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Shelter from the Storm: The Current State of the Tax Shelter Rules in Section 237.1

Rosemarie Wertschek and James R. Wilson*

PRÉCIS

L'article 237.1 est une disposition administrative promulguée en 1989 pour faire en sorte que le promoteur d'un investissement dans un bien qui constitue un « abri fiscal » (d'après la définition du paragraphe 237.1(1)) obtienne à l'aide du régime d'inscription un numéro d'inscription auprès de l'Agence du revenu du Canada avant d'offrir de vendre cet investissement à des investisseurs éventuels. Lorsque l'obligation d'inscription n'est pas respectée, l'article 237.1 impose au promoteur et aux investisseurs de graves conséquences punitives qui prennent la forme d'amendes pour le promoteur et de rejet de toutes les déductions à l'égard de l'investissement pour les investisseurs. Par suite de la promulgation en 1995 des dispositions à recours limité de l'article 143.2, la définition d'« abri fiscal » au paragraphe 237.1(1) a été importée par renvoi à l'article 143.2, ce qui donne à cette disposition un impact prépondérant en réduisant le coût fiscal d'un investissement dans un abri fiscal par des montants à recours limité ou de rajustement à risque. À l'article 143.2, la définition d'« abri fiscal » du paragraphe 237.1(1) s'applique indépendamment de l'obligation d'inscription de l'article 237.1 pour lequel la définition a été conçue à l'origine. Lorsque les conditions d'application de l'article 143.2 sont satisfaites, on doit procéder à la réduction nécessaire du coût fiscal du bien en question, même dans les cas où il y avait conformité avec l'obligation d'inscription à l'article 237.1

Jusqu'aux décisions dans deux affaires récentes – *Maege* et *Baxter,* les tribunaux ne s'étaient pas beaucoup prononcés sur la question de l'interprétation de l'article 237.1. Comme il était prévisible, le principal intérêt de ces affaires a trait au sens à donner à l'expression *déclarations ou annonces* que l'on trouve au paragraphe 237.1(1). Dans *Maege,* la Cour canadienne de l'impôt et la Cour d'appel fédérale ont donné à l'expression (et, par voie de conséquence, à l'article 237.1) une interprétation large, tandis que dans l'affaire *Baxter* , les mêmes tribunaux ont donné à cette expression (et à l'article 237.1) une interprétation plus restreinte.

Le présent article traite de la signification adéquate à donner à l'expression clé *déclarations ou annonces* que l'on trouve dans l'article 237.1 et fait valoir que, pour plusieurs raisons qui ont trait au style, au contexte et à l'objectif visé, cette expression devrait être interprétée dans un sens plus restreint, à la fois plus technique et objectif, qui

* Rosemarie Wertschek is of McCarthy Tétrault LLP, Vancouver, and James R. Wilson is of Wilson & Partners LLP, Toronto. We acknowledge, with thanks, the assistance of Sara Levine, Matthew Taylor, and Geneviève Lille. Any errors or omissions are our responsibility.

se rapproche de celui qu'on lui a donné dans *Baxter*, avec pour résultat que l'article 237.1 doit avoir une portée plus limitée que celle que lui attribue l'Agence du revenu du Canada. En outre, l'article fait également valoir qu'un investissement ne peut constituer un « abri fiscal » au sens du paragraphe 237.1(1) sauf si des déclarations ou des annonces ont été faites à l'égard du bien en particulier sur des questions précises ayant trait à la fois aux déductions fiscales projetées et à la disposition d'avantages prescrits particuliers, que toutes les communications ne constituent pas des « déclarations ou annonces » au sens de cette disposition, que cette expression n'est généralement pas appropriée pour décrire les communications établies dans le cadre d'opérations négociées en privé et que le fardeau de l'établissement des déclarations ou des annonces pour ce qui est de l'impôt et des questions connexes repose sur la Couronne puisque l'article 237.1 s'applique de manière à imposer des pénalités aux promoteurs et aux investisseurs.

ABSTRACT

Section 237.1 of the Income Tax Act (Canada) was originally enacted in 1989 as an administrative provision. Its purpose is to ensure that a promoter of an investment in property that is a "tax shelter" (as defined in subsection 237.1(1)) obtains an identification number from the Canada Revenue Agency through a registration regime, before offering the investment for sale to potential investors. Where the registration requirement is not met, section 237.1 imposes serious and punitive consequences for the promoter and investors, in the form of fines for the promoter and the disallowance of all deductions in respect of the investment for the investor. As a result of the enactment in 1995 of the limited-recourse provisions in section 143.2, the definition of "tax shelter" in subsection 237.1(1) was imported by reference into section 143.2, thereby giving this provision a substantive impact, by reducing the tax basis of a tax shelter investment to the extent of limited-recourse amounts or at-risk adjustments. In section 143.2, the subsection 237.1(1) definition of "tax shelter" operates independently of the registration requirements found in section 237.1, for which that definition was originally formulated. Where the requirements for the application of section 143.2 are met, the required reduction in the tax basis of the particular property must be made, even in circumstances where there has been compliance with the registration requirement in section 237.1.

Until two recent cases, *Maege* and *Baxter*, there was limited judicial guidance as to the interpretation of section 237.1. As expected, the primary focus of these cases was the meaning of the phrase "statements or representations" found in subsection 237.1(1). In *Maege*, the Tax Court of Canada and the Federal Court of Appeal gave the phrase (and, as a consequence, section 237.1) an expansive interpretation; in *Baxter*, the same courts accorded the phrase (and section 237.1) a narrower interpretation.

This article focuses on the proper meaning of the key phrase "statements or representations" found in section 237.1 and makes the case that, for several reasons based on its language, context, and purpose, the phrase should be given a narrower, more technical, and objective meaning, closer to that accorded to it in *Baxter*. As a result, section 237.1 should have a narrower ambit than that asserted by the Canada Revenue Agency. The case is further made that (1) an investment cannot be a "tax shelter" within the meaning of subsection 237.1(1) unless there were statements or representations made with respect to the particular property as to specific matters dealing with both intended tax deductions and the provision of specific prescribed benefits; (2) not all communications constitute "statements or representations" within the meaning of this provision; (3) this phrase is not generally appropriate to describe communications made

in the context of privately negotiated transactions; and (4) the onus of establishing that statements or representations were made as to the specific tax and related matters is on the Crown, given that section 237.1 operates to impose penalties on promoters and investors.

KEYWORDS: TAX SHELTERS ■ TAX-BASED FINANCING ■ NON-RECOURSE ■ REGISTRATION ■ STATUTORY INTERPRETATION ■ PENALTIES

CONTENTS

INTRODUCTION

Section 237.1 of the Income Tax Act (Canada)[1] has two purposes—the original administrative purpose and another, somewhat curious, substantive purpose resulting from the incorporation of the "tax shelter" definition into section 143.2. The hybrid nature of the provision is unfortunate. The administrative purpose of section 237.1 is plain enough. The provision was enacted in 1989 to ensure the more effective audit of certain tax-advantaged investments. To that end, section 237.1 requires a "promoter" of a property that is a "tax shelter" to obtain an identification number from the Canada Revenue Agency (CRA) before the sale of an interest in the property. Where a promoter fails to obtain the required number, there are serious consequences for both the promoter and any investor who acquires an interest in the tax shelter property: the promoter is subject to a monetary penalty, and the investor is denied any tax deductions claimed in respect of the property.

1 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.

Section 237.1 became a substantive provision in 1995, with the introduction of the limited-recourse rules in section 143.2.[2] These rules require that the tax basis of a taxpayer's tax shelter investment be reduced by limited-recourse amounts or at-risk adjustments. The addition of this substantive consequence of a property's tax shelter status represented a significant change in how section 237.1 was viewed by taxpayers and their tax advisers. Before this addition, a prudent approach to avoid the penalties for a property that might be a "tax shelter" was simply to obtain an identification number from the CRA. It therefore became a common practice to acquire an identification number in any circumstance where the status of a property as a tax shelter was uncertain. The only adverse consequence was that the proposed transactions would be disclosed to the CRA, but that was often considered an acceptable cost of avoiding the potential application of the penalties under section 237.1.

The purpose of this article is not to review the tax shelter rules in detail; there is no shortage of published commentary on section 237.1.[3] Here, our objective is more modest and simple—to make the case that, in light of the language, context, and purpose of the provision, the proper ambit of section 237.1 is much narrower than the CRA has recently asserted. The CRA's position is based in part on the decisions of the Tax Court of Canada in *Maege v. The Queen* and *Jevremovic v. The Queen*.[4]

2 Initially introduced in a technical amendments bill (1995-1997), section 143.2 was added to the Act by SC 1998, c. 19, s. 168, applicable to property acquired and to outlays and expenses incurred by a taxpayer after November 1994, except as provided by certain transitional rules for 1994 and 1995 set out in SC 1998, c. 19, s. 168(2).

3 See Robert C. Strother, "The Future of Tax Shelters," in *1995 British Columbia Tax Conference* (Toronto: Canadian Tax Foundation, 1995), tab 13; Richard Lewin, "Tax Treatment of Lease Inducements and At-Risk Rules and the New Limited Recourse Debt Rules," in *Real Estate Transactions: Tax Planning for the Second Half of the 1990s*, 1995 Corporate Management Tax Conference (Toronto: Canadian Tax Foundation, 1996), 5:1-20, at 5:18-20; Ralph T. Neville, "Real Estate and the Draft Legislation Technical Amendments of April 26, 1995," ibid., 11:1-10, at 11:3-8; Michael D. Templeton, "No Shelter Here: The April 26, 1995 Draft Legislation Restricts Tax Shelters and Loss Utilization," ibid., 19:1-27, at 19:1-11; P. Wayne Penny, "Tax Shelter Rules: Where Are We?" in *Report of Proceedings of the Forty-Seventh Tax Conference*, 1995 Conference Report (Toronto: Canadian Tax Foundation, 1996), 13:1-22; C. Anne Sanderson, "Tax Shelters: The War Zone," ibid., 32:1-28; Douglas S. Ewens, "Tax Shelter Analysis: Part 1," The Taxation of Corporate Reorganizations feature (1996) vol. 44, no. 4 *Canadian Tax Journal* 1207-20, and ". . . Part 2," The Taxation of Corporate Reorganizations feature (1996) vol. 44, no. 5 *Canadian Tax Journal* 1486-97; Shawn D. Porter, "Tax Shelter Rules: Are We There Yet?" in *Report of Proceedings of the Forty-Eighth Tax Conference*, 1996 Conference Report, vol. 1 (Toronto: Canadian Tax Foundation, 1997), 24:1-36; C. Anne Sanderson and Douglas S. Ewens, "The 'New and Improved' Tax Shelter Rules," in *1996 Prairie Provinces Tax Conference* (Toronto: Canadian Tax Foundation, 1996), tab 5; Vincent M. Bjorndahl, "The Tax Shelter Minefield" (1997) vol. 10, no. 1 *Canadian Petroleum Tax Journal* 129-60; and Donald H. Watkins, "The Tax-Shelter Rules: An Update," in *Report of Proceedings of the Fiftieth Tax Conference*, 1998 Conference Report (Toronto: Canadian Tax Foundation, 1999), 5:1-32

4 Heard on common evidence and reported sub nom. *Maege et al. v. The Queen*, 2006 DTC 3193 (TCC).

The essence of those decisions is that section 237.1 is applicable in any circumstance where the numerical formula requirement in the tax shelter definition in subsection 237.1(1) is met, whether or not any statements or representations were made or proposed to be made in respect of the property. The Tax Court's decisions were affirmed by the Federal Court of Appeal,[5] but with little, if any, analysis. In this article, we make the case that the application of section 237.1 does not rest simply on the numerical formula requirement contained in the provision, as concluded by the courts in these cases. Rather, section 237.1 contains a second requirement—that statements or representations must be made or proposed to be made on certain tax or financial matters—and this requirement is fundamental for the application of the tax shelter rules.

