundant, since all (or nearly all) “related transactions” would presumably be considered to have been carried out “in relation to” a common-law series.

### ***“Strong Nexus”***

In *MIL (Investments) SA v. The Queen*, the Tax Court concluded that a “strong nexus” among transactions was required, since a lower threshold of mere possibility would leave too many transactions open to attack as forming part of a series.<sup>43</sup> This strong nexus standard was applied by the Tax Court in *Coptborne*, where the trial judge found that a strong nexus did in fact exist between the common-law series that

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41 *Canada Trustco*, supra note 6, at paragraph 26.

42 *Ibid.*

43 2006 TCC 460, at paragraph 65.

contained the avoidance transaction and the related tax-benefit transaction.<sup>44</sup> The Tax Court held that this strong nexus existed because the subsequent transaction (the share redemption) was “exactly the type of transaction necessary to make a tax benefit a reality based on the preservation of the [paid-up capital].”<sup>45</sup> On appeal, the Federal Court of Appeal found that the strong nexus test was too demanding, and substituted a requirement that the common-law series be a “motivating factor” for the related transaction.<sup>46</sup> Finally, the Supreme Court agreed with the Federal Court of Appeal that a strong nexus was not required for a related transaction to be deemed to form part of the series.<sup>47</sup> The Supreme Court went on to say, however, that a “mere possibility” was insufficient.<sup>48</sup> As a result of *Copthorne*, then, we know that the required degree of connection for a transaction to be “because of” or “in relation to” a common-law series falls somewhere to the south of a strong nexus and somewhere to the north of a mere possibility. The meaning of “a mere possibility” is addressed below.

### **“Motivating Factor”**

The Federal Court of Appeal in *Copthorne* held that while a strong nexus was not required for a transaction to be in contemplation of a series, the series must be a “motivating factor” for the transaction.<sup>49</sup> The Federal Court of Appeal held that “if a series is a motivating factor with respect to the completion of a subsequent transaction, the transaction can be said to have been completed ‘in contemplation of the series.’”<sup>50</sup> While the Supreme Court agreed with the Federal Court of Appeal that the strong nexus test was inappropriate, it did not endorse or comment on the “motivating factor” analysis, thus leaving some uncertainty as to the current legal status of that test.

### **“More Than a Mere Possibility”**

While the Supreme Court in *Copthorne* rejected the strong nexus test and did not comment on the motivating factor test adopted by the lower courts, the court confirmed that a mere possibility that a transaction will occur is insufficient to establish a series under the “because of” or “in relation to” requirement for contemplation.<sup>51</sup> Thus, it seems clear that if a party can successfully convince a court that subsequent transactions or events did not amount to anything more than a mere possibility,

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44 *Copthorne Holdings Ltd. v. The Queen*, 2007 TCC 481, at paragraph 39.

45 *Ibid.*, at paragraph 40.

46 *Copthorne Holding Ltd. v. Canada*, 2009 FCA 163, at paragraphs 45-46.

47 *Copthorne*, *supra* note 5, at paragraph 47.

48 *Ibid.*

49 *Copthorne*, *supra* note 46, at paragraph 46.

50 *Ibid.*

51 *Copthorne*, *supra* note 5, at paragraph 47.

then that party can avoid having those transactions characterized as part of a series. The Supreme Court went on to find that on the facts of *Copthorne*, the connection between the series and the related transaction exceeded the requisite mere possibility threshold, and thus the court concluded that the subsequent transactions formed part of the earlier series.<sup>52</sup>

Unfortunately, the Supreme Court in *Copthorne* did not provide explicit reasons as to why it considered the subsequent transactions and events to be more than a mere possibility on the facts. The court did, however, cite the earlier Tax Court decision in *MIL*, which had used the mere possibility threshold to determine that no series existed.<sup>53</sup> The taxpayer in *MIL*, a Cayman Islands corporation, held approximately 11.9 percent of the shares in a Canadian public company, Diamond Field Resources (“DFR”). In June 1995, *MIL* engaged in a share exchange transaction with Inco resulting in the reduction of its shareholding in DFR to just under 10 percent. In July 1995, *MIL* was continued into Luxembourg, becoming a resident of that country, in order to qualify for certain capital gains exemption benefits under article 13 of the Canada-Luxembourg tax treaty<sup>54</sup> when Inco subsequently (in 1996) purchased all of the remaining shares in DFR (including *MIL*’s stake). The Tax Court concluded that transactions carried out in 1995 did not form part of the same series as the 1996 sale for the purposes of GAAR because, at the time of the initial transactions, the ultimate sale of *MIL*’s shares to Inco was no more than a mere possibility.<sup>55</sup>

Comparison of the facts in *Copthorne* and the facts in *MIL* has proved to be an interesting point for commentators. Most commentary from the private bar has praised the result in *MIL* (finding no series) while being more critical of the result in *Copthorne* (finding a series). Carr and Milot compare the facts in *MIL* and *Copthorne* in their commentary on the Tax Court’s *Copthorne* decision.<sup>56</sup> They note that while there were some intervening events that changed the course of the transactions in *MIL*, the underlying motivation for the first series was clearly to set up better tax consequences for a subsequent transaction, even if the precise parameters of that subsequent transaction were unknown at the time of the series. In light of this fact, they question why the taxpayer in *Copthorne* should have been treated any differently from the one in *MIL*.<sup>57</sup> Similarly, Kandev et al. consider both *MIL* and *Copthorne* to be examples of cases where the taxpayer engaged in “good strategic planning.”<sup>58</sup> In an argument that we will develop in the next part of the article, one response to Carr

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52 Ibid., at paragraph 58.

53 Ibid., at paragraph 47.

54 The Convention Between the Government of Canada and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, signed at Luxembourg on January 17, 1989.

55 *MIL*, supra note 43, at paragraph 69.

56 Carr and Milot, supra note 27.

57 Ibid., at 260.

58 Kandev et al., supra note 10, at 325.

and Milot is that with the benefit of the decision of the Supreme Court in *Copthorne*, one might reasonably question whether the decision in *MIL* with respect to series ought to have been different in order to restore consistency of treatment of the taxpayer with *Copthorne*.

Indeed, despite the value provided by these comparisons of the decisions in *MIL* and *Copthorne*, the absence of detailed analysis by the Supreme Court on the facts in *Copthorne* means that there is still a gap in our understanding of what a merely possible transaction looks like relative to one that is sufficiently connected to form part of a series pursuant to subsection 248(10). While the guidance from the Supreme Court makes it clear that the facts in *Copthorne* were not merely a possibility, the court has not explained which aspects of the transactions made that the case. It is possible that *MIL* can be distinguished from *Copthorne* on the basis of the trial judge's finding that at the time of the common-law series of transactions, MIL was actively taking steps to prevent the occurrence of the subsequent transaction, making for a more compelling case that the subsequent transaction was no more than a mere possibility (if that).<sup>59</sup> That being said, MIL could surely have been expected to sell its shares in DFR one day, in the same way that it could be said that Copthorne could one day be expected to use the PUC it preserved by carrying out a horizontal amalgamation. Ultimately, it was virtually certain in both cases that the transactions planned for would eventually occur. Only the exact timing and circumstances of the transactions were unknown.

### *Intervening Events*

Taxpayers resisting a finding of series often argue that some of the events that occurred between the time of the earlier transactions and the subsequent ones were such that they interfered with the supposed series. Indeed, the taxpayer in *Copthorne* argued that changes to the FAPI rules motivated its subsequent transaction rather than the earlier series. While the Supreme Court in *Copthorne* accepted that intervening events are relevant to the determination of whether there was a subsection 248(10) series,<sup>60</sup> the court declined to accept the argument presented by the taxpayer that the introduction of the amendments to the FAPI rules qualified as an "intervening event" that should prevent subsection 248(10) from applying.<sup>61</sup> In the court's unanimous judgment, Rothstein J accepted the findings of the lower courts that the related transaction was exactly the type of transaction that was necessary to take advantage of the earlier series that had duplicated the PUC, and thus the intervening rule changes did not serve to break the series.<sup>62</sup>

Unfortunately, the Supreme Court in *Copthorne* did not provide any guidance on what should qualify as an "intervening event" for the purposes of preventing a series

59 *MIL*, supra note 43, at paragraphs 67-69.

60 *Copthorne*, supra note 5, at paragraph 47.

61 *Ibid.*, at paragraph 48.

62 *Ibid.*

from existing. While the court did not provide any examples, a reasonably reliable (and uncommon) one would appear to be the death of an individual, such as happened in *MIL* with the death of one of the principal executives of DFR. In that case, the death led the board of directors of the company to decide to seek a buyer. That decision, in turn, ultimately led to the sale of DFR to Inco. The trial judge seems to have been particularly influenced by this event in arriving at the conclusion that no series of transactions existed in the case. The question is: What is the legally significant difference between the events in *MIL* and the introduction of the amendments to the FAPI rules in *Copthorne*?

