Policy Forum: Canada Trustco and Beyond

In the fall of 2005, the general anti-avoidance rule (GAAR) in section 245 of the Income Tax Act (Canada)[1] had its long-awaited encounter with the Supreme Court of Canada in the *Canada Trustco* and *Kaulius* (or, as *Kaulius* is more commonly called, *Mathew*) cases.[2] Interestingly, the *Canada Trustco* case, which the Supreme Court used to set out its interpretive principles to guide the application of the GAAR, mirrored a similar UK case, *Barclays Mercantile*,[3] in which the House of Lords clarified its views on the limits of judicial anti-tax-avoidance doctrines. Despite the Supreme Court's considered review of the GAAR and its articulation of seven principles to direct its application, there is still a great deal of room to study and evaluate the significance and scope of the "unified textual, contextual and purposive" analysis recommended by the court to determine whether tax avoidance ultimately proscribed after considering subsection 245(4) exists. Indeed, the principles that the Supreme Court advises underlie this analysis bear a striking similarity to what effectively are seven judicial anti-tax-avoidance principles formulated at the outset of the GAAR odyssey by the Supreme Court 20 years ago in its adjudication of the *Stubart* case.[4] This in itself is the source of intriguing questions about what the *Canada Trustco* decision means.

A number of even more compelling questions come to mind. Does the Supreme Court's determination of the limits of acceptable tax avoidance, based as it is on the application of a statutory general anti-avoidance rule, affect the continuing relevance and application of judicial rules and guidelines? Is there much difference between the two? A comparison of the analysis and conclusions of the House of Lords in the *Barclays Mercantile* case and another UK case, *Scottish Provident*,[5] with the approach taken by the Supreme Court presents an opportunity to reconcile the UK and Canadian law applied in similar circumstances. Does the "unified textual, contextual and purposive" (or, as it is more commonly styled, the "textual, contextual, purposive" or "TCP") approach to interpreting the Act when applying the GAAR reflect the approach to statutory interpretation that should be undertaken generally? In the *Canada Trustco* case, the Supreme Court seems to suggest that the TCP approach is a device to resolve ambiguities concerning the reach of specific

1 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the Act").

2 *The Queen v. Canada Trustco Mortgage Co.*, 2005 SCC 54 and *Mathew v. The Queen*, 2005 SCC 55.

3 *Barclays Mercantile Business Finance Ltd. v. HM Inspector of Taxes*, [2004] UKHL 51.

4 *Stubart Investments Ltd. v. The Queen*, [1984] 1 SCR 536.

5 *Inland Revenue v. Scottish Provident Institution*, [2004] UKHL 52.

statutory provisions when subsection 245(4) is involved. Interestingly, however, the contemporaneous decision of the Supreme Court in *Montreal (City) v. 2952-1366 Québec Inc.*[6] applied an equivalent approach to statutory interpretation to ascertain the meaning of a municipal noise bylaw and, in particular, to resolve what the court perceived to be latent ambiguities about its intended scope. This case presented a question of legislative interpretation without, arguably, the overtones of extralegal conduct anticipated by subsection 245(4). Are the judicial attitudes and approaches to statutory interpretation in these cases compatible? Does the approach of the court in the *Montreal (City)* case inform the court's meaning in the *Canada Trustco* setting? Questions persist about the responsibility of litigants in a tax case to assert and prove, or disprove, the basis for alleged tax avoidance and the relevance of "economic substance" or "economic reality," either as an evidentiary test to ascertain the transactions under scrutiny or in some sense as a determinant of the transactions themselves.

These are early days to be confident about any hard and fast conclusions concerning the significance and scope of the guidelines articulated by the Supreme Court in *Canada Trustco* or to draw inferences about their application from the *Mathew* case. The intention of this policy forum is to encourage a study of this important step in the development of the GAAR by collecting a number of points of view that we hope will spark a debate about the theoretical and practical significance of the *Canada Trustco* principles and at the same time provide a framework within which to begin testing the limits of the Supreme Court's guidance.

On November 18, 2005, a symposium was held at the Faculty of Law at the University of Toronto. Academic commentators, practitioners, representatives of the Canada Revenue Agency, and the chief justice of the Tax Court of Canada took part. The discussion at the symposium and the views expressed in papers prepared by a number of the participants reflect thoughtful attempts by experienced commentators to come to grips early on with the *Canada Trustco* decision. The participants were willing to speculate on the possible significance of the *Canada Trustco* principles and to offer their initial thoughts on how those who are faced with the application of these principles ought to guide themselves. The *Canadian Tax Journal* asked David Duff, Benjamin Alarie, and Sanjana Bhatia to chronicle the symposium proceedings as rapporteurs. It is our hope that their comprehensive summary will provide a jumping-off point for further reflections on the *Canada Trustco* principles.

The journal also invited Judith Freedman of Oxford University and Malcolm Gammie, QC, to comment in the context of the *Barclays Mercantile* and *Scottish Provident* decisions on the Supreme Court's disposition of *Canada Trustco* and the apparent scope of the Canadian GAAR. Professor Freedman has a particular interest in the significance of statutory anti-avoidance rules relative to judge-made anti-

6 2005 SCC 62.

tax-avoidance law. Mr. Gammie is well known internationally for his considered views on taxation and tax policy.

Forthcoming issues of the journal will include an article by Daniel Sandler on the minister's burden of proof of statutory purpose in relation to the GAAR; an article by Jinyan Li on the role, if any, of "economic substance" in evaluating the legitimacy of tax planning and tax avoidance through the application of the GAAR; and commentary by Brian Arnold on the *Canada Trustco* and *Mathew* decisions.

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