This article focuses on this second fundamental requirement and on the principles that we believe to be relevant in determining the proper ambit and meaning of the phrase "statements or representations" (which is not defined in the Act) in the tax shelter definition. We start with a review of the salient parts of the definition and a discussion of the "mischief" at which the tax shelter rules are aimed. This is followed by a summary of the general principles of construction that apply to the interpretation of provisions of the Act and a detailed analysis of the proper interpretation of the phrase "statements or representations," based on a textual, contextual, and purposive approach. We then consider how the courts have dealt with the phrase in applying section 237.1, particularly in *Maege* and in *Baxter v. The Queen*.[6] In *Baxter*, the Federal Court of Appeal rejected the interpretation endorsed by the courts in *Maege*, that section 237.1 applies in any case where the numerical formula requirement in the tax shelter definition is met. An application for leave to appeal *Baxter* was refused by the Supreme Court of Canada on November 1, 2007.

It will be apparent from our detailed analysis of *Maege* and *Baxter* that we are left with two conflicting decisions of the Federal Court of Appeal on the question of whether statements or representations must be made or proposed to be made for a particular property to constitute a tax shelter property pursuant to section 237.1. It is reasonable to expect that the CRA will assert that the interpretation endorsed in *Maege* is the correct one—that is, that the making or proposed making of statements or representations is not a fundamental requirement for the application of section 237.1. We believe that this interpretation is wrong and that the reasoning in *Maege* on which it is based is seriously flawed. The mischief at which section 237.1 is aimed is "marketed" tax-advantaged investments, and this purpose is reflected in the language and context of the provision. The phrase "statements or representations" makes section 237.1 work and is the basis for what we consider to be a second fundamental requirement for the application of the provision to a particular property. The importance of this phrase to the proper interpretation and scope of the

5 2007 FCA 125.

6 2006 DTC 2642 (TCC); rev'd. 2007 DTC 5199 (FCA).

provision is plain to see. Nevertheless, for reasons that are difficult to understand, in *Maege*, the courts endorsed an interpretation that gives the phrase little weight and seems out of step with its ordinary meaning, the meaning accorded to it in Canadian non-tax jurisprudence, its context, and the purpose of the tax shelter rules in section 237.1.

With the detailed reasons that follow as underpinning, this article makes two key points. First, for section 237.1 to apply to treat a particular property as a tax shelter property, the required statements or representations on certain tax or financial matters must be made or proposed to be made in respect of an interest in the particular property. Second, the statements or representations, viewed objectively, must have sufficient nexus to such interest and its acquisition for the particular property to constitute a tax shelter property.

THE TAX SHELTER DEFINITION

The definition of "tax shelter" in subsection 237.1(1) is at the centre of the discussion that follows. We therefore begin by reproducing the relevant portions of the definition, with italics added to emphasize certain parts, as follows:

> "[T]ax shelter" means . . .
>
> (b) . . . a property . . . in respect of which *it can reasonably be considered, having regard to statements or representations made or proposed to be made* in connection with . . . the property, that, *if* a person were to . . . acquire an interest in the property . . .
>
> (i) the total of all amounts each of which is
>
> (A) an amount, or a loss in the case of a partnership interest, *represented to be deductible* in computing the person's income . . . in respect of . . . the interest in the property (including, if the property is a right to income, an amount or loss in respect of that right that is *stated or represented to be so deductible*), or
>
> (B) any other amount *stated or represented* to be deemed under this Act to be paid on account of the person's tax payable, or to be deductible in computing the person's income, taxable income or tax payable under this Act, . . . in respect of . . . the interest in the property . . .
>
> would equal or exceed . . .
>
> (ii) the amount, if any, by which
>
> (A) the *cost to the person* . . . of the interest in the property . . .
>
> would exceed
>
> (B) the total of all amounts each of which is the amount of any *prescribed benefit* that is expected to be received or enjoyed, directly or indirectly, in respect of . . . the interest in the property.[7]

7 This definition was amended in 2003 to include property acquired under a "gifting arrangement." The definition of a gifting arrangement is reproduced and discussed below, under the heading "Proper Interpretation of 'Statements or Representations.'"

With respect to the term "prescribed benefit," the type of financial assistance that results in a prescribed benefit is defined in two regulations—regulations 231(6) and (6.1). Regulation 231(6) defines the prescribed benefits using the phrase "statements or representations," but with slightly different wording than the preamble of the tax shelter definition, as follows:

> For the purposes of paragraph (b) of the definition "tax shelter" in subsection 237.1(1) of the Act, "prescribed benefit" in respect of an interest in a property means any amount that may reasonably be expected, having regard to statements or representations made in respect of the interest, to be received or enjoyed by a person . . . who acquires the interest . . . and includes [certain specified amounts].

Presumably, the specified amounts that the regulation goes on to describe are considered to constitute prescribed benefits without reference to the preamble of the tax shelter definition. The language in regulation 231(6) concerning prescribed benefits is consistent with typical prepackaged tax shelter offerings involving prearranged financial protections that are held out to investors as part of the offering (the very kinds of arrangements that prompted the introduction of the tax shelter rules). Regulation 231(6) requires more than the existence of facts or contractual arrangements that have, or might have, the effect of reducing or managing the risk of loss to an investor. In the same way that subsection 237.1(1) requires that the tax benefits be advertised to investors, regulation 231(6) requires that statements or representations *actually* be made to the investor concerning such benefits; it is not sufficient that the statements or representations are *proposed* to be made.

Unlike regulation 231(6), regulation 231(6.1) makes no reference to statements or representations in prescribing benefits. It simply provides that, subject to certain enumerated exceptions, a prescribed benefit in respect of an interest in a property includes an amount that is a limited-recourse amount because of subsection 143.2(1), (7), or (13). In general, a limited-recourse amount in those provisions includes the amount of any debt for which recourse is limited in any way or that is not repayable in full in 10 years or less.

To focus the discussion that follows, there are several aspects of the tax shelter definition that merit closer consideration. It is useful to note at this point what the definition says and, perhaps more important, what it does not say. The definition does not say that a property is a tax shelter if statements or representations—however those terms are defined—are made in connection with certain tax or financial matters in respect of an interest in the property. In fact, the definition says much more and, as a consequence, is more complicated in its application. What the provision says is that a property is a tax shelter if statements or representations are made in connection with certain tax or financial matters in respect of an interest in the property, *and* such statements or representations meet an objective standard. This objective standard is embodied in the language of the tax shelter definition, which refers to a property "in respect of which it can reasonably be considered, having regard to statements or representations." This language is the cornerstone of the definition, and

its use by Parliament is deliberate and instructive. In fact, the phrase "can [or "may"] reasonably be considered" is used throughout the Act to manifest an objective or reasonable standard. The tax shelter definition provides that a property is a tax shelter as a consequence of particular statements or representations if, and only if, such statements or representations satisfy this objective or reasonable standard.

GENERAL PRINCIPLES OF CANADIAN TAX INTERPRETATION

In recent jurisprudence, the Supreme Court of Canada has considered the proper approach to interpreting provisions of the Act. This jurisprudence includes *The Queen v. Canada Trustco Mortgage Co.*,[8] *Ludco Enterprises Ltd. et al. v. The Queen*,[9] *Stubart Investments Limited v. The Queen*,[10] and *Antosko et al. v The Queen*.[11] Two general principles can be distilled from these cases: first, the provisions of the Act must be interpreted in accordance with their ordinary meaning, absent ambiguity; and second, in most cases, the provisions must be interpreted without reference to the tax motivation of the taxpayer. In *Shell Canada Limited v. The Queen*, the Supreme Court elaborated upon the foregoing and endorsed the following general principle of tax interpretation:

> [I]t is well established in this Court's tax jurisprudence that a searching enquiry for either the "economic realities" of a particular transaction or the general object or spirit of the provision can never supplant a court's duty to apply an unambiguous provision of the Act to a taxpayer's transaction. Where the provision at issue is clear and unambiguous, its terms must simply be applied.[12]

Canada Trustco is one of only three cases heard by the Supreme Court to date dealing with the interpretation of the general anti-avoidance rule (GAAR).[13] In *Canada Trustco*, the court made certain observations concerning the correct approach to interpreting the provisions of the Act. Describing how that approach has evolved over the years, the court stated:

> There is no doubt today that all statutes, including the Act, must be interpreted in a textual, contextual and purposive way.[14]

8 2005 DTC 5523 (SCC).

9 2001 DTC 5505 (SCC).

10 84 DTC 6305 (SCC).

11 94 DTC 6314 (SCC).

12 99 DTC 5669, at paragraph 40 (SCC).

13 The other two GAAR cases are *Kaulius v. The Queen*, reported sub nom. *Mathew v. The Queen*, 2005 DTC 5538 (SCC); and *Lipson v. The Queen* (April 23, 2008, SCC) [unreported].

14 *Canada Trustco*, supra note 8, at paragraph 11.