One possible standard to consider for intervening events comes from the field of tort law: the concept of *novus actus interveniens*. According to this test, “if the intervening act was broadly within the scope of the foreseeable risk” created by the defendant’s negligence, the intervening act will not excuse the defendant from liability.<sup>63</sup> Otherwise, it breaks the chain of causation between the plaintiff’s negligence and the damage suffered by the defendant. This is essentially a foreseeability test. Applying this test to the series concept would mean asking whether the intervening event was foreseeable at the time of the earlier transaction or series. If the event was foreseeable, it would not be sufficient to break the series. If the event was unforeseeable, it would break the series. This would explain why the death of one of the principal executives of DFR in *MIL* (which was clearly *in its timing* not reasonably foreseeable) qualified as an intervening event. It might not, however, explain the holding in *Copthorne*, since the introduction of the amendments to the FAPI rules was arguably also not reasonably foreseeable (though perhaps somewhat less so). Despite the possible lack of reasonable foreseeability, the Supreme Court refused to accept that the intervening event was sufficient to break the series in *Copthorne*.

### ***Length of Time Between the Series and the Related Transactions***

The Supreme Court in *Copthorne* made it clear that the length of time between the common-law series and the related transactions or events may be one relevant factor in determining whether those transactions or events can form part of the series under subsection 248(10). In the court’s judgment, Rothstein J stated that “the length of time between the series and the related transaction may be a relevant consideration in some cases.”<sup>64</sup>

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63 Philip H. Osborne, *The Law of Torts*, 4th ed. (Toronto: Irwin Law, 2011), at 102.

64 *Copthorne*, supra note 5, at paragraph 47. See also the Federal Court of Appeal decision in *Copthorne*, supra note 46, at paragraph 51: “While approximately eighteen months elapsed between the 1993 Share Sale and the 1995 Redemption, the record indicates that the redemption was contemplated shortly after the introduction of the Proposed FAPI Amendments, indicating a time frame of something just over a year between the first event and the commencement of planning for the second event. While I do not wish to suggest that any particular length of time between a series and a transaction will be determinative of whether there is a sufficient

The courts have previously expressed a variety of views on what might count as a sufficient length of time to prevent a series from existing. In *Les Placements E. & R. Simard Inc. v. The Queen*, for example, Tardif J wrote that a 12-month interval constituted a “long period of time” for the purpose of determining whether a series existed.<sup>65</sup> Similarly, in *Industries SLM Inc. v. MNR*, Archambault J suggested that intervals of 9 months and 33 months were relatively long for a common-law series.<sup>66</sup> Finally, in *Copthorne* itself, Ryer J of the Federal Court of Appeal appeared to be of the view that while 18 months might be sufficient to prevent subsection 248(10) from applying, one year was relatively short.<sup>67</sup>

The Supreme Court did not provide any details in *Copthorne* as to what amount of time (if any) it considered sufficient to avoid the existence of a series. This is perhaps unsurprising, since further elaboration on this point would arguably have provided taxpayers with a road map for avoiding the application of provisions such as GAAR. Nevertheless, the court’s conclusion that the 1993 share sale and the 1995 redemption formed a subsection 248(10) series of transactions suggests that the justices did not believe that 12 to 18 months between transactions was a sufficiently long period in the *Copthorne* context to break the series.

### ***Timing and Retrospection***

Two particular timing issues are raised by subsection 248(10). The first question is whether the words “in contemplation of” may be applied both prospectively and retrospectively, or only prospectively. In other words, is it possible for subsection 248(10) to link a related transaction carried out after a series to that series on the basis that the taxpayer was contemplating the series at the time of the subsequent transaction? The second question is whether subsection 248(10) can link a transaction to a series carried out in contemplation of a related transaction (as opposed to just a related transaction carried out in contemplation of a series). In *Copthorne*, the Supreme Court was asked to comment on the first of these questions. The Crown argued that the 1995 redemption had been carried out in contemplation of the 1993 share sale. The taxpayer argued that this was irrelevant, since the real question was whether the 1993 share sale had been carried out in contemplation of the 1995 redemption. The taxpayer argued that the “in contemplation of” test could not be applied from the perspective of the subsequent transaction (or transactions).

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connection between them so as to result in the application of subsection 248(10), in the present circumstances, it is my view that an approximately one year gap between the 1993 Share Sale and the contemplation of the 1995 Redemption militates against accepting an assertion that there was an ‘extreme degree of remoteness’ that the 1995 Redemption would be undertaken, as was urged upon the Court.”

65 97 DTC 1328, at 1337 (TCC).

66 [1996] 2 CTC 2572, at 2589 (TCC).

67 *Copthorne*, supra note 46, at paragraph 51.

In the Supreme Court's decision, Rothstein J began by observing that the "common use" of "in contemplation of" was prospective.<sup>68</sup> That being said, the definitions of "contemplation" set out in the *Oxford English Dictionary* ("[t]he action of contemplating or mentally viewing; the action of thinking about a thing continuously; attentive consideration, study") and *Webster's Third New International Dictionary* ("an act of the mind in considering with attention: continued attention to a particular subject . . . : something for which such consideration is asked . . . : the act of viewing steadfastly and attentively: the viewing of something . . . for its own sake") were not exclusively confined to forward-looking interpretations.<sup>69</sup> While Rothstein J acknowledged that one of the definitions in *Webster's Third New International Dictionary* referred to "the act of looking forward to an event: the act of intending or considering a future event," he was of the view that the more general definitions reproduced above were to be preferred.<sup>70</sup> He also indicated that an interpretation of "contemplation" as both retrospective and prospective was more consistent with the intention of Parliament in enacting subsection 248(10), which in his view was clearly to broaden the notion of a series (as discussed above in the context of Rothstein JA's judgment in *OSFC*).<sup>71</sup> Finally, citing the following passage from *Canada Trustco*, he concluded that the court had already decided the issue:

The phrase ["in contemplation of"] can be applied to events either before or after the basic avoidance transaction found under s. 245(3). As has been noted:

It is highly unlikely that Parliament could have intended to include in the statutory definition of "series of transactions" related transactions completed in contemplation of a subsequent series of transactions, but not related transactions in the contemplation of which taxpayers completed a prior series of transactions. (D. G. Duff, "Judicial Application of the General Anti-Avoidance Rule in Canada: *OSFC Holdings Ltd. v. The Queen*" (2003), 57 I.B.F.D. Bulletin 278, at p. 287)<sup>72</sup>

Interestingly, it is not clear whether the above passage from *Canada Trustco* addressed the issue before the court in *Copthorne*. While the statement that the test may be applied to "events either before or after the basic avoidance transaction" might be interpreted as an endorsement of both prospective and retrospective applications of subsection 248(10), the quotation reproduced from Duff's article (and particularly the reference to "related transactions *in the contemplation of which* taxpayers

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68 *Copthorne*, supra note 5, at paragraph 50.

69 *Ibid.*, at paragraph 53.

70 *Ibid.*

71 *Ibid.*, at paragraph 54.

72 *Canada Trustco*, supra note 6, at paragraph 26 (quoted in *Copthorne*, supra note 5, at paragraph 55).

completed a *prior series* of transactions [emphasis added]”) suggests that the court in *Canada Trustco* was really dealing with the second question set out at the beginning of this section, namely, whether subsection 248(10) could be applied to a series carried out in contemplation of a related transaction. While the language of the provision suggests that this is not possible, the court appears to have been of a different view.<sup>73</sup>

Accepting a retrospective “in contemplation of” test also raises a number of issues in terms of its application. Retrospective application of the contemplation test is problematic since past transactions will nearly always be within the knowledge of the taxpayer and will assuredly be more than mere possibilities (and thus be within the taxpayer’s “contemplation”). As Kandeve et al. point out, “the law presumes that persons intend the reasonable and probable consequences of their actions, and . . . prudent taxpayers would be expected to be cognizant of their past transactions when engaging in current ones.”<sup>74</sup> It is hard to imagine a taxpayer not taking into account all of its prior transactions when engaging in tax planning, at least in the form of a comprehensive appreciation of the current state of the taxpayer’s affairs, which would, of course, be a result of all of those prior transactions.

There is also a certain tension between the Supreme Court’s finding that the words “in contemplation of” can apply retrospectively and its statements concerning the “more than a mere possibility” test. Bell J in *MIL* originally conceived of the test as one surrounding the interpretation of the words “in contemplation of” in subsection 248(10). The Supreme Court in *Copthorne* also appeared to consider the two to be linked, since it referred to that test in the course of its explanation of the “because of” or “in relation to” standard. Assuming that this is the correct approach, it may be that the “more than a mere possibility” test will be of assistance to taxpayers in future cases only where a related transaction precedes a series. Where the transaction occurs subsequently (as was the case in *Copthorne* and *MIL*), the series will necessarily be more than a mere possibility—it will have already occurred with certainty. This seems to us to be an unintended result of the decision, and is not consistent with the way the test was applied at the Tax Court and Federal Court of Appeal. Despite this, the only alternative appears to be for subsequent jurisprudence to delink the test from the “in contemplation of” language (though it is not clear what the textual basis for the test would be if this were done).