That is, to the extent that the *Duke of Westminster* principle[15] stands for the proposition that the Act should be read literally, it no longer represents good law in Canada. However, the court also stated that, having regard to the fact that the Act "remains an instrument dominated by explicit provisions dictating specific consequences,"[16] it invites a largely textual interpretation. Commenting on the proper role of the courts, the court emphasized the need to interpret the Act in such as way as "to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently."[17] The court found support for this principle in prior case law and legal authorities on statutory interpretation:

> As stated at para. 45 of *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622:
>
> > *Absent a specific provision to the contrary*, it is not the courts' role to prevent taxpayers from relying on the sophisticated structure of their transactions, arranged in such a way that the particular provisions of the Act are met, on the basis that it would be inequitable to those taxpayers who have not chosen to structure their transactions that way. [Emphasis added by the court.]
>
> See also *65302 British Columbia*, at para. 51 *per* Iacobucci J. citing P.W. Hogg and J.E. Magee, *Principles of Canadian Income Tax Law* (2nd ed. 1997), at pp. 475-76:
>
> > It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.[18]

The court concluded that

> [u]ltimately, as affirmed in *Shell*, "[t]he courts' role is to interpret and apply the Act as it was adopted by Parliament" (para. 45).[19]

More recently, in *Placer Dome Canada Ltd. v. Minister of Finance (Ontario)*,[20] the Supreme Court dealt with the proper interpretation of a provision of the Mining Tax Act (Ontario). The specific issue was whether the term "hedging," as defined in that statute, was confined to contracts that were settled by physical delivery of the output from an Ontario mine, as argued by the taxpayer, or included any derivative transaction that had a sufficient link to such output, as maintained by the minister. The Supreme Court held that the definition of "hedging" was not restricted to

15 *Inland Revenue Commissioners v. Westminster (Duke)*, [1936] AC 1 (HL).

16 *Canada Trustco*, supra note 8, at paragraph 13.

17 Ibid., at paragraph 12.

18 Ibid.

19 Ibid., at paragraph 13.

20 2006 DTC 6532 (SCC).

transactions that were settled by physical delivery. In the course of its decision, the court elaborated upon its views with respect to the proper interpretation of the Act, as set forth in *Stubart* and *Canada Trustco*:

> In *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, this Court rejected the strict approach to the construction of taxation statutes and held that the modern approach applies to taxation statutes no less than it does to other statutes. That is, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (p. 578): see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. However, because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation where taxation statutes are concerned: *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, at para. 11. Taxpayers are entitled to rely on the clear meaning of tax provisions in structuring their affairs. Where the words of a statute are precise and unequivocal, those words will play a dominant role in the interpretive process.[21]

In a similar vein, in *The Queen v. Imperial Oil Ltd. and Inco Ltd.*,[22] the Supreme Court considered the proper interpretation of paragraph 20(1)(f). The taxpayers had realized foreign exchange losses on the redemption of debt obligations that were denominated in a foreign currency. The taxpayers sought to deduct the foreign exchange losses under paragraph 20(1)(f) on the principal basis that there was nothing in the language of the provision that restricted its application to original issue discounts. In a narrow 4-3 decision, the majority rejected the taxpayers' argument and, instead, held that subsection 39(2) was a complete code for determining the proper tax treatment of capital gains and losses realized by a taxpayer on the repayment of debt obligations that were attributable to foreign-currency fluctuations. The reasoning of the majority is clearly based on an approach that gives considerable weight to the context and purpose of the provision, and not just the ordinary meaning of its language.[23]

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21 Ibid., at paragraph 21.

22 2006 DTC 6639 (SCC).

23 The majority noted that the taxpayers' interpretation of paragraph 20(1)(f) was based primarily on its language and, in particular, its incorporation of the term "principal amount." The taxpayers argued that the definition of that term in subsection 248(1) includes the possibility that, in the case of a debt denominated in a foreign currency, the principal amount could fluctuate by reason of foreign-currency fluctuations. However, the majority rejected this argument, based as it was on the ordinary meaning of the language of paragraph 20(1)(f). Instead, the majority based their interpretation of the provision on its context and scheme or purpose. The majority stated, ibid., at paragraphs 61-62:

> [T]he arguments based on the use of the phrase "maximum amount" in the definition of "principal amount" fail because there is no indication that foreign currency conversions were in Parliament's contemplation when that section was drafted. Whether foreign

In summary, the Supreme Court of Canada has confirmed that the proper interpretation of a provision of the Act such as section 237.1 must be based on a consideration of three things: the ordinary meaning of the language of the provision, the context of the provision, and the legislative purpose of the provision. Canadian courts have confirmed that all three aspects of the provision must be considered in every case. However, where the interpretation of the provision is clear and unambiguous, according to the ordinary meaning of its language, this interpretation should be considered the proper one. While the context and purpose of the provision should also be considered, they should not be given much weight. This point was made in *Shell Canada*, where, as noted above, the Supreme Court affirmed the courts' overriding duty to apply an unambiguous provision of the Act, regardless of the "economic realities" of the particular transaction or the "object or spirit" of the provision.[24]

As the conflicting decisions in *Maege* and *Baxter* attest, the Canadian courts do not seem to have found the words "statements or representations" in the tax shelter definition to be clear and unambiguous on the basis of their ordinary meaning. In some ways, this is not surprising. As a matter of proper interpretation, there are several aspects of the definition that render its meaning, in all but the simplest cases, anything but clear and unambiguous. In light of the foregoing jurisprudence and the inherent ambiguity of the phrase, it should follow that, while the language in the definition and the other relevant language in section 237.1 should be paramount, the context of the phrase and the purpose of section 237.1 must also be given some weight in determining the proper interpretation. It seems clear that the proper interpretation of the phrase "statements or representations" should *not* be determined solely by reference to its language, with no consideration of its context and the purpose of section 237.1. While the jurisprudence is replete with examples of the approach that the courts should take in applying section 237.1, we note in particular the description provided by the Federal Court of Appeal in *The Queen v. Brelco Drilling Ltd.*:

> Subsection 55(2) is not clear and unambiguous. Where the words of a provision are difficult to understand, as here, Courts are required to look to the context, the object and the purpose of that provision. This Court did so in *Placer Dome*, *supra*, and *Walnut Investment*, *supra*.[25]

Accordingly, before we consider the principles that should govern the proper interpretation of the phrase "statements or representations" in the tax shelter definition,

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exchange losses are covered by s. 20(1)(f) must be ascertained with respect to the text, scheme and context of that provision.

Although the word "discount" does not appear in s. 20(1)(f), the opening words of s. 20(1)(f)(i) set out what is commonly accepted as the definition of a discount. Moreover, there is no express mention in s. 20(1)(f) of a foreign currency exchange. These facts suggest that the *primary reference* of s. 20(1)(f) is something other than foreign exchange losses, namely, payments in the nature of discounts.

24 See supra note 12 and the accompanying text.

25 99 DTC 5253, at paragraph 32 (FCA).

it is useful to outline what we believe to be the underlying purpose of the tax shelter rules in section 237.1.

UNDERLYING PURPOSE OF THE TAX SHELTER RULES

As we noted at the outset, section 237.1 is a provision that is both administrative and substantive. With respect to its administrative aspect, the provision is designed to ensure that a promoter of investments in certain (but not all) tax-advantaged property registers the property and obtains a tax identification number before "marketing" it to potential investors. This registration scheme was introduced in order to facilitate the effective audit of tax shelters by the CRA. The CRA was concerned that interests in tax shelters were being acquired by individual investors who were claiming significant tax deductions and were not normally subject to tax audit. Against this background, section 237.1 was enacted to facilitate the auditing of individual taxpayers who acquired an interest in a tax shelter, by requiring the promoter of the tax shelter, before selling or issuing any interests in the property, to "pre-register" it and obtain an identification number. To further ensure compliance, any investor who claims expected benefits in respect of the tax shelter is required to report the identification number in his or her tax return in order to obtain such benefits.

That the purpose of section 237.1 was to establish a system for the pre-registration of certain "marketed" investments seems clear. When section 237.1 was introduced, the focus in the technical notes to the tax shelter rules and other relevant materials was on "marketed" tax shelters that were designed to attract investors through the availability of tax deductions. These tax shelter investments were typically sold by prospectus or offering memorandum containing detailed statements on Canadian tax matters, including the available tax deductions and the financial assistance or protections to be made available to investors to reduce their investment risks.

In a technical interpretation issued in 1990, shortly after the tax shelter provisions came into effect, the CRA stated:

> Before an interest acquired in a partnership upon its creation would be considered to meet the definition of tax shelter there must be, inter alia, statements, representations, or advertisements promoting the income tax deductions available in respect of the partnership interest made or proposed to be made to the public in order to recruit investors. Consequently, where such statements or representations have not been made or are not proposed to be made in respect of the creation of a general partnership consisting of a small number of individual partners who are involved in its creation, such a partnership interest would not normally meet the definition of a tax shelter in subsection 237.1(1) of the Act.[26]

In a separate interpretation of the same date,[27] the CRA concluded that a tax shelter requires a promoter because the scheme of the provision is that it applies only where

26 CRA document no. 5-9372, April 23, 1990.

27 CRA document no. 5-0301, April 23, 1990.

there is a promoter who was required to obtain an identification number. In addition, in the CRA's view, the words "having regard to statements and representations made" indicate that the concern is with investments that are actively sought, so that "the likelihood of an investment being a tax shelter without a promoter is minimal."[28]

When amendments to the tax shelter provisions were announced in 1994, the minister of finance issued a press release stating that the improved measures would "prevent abuses through aggressive tax shelter promotions."[29] Given that the target of section 237.1 is marketed tax shelters, the tax shelter definition has been drafted to require the promoter to obtain an identification number before the prospectus, offering memorandum, or other selling instrument is circulated; the identification number can then be included in the selling instrument, thus identifying the offered investment as a tax shelter to prospective investors and ensuring that the CRA has the requisite information on file to permit an effective audit of all investors in the tax shelter. The phrase "proposed to be made" expands the tax shelter definition so that a property constitutes a tax shelter on the strength of statements or representations that have not in fact been made but are proposed to be made to prospective investors. This permits the promoter to pre-register the particular property as a tax shelter before the sale of the investment commences. To reinforce this requirement, subsection 237.1(4) precludes any person, whether as principal or agent, from selling, issuing, or accepting consideration in respect of a tax shelter property before the minister has issued an identification number; and subsection 237.1(5) requires the promoter of a tax shelter property to prominently display the identification number in certain written documents and on "every written statement made after 1995."