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73 This is the interpretation given to the passage from *Canada Trustco* by Brender, *supra* note 35, at 233, and Bell J, in *MIL*, *supra* note 43, at paragraphs 58–69, which concerned an attempt by the Crown to argue that a series had been carried out in contemplation of a subsequent related transaction. Bell J appeared to agree that this was possible in theory, but on the facts of the case, he concluded that the “in contemplation of” test was not satisfied (because the related transaction was a “mere possibility” at the time the series was carried out).

74 Kandeve et al., *supra* note 10, at 314.

## CONCEPTUALIZING SERIES: CONTEXT AND PURPOSE THROUGH FAMILY RESEMBLANCE

Legal reasoning requires us to characterize events as having certain legal attributes. In first-year contract-law classes, students and professors at law schools across North America discuss the circumstances in which interactions between negotiators will be characterized as legal “offers” that are capable of being legally “accepted” by another party, and what kinds of interactions will merely be “invitations” to make an offer. Courts have decided that placing goods on a shelf with a price tag attached does not amount to a legal “offer” to sell that item at that price, and are merely invitations to make an offer. It is the customer who makes an offer to buy the item at the indicated price when he or she presents the tagged item at the checkout. At common law, the cashier then has the option of either accepting or not accepting the customer’s offer. There are numerous similar examples throughout the law, of situations in which factual clarity does not lead to obvious legal characterization. Tax law is, of course, no different.

Tax law frequently requires taxpayers to legally characterize certain facts in particular ways. A taxpayer in a business setting who buys an asset for  $\$n$  and sells it a short time later for  $n + 1$  must determine how to characterize the gain (1) on the sale. More specifically, in Canadian income-tax law, the gain must generally be characterized as either a capital gain or income from a business (for example, profit realized from “an adventure or concern in the nature of trade” under the extended meaning of “business” in subsection 248(1)).<sup>75</sup> While the “capital” versus “income” characterization exercise is fundamental to the proper operation of the Act, its deployment is not always straightforward. The general trappings of transactions that give rise to capital gains, on the one hand, and the trappings of transactions that give rise to income from a business, on the other, are reasonably clear. It is inevitable, however, that there will be many borderline cases that will be difficult to resolve with any satisfaction. Indeed, in fact situations that are closely balanced in terms of the attributes that tend to point in the direction of capital gain and the attributes that tend to point in the direction of income from a business, as the Master of the Rolls, Sir Wilfred Greene, pointed out in 1937, “it is almost true to say that the spin of a coin would decide the matter almost as satisfactorily as an attempt to find reasons.”<sup>76</sup> Of course, despite the difficulty of making calls in borderline cases between capital and income, taxpayers, tax administrators, and the courts routinely make these calls through a process of reasoning by analogy to similar situations where the characterization has been decided in prior case law.

The same type of reasoning that allows, and indeed requires, lawyers and courts to decide whether an item with a price tag attached in a store is a legal offer (in

75 See, for example, *MNR v. Taylor*, 56 DTC 1125 (Ex. Ct.).

76 *British Salomon Aero Engines, Ltd. v. Commissioners of Inland Revenue* (1937), 22 TC 29, at 43 (CA); quoted by the Supreme Court of Canada in *Jobns-Manville Canada v. The Queen*, [1985] 2 SCR 46, at paragraph 13.

contract law) and whether a gain on the sale of an asset of a business is a capital gain (in tax law) applies in determining whether a particular set of events or transactions amounts to a “series of transactions” in a particular statutory setting.

### **Characterization: The Family Resemblance Concept**

Deciding whether a set of events or transactions can be construed as constituting (or not constituting) a “series of transactions” for the purposes of a particular provision (or provisions) of the Act is an issue of legal characterization. It comes down to a yes or no determination, even though multiple criteria are often in play in making the characterization. The difficulty presented by the series concept is evident from the numerous tests (discussed earlier) that the courts have introduced, developed, and rejected over time. The purpose of this part of the article is to demonstrate some of the gaps in and problems with the current approach and to suggest an improvement in the framing of the legal issue in order to assist with its consistent treatment by the courts. More specifically, we will explain why the current approach taken to the characterization issue with respect to the definition of “series of transactions” in subsection 248(10) is too narrow, with the courts expending too much effort in analyzing the relationship between various steps of an alleged series of transactions, as opposed to examining the link between the elements of a purported series and the types of transactions that Parliament can reasonably be understood to have had in mind in invoking the series concept in the relevant statutory context. An approach based on the concept of “family resemblance” complements the series analysis adopted by the courts to date and ensures that that analysis will not yield inappropriate results. This approach accepts and essentially builds on Brender’s comment that the series concept “must be interpreted contextually and in light of the purpose underlying the particular provision in which it is invoked.”<sup>77</sup>

To begin, what do we mean when we refer to family resemblance? Wittgenstein wrote about “family resemblance” in his work regarding the problem of categorizing and describing things using language. In *Philosophical Investigations*,<sup>78</sup> he explained the family resemblance concept using the example of the category of “games.” He noted that there is no single element that is common to all things referred to as “games” (just as we would argue that there is no single element that all capital gains transactions or all trading transactions have in common):

Look for example at board-games, with their multifarious relationships. Now pass to card-games; here you find many correspondences with the first group, but many common features drop out, and others appear. When we pass next to ball-games, much that is common is retained, but much is lost.—Are they all “amusing”? Compare chess with noughts and crosses [tic-tac-toe]. Or is there always winning and losing, or competition

77 Brender, *supra* note 35, at 210.

78 Ludwig Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe, 3d ed. (Oxford: Basil Blackwell, 1967).

between players? Think of patience [solitaire]. In ball games there is winning and losing; but when a child throws his ball at the wall and catches it again, this feature has disappeared. Look at the parts played by skill and luck; and at the difference between skill in chess and skill in tennis. Think now of games like ring-a-ring-a-roses; here is the element of amusement, but how many other characteristic features have disappeared! And we can go through the many, many other groups of games in the same way; [we] can see how similarities crop up and disappear.<sup>79</sup>

According to Wittgenstein, all that games fundamentally share is a certain “family resemblance.” This concept may be of assistance in the context of provisions dealing with series. When Parliament uses the phrase “series of transactions” in the Act, it can reasonably be regarded as intending to apply the relevant provision to transactions that are of a certain type or family. The series concept is used as a means whereby Parliament can cast its anti-avoidance net wider in order to catch transactions that are similar in effect to the ones that are specifically thought of as being objectionable. Another way of thinking about this is that the series concept is often invoked as a pre-emptive strike against tax-avoidance strategies that build some extra steps into a prohibited transaction or set of transactions in order to avoid the application of the anti-avoidance provision. Sometimes Parliament will have a specific avoidance technique in mind; in other cases, the purpose is to catch an indeterminate variety of perhaps not clearly anticipated transactions. It is clear, however, that in drafting a particular provision, Parliament will never (or almost never) have had in mind the exact sequence of transactions entered into by the taxpayer. Thus, it will almost always be necessary to carry out some kind of comparison exercise in determining whether a particular anti-avoidance provision should apply to the taxpayer in a particular case. This is where the family resemblance concept comes into play in determining whether or not a series exists.

We are not the first to advocate for the use of a family resemblance test in tax law. In the context of characterizing hybrid foreign entities for Canadian income tax purposes, Milet has explained the idea of family resemblance as follows:

There is among legal experts a deeply ingrained tendency to assume that if in common legal usage different things are capable of being referred to by the same term, this must be because of some “essential” or “fundamental” characteristic that they all have in common. There is an alternative view, however, which is that if A, B, and C are all referred to by the same term, it is not necessarily because of a shared essence but may instead be because A and B have features in common, B and C have some but not all the same shared features, and A and C share a still different set of features in common. The various instances are linked together by overlapping and criss-crossing commonalities of characteristics, and it may be that there is no irreducible set of core characteristics that they all share. In this alternative view, the various instances of a general term’s application would be linked by, as Wittgenstein called them, “family resemblances”—the reference here being to the way that traits are shared by and dispersed among

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79 Ibid., at paragraph 66.

members of a family: for instance, a girl has red hair and is short like her father and grandmother, while her brother, who is also red-haired, is tall like his blond mother. Despite having no single set of features in common, the various members viewed as a group may quite visibly belong to the same family. It can be helpful to think of various instances of a general term as being linked together by precisely such a network of criss-crossing similarities and differences.<sup>80</sup>

In our view, just as the family resemblance test is appropriate for the characterization of hybrid foreign entities for Canadian tax purposes, it will frequently make sense to apply a family resemblance approach to the use of the series concept in Canadian income tax law, for several reasons. First, its use is supported by the textual, contextual, and purposive approach to statutory interpretation repeatedly endorsed by the Supreme Court of Canada in recent years. That is, because the ordinary purpose of the invocation of the series concept in the Act is to counter variations of particular avoidance transactions, it makes sense—insofar as it is possible—to attend to the nature of the particular kind of avoidance transaction contemplated by Parliament in the provision that invokes the series concept. Second, there is a sense in which the family resemblance concept is consistent with the idea that, at bottom, the notion of a series requires that there be a certain relationship or connection between transactions. To be a series pursuant to the definition in subsection 248(10) for the purposes of a particular anti-avoidance rule, what the transactions must have in common (or, at least, one thing that they must have in common) is that they, considered collectively, amount to being of the type or from the family that Parliament can reasonably be considered to have had in mind in invoking the series concept in the particular statutory context at issue. Finally, and perhaps most importantly, we believe that a family resemblance approach prevents some of the potentially absurd results that could result from focusing only on the various interrelationships discussed in the case law to date among the various transactions in a sequence of events. That is, by attending to the nature of the family (or families) of transactions that the anti-avoidance provision is aimed at countering, one can avoid counterintuitive and surprising applications of anti-avoidance rules. Using a family resemblance test can promote certainty, predictability, and fairness in the use of the series concept.