If the tax shelter definition were limited to property in respect of which the required statements or representations on certain tax or financial matters were made, without any further reference to statements or representations that were proposed to be made, no tax shelter would exist until the selling instruments were actually delivered to prospective investors. Accordingly, there would be no statutory basis on which an identification number could be obtained in respect of a tax shelter property before it was actually marketed to prospective investors, nor would there be any statutory requirement to that effect. It seems clear that this would not be an appropriate result, either for promoters of tax shelter property or for the CRA. Prospective investors would first become aware that a particular property was a tax shelter property only after they had received the selling instrument containing the required statements or representations.

Thus, the reference in the tax shelter definition to statements or representations that are proposed to be made seems to have the purpose of ensuring compliance with the statutory scheme in section 237.1, which is tied to fulfilling the objective

28 Ibid. For a fuller explanation of the CRA's position on this point, see infra note 32.

29 Canada, Department of Finance, "Measures Limiting the Use of Tax Shelters Announced," *News Release* 94-112, December 1, 1994. The amendments were included in a technical bill that was ultimately enacted in 1998: see supra note 2.

of auditing publicly distributed tax shelters that involve a large number of taxpayers. It ensures that the selling instruments to be distributed to prospective investors already include the identification number, as required under subsection 237.1(5). This is a practice that is now regularly followed for public offerings of tax shelter property, and it is common to see the number displayed on the selling instruments that are distributed to prospective investors.

The public statements issued by the Canadian government when section 237.1 was introduced made no reference to commercial transactions negotiated on a private basis by one or more taxpayers. This, we believe, is a reasonably clear indication that Parliament did not intend such transactions to be subject to section 237.1, even though the transactions may involve the acquisition of an investment that is expected to provide tax benefits to a small number of investors. Thus, an investment could have the necessary tax attributes to meet the numerical formula in the tax shelter definition but still not attract the application of the tax shelter rules.

PROPER INTERPRETATION OF "STATEMENTS OR REPRESENTATIONS"

Statements or Representations—A Fundamental Requirement of Section 237.1

On the basis of the language, context, and purpose of section 237.1, we believe that a fundamental requirement for the application of the tax shelter rules is that statements or representations on certain tax or financial matters must have been made or proposed to be made. The result, in our view, is that the status of a particular property as a tax shelter is not based on the simple application of the numerical formula described in the tax shelter definition, into which are fed certain tax and financial amounts relating to such property. Rather, tax shelter status is based on certain statements or representations made or proposed to be made to prospective investors in respect of such tax and financial matters. Simply stated, the fact that an investor in a particular property is entitled to a certain quantum of tax benefits as the result of acquiring an interest in the property is not enough to make the property a tax shelter. As well, statements or representations must have been made or proposed to be made to prospective investors, indicating that such entitlement would result from an acquisition of an interest in the property.

This requirement is set out in the "preamble" of paragraph (b) in the tax shelter definition. Subparagraphs (b)(i) and (ii) then go on to quantify the expected benefits of the investment pursuant to such statements or representations: specifically, for a property to be a tax shelter, statements or representations must be made in connection with the property to the effect that, within four years after the acquisition of an interest in the property by a person, (1) the aggregate amount of tax deductions (or deemed tax payments or tax reductions) so represented to be available to the person in respect of such interest will equal or exceed (2) the cost of such interest to the person, less (3) the amount of certain "prescribed benefits" or financial assistance that the person who acquires such interest may receive.

Thus, the classification of a property as a tax shelter under section 237.1 is not based on the taxpayer's actual tax results from the acquisition or ownership of an interest in the property. If that were the case, many investments would constitute tax shelters as a consequence of the mechanical application of the numerical formula in the tax shelter definition. Instead, a property is a tax shelter if, and only if, statements or representations are made or proposed to be made in respect of an interest in the property to the effect that, within four years of the acquisition of the interest, the purchaser will have tax deductions or claims in respect of the interest that equal or exceed the acquisition cost as determined by the formula.

The conclusion that the required statements or representations must be made or proposed to be made for a property to be a tax shelter is consistent with the language and context of the tax shelter definition pertaining to "gifting arrangements." Subsection 237.1(1) was amended in 2003 to include such arrangements in the tax shelter definition. In general, the amendments were intended to treat as tax shelters certain arrangements under which taxpayers make gifts or contributions of property in respect of which they are entitled to charitable or political deductions where the amount of the gift or contribution is effectively funded with limited-recourse debt. To this end, a "gifting arrangement" is defined in subsection 237.1(1) to mean

> any arrangement under which it may reasonably be considered, having regard to statements or representations made or proposed to be made in connection with the arrangement, that if a person were to enter into the arrangement, the person would
>
> (a) make a gift to a qualified donee, or a contribution referred to in subsection 127(4.1), of property acquired by the person under the arrangement; or
>
> (b) incur a limited-recourse amount that can reasonably be considered to relate to a gift to a qualified donee or a contribution referred to in subsection 127(4.1).

Further, the tax shelter definition was amended to provide that a tax shelter means a gifting arrangement described in paragraph (b) above, and a gifting arrangement described in paragraph (a) in respect of which it can reasonably be considered, having regard to statements or representations made or proposed to be made in connection with the gifting arrangement, that certain tax results or financial assistance would be available. It is difficult to see how an arrangement could be held to constitute a gifting arrangement without reference to the "statements or representations" described in the preamble of the gifting arrangement definition, since that phrase evinces the required linkage between entering into an arrangement and making, or incurring a limited-recourse amount relating to, a charitable donation or political contribution.

Ambit and Nature of the "Statements or Representations" Requirement

For the reasons set out above, it is clear that statements or representations must be made or proposed to be made for section 237.1 to apply. It remains to consider the ambit and nature of this requirement.

In general, we believe that for section 237.1 to apply in respect of a property, the required statements or representations on certain tax or financial matters must be oral or written communications that have sufficient particulars, meaning, and formality, when viewed objectively by a reasonable person, to be taken as having been intended to induce the purchaser to acquire an interest in the property, and must be intended to be relied upon to that end. This conclusion is based primarily on what we believe to be the proper interpretation of the tax shelter definition, taking into consideration its language, context, and legislative purpose. In particular, our conclusion is consistent with the objective, or "reasonable person," standard embodied in the definition. That is, the mere existence of statements or representations about tax benefits or financial assistance in relation to an interest in the property is not sufficient for the property to constitute a tax shelter; additionally, the relevant statements or representations must meet the objective, "reasonable person" test. Stated simply, the application of section 237.1 is based on an action and a result that are sufficiently linked as determined by an objective standard: *if* a person acquires a property, *then* that person will be entitled to the stated or represented Canadian tax benefits or financial assistance. For section 237.1 to apply as a consequence of particular statements or representations, those statements and representations (and no others) must link the action and the result, when viewed objectively by a reasonable person who has regard *only* to the particular statements or representations.

That the objective standard contemplated in the definition must be met by reference to particular statements or representations, as described in that provision, and not by reference to other statements or representations, or to the surrounding facts and circumstances, seems evident from the language of the definition. As well, where Parliament uses the phrase "can [or "may"] reasonably be considered" in the Act to provide an objective standard or measure in relation to a thing, and the legislator intends that reference is to be made to the surrounding facts and circumstances in addition to that thing, the legislator says so.

Thus, where a Canadian taxpayer who acquires an interest in a property relies on his own tax knowledge or expertise, or on statements or advice provided by his tax or legal advisers, and no other statements or representations in respect of the property are made to the taxpayer by any other person, such interest should not constitute a tax shelter for the purposes of section 237.1. In these circumstances, there are no grounds on which a reasonable person could conclude that the taxpayer based his expectations of receiving Canadian tax benefits or financial assistance as a result of the acquisition of the property on some general declaratory or discursive statement or representation made by a promoter or other person in relation to such matters. Instead, the reasonable person would conclude, using this objective standard, that the taxpayer based his expectations in relation to such matters on his own knowledge, or relied on detailed and informed statements and representations that he sought and received from his own tax or legal advisers.

Notwithstanding that *Maege* held to the contrary (as discussed below), for the several reasons noted above, we believe that a taxpayer cannot make statements or representations of the nature contemplated in section 237.1 to himself or herself.

Stated simply, thinking about the tax consequences of an investment in a property, even if one thinks out loud, does not make that property a tax shelter for purposes of the Act. In the same vein, while a taxpayer might receive statements or representations on Canadian tax matters from his or her professional advisers, these are not the type of statements or representations contemplated in the tax shelter definition. To conclude otherwise on these two points would, we believe, result in an inappropriate and unintended application of section 237.1.

The objective of section 237.1 is to ensure the pre-registration of marketed tax shelters. It is no more complicated than that. If *Maege* were correct in concluding that one can make the type of representations contemplated in section 237.1 to oneself, the results would be perverse. A purchaser who acquires an interest in a property may unintentionally invest in a tax shelter, depending on his or her tax expertise or knowledge. The result that is decried by Rip J in *Maege*—that a person with tax expertise can avoid the characterization of an interest in a property as a tax shelter, while a person who acquires a similar interest but has no tax expertise cannot—would be reversed. Tax expertise would become a disadvantage: these two purchasers would acquire similar interests in a property by participating in the same transaction or series of transactions, but would be treated differently. In *Maege*, Rip J was concerned that a tax-knowledgeable taxpayer should not be in a better position than a less knowledgeable one in the determination of whether either had acquired a tax shelter investment in the same transaction or series of transactions. In his view, to avoid this result, the more tax-sophisticated taxpayer should be considered to have made representations to herself. This curious interpretation conflicts with the language or context of section 237.1 and, with respect, defies common sense. Further, the result of this interpretation is to put the tax-knowledgeable taxpayer in a less favourable position with respect to the potential application of the tax shelter rules. In other words, the decision in *Maege* would mean that the more you know about tax matters, the more likely it is that your investment will be considered a tax shelter.

This result is contrary to the principle established in several decisions in which the Supreme Court of Canada has confirmed that, generally, tax legislation should be interpreted to ensure that taxpayers receive equal treatment. In *The Queen v. Singleton*,[30] the majority of the court reaffirmed the principle enunciated in *Bronfman Trust* that "[f]airness requires that the same legal principles must apply to all taxpayers, irrespective of their status as natural or artificial persons, unless the Act specifically provides otherwise."[31]

In considering a potential investment, it is common for a taxpayer to seek and obtain professional advice respecting the tax consequences of such investment. Such advice should not constitute statements or representations for the purposes of section 237.1. To conclude otherwise is to misread the language and ignore the context

30 2001 DTC 5533, at paragraph 37 (SCC).