### **The Family Resemblance Approach to “Series” in a Non-GAAR Context**

Every series problem can essentially be reduced to a question about whether any subset of a given sequence of events constitutes a series of transactions for the purpose of applying a particular rule in the Act. Consider a generic set of facts in the form of a sequence of events:  $E_1, E_2, E_3, \dots, E_n, E_{n+1}, E_{n+2}$ . The question that the series test fundamentally poses is whether any subset of those events should be characterized as forming a series for the purposes of a particular provision of the Act

80 Matias Milet, “Hybrid Foreign Entities, Uncertain Domestic Categories: Treaty Interpretation Beyond Familiar Boundaries” (2011) 59:1 *Canadian Tax Journal* 25-57, at 34 (notes omitted).

that invokes the concept. The traditional approach to resolving that problem and characterizing a series is to analyze the individual linkages between each of the events pursuant to the “related transactions or events” and “in contemplation of” aspects of the expanded statutory definition of series in subsection 248(10), discussed above.

The courts have typically asked whether  $E_n$  was done in contemplation of the subset  $E_1$ ,  $E_2$ , and  $E_3$  or whether  $E_1$  was done in contemplation of  $E_n$ ,  $E_{n+1}$ , and  $E_{n+2}$ . This analysis gives rise to the problems that have consumed the attention of the courts, as described above. What does “contemplation” mean? When can contemplation be retrospective? What length of time between events can break a series? This approach expends too much effort in analyzing the connections between events (or an overly narrow set of connections between events) and not enough in analyzing the connections between and among the set of events as against the object, spirit, and purpose of the rule that invoked the series concept under consideration. If, at the outset in the interpretive process, more effort is spent on determining the object, spirit, and purpose with which the series concept is invoked in a particular provision (or provisions), the work of applying the concept in a particular factual circumstance will become easier (though not necessarily easy).

This leads us naturally to two questions:

- First, what precisely would be involved in the exercise of determining the purpose (or purposes) for which the series concept is invoked by a particular provision?
- Second, once the purpose (or purposes) is (are) identified, how, precisely, is the court to use such purpose(s) in the characterization exercise, drawing upon the idea of family resemblance?

With respect to the first question, a court should engage in a textual, contextual, and purposive exercise of interpretation, as endorsed by the Supreme Court of Canada.<sup>81</sup> The text, context, and purpose are, of course, all relevant to the exercise of interpreting the purpose behind the invocation of the series concept in a particular provision. Where the text of a provision is not “precise and unequivocal,” the context and purpose have to bear additional weight. The term “series of transactions” does not admit of a precise and unequivocal interpretation, even with the benefit of the expanded statutory meaning offered in subsection 248(10). The challenge

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81 The Supreme Court explained in *Canada Trustco*, supra note 6, at paragraph 10, that “[t]he 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 [sic] 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.”

that the series concept has posed for the courts and commentators is clear evidence of this lack of precision. Thus, a court must look to the conventional sources in a contextually sensitive way in order to develop an understanding of the purpose or purposes behind the invocation of the series concept in a particular provision. This is, in many ways, akin to focusing on the “object, spirit and purpose” of the relevant provision in a manner consistent with Rothstein J’s explanation of how to go about finding the purpose of one or more provisions of the Act in the GAAR context.<sup>82</sup> In general, there are two ways by which courts may approach the identification of the purpose of a provision.<sup>83</sup> The first and preferred approach is to rely on explanations in the statute itself. Unfortunately, the Act does not often provide explanations for its provisions directly. The second approach is to draw on “extra-statutory materials like commission reports, ministerial statements, government publications, or academic texts.”<sup>84</sup> Among these, some sources must be treated with caution (parliamentary debates and budget statements, because of their partisan nature), while others are more generally intended to be impartial (Department of Finance explanatory information and academic commentary).<sup>85</sup>

In many statutory contexts, the appropriate ambit of the series concept will be dependent on the particular reasons motivating the legislative reliance on the invocation of the concept, which will best be derived from reference to extrinsic materials. This will be even more the case with the statutory amendments associated with the 2012 federal budget, which introduced several new references to “series of transactions” in the Act.<sup>86</sup> And although the exercise of determining the purpose of the invocation of the series concept in an anti-avoidance provision will not be free of ambiguity and uncertainty, it will often be the correct inquiry for a court to be undertaking in determining whether a particular subset of transactions ought to be considered a series, given the context and the apparent animating purpose or purposes of a particular provision.

With respect to the second question—namely, having determined the purpose of the provision, how should a court use that purpose to determine whether or not a series exists? The answer in many statutory contexts is that the set of transactions must bear a family resemblance to those that Parliament could reasonably be considered to have had in mind in invoking the series concept as a means of anti-avoidance. Under a family resemblance approach to series of transactions, a court would begin by identifying a stylized set of transactions or events (generally an avoidance arrangement of some kind) that Parliament could reasonably be considered to have

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82 See *Copthorne*, supra note 5, at paragraph 70.

83 See David G. Duff, Benjamin Alarie, Kim Brooks, Geoffrey Loomer, and Lisa Philipps, *Canadian Income Tax Law*, 4th ed. (Markham, ON: LexisNexis Canada, 2012), at 94.

84 *Ibid.*

85 *Ibid.*, at 95.

86 Canada, Department of Finance, 2012 Budget, March 29, 2012. See supra note 4 for a list of some of the amendments included in the subsequent legislation.

had in mind in drafting the provision (or provisions) in which the series concept appears. The court would then attempt to ascertain whether the transactions carried out by the taxpayer bore a sufficient family resemblance to that stylized set of transactions or events to be considered a series for the purposes of that particular statutory invocation of the term.

The utility of the family resemblance approach to identifying whether a series of transactions exists in the context of a particular provision might be better appreciated by considering some examples. Consider the following example from the article by Brender cited earlier:

Bidco is a wholly owned subsidiary of a public corporation, Pubco. Bidco intends to acquire all of the shares of Target, also a public corporation, in an all-cash deal. Certain management employees of Target are specified shareholders for purposes of the bump denial rules in paragraph 88(1)(c). As part of a pre-sale reorganization, at the request of Bidco, Target carries out a “packaging” transaction pursuant to which certain assets are transferred on a tax-deferred basis to a newly formed subsidiary corporation of Target. Following the takeover, Bidco plans to wind up Target and bump the ACB [adjusted cost base] of the subsidiary to fair market value under paragraph 88(1)(c), and then sell the subsidiary to an arm’s-length third party. In connection with the takeover, Bidco will enter into employment agreements with the management employees of Target providing that those employees will receive, in accordance with Pubco’s regular compensation policy, options to acquire shares of Pubco. The purpose of the stock option grant is to retain Target’s management employees and foster their loyalty to Pubco following the takeover. Target’s management has no involvement in Bidco’s tax planning and is unaware that Bidco is contemplating a bump reorganization.<sup>87</sup>

The question in Brender’s example is whether the acquisition by the management employees of options or shares of Bidco forms part of the same series of transactions as the windup of Target, causing the bump denial rule in subparagraph 88(1)(c)(vi) to apply. Focusing only on the length of time between the transactions, or on whether the option grant would have occurred in the absence of the series that includes the sale and subsequent windup of Target (such that it could be said that the grant occurred “because of” the series), might lead one to conclude that the transactions would be characterized as forming a series; and yet, to many (including us), this would seem intuitively to be an inappropriate result. Brender argues that the transactions do not form a series because they do not share a common purpose, a point with which we agree. That being said, in our view, the option grant should not form part of the series for a more fundamental reason—namely, that the option grant does not bear any family resemblance to the types of transactions that Parliament can reasonably be considered to have had in mind when it enacted subparagraph 88(1)(c)(vi).

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87 Brender, *supra* note 35, at 223.

Begin with the first part of the family resemblance test. What is the purpose of the provision that invokes the series of transactions concept—in this case, subparagraph 88(1)(c)(vi)? Because the Act is silent on the purpose, recourse must be had to commentary from the Department of Finance and various tax publications. Without going into exhaustive detail here, it appears to us from the literature that the widely accepted purpose of subparagraph 88(1)(c)(vi) is to prevent “back-door purchase butterflies.”<sup>88</sup> In a typical back-door purchase butterfly, a taxpayer owns shares of a corporation (“Opco”) and wants to sell one of its properties (“asset A”) to a third-party purchaser and to keep the remainder of its assets. In order to avoid the corporate-level tax that would be payable if the taxpayer were to cause Opco to sell the property directly to the third party, Opco transfers all of its property other than asset A to a newly created subsidiary (“Subco”) on a tax-deferred basis as part of a packaging transaction not unlike the one described in Brender’s example. The taxpayer sells the shares of Opco to the third-party purchaser, and the purchaser winds up Opco, bumping up the cost of its shares in Subco in the process. The purchaser then sells the Subco shares to the taxpayer, who is left in the same position that he would have been in if he had caused Opco to sell asset A directly to the purchaser.<sup>89</sup>

The second part of the family resemblance test asks whether what occurred in Brender’s example bears any family resemblance to the sort of back-door purchase butterflies that the invocation of the series concept in subparagraph 88(1)(c)(vi) was aimed at. Simply put, in our view there is no subset of the sequence of events described in Brender’s example that bears a family resemblance to the avoidance arrangement that Parliament sought to address through the enactment of subparagraph 88(1)(c)(vi). It would therefore be inappropriate to describe any such subset of the transactions outlined as part of a series for the purposes of that provision.

The analytical importance of the family resemblance concept is even more apparent in cases where there is a common purpose underlying a sequence of transactions (such that one cannot avoid an inappropriate result simply by applying Brender’s purposive approach), but that shared purpose bears little or no relationship to the anti-avoidance purpose of the provision whose application is being considered.

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88 Brender, *ibid.*, at note 48, cites the following materials as substantiating the purpose of subparagraph 88(1)(c)(vi): technical notes relating to clause 88(1)(c)(vi)(B) in David M. Sherman, ed., *Income Tax Act: Technical Notes*, 13th ed. (Toronto: Carswell, 2001); Judith Woods and Jerald Wortsman, “The Bump Denial Rule in Subparagraph 88(1)(c)(vi),” in *Report of Proceedings of the Fiftieth Tax Conference*, 1998 Conference Report (Toronto: Canadian Tax Foundation, 1999), 14:1-40; Manjit Singh, “An Introduction to the ‘Bump’ Rules,” in *Report of Proceedings of the Fifty-Fifth Tax Conference*, 2003 Conference Report (Toronto: Canadian Tax Foundation, 2004), 51:1-31; and Geoffrey S. Turner, “Bumps on the Road to the Bump: Deficiencies in the Specified Property Exception” (2005) 9:4 *Corporate Structures and Groups* 511-21.

89 This example is taken directly from the technical notes to subparagraph 88(1)(c)(vi) issued at the time the provision was introduced: Canada, Department of Finance, *Explanatory Notes Relating to Income Tax* (Ottawa: Department of Finance, December 1997), at subclauses 118(3) and (4).

Consider the example of a corporation (“Xco”) that operates a division of its business (“division A”) through a wholly owned subsidiary (“Aco”). Xco would like to sell Aco in the medium term but believes that, in order to achieve an optimum selling price, it must further develop the business carried on by division A; however, it requires additional capital to do so. To that end, Xco attracts an arm’s-length investor (“Investco”). Investco subscribes for a minority stake in Aco in exchange for subscription proceeds that Aco uses to carry on the development work needed to put it on the market. Six months later, when the work has been completed, and in anticipation of the sale of Aco, Xco rolls its shares of Aco to a sister corporation with capital losses (“Lossco”) in exchange for preferred shares of Lossco. These preferred shares are then subsequently redeemed in exchange for a promissory note. As soon as a buyer is found, Lossco will sell the Aco shares and use its losses to offset the gain realized.

In this type of situation, the redemption of the preferred shares issued to Xco by Lossco will generally be regarded as leading to a deemed capital gain under subsection 55(2) unless one of the exemptions set out in paragraph 55(3)(a) or (b) applies. Xco will ideally be able to rely on paragraph 55(3)(a), on the basis that none of the triggering events described in that provision has occurred. Subparagraph 55(3)(a)(ii), however, provides that paragraph 55(3)(a) does not apply to a dividend if, as part of the same series of transactions as the dividend, there is a significant increase in the total direct interest of any unrelated person in any corporation. Thus, the question will be whether the subscription by Investco for shares of Aco six months prior to the redemption of the preferred shares issued by Lossco forms part of the same series as that redemption. If so, paragraph 55(3)(a) will not apply, and subsection 55(2) will deem a capital gain to be realized. The transactions will be relatively closely related in time. Moreover, depending on the circumstances, the redemption could be considered to be causally linked to the share subscription by Investco, and to have been more than a mere possibility at the time of that subscription. Finally, the transactions arguably share a common purpose, namely, facilitating the sale of Aco by Xco and its corporate group. It is difficult, however, to see how the application of subparagraph 55(3)(a)(ii) can be justified. How would the family resemblance test address this example?

Begin again with the first step of the test. What is the purpose of subsections 55(2) and (3)? These subsections are regarded in the tax community as being intended to counteract capital gains strips.<sup>90</sup> Subparagraph 55(3)(a)(ii), in particular, seems to have been enacted for the purposes of avoiding a relatively straightforward avoidance technique: rolling an asset that the taxpayer intends to sell to a third party into a newly created subsidiary, having the third party subscribe for shares of the

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90 See, for example, Brian Robson, “Capital Gains Strips: A Tale of Small Details,” *CGA Magazine*, November 12, 2011 (<http://cgamagazine.ca/capital-gains-strips/>): “On the sale of a business, advisors routinely look to shield tax through capital gains strips and/or using capital gains exemptions. The relevant rules are set out in Section 55 of the *Income Tax Act*.”

subsidiary, and then having the subsidiary use the subscription proceeds to redeem the shares held by the taxpayer.<sup>91</sup>

With respect to the second part of the family resemblance test for series of transactions, it is safe to say that no subset of the transactions undertaken by Xco, Investco, and Lossco in the above example involves capital gains strips or bears any family resemblance to the type of planning that Parliament can reasonably be regarded as having had in mind when it enacted subparagraph 55(3)(a)(ii). This should be the most important factor in determining whether a series exists. Focusing on narrow questions of relatedness, such as the number of days elapsed between the transactions undertaken, is an inadequate alternative to the family resemblance test that we endorse. Obviously, looking at the time elapsed between transactions is apt to be both overinclusive and underinclusive. It would be overinclusive in that it would then apply to situations such as the example given above involving Investco. It would be underinclusive in that it would not apply to situations in which taxpayers have decided that “waiting it out,” while inconvenient, is worthwhile in order to secure a relevant tax benefit that would otherwise (rightly, in light of Parliament’s purpose) be denied to them.

We are aware that it might be objected that the family resemblance test that we propose does not attend sufficiently to the fact that subsection 248(10) defines “series of transactions” for the purposes of the entire Act. Indeed, Carr and Milot cite case law that explains that it is not appropriate to give the same term different meanings in different sections of the Act.<sup>92</sup> We agree with the motivation underlying this principle in the case law, and recognize and acknowledge that it is a general presumption of statutory interpretation. We also bear in mind that it is merely one of many presumptions that courts use in the interpretive process, and that a large number of such presumptions are always simultaneously in play. Having recognized and acknowledged this, it would be a mistake to conclude that a family resemblance approach to the series concept offends the principle of consistency. Indeed, the term “series” would be given the same interpretation in each provision in which it is found for the simple reason that it would involve the same textual, contextual, and purposive interpretive exercise each time that it appears. More specifically, with respect to purpose, the question would be whether the transactions entered into bear a family resemblance to those that Parliament can reasonably be considered to have had in mind in referencing the concept in enacting the provision in issue. Put another way, the words “as part of a series of transactions” would be interpreted through the contextual and purposive lens in each case as though they read “as part of a sequence of transactions that bears a family resemblance to the ones Parliament intended” in the relevant rule. The inappropriate (and in some cases absurd) results that follow from demanding a perfectly consistent meaning of series of transactions

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91 See generally David Tetreault, “Reorganizations of Private Corporations,” in *1991 Ontario Tax Conference* (Toronto: Canadian Tax Foundation, 1991), 14:1-166.

92 Carr and Milot, *supra* note 27, at 263.

throughout the Act suggests that a textual insistence on this presumption is inappropriate with respect to the series concept.

Another objection might reasonably be raised regarding series in the context of anti-avoidance standards (rather than rules).<sup>93</sup> As we explain in the next section of the article, precisely the same family resemblance approach can be used in the GAAR context—though, as we will explain, the way that series is invoked in GAAR suggests a somewhat different contextual and purposive use of the family resemblance concept. In fact, in the GAAR context, the series concept is invoked in two different subsections, thereby necessitating a more considered treatment of what Parliament can be construed as having intended series to mean in its enactment of GAAR.