31 *The Queen v. Bronfman Trust*, 87 DTC 5059, at 5064 (SCC).

of the phrase "statements or representations" in the tax shelter definition. In particular, as noted, the purpose of section 237.1 is to ensure that the promoter of a tax shelter pre-register the property before it is marketed and sold to potential investors. This purpose cannot be reconciled with the position that statements or representations made to a taxpayer by his or her own legal or tax advisers may cause the investment to be a tax shelter.

Such reading of section 237.1 would produce anomalous and, we believe, unintended results. For example, an investment by a taxpayer would be a tax shelter if another taxpayer received advice from his lawyer or accountant as to the tax consequences of the same investment. That the advice given to a potential investor by his own adviser would cause the investment to be a "tax shelter" for other investors (who, in most cases, would have no knowledge of such advice) is not a reasonable reading of the provision. As noted below, in *Baxter*, Bell J expressly rejected an interpretation of the tax shelter rules that would base their application to a particular taxpayer on statements or representations made to persons other than the taxpayer.[32]

32 *Baxter*, supra note 6 (TCC). On a related point, we believe that for a property to be a tax shelter, there must be a promoter in respect of the property. This point also seems to have been confirmed by the Federal Court of Appeal in *Baxter*, ibid. Subsection 237.1(1) defines a "promoter" in respect of a tax shelter to mean

> a person who in the course of a business
>
> (a) sells or issues, or promotes the sale, issuance or acquisition, of the tax shelter,
>
> (b) acts as an agent or adviser in respect of the sale or issuance, or the promotion of the sale, issuance or acquisition, of the tax shelter, or
>
> (c) accepts, whether as a principal or agent, consideration in respect of the tax shelter.

The scheme of section 237.1 is that before there is any sale or issuance of an interest in property that is a tax shelter, an identification number must be obtained from the CRA. To this end, as noted earlier, subsection 237.1(4) provides that no person shall, as principal or agent, sell, issue, or accept consideration in respect of a tax shelter before an identification number has been issued by the minister. Further, subsection 237.1(2) provides that a promoter in respect of a tax shelter shall apply for the identification number in prescribed form. On the basis of these provisions and the scheme underlying section 237.1, we believe that a cogent and compelling case can be made that if there is no promoter, there can be no tax shelter.

This conclusion seems consistent with (but is not based on) the CRA's administrative position. In CRA document no. 5-0301, supra note 27, the CRA had this to say in response to the question whether the reference to a tax shelter in subsections 237.1(4) and (6) could include a tax shelter for which there has been no promoter:

> In view of the scheme of the section, the Department considers that the provision in subsection 237.1(4) for the prohibition of sales of an interest in a tax shelter before it has a tax shelter identification number and the provision in subsection 237.1(6) for the disallowance of deductions claimed by a taxpayer in respect of an interest in a tax shelter unless the taxpayer provides the tax shelter identification number only apply to tax shelters in respect of which a promoter has been required, by the provisions of subsection 237.1(2), to apply for a number. In addition, in our view, the inclusion of the words "having regard to statements and representations made" in the definition of a tax

It is also important to note that section 237.1 is a penal provision and, as such, should be accorded a strict construction. It therefore seems unlikely that Parliament could have intended an investment to become a tax shelter merely because a taxpayer sought private professional advice about the legal and tax consequences of an investment. Such an interpretation would introduce great uncertainty into the possible application of a provision that must be certain in order to achieve its intended effect. There is no scope for ambiguity in a penal provision such as section 237.1. Canadian jurisprudence clearly requires that any such ambiguity be resolved in favour of the affected taxpayers.

For the reasons detailed above, in our view, statements or representations made to a taxpayer by his own legal or other advisers should never be the basis for characterizing an investment as a tax shelter under section 237.1. We note that the CRA also accepts this as a general principle and has made public statements to this effect. In the 1990 interpretation quoted earlier, the CRA stated:

> Where the lawyer or accountant is merely giving advice to a client who proposes to invest in a tax shelter, the lawyer or accountant will not be affected by the reporting requirements of subsection 237.1(7).[33]

We believe that the CRA's administrative position on this point, as stated above, is correct.

In sum, it is our view that, for an interest in a property to be a tax shelter as a consequence of any statements or representations made or proposed to be made in connection with the property, such statements or representations, considered objectively, must be intended to induce the acquisition of the property. That this linkage is required clearly follows from the language and operation of subsection 237.1(1),

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shelter in subsection 237.1(1) and our discussion thereof in paragraph 3 of IC [*Information Circular*] 89-4 indicates concern for investments the disposition of which is actively sought and that the likelihood of an investment being a tax shelter without a promoter is minimal.

The reasoning of the CRA reflected in the foregoing passage seems correct. As well, in our view, this reasoning ties in with and supports our conclusion that for a property to be a tax shelter, the required statements or representations on tax matters must be made (or at least be proposed to be made); and, we would add, they must be made (or proposed to be made) by the promoter. In this connection, we also concur with the following statement in CRA document no. 9015535, December 3, 1990:

> If it may reasonably be considered having regard to the statements and representations made or proposed to be made in connection with the property, that a purchaser will be entitled to deduct losses or other amounts in excess of the cost of the interest in the property to the purchaser at the end of any particular year after the deduction of prescribed benefits, then the property is a tax shelter. If statements or representations to that effect are not made by the promoter, then the property is not a tax shelter.

33 CRA document no. 5-9372, supra note 26. To similar effect, see also CRA document nos. 9201855, May 27, 1992, and 911990, November 6, 1991.

in the context of section 237.1 read as a whole. Given this scheme, it seems an untenable proposition that unspoken representations, whether intentionally unspoken or omitted through inadvertence, or statements or representations that are not reduced to a communicable form such as writing, and remain in the mind of a person, can come within the requirements of the Act for "statements or representations proposed to be made." There are compelling reasons for concluding that the phrase "statements or representations" in section 237.1 is intended to mean formal communications, but not necessarily legal ones, that relate to tax matters—either available tax deductions or other claims—or, in the case of prescribed benefits, specifics of the financial assistance that is to be provided to investors. Given the context of the phrase, including the punitive consequences for non-compliance where section 237.1 applies, it seems reasonable to conclude that these words were intended to refer to formal communications that are specific in nature in relation to tax matters. There should be no doubt on the part of promoters, potential investors, or tax advisers as to whether a particular investment is a tax shelter under the Act. In other words, section 237.1 should encapsulate a bright-line test. To this end, the statements or representations contemplated in subsection 237.1(1), whether they are made or proposed to be made, should be sufficiently specific that the need to pre-register the investment as a tax shelter is clear and unequivocal.

As explained in detail below, the interpretation set out above is in complete conformity with the legal interpretation of the phrase "statements or representations," and with the statutory context and scheme of section 237.1.

Determining the Meaning of "Statements or Representations"

Our conclusion that there must be a sufficient degree of formality to a communication or intended communication, viewed objectively, for it to constitute a required statement or representation for the application of section 237.1 is consistent with the ordinary meaning of these terms and, as well, the context and the underlying purpose of section 237.1. At first blush, the term "statements" in the phrase, considered by itself, has a very broad meaning. A statement has been defined to include any communication made in speech or writing about a fact or particular, including a single sentence or assertion. On closer examination, however, the expansive meaning of the term "statements" is clearly circumscribed, and significantly so, in subsection 237.1(1) by its juxtaposition to the narrower term "representations." The use of these words in combination in the tax shelter definition is surely deliberate, and relevant to the proper interpretation of the phrase. It is an accepted principle of statutory construction that every word or phrase in a statute is presumed to be relevant to its proper interpretation.[34] Accordingly (as Rip J correctly noted in *Maege*), phrases and words in statutes should not be interpreted so as to render any portion of a statute meaningless, pointless, or redundant.

34 Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, ON: Butterworths, 2002), 159.

For the reasons that follow, we believe that the ordinary meaning of "statements," which is potentially broad and expansive, must be read down when the term is used in the phrase "statements or representations." A narrower reading is necessary, in part, because the pairing of "statements" with "representations" constitutes an "associated word phrase," such that these terms are linked by a common or parallel meaning that reflects a common thread. Such reading down also ensures that the term "representations" is not rendered superfluous or mere surplusage, and reflects the fact that the terms "statement" and "representation" are treated as having substantively similar meanings in Canadian statutes and common law. These reasons, along with other supporting arguments, are explained in more detail below.

Interpretation of an Associated Word Phrase

The phrase "statements or representations" as used in section 237.1 is an associated word phrase. That is, it is a phrase in which two or more terms are connected by the word "and" or "or," are linked by parallel or similar meanings, and serve an analogous grammatical and logical function within a provision. Associated word phrases must be interpreted in accordance with the *noscitur a sociis*, or associated words, rule. Under this rule, the proper interpretation of the phrase requires the identification of a common feature of the terms that is intended to focus or narrow their separate meanings.[35] More particularly, where words are used in an associated word phrase, they must be read in their cognate sense on the basis that the meaning of one colours the meaning of another. Where an associated word phrase includes two terms, the more general of the two is read down to reflect the common denominator that it shares with the other. The result is that the meaning of the more general term is restricted to a sense analogous to that of the less general.[36]

Because "statements or representations" in section 237.1 constitutes an associated word phrase, the associated words rule requires that each term should be interpreted having regard to the other and to the common thread that links them. Thus, the meaning of "statements," which is potentially broader than the meaning of "representations," should be narrowed to the meaning shared by the two terms.

We recognize that the associated words rule as a principle of construction has its limits. For example, where the terms in question are joined by the word "or" but are not intended to be part of a list or enumeration, those terms need not be interpreted as having a common meaning or thread. Thus, in *The Queen v. Daoust*,[37] the Supreme Court of Canada concluded that the word "convert" used in the phrase "conceal or convert," as used in Canada's Criminal Code, should be given its well-accepted meaning at common law and not be read as having a similar meaning to the word "conceal." However, the terms "statements" and "representations" in section 237.1

35 *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919.

36 See *Regina v. Goulis* (1981), 33 OR (2d) 55, at 61 (CA); and W. Wyatt-Paine, *Maxwell on Interpretation of Statutes*, 6th ed. (London: Sweet & Maxwell, 1920), 574.