### **The Family Resemblance Approach to “Series” in a GAAR Context**

In the case of GAAR, it is not possible to pinpoint *ex ante* a particular family of transactions that Parliament sought to address with the provision’s enactment. Thus, an important question that arises under the family resemblance approach is how it should be applied in the context of GAAR. Naturally, and as is well known, in the wake of the Supreme Court of Canada’s judgment in *Stuart Investments*,<sup>94</sup> which rejected a judicial business purpose test, Parliament’s motivation in enacting GAAR was to combat tax avoidance in a general way, by avoiding having to clearly articulate with specificity in advance the particular types of transactions that would be denied a tax benefit that would otherwise be realized by the taxpayer, insofar as that tax benefit would be gained inappropriately through reliance on a distorted interpretation of one or more statutory provisions. Stepping in to perform this role in GAAR is the idea of the object, spirit, or purpose underlying one or more relevant legislative provisions under the misuse or abuse test in subsection 245(4). If there is no misuse or abuse under subsection 245(4), then the general rule in subsection 245(2) will not apply to deny the tax benefit realized by the taxpayer. It is curious, therefore, that subsection 245(4) does not make reference to the series concept at all. Instead, GAAR uses the series concept in two other places:

1. in the definition of “avoidance transaction” in paragraph 245(3)(b); and
2. in the articulation in subsection 245(2) of the principal rule that denies the taxpayer a tax benefit if GAAR applies.

The appropriateness of our approach to series in the non-GAAR context extends also to the series concept in the GAAR context, and we can use precisely the same family resemblance approach in addressing the contextual and purposive elements of the interpretation exercise. However, there is a significant difference between the

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93 See Louis Kaplow, “Rules Versus Standards: An Economic Analysis” (1992) 42:3 *Duke Law Journal* 557-629.

94 *Stuart Investments Ltd. v. The Queen*, [1984] 1 SCR 536.

non-GAAR and the GAAR contexts for series. In the non-GAAR context, it is likely to be more straightforward to determine the purpose for the invocation of the series concept by Parliament. In the GAAR context, because it is a general rule (or, in other words, a standard), it will be often be somewhat less obvious what family of arrangements needs to be compared.

As noted above, the series concept is invoked in GAAR in paragraph 245(3)(b), with reference to whether the taxpayer has engaged in an “avoidance transaction,” and in subsection 245(2), with reference to the denial of a “tax benefit”<sup>95</sup> that results from an “avoidance transaction” or from “a series of transactions that includes that [avoidance] transaction.” Subsection 245(2) further provides that the tax consequences will be determined “as is reasonable in the circumstances,” and subsection 245(4) requires, for the application of subsection 245(2), that the avoidance transaction results in a misuse or abuse of the relevant statute.

In interpreting the invocation of the series concept in paragraph 245(3)(b) and subsection 245(2), it is important (as in the non-GAAR context) to begin with the textual, contextual, and purposive analysis that applies to all questions of statutory interpretation. In both provisions, there is scope for the application of a family resemblance test to guide a court’s assessment of whether there was a series for the purposes of GAAR.

Clearly Parliament intended “series” to refer to the same broadened set of transactions in both paragraph 245(3)(b) and subsection 245(2). That is, the series reference in GAAR should be construed as denying a tax benefit where there is a set of transactions that simultaneously secures a tax benefit through a tax-motivated and interdependent sequence of transactions or events, and constitutes a misuse or abuse through a family resemblance to a stylized transaction that is abusive.

### **“Series” in Paragraph 245(3)(b)**

Analytically, the entry point into GAAR for our purposes is subsection 245(3), the provision that defines the meaning of “avoidance transaction.” Subsection 245(3) reads as follows:

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

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95 Subsection 245(1) defines “tax benefit” to mean “a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this Act but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty.”

Pursuant to subsection 245(3), there are two ways in which a transaction can satisfy the statutory requirement for an “avoidance transaction.” The first, addressed by paragraph 245(3)(a), is that the transaction that is under scrutiny *itself* yields a tax benefit, and that transaction cannot reasonably be regarded as being motivated by some purpose other than obtaining the tax benefit. The second, addressed by paragraph 245(3)(b), expands on the first to sweep in any transaction that is part of a series that similarly yields a tax benefit and has one or more constituent transactions that cannot reasonably be regarded as being motivated by some purpose other than obtaining the tax benefit.

It is arguable that paragraph 245(3)(a) does not cast the anti-avoidance net very widely at all, since an attentive taxpayer could in many circumstances ensure that the transaction that ultimately triggers the realization of a tax benefit is separate from the transaction that was predominantly tax-motivated. This argument is weakened by two observations. First, the phrase “directly or indirectly” in paragraph 245(3)(a) suggests that a predominantly tax-motivated transaction that indirectly secures a tax benefit through a separate non-tax-motivated transaction can still be construed as an avoidance transaction. Second, a “transaction” is defined in subsection 245(1) to include “an arrangement or event.” Although “arrangement” is not itself a defined term in the Act, it is arguable that the ordinary meaning of “arrangement” embraces greater potential complexity than “transaction,” and, if this is correct, then the definition of “transaction” as including “an arrangement or event” is itself an expansion of what would otherwise constitute an avoidance transaction under paragraph 245(3)(a). Yet, even if it is acknowledged that paragraph 245(3)(a) may not be as narrow as it at first appears, paragraph 245(3)(b) is more expansive in its textual focus on multiple transactions.

This brings us to Parliament’s invocation of the series concept in paragraph 245(3)(b). Applying the family resemblance test, the first step is to ask what the context and purpose of paragraph 245(3)(b) tell us about the reason for the use of the series concept in this provision. It is natural to see paragraph 245(3)(b) as an attempt to expand the domain for finding that the taxpayer has engaged in an avoidance transaction. It identifies as an avoidance transaction any transaction that is part of a series of transactions that collectively—that is, as a series—results in a tax benefit, unless the particular transaction in question can reasonably be regarded as not being predominantly tax-motivated. Thus, the purpose of invoking series in paragraph 245(3)(b) is to expand the scope of the meaning of avoidance transaction from the focus of paragraph 245(3)(a) on a singular transaction to include any series that has at least one element (such as a transaction, an arrangement, or an event) that is predominantly motivated by securing a tax benefit. The implicit reasoning behind Parliament’s decision to adopt this formulation is clear enough. Just as “division by zero” at any stage of an algebraic manipulation renders an entire sequence of reasoning logically invalid and unreliable, so too should the injection of any predominantly tax-motivated element into a series of transactions render suspect the legitimacy of a tax benefit from an entire series of transactions. Thus, this first step of the family resemblance test for the invocation of the series concept in paragraph 245(3)(b) tells

us to focus on the desire of Parliament to capture all transactions that bear a certain relation to the generation of a tax benefit that, but for GAAR, would be realized by the taxpayer.

The second step of the family resemblance test for the use of series in paragraph 245(3)(b) requires us to ask what kinds of transactions Parliament would have wanted to include in the series given that the focus is on expanding the ambit of “avoidance transaction.” From this perspective, the focus should be on the relationship among and between a sequence of transactions or events insofar as they are linked to the generation of a tax benefit. Thus, at this stage of the analysis, the question is whether the transactions or events are sufficiently related to each other in the sense that they interdependently generate the tax benefit identified by the minister. If the transactions are interdependent in this way, then they should be regarded as a series for the purposes of paragraph 245(3)(b).

This conclusion echoes what has been suggested by early commentators on GAAR. For example, in 1997 Couzin addressed the difficulty of applying the series concept in the context of paragraph 245(3)(b). He stated:

I would not be surprised to find different judges reaching different conclusions as to how the series rule works. A literal approach could require that there be an identified transaction [in a purported series] that fails the purpose test. However, I could also imagine a more “purposive” interpretation of paragraph 245(3)(b) that reached the situation where the series as a whole reflected a primary tax motivation in the manner of its construction or shape, even though each step, standing alone, passed the purpose test.<sup>96</sup>

Although we hesitate to endorse Couzin’s imagined series under paragraph 245(3)(b), where each individual element satisfies the purpose test, we do endorse his view that Parliament’s intention was clearly to expand on the ability of paragraph 245(3)(a) to capture the pursuit of tax benefits by taxpayers through more than one transaction.

Another contextual point relates to the fact that the avoidance transaction test plays merely a gatekeeping function, being a step in the application of GAAR that precedes the determination of whether there has been a misuse or abuse under subsection 245(4) (discussed below). This could account for Couzin’s appreciation of a more purposive approach to the interpretation of series in paragraph 245(3)(b). It also suggests that as an analytical matter, there should be an inclination—at least in principle—to subject the entire series to further scrutiny under the remainder of GAAR. Another way of putting the same point is that in this context, where there is yet another stage of analysis that will determine whether the tax benefits are preserved or lost to the taxpayer (that is, whether there is a misuse or an abuse), it

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<sup>96</sup> Robert Couzin, “Subsection 245(3): A Framework,” in *Report of Proceedings of the Forty-Ninth Tax Conference*, 1997 Conference Report (Toronto: Canadian Tax Foundation, 1998), 4:1-15, at 4:14.

would be sensible to attribute to Parliament a desire to be more inclusive rather than less inclusive with respect to what constitutes a series. Given that the concept of an avoidance transaction serves a gatekeeping function in GAAR—since without an avoidance transaction there can be no application of GAAR to deny a tax benefit—the degree of connection required among transactions in determining whether there has been a series under paragraph 245(3)(b) should not be overly demanding. Moreover, it is arguable that because the series concept is also invoked in GAAR in subsection 245(2), it would be inappropriate to be too hasty in concluding that a taxpayer does not have an avoidance transaction because the taxpayer does not have a series under paragraph 245(3)(b). Since it is likely that Parliament intended the reference to series to apply to the same set of transactions in the application of both paragraph 245(3)(b) and subsection 245(2), for analytical completeness one should conduct both exercises before determining whether there is a series.

To summarize, the purpose of paragraph 245(3)(b) is to expand the range of transactions that will be avoidance transactions to which GAAR might potentially apply. The reasons for Parliament's invocation of the series concept in paragraph 245(3)(b) were (1) to avoid narrow and technical arguments from taxpayers about what constitutes a transaction, arrangement, or event (as opposed to a series); and (2) to reduce the scope for taxpayers to argue that a particular tax benefit did not “indirectly” result from a transaction, arrangement, or event (again, as opposed to a series) that was itself predominantly tax-motivated. Instead, Parliament's focus in subsection 245(3) as disclosed by a textual, contextual, and purposive analysis relates to whether the taxpayer engaged in a sequence of transactions that in one or more respects was primarily tax-motivated. Put simply, if the minister is able to show that there was a predominantly tax-motivated element in a sequence of transactions then, as a preliminary matter (at least until one has conducted the exercise of interpreting “series” under subsection 245(2)), any interdependent aspect of the sequence of transactions leading up to and following the predominantly tax-motivated element should be considered to be part of the paragraph 245(3)(b) series.

### ***“Series” in Subsection 245(2)***

This brings us to the second invocation of the series concept in GAAR, found in subsection 245(2). This provision reads as follows:

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

Textually, subsection 245(2) requires the transaction at issue to be an “avoidance transaction.” As we have just explained, where there is a sequence of transactions that is also a series under paragraph 245(3)(b) and that series includes at least one predominantly tax-motivated element, this avoidance transaction requirement will (at least as a preliminary matter) be satisfied. One predominantly tax-motivated

element in an interdependent sequence of transactions will result in the characterization of all the transactions in that sequence as avoidance transactions, pursuant to our analysis of series in paragraph 245(3)(b).

Turning to the first part of the family resemblance test for the purposes of the use of the series concept in subsection 245(2), the question is this: On the basis of the text, context, and purpose of subsection 245(2), what is the role of the series concept in subsection 245(2)? The effect of subsection 245(2), when it applies, is to deny the taxpayer a “tax benefit” that the taxpayer would realize if GAAR did not apply. The tax benefit that the subsection denies is one that results directly or indirectly from the avoidance transaction itself (as determined under paragraph 245(3)(b)) or from “a series of transactions that includes that transaction.” As was the case with respect to the use of series in paragraph 245(3)(b), it appears from the context and purpose of the invocation of series in subsection 245(2) that Parliament’s intention is to expand considerably the range of transactions in respect of which tax benefits might be denied through the application of GAAR. This expansive intention is both reasonable and appropriate in light of the other safeguards that limit the deleterious effects that might otherwise be problematic. There are two safeguards that protect the interests of taxpayers from what might otherwise be overreaching by Parliament. The first safeguard is the requirement that whatever is done in denying a tax benefit must be “reasonable in the circumstances.” This standard allows for some flexibility; however, it is presumed that all the surrounding facts will be drawn upon in tailoring an appropriate remedy. The second safeguard is that for a tax benefit to be denied under subsection 245(2), the minister must show that what has been done is a misuse or abuse under subsection 245(4). Working together, these two safeguards justify the view that the purpose for Parliament’s invocation of series in subsection 245(2) was to reduce the scope for narrow and technical arguments about the boundaries of the transactions that should be subject to scrutiny and potential remediation under GAAR. This is similar, of course, to the anti-formalist motivations underlying the use by Parliament of the series concept more generally.

In order for GAAR to deny a tax benefit to a taxpayer under subsection 245(2), the minister must show that there has been a misuse or abuse under subsection 245(4). This provision reads as follows:

- (4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction
  - (a) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of
    - (i) this Act,
    - (ii) the *Income Tax Regulations*,
    - (iii) the *Income Tax Application Rules*,
    - (iv) a tax treaty, or
    - (v) any other enactment that is relevant in computing tax or any other amount payable by or refundable to a person under this Act or in determining any amount that is relevant for the purposes of that computation; or

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

The gist of the abuse analysis under subsections 245(2) and (4) consists of determining whether a particular transaction is the sort of transaction that Parliament would not have wanted taxpayers to engage in.<sup>97</sup> According to the Supreme Court of Canada, such transactions include transactions that (1) rely on provisions to achieve an outcome that they were designed to prevent, (2) defeat the underlying rationale for provisions of the Act, or (3) circumvent provisions of the Act in a manner that defeats their object, spirit, or purpose.<sup>98</sup> We contend that if a particular transaction in its context bears a family resemblance to a stylized transaction that is accepted as being abusive, then the safeguard of subsection 245(4) ought not to operate to protect the tax benefit claimed by the taxpayer, which will be denied “as is reasonable in the circumstances” by the operation of subsection 245(2).

Thus, our analysis of the text, context, and purpose of subsection 245(2) indicates that the intent in invoking the series concept in this provision is (1) to reduce the scope for taxpayers to legitimately argue that a particular tax benefit did not result in a sufficiently direct way from a tax-motivated element in a sequence of transactions (a role similar to the one that the concept plays in paragraph 245(3)(b) with respect to whether there is an avoidance transaction); and (2) to provide a court with a wide platform for denying a tax benefit under subsection 245(2) where an element in a sequence of transactions is appropriately regarded as abusive pursuant to subsection 245(4). Arguably, in light of the safeguards against applying GAAR to sequences of transactions that are not tax-motivated (the avoidance transaction requirement) and that are not abusive (subsection 245(4)), a sequence of transactions should be regarded as a series for the purposes of GAAR if those transactions interdependently give rise to a tax benefit identified by the minister. This expansive approach with respect to finding the existence of a series in the context of GAAR is particularly suitable in light of the additional safeguard that the Supreme Court has provided in insisting that the abusive nature of a transaction or series must be clear, and that the onus is on the minister to show that the taxpayer has engaged in a misuse or abuse.<sup>99</sup>

### ***“Series” Analysis According to Family Resemblance in MIL and Coptborne***

Our analysis of the two GAAR provisions that include a reference to series has led us to conclude that a sequence of transactions will be a series for the purposes of GAAR when one can say that the transactions in that sequence are interdependent in the

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97 Duff, “Judicial Application of the General Anti-Avoidance Rule,” supra note 26, at note 123.

98 *Canada Trustco*, supra note 6, at paragraph 45; *Lipson v. Canada*, 2009 SCC 1, at paragraph 25; and *Coptborne*, supra note 5, at paragraph 72.

99 *Canada Trustco*, supra note 6, at paragraphs 62 and 65.

sense that they give rise to the tax benefit challenged by the minister. How would this series analysis, which would require determining the sequence of transactions that includes the purportedly tax-motivated element as well as the abusive element, play itself out in the context of some well-known GAAR cases? To make the foregoing discussion of the series concept in the GAAR context more concrete, let us consider the facts of *MIL* and *Copthorne*.

The starting point of the series analysis in both cases is the identification of the tax benefit. As discussed earlier, the tax benefit in *MIL* was the treaty exemption under the Canada-Luxembourg tax treaty that the taxpayer claimed in respect of a significant capital gain on the sale of shares of DFR held by MIL. On the basis of the above analysis, what should the boundary of the series of transactions be for the purposes of paragraph 245(3)(b) and subsection 245(2)? With respect to paragraph 245(3)(b), any transaction in the sequence of transactions that preceded the purported treaty-exempt capital gain should be considered to be part of the series. Those transactions would include the continuation of MIL into Luxembourg, the disposition by MIL to Inco of the shares of DFR necessary to bring MIL's interest below 10 percent, and the ultimate share sale realizing that capital gain. With respect to subsection 245(2), it is clear that the same boundaries are reasonable for the series, given the Crown's contention that treaty shopping was the abusive element of the claimed tax benefit. Because the scope of the series issue in the GAAR context reduces to the set of transactions that interdependently gave rise to the claimed tax benefit, and moves away from the questions considered by the courts that we addressed earlier in this article, the series issue should be easier to decide. So long as the purported principally tax-motivated transaction and the purported abusive transaction are linked to the realization of the tax benefit, in the sense that the tax benefit depends for its existence on the tax-motivated transaction under paragraph 245(3)(b) and likewise on the purported abusive transaction under subsection 245(2), the series determination should not be a challenge. In *MIL*, even setting aside the fact that GAAR at the time did not mention tax treaties (and only did so with the retroactive amendment of GAAR in 2005), the challenging aspect of the case for the Crown would be to demonstrate that treaty shopping generally is a misuse or abuse. As mentioned earlier, the minister has the onus of demonstrating that the treaty shopping engaged in by the taxpayer should be considered to be a misuse or abuse.