37 [2004] 1 SCR 217.

are intended to be read as part of a list or enumeration, and are susceptible of analogous meanings. The wording of the provision requires these terms to be interpreted with reference to each other; indeed, it is difficult to find a clearer example of an associated word phrase. There are, however, several other cogent reasons to read down the meaning of these terms, with the same result as if the associated words rule were applied.

Avoiding Surplusage

There is a general Canadian principle of statutory construction that each word used in a statutory provision is intended to have a specific meaning and function. This principle, known as "the presumption against tautology," is succinctly summarized in *Sullivan and Driedger on the Construction of Statutes* as follows:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and have a specific role to play in advancing the legislative purpose.[38]

To similar effect, the Supreme Court of Canada stated in *The Queen v. Proulx*:

> It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage.[39]

The result of the requirement that every word in a statutory provision be given a meaning and a function is that an interpretation of a particular provision that renders a word meaningless should be avoided in favour of one that does not have this result. There are many cases where Canadian courts have relied upon the presumption against tautology to resolve questions of statutory ambiguity.[40]

Thus, another reason why the term "statements" in the phrase "statements or representations" should not be read in an expansive manner to include any communication, whether or not intended to induce an action, is that such a reading would render the term "representations" in the phrase meaningless. If such a broad meaning were ascribed to the term "statements," there would be no circumstance in which such meaning would not include representations, whatever the proper meaning of the latter term. In short, there would be no communication to which the term "representations" in the phrase would apply and to which the term "statements" would not. As a result, the term "representations" would have no role to play in determining the proper interpretation of the phrase. In our view, this would clearly be an unintended result, and one that the courts should strive to avoid. As

38 Supra note 34, at 158.

39 [2000] 1 SCR 61, at paragraph 28. See also *Gray Beverage v. Wong et al.* (1981), 29 AR 385 (QB).

40 See, for example, *Johns-Manville Canada Inc. v. The Queen*, [1985] 2 SCR 46, at paragraph 43; *R v. Z (DA)*, [1992] 2 SCR 1025, at 1044-48; *Davidson v. Board of Referees* (1987), 80 NR 268, at 269 (FCA); and *Swan v. Canada*, [1990] 2 FC 409, at 431 (TD).

stated in *Sullivan and Driedger*, "[t]he presumption against tautology is invoked by the courts frequently and for a variety of purposes."[41] In the case of section 237.1, the foregoing result is avoided if "statements" is read down to give it a meaning that is more akin to the meaning of "representations." We believe that the courts should interpret the provision in a manner that ensures that the term "representations" has a role to play and is not mere surplusage.

Consistency with Usage in Statute Law

Another reason why the term "statements" in the phrase "statements or representations" should be read so as to reflect a common thread or meaning with the term "representations" is that such a reading would be consistent with the meaning accorded the phrase when used in Canadian statute law. There are, in fact, many federal and provincial statutes that include the phrase "statements or representations."

Prior versions of the tax shelter definition in section 237.1 indicate that the two terms were originally intended to be read interchangeably. For example, the relevant portions of the definition as enacted in 1989 could be parsed as follows:

> "[T]ax shelter" means any property . . . in respect of which it can reasonably be considered, having regard to statements or representations made or proposed to be made in connection with the property, that, if a person were to acquire an interest in the property . . .
>
> (a) the total of all amounts each of which is
>
> (i) an amount, or a loss in the case of a partnership interest, represented to be deductible in computing income in respect of the interest . . . (including, where the property is a right to income, an amount or loss in respect of that right that is represented to be deductible) . . .
>
> (ii) any other amount represented to be deductible in computing income or taxable income in respect of the property. . .
>
> would equal or exceed. . . .

Thus, the first iteration of the definition clearly indicated that the terms "statements" and "representations" were understood to share a common meaning: each encompassed communications made to a potential investor in a tax shelter that "represented" the availability of certain deductions if the proposed investment was made. However, as a result of subsequent amendments, in the current version the interchangeable use of the terms has been obscured. Notably, specific references to amounts "stated" to be deductible have been added to the definition, but the key reference to amounts deductible in clause (b)(i)(A) continues to refer only to such amounts "represented" to be deductible. This reference is fundamentally inconsistent with an expansive meaning of either the phrase "statements or representations" or the term "statements," because it expressly requires that the particular statements or representations under consideration must result in amounts being *represented*,

41 Supra note 34, at 159.

and not simply stated, to be deductible. While clause (b)(i)(B) has been amended to refer to any other amount "stated or represented" to be deductible, to avoid double counting this clause excludes any amount stated or represented to be deductible by virtue of the computation under clause (b)(i)(A). The result is that a key aspect of the tax shelter definition expressly restricts the relevant "statements or representations" to those that result in amounts being represented to be deductible.

Consistency with Usage in Common Law

Our conclusion that the terms "statements" and "representations," as used in section 237.1, should be read as having substantively similar meanings is consistent with the usage of these words as parallel or mirror terms in Canadian common law.[42] In particular, in the common law of torts and contract, both terms are used to mean a communication made to induce an action with the intention that it be relied on. Thus, in our view, "statements" and "representations" should be interpreted as being effectively interchangeable for the purposes of section 237.1, not just because the terms are used in an associated word phrase, but also because of their usage as substantively similar terms in common law.

Moreover, common-law usage supports our view that formality, reliance, and specificity are appropriate requirements for a statement or representation for purposes of the application of a statute. Perhaps the best example of the common-law approach is the use of the related concepts of representation and misrepresentation in the tort law of negligent misstatement or misrepresentation. A useful starting point is the description of a "representation" found in *Halsbury's Laws*:

> A representation is a statement made by a representor to a representee and relating by way of affirmation, denial, description or otherwise to a matter of fact. . . .
>
> Mere praise by a person of his own goods, inventions, projects . . . if confined to indiscriminate puffing and pushing, and not related to particulars, is not representation.
>
> Where instead of basing the exaggeration or puffing upon facts separately stated . . . the representor intermingles it with facts, punctuates it by details or quantifies it by figures, the whole of the compound statement is deemed a representation.[43]

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42 Where a word or phrase used in the Act is not defined therein but has an accepted meaning in the broader Canadian commercial law, it should be interpreted by reference to such meaning. In *Will-Kare Paving & Contracting Ltd. v. The Queen*, [2000] 1 SCR 915, the Supreme Court reaffirmed the principle of tax construction that the Act relies implicitly on general commercial law, especially the law of contract and property. The court stated, at paragraphs 32-33:

> Referring to the broader context of private commercial law in ascertaining the meaning to be ascribed to language used in the Act is also consistent with the modern purposive principle of statutory interpretation. . . .
>
> The technical nature of the Act does not lend itself to broadening the principle of plain meaning to embrace popular meaning. The word sale has an established and accepted legal meaning.

43 31 *Halsbury's Laws of England*, 4th ed., 2003 reissue (London: LexisNexis UK, 2003), paragraphs 703, 715-16.

The distinction between a representation and "indiscriminate puffing and pushing, . . . not related to particulars" is based on the formality requirement. The statement must be capable of causing reliance by a representee, as contemplated in the statutory uses of "representation" discussed earlier. The use of the word "statement" in the extract above indicates that this term has both a formal and a less formal meaning, and its formal meaning applies where "statement" is coupled with "representation."

The common law regarding negligent misrepresentation or negligent misstatement provides further support for the formality and reliance requirements in interpreting the phrase "statement or representation." In the seminal case on negligent misrepresentation, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*,[44] the court found that a duty of care arises where the person making a statement or expressing an opinion realizes that others may be influenced by the opinion or advice. Only a statement that could properly be relied upon may result in a misrepresentation.

A similar interpretation of the terms "statement" and "representation" is evident in the Canadian jurisprudence involving issues of tort law. An instructive example is the following comment of the Supreme Court of Canada in *Hercules Management Ltd. v. Ernst & Young*:

> In negligent misrepresentation actions, . . . the plaintiff's claim stems from his or her detrimental reliance on the defendant's (negligent) statement, and it is abundantly clear that reliance on the statement or representation of another will not, in all circumstances, be reasonable.[45]

The term "representation" has also been considered in contract law. This context is relevant in determining the proper meaning of the term for the purposes of section 237.1 because the tax shelter provisions apply in circumstances where a contract or bargain is made in respect of the acquisition of an investment. The definition of "representation" in contract law was cited in the BC case of *Ward v. Smith*:

> It is necessary first to determine whether the statements made by the Smiths in the disclosure statement are representations. G.H.L. Fridman, in *The Law of Contract in Canada*, 4th ed. (Scarborough: Carswell, 1999), stated at p. 474:
>
> > A representation has been defined as "a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstances relating to it." Such statements may indeed be, or become terms of the contract, in which event they will have effect as such. However, if a representation is not and never becomes a term, its legal character and consequences are different.
> >
> > Terms are contractual and the failure to fulfil the promise contained in a term gives rise to an action for breach of contract. Representations are non-contractual. If they are not true the appropriate remedy is not an action for

44 [1964] AC 465 (HL). See also *DeLazzari v. Bond*, [1989] BCJ no. 160.

45 [1997] 2 SCR 165, at paragraph 26.

> breach of contract, but the avoidance or rescission of a contract entered into in consequence of the representation, and, possibly, a tort action for damages. Thus, an untrue representation, or misrepresentation, may: (1) entitle the representee to avoid the contract, if the representation was fraudulently made; (2) entitle the representee to rescind the contract, if the representation was innocently made or; (3) entitle the representee to sue, in tort, for damages if the representation was negligently made.[46]

The authorities cited above focus attention on the need for sufficient specificity and formality to enable the parties to identify in a concrete way the actual statement or representation. In Canadian law, a general sense or belief that a person would have made some comment regarding a generic subject matter is not sufficient to crystallize such uncertain thoughts or fragments into statements or representations.

On this point, we note that when the phrase "statements or representations" is used in Canadian statutes, including section 237.1 of the Act, the language of the legislation reflects a consistent theme: namely, where a person makes statements or representations relating to specific matters to another person, in circumstances where it is reasonable to expect that the other person was intended to and could rely on such statements or representations, serious consequences may be imposed under the applicable provision.

For our purposes, two points stand out in the foregoing discussion of the use of the terms "statement" and "representation" in common law. First, the terms are consistently used as having similar meanings or, where they are used together, a common meaning. Second, the distinction between a statement or representation, on the one hand, and "indiscriminate puffing and pushing, . . . not related to particulars," on the other, is based on the formality requirement. A statement or representation must be capable of being relied upon by the recipient. The use of the terms "statement" and "representation" as being interchangeable indicates that "statement" has a formal and a less formal meaning, and that it should be given its formal meaning when coupled with, or used as having a similar meaning to, "representation."