Does this same kind of analysis extend to *Copthorne*? As described at the beginning of this article, the tax benefit in *Copthorne* related to the claimed return of capital in conjunction with the 1995 redemption. The return of capital relied on the PUC of the redeemed shares, which included PUC linked to the 1993 share sale. On the facts of the case, it is clear to us that the series of transactions for the purposes of GAAR should encompass both the transaction that was the predominantly tax-motivated transaction pursuant to paragraph 245(3)(b)—the 1993 share sale—and the transaction purportedly giving rise to the abuse under subsections 245(2) and (4)—the horizontal amalgamation and the consequent duplication of the PUC long before the 1995 redemption. Since both of these transactions are, as a preliminary determination, construed as being part of the series for the purposes of both paragraph 245(3)(b)

and subsection 245(2), they can then fairly be subjected to a misuse or abuse analysis under subsection 245(4).

In our view, if in *Copthorne* the Supreme Court had approached the series issue from the family resemblance perspective, the determination of whether there had been a series of transactions would have been considerably simplified and would have borrowed strength from the analysis conducted by the court at paragraphs 68 through 122 of its judgment.<sup>100</sup> The court would have first attended to the object, spirit, and purpose of the provisions cited by the Crown, bearing in mind the allegedly abusive tax result realized by the taxpayer. Only when the court was clear on this question would it have turned to the issue of whether the transactions engaged in by the taxpayer could reasonably be said to bear a family resemblance to the kinds of PUC-duplicating transactions that would offend the object, spirit, and purpose of the Act.

### **POSSIBLE STATUTORY AMENDMENTS TO PROMOTE PREDICTABILITY, CERTAINTY, AND FAIRNESS**

Given the path that Canadian tax law has taken with respect to the series concept, it is arguable that the best path forward is one that consciously and explicitly resets the approach. There are several ways in which the approach could be reset explicitly by a legislative amendment, and some design choices would have to be made in the process.

The first possibility would be to replace the series concept with something else entirely throughout the Act. Given that the series concept is now invoked in many anti-avoidance contexts in the Act, and in light of the general reluctance to make sweeping changes to the Act without being able to anticipate fully all of the consequences (particularly in this case, owing to the prevalence of the series concept), it is probably unrealistic to suggest that the series concept could be jettisoned altogether. Nevertheless, if this were possible, the concept could be replaced with something along the lines of an open-ended and loose definition of an “arrangement” (discussed below, though only in the GAAR context) coupled with a required purposive element similar to the family resemblance test that we propose in this article. It would then presumably be necessary (or at least prudent) to specify within each provision that referenced the new concept (or in the regulations relating thereto) the types (or families) of transactions to which the anti-avoidance rule was intended to apply. The advantage of sweeping amendments of this kind is that they would make manifest the intention of law makers in curbing particular types or families of tax avoidance, and at the same time would avoid disputes over prior case law and the correct interpretation of subsection 248(10).

In the event that moving away from the series concept entirely should prove to be beyond law makers’ appetite for reform, in our view the next-best option would be

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100 See *Copthorne*, supra note 5.

to amend subsection 248(10) to explicitly instruct judges to take into account the types or families of transactions that Parliament can reasonably be considered to have wanted to address in invoking the series concept. For the reasons outlined above, this approach would naturally work best for the use of the series concept in a non-GAAR context. In the GAAR context, it might be wise to consider doing away with the series concept altogether and replace it with a low threshold test along the lines of the one conceived of by Rothstein JA in *OSFC*. Rothstein JA remarked that a possible understanding of the series concept would be that of “mutual interdependence.”<sup>101</sup> One formulation of a mutual interdependence test for series states that “two or more transactions will constitute a series if the transactions are so interdependent that the legal relations created by one transaction would be meaningless without a completion of the series.”<sup>102</sup> Despite referring to this possibility of embracing a low threshold for series, Rothstein JA did not do so in *OSFC*.

With respect to perhaps hiving off the GAAR context for different treatment from the specific anti-avoidance concepts that also make use of the series concept, it is instructive that the United Kingdom has decided not to use the series concept in its new general anti-abuse rule (“UK GAAR”). Instead, it has adopted a “tax arrangement” test, which sets a low threshold for determining whether transactions are tax-motivated. According to the most recent guidance from HM Revenue & Customs, under the new UK GAAR,

[i]n broad terms a tax arrangement is any arrangement which, viewed objectively, has the obtaining of a tax advantage as its main purpose or one of its main purposes.<sup>103</sup>

The guidance goes on to explain that

[t]he broad definitions of “arrangements” and “tax arrangements” set a low threshold for initially considering the possible application of the GAAR. A much higher threshold is then set by confining the application of the GAAR to tax arrangements which are “abusive.”<sup>104</sup>

Given that the United Kingdom has had the benefit of surveying the international experience with general anti-avoidance rules, it is quite illuminating that it has decided to adopt an approach that bears greater resemblance to the New Zealand example than to the Canadian approach of invoking the series concept.

Another possible reform, and one that is less reliable and more likely to embroil Canadian courts in difficult debates about the state of law surrounding the series

101 *OSFC*, supra note 11, at paragraph 21.

102 *Ibid.*

103 United Kingdom, HM Revenue & Customs, *HMRC’s GAAR Guidance* (London: HMRC, April 2013) ([www.hmrc.gov.uk/avoidance/gaar-part-abc.pdf](http://www.hmrc.gov.uk/avoidance/gaar-part-abc.pdf)), at 9.

104 *Ibid.*, at 10.

concept, is for judges to forge ahead in the absence of explicit guidance from law makers. This is distinctly a third-best option, but it is one that is defensible in light of the serious difficulties that the courts have had to date in settling on a consistent and reliable approach to the series concept. In conducting a textual, contextual, and purposive interpretation of the Act, we believe that judges in many circumstances would be able to make use of the family resemblance concept as we have outlined it above. As mentioned, however, we regard this ability to have recourse to the family resemblance concept through the conventional tools of statutory interpretation as an approach that is more difficult for the judiciary to apply. Nevertheless, a statutory amendment may not be forthcoming. Canadian judges are talented and resourceful. When faced with an incoherent and inconsistent concept and little or no guidance from law makers, they could certainly do worse than to find and take the path to conceptual coherence on their own.

## CONCLUSION

While the Supreme Court's decision in *Coptborne* arguably contains the most extensive treatment of the series concept by the court to date, there are still a number of areas of uncertainty. *Coptborne* effectively establishes a range for the threshold level of connection for a related transaction to be deemed to be part of a series requiring something more than a mere possibility but less than a strong nexus. The aim here has been to review the major issues canvassed in *Coptborne* and to suggest a new framework for understanding series based on a family resemblance test. The family resemblance test starts with a purposive analysis of each of the provisions that contains a reference to a series of transactions, to determine what type (or types, in the case of GAAR) of series of transactions Parliament can reasonably be considered to have been trying to address. In the context of GAAR, the types of series of transactions that Parliament can reasonably be considered to have been trying to address were those that secure a tax benefit through at least one predominantly tax-motivated transaction under paragraph 245(3)(b) where the tax benefit results from what purportedly amounts to abusive tax avoidance under subsections 245(2) and (4). Once the purpose of the applicable provision is determined and the prototypical series is specified, courts can consider whether the set of transactions before them sufficiently resembles that prototypical series to be captured by the rule.

The family resemblance approach that we have described would avoid many of the problems identified by commentators regarding the possible overbreadth of the *Coptborne* test for series when applied to other provisions of the Act. Indeed, one of the main criticisms of the *Coptborne* decision is that retrospective contemplation can be overly broad, particularly when applied in other contexts in the Act. If each provision is interpreted first to determine the purpose of its invocation of the series concept, this issue also can be avoided. We have shown that this approach works well even with GAAR, by recognizing that the misuse and abuse analysis plays a purposive role in that context similar to that which is naturally available in more contextualized statutory specific anti-avoidance rules. As mentioned in the introduction to this

article, the concerns about the contextualized use of the series concept are only likely to grow with the recent enactment of many new provisions that rely on series of transactions.<sup>105</sup>

In our view, family resemblance gives appropriate weight to all elements of the statutory interpretation exercise, being textual, contextual, and purposive, and it does so in a way designed to promote certainty, predictability, and fairness. Indeed, the family resemblance test should help to generate results that are more consistent with each of the provisions of the Act in which a series of transactions can play a role, by grounding the interpretation of those provisions in a purposive analysis. And by moving away from a narrow test focused on the connections between each individual event, the series test can be reformulated on the basis of the purpose of each provision, to suit the specific type(s) of transactions that the particular provision was designed to prevent.

It is probably impossible to definitively exhaust the meaning of “series.” Indeed, it is clear that much of the meaning must be drawn from the context in which the term is used, and the purpose for its invocation. Largely for this reason, to adopt any interpretive approach that is less than the family resemblance test described above will be to invite the problems that Wittgenstein described so clearly with respect to isolating the common features of games. Just like a game, any particular feature of a series is not always a feature of a series; indeed, in a comparison of two series, “you find many correspondences,” and yet in a third, “many common features drop out and others appear.”<sup>106</sup> And when the context changes again, “much that is common is retained, but much is lost.”<sup>107</sup> Wittgenstein would probably have appreciated the observation that a family resemblance analysis suggests that tax avoidance can reasonably be regarded as a game in its own right.

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105 See *supra* note 4.

106 Wittgenstein, *supra* note 78, at paragraph 66, quoted in the text above at note 79.

107 *Ibid.*