Reference to the French Version of the Statute

A further argument in support of a narrow reading of the phrase "statements or representations" as used in the tax shelter definition is that such a reading would give the phrase a shared meaning with its counterpart in the French version of the Act. In Canada, all federal statutes exist in two versions—English and French—and both are equally authentic.[47] The two versions can be used to assist in determining the proper interpretation of a particular provision of the statute. This is not to say that the interpretation of the provision in one version can be used to override the interpretation in the other version. In this respect, neither version is paramount. Rather, since each version is authentic and may be relied upon, an ambiguity or

46 *Ward v. Smith*, 2001 BCSC 1366, at paragraph 21.

47 See infra notes 48-50 and the accompanying text.

uncertain interpretation of a provision in one version of the statute may be resolved by reference to the proper interpretation of the same provision in the other version. For the reasons that follow, we believe that the proper interpretation of the counterpart phrase in the French version of the tax shelter definition is strong and cogent support for our conclusion that "statements or representations" should be given a narrow reading in the English version.

The French version of the tax shelter definition does not use the French-language equivalent of the phrase "statements or representations." Instead, the French version uses the phrase "*déclarations ou . . . annonces*." The relevant portion of the French version reads as follows, with italics added to highlight the critical terms:

> « *abri fiscal* »
>
> bien . . . pour lequel il est raisonnable de considérer, compte tenu de *déclarations ou d'annonces* faites ou envisagées relativement . . . au bien, que, si une personne devait conclure l'arrangement ou acquérir une part dans le bien . . .
>
> (i) le total des montants représentant chacun :
>
> (A) un montant ou, dans le cas d'une participation dans une société de personnes, une perte qui est *annoncé* comme étant déductible dans le calcul du revenu de la personne pour l'année ou pour une année d'imposition antérieure au titre . . . de la part dans le bien (y compris, si le bien est un droit à un revenu, un montant ou une perte afférent à ce droit qui est *déclaré* ou *annoncé* comme étant ainsi déductible),
>
> (B) un autre montant qui est *déclaré* ou *annoncé* comme étant réputé, en vertu de la présente loi, être payé au titre de l'impôt payable par la personne, ou comme étant déductible dans le calcul de ses revenu, revenu imposable ou impôt payable en vertu de la présente loi.

When viewed in isolation, the terms "déclarations" and "annonces" have a different meaning than the counterpart terms, "statements" and "representations," in the English version of the definition.

Harrap's French-English Dictionary defines "déclaration" and "déclarer" in part as follows:

> déclaration *n.f.* declaration; (*a*) proclamation, announcement; . . . (*c*) émettre une d., to make a statement; d. sous serment, affidavit. . . .
>
> déclarer *v.tr.* 1. (*a*) to declare, to make known (one's intentions, wishes, . . . etc.); . . . 2. to declare, proclaim, announce, make public. . . .

While the person making an oral or written déclaration does not necessarily intend to be legally bound by its contents, a déclaration is usually made with the purpose of giving official status to a fact situation, a position, or an opinion, and in that sense is generally relied upon as an accurate expression of the issuer's position. Also, a déclaration generally conveys an impression of solemnity so as to have the desired influence on the addressees; accordingly, it is more than a mere statement or casual comment. In that sense, the meaning of the term "déclaration" is narrower than

that of the term "statement"; in fact, the English equivalent of "déclaration" is "declaration." Like the French term, "declaration" conveys a more formal statement that, in certain circumstances, may be relied upon.

Although the use of the French term "déclarations" for the English term "statements" is helpful in clarifying Parliament's intention, it is the use of the term "annonces" in place of the term "representations" and the phrase "un montant . . . qui est annoncé comme étant déductible" ("an amount . . . represented to be deductible") that provides the most compelling support for a narrow reading of the phrase "statements or representations." *Harrap's French-English Dictionary* defines "annonce" and "annoncer" in part as follows:

> annonce *n.f.* 1. (*a*) announcement, notification, notice; . . . (*c*) sign, indication. 2. advertisement; petites annonces, classified advertisement, small ads.
>
> annoncer *v.tr.* 1. to announce, give notice of, give out (sth.); . . . 2. to advertise (sale, etc.). 3. (*a*) to promise, foretell, give promise of; . . . (*b*) to give proof of (sth.); to show (sth.); . . . 4. to announce (s.o.), to show (s.o.) in.

It is noteworthy that the drafters of the French version did not use the term "représentations" (which might seem to be a closer equivalent to the English) but instead chose the term "annonces," connoting an advertisement or public notice. A communication is not an "annonce" if it is made in passing, without an intention and understanding that it will be relied on by the person to whom it is directed. In short, to constitute an "annonce," a communication requires a sufficient level of formality to induce reliance.

Given that the English and French versions of the Act are both authentic, not surprisingly there is a body of Canadian jurisprudence dealing with the significance of differing interpretations of a particular provision in the two versions. As a starting point, section 133 of the Constitution Act, 1867[48] and section 18 of the Constitution Act, 1982[49] require that federal statutes enacted by Parliament be printed and published in both English and French. These provisions have been interpreted by Canadian courts to mean that there is an implicit requirement that legislation also be *enacted* in both languages. This requirement has important implications when it comes to interpreting a federal statute. As noted in *Sullivan and Driedger*,

> [i]t means that both language versions of a bilingual statute or regulation are official, original and authoritative expressions of the law. Neither version has the status of a copy or translation; neither enjoys priority or paramountcy over the other. This corollary of bilingual enactment is known as the equal authenticity rule.[50]

48 30 & 31 Vict., c. 3, as amended.

49 Part I of the Constitution Act, 1982, being schedule B of the Canada Act 1982 (UK), 1982, c. 11.

50 Supra note 34, at 74-75, citing the following, at 75, note 8: "See *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at 618, *per* L'Heureux-Dubé J.: 'It is an established principle of interpretation in Canada that the French and English texts of legislation are deemed to be

The basic interpretive rule that is relevant is the "shared meaning" or "common meaning" rule. This rule requires that where there are choices of interpretation as between the two linguistic versions of a provision, and one interpretation reflects a shared or common meaning, that interpretation should be favoured over any other.

In *Hlopina v. The Queen*,[51] the Tax Court of Canada held that a Canadian-resident taxpayer enrolled in an American correspondence program was not entitled to a tuition credit under the Act because the applicable provision required full-time attendance. Although the taxpayer was enrolled full-time in the program, the court found that the French equivalent of the English word "attend" ("fréquenter") implied a physical presence at the university. Thus, the ambiguity of the English version was resolved by reference to the French. However, in a more recent case, *Valente v. The Queen*,[52] the Tax Court rejected this interpretation and held that the term "fréquenter" was as ambiguous as "attend."

It is instructive that in many cases, the shared meaning rule is used to provide a context for a particular phrase; often, the rule will help to determine whether a particular term or phrase is to be given its ordinary meaning or a narrower and more technical meaning.[53] However, like the associated words rule, the shared meaning rule has its limits. In particular, it will not be applied to displace what is determined to be a clear intention of Parliament that a different interpretation applies, depending on which linguistic version of the Act is considered. For example, Canadian courts may look at the history of the provision, the context of the legislation, the presumption against tautology, or any other elements of a purposive analysis as factors that may override the shared meaning rule.

In a 1946 decision, *Food Machinery Corp. v. Registrar of Trade Marks*,[54] the Exchequer Court favoured the application of the English version of section 26(2) of the Unfair Competition Act, even though the French version might have resolved the ambiguity of the English, because adopting the French version would have contradicted the clear meaning of section 26(1). In the 1979 case of *The Queen. v. Cie Imm. BCN Ltée*,[55] the Supreme Court of Canada referred to the overall context of the Income Tax Regulations as grounds to reject the shared meaning rule. Pratt J stated:

> In most cases, "*produit d'une disposition*" is treated as the equivalent of "proceeds of disposition": see ss. 20(1), 20(5)(c), 20(5)(e)(ii)(A), 20(6)(e), 20(6)(f)(ii) and 20(6)(g). But, in a few cases, the expression "*produit d'une aliénation*" has been used: see ss. 20(5a)(b), 20(6)(i), 20(6)(g) and 20(12).

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equally authoritative.' See also *R. v. Collins*, [1987] 1 S.C.R. 265, at 287-88; *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at 744. For further discussion of the equal authenticity rule, see M. Beaupré, *Interpreting Bilingual Legislation*, 2nd ed. (Toronto: Carswell, 1986)."

51 [1998] CTC 2669 (TCC).

52 2006 TCC 145.

53 See *Sullivan and Driedger*, supra note 34, at 85.

54 [1946] 2 DLR 258 (Ex. Ct.).

55 [1979] 1 SCR 865.

> A detailed examination of these provisions has convinced me that the expressions "disposition," "proceeds of disposition" and "disposed of" must, throughout, receive the same meaning respectively, regardless of the fact that in a limited number of cases the French text taken in isolation would convey a more restrictive meaning. Such a narrow meaning cannot however be held to control the much broader meaning of the English expressions, especially when it is apparent that such was not the intent, quite the contrary.[56]

Applying the shared meaning rule to the phrase "statements or representations" supports a narrow reading of the phrase. This narrow reading is consistent with the interpretation of the counterpart in French, "déclarations ou . . . annonces." In particular, the terms "annonces" and "annoncé" clearly require an announcement or notice with an intention and purpose to be relied upon. Further, the use of the shared meaning rule, effectively to restrict the broad meaning of the term "statement," is consistent with the overall context of the tax shelter rules. As described above, the underlying purpose of section 237.1 is to facilitate the auditing of investors in tax shelters and to prevent abuses through aggressive retail marketing of tax shelter investments. Viewed against that background, the French phrase "déclarations ou . . . annonces" seems quite consistent with Parliament's intention in enacting the tax shelter rules.

The Penal Nature of Section 237.1

A final reason for reading down the term "statements" in the phrase "statements or representations" is the intrinsic penal nature of section 237.1. Where the provision applies, it has extremely harsh results for promoters and investors, and this should mean that the phrase should be given a narrow interpretation.

Most provisions of the Act are merely administrative in nature, establishing rules governing the computation of a taxpayer's income and tax liability. While section 237.1 performs an administrative function, it is also, importantly, a penal provision. As such, its proper interpretation is not determined in the same manner as purely administrative provisions. Section 237.1 contains several "deterrence" rules that are aimed at enforcing compliance, by imposing potentially substantial monetary penalties for non-compliance on the purchasers of an interest in an unregistered tax shelter as well as on the promoter of the investment. Given these penalties, the CRA is required to surmount significant evidentiary and procedural hurdles in seeking to apply section 237.1 to a purchaser or promoter of a tax shelter. These hurdles should effectively raise the bar for the CRA in respect of any potential application of section 237.1. One such hurdle is that, as a penal provision, section 237.1 should be given a strict construction in favour of the taxpayer. Before considering the case law in support of the principle of strict construction for penal provisions, it is important to explain why section 237.1 is properly construed as a penal provision.

56 Ibid., at 874-75.

In *Stubart*,[57] the Supreme Court of Canada confirmed that the Act generally is not a penal statute. However, it is well established in Canadian tax jurisprudence that there are many provisions of the Act that are penal in nature (including, but not restricted to, sections 238 and 239, dealing with tax offences and tax evasion).

Canadian case law makes it clear that a penal provision need not be one that imposes the obligation to pay an amount that is expressly described as a penalty. The determination of whether a provision is penal in nature depends on its purpose and the consequences of its application—in short, whether the provision is intended to deter particular conduct by imposing a punishment when such conduct occurs. In *Colangelo Estate et al. v. The Queen*,[58] Bowie J treated subsections 163(2) and 110.6(6) as penal provisions. Subsection 163(2) applies generally where a taxpayer makes a false disclosure or omission in a return, form, or statement filed under the Act; subsection 110.6(6) applies where a taxpayer fails to report a capital gain in respect of a particular year. Where subsection 163(2) applies, the taxpayer is subject to a monetary penalty. Where subsection 110.6(6) applies, the penalty imposed on the taxpayer is the denial of a capital gains deduction that would otherwise be available under the Act.

The key characteristic of these and other provisions of the Act that makes them penal in nature is the punitive consequences for taxpayers when they apply—generally, but not necessarily, the denial of a benefit, or the imposition of a stated monetary penalty and, occasionally, imprisonment. That penal provisions are not restricted to those that impose a stated monetary penalty or imprisonment is clear from the Tax Court's ruling in *Colangelo Estate* in respect of subsection 110.6(6). To similar effect, reference may be made to *Taylor v. MNR*[59] and *H.J. Flemming Estate v. MNR*.[60] In *Taylor*, Rip J held that subsections 159(2) and (3), which make a legal representative personally liable for the tax liability of a trust or an estate in certain instances, are essentially penal in nature and must be strictly construed.

Section 237.1 clearly meets the criteria in the case law for characterization as a penal provision. Specifically, it seeks to regulate compliance with a reporting procedure for certain types of investments that fall within the statutory definition of a tax shelter, in order to assist the CRA in the administration of the Act; and, to this end, it imposes certain penalties for non-compliance. In this respect, it is similar to other enforcement and administration provisions that impose penalties under the Act (such as section 238).

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57 Supra note 10.

58 98 DTC 1607 (TCC). In an earlier decision, *Sommers v. MNR*, 91 DTC 656, at 660 (TCC), the court found that subsection 163(2) "is not a penal provision and . . . the penalties assessed pursuant thereto are administrative in nature," citing *Lavers et al. v. Minister of Finance of BC et al.*, 90 DTC 6017 (BCCA), and *The Queen v. Sharma*, 87 DTC 5424 (Ont. SC). Notwithstanding these decisions, there is considerable and more recent authority to the contrary, as discussed below.

59 [1986] 1 CTC 2313 (TCC).

60 Sub nom. *Parsons et al. v. MNR*, 83 DTC 5329 (FCTD); rev'd. 84 DTC 6345 (FCA).

The penalties imposed under section 237.1 are comparable to those in section 239, and perhaps subsection 163(2), in the severity of their consequences. In particular, if a taxpayer's investment is found to be a tax shelter for which no identification number was obtained by the promoter, subsection 237.1(6) will apply to deny the taxpayer any tax deduction or claim under the Act in respect of the investment, whether for capital cost allowance, interest, or otherwise. The penalty applies irrespective of the merits of the investment, its compliance with other technical requirements of the Act, or the magnitude of the taxpayer's investment. Moreover, even where the tax shelter investment has an identification number, the limited-recourse limitations under section 143.2 will apply. In short, the potential tax consequences to a taxpayer whose investment is determined to be a tax shelter under subsection 237.1(1) are harsh and punitive.

Given the draconian consequences of a mere failure to comply with certain filing requirements based on the characterization of an investment as a tax shelter, it is apparent that section 237.1 is intended to deter particular conduct by imposing a punishment when such conduct occurs, and thus should be construed as a penalty provision.

According to the case law, in considering the potential application of a penalty provision, that provision must be given a strict interpretation. This means that any ambiguity in its interpretation or its application in a particular case should be resolved in favour of the taxpayer. Further, it is the Crown that bears the onus of establishing that a penal provision applies in a particular case.

The proper interpretive approach to a penal provision was succinctly described in an 1887 English decision, *Tuck & Sons v. Priester*, as follows:

> We must be very careful in construing [the section in issue], because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction.[61]

Penal provisions are always given a strict, or narrow, construction by the Canadian courts.[62] This rule of interpretation is based on two related principles: first, the Crown's power to restrict the liberty of its citizens, whether by the imposition of fines or incarceration, should be exercised with care; and second, following from the important legal principle of the presumption of innocence, the imposition of an undeserved penalty is worse than the failure to impose a deserved one.

These principles for the interpretation of penal provisions have been consistently applied by Canadian courts in both tax and non-tax cases. In *Marcotte v. Deputy Attorney General (Canada) et al.*, a decision of the Supreme Court of Canada, Dickson J wrote:

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61 (1887), 19 QBD 629, at 638. See also *Proprietary Articles Trade Ass'n v. A-G Can.*, [1931] 2 DLR 1 (PC).

62 *Sullivan and Driedger*, supra note 34, at 384.

> No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced. If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.[63]

The Supreme Court reiterated this view in *R v. McIntosh*:

> [T]he overriding principle governing the interpretation of penal provisions is that ambiguity should be resolved in a manner most favourable to accused persons.[64]

In *Udell v. MNR*, Cattanach J (then of the Exchequer Court) referred with approval to *Tuck & Sons v. Priester*, stating, in an oft-quoted passage, that it was "unimpeachable authority" for the principle that

> if the words of a penal section are capable of an interpretation that would, and one that would not, inflict the penalty, the latter must prevail.[65]

Applying similar reasoning in *Electrocan Systems Ltd. v. The Queen*, the Federal Court Trial Division held:

> In construing a penal section words that are capable of an interpretation that would or would not inflict the penalty must be given the latter interpretation (see *The Minister of National Revenue v. Donald M. Weeks*, 71 DTC 6001, p. 6002). In other words, if this penal provision is ambiguous, the taxpayer must be given the benefit of the doubt.[66]

Canadian law recognizes "the need to give fair notice to the public of what acts or omissions are liable to be punished."[67] Therefore, the court may not "read in" a violation where the language of a statute is ambiguous. This concern was expressed by the Supreme Court of Canada in *R v. Kelly*, where McLachlin J wrote:

> It is a fundamental proposition of the criminal law that the law be certain and definitive. . . . This principle has been enshrined in the common law for centuries,

63 [1976] 1 SCR 108, at 115.

64 [1995] 1 SCR 686, at paragraph 38.

65 70 DTC 6019, at 6025 (Ex. Ct.). There are myriad examples of the application of this rule in Canadian tax law, including *Farm Business Consultants Inc. v. The Queen*, 96 DTC 6085 (FCA); *Holley v. MNR*, 89 DTC 366, at 369 (TCC); *De Graaf v. The Queen*, 85 DTC 5280 (FCTD); *Tatarchuk Estate v. MNR*, [1993] 1 CTC 2440, at 2446 (TCC); *Pallan et al. v. MNR*, 90 DTC 1102 (TCC); *Urpesz v. The Queen*, [2001] 3 CTC 2256 (TCC); *The Queen v. Taylor*, 84 DTC 6459 (FCTD); *Carlson v. The Queen*, 98 DTC 1373 (TCC); *MacKinnon v. The Queen*, [2001] 4 CTC 2772 (TCC); and *Billingsley v. The Queen*, 97 DTC 1436 (TCC).

66 86 DTC 6089, at 6090 (FCTD).

67 *Sullivan and Driedger*, supra note 34, at 385.

> encapsulated in the maxim *nullum crimen sine lege, nulla poena sine lege*—there must be no crime or punishment except in accordance with the law which is fixed and certain.[68]

This principle applies to both criminal and non-criminal statutes that impose penalties. In *R v. Wholesale Travel Group Inc.*, the Supreme Court of Canada stated:

> In *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, this Court held that the rights guaranteed by s. 11 of the *Charter* are available to persons prosecuted by the state for public offences involving punitive sanctions, i.e., criminal, *quasi*-criminal, and regulatory offences, either federally or provincially enacted. Wilson J. (for the majority) stated that s. 11 is intended to provide procedural safeguards in proceedings which may attract penal consequences even if not criminal in the strict sense.[69]

Thus, the strict construction rule prevails whether the offence to which a penal provision applies is a criminal, quasi-criminal, or regulatory offence.

According to the principles established in Canadian case law, the strict construction rule should apply to the interpretation of section 237.1, given the penal nature of the provision. In particular, the tax shelter definition in subsection 237.1(1), and the critical phrase "statements or representations" contained therein, should be given a strict, or narrow, reading since that definition and phrase are essential elements on which the application of section 237.1 is based. Moreover, any ambiguity should be resolved in favour of the taxpayer.

Summary of the Relevant Interpretive Principles

On the basis of the foregoing review, we conclude that for section 237.1 to apply, the required statements or representations on tax matters or financial assistance must have been made or proposed to have been made. Further, given the context of the tax shelter rules, we believe that the phrase "statements or representations" refers to a written or verbal communication that has sufficient specificity and formality to induce an act or event, and is intended to be relied upon to that end. The ordinary meaning of the term "statements" must be read down because of its pairing with the term "representations," to ensure that each has a parallel meaning that reflects a common thread. Thus, to constitute a statement or representation, a communication must be made formally, and in a context and form that would cause the recipient reasonably to rely on it. The result is that while a written or verbal comment about a tax matter that is made by a particular person in the course of a discussion with another person might constitute a statement by the particular person, without much more, it would not constitute a statement or representation about the tax matter. A

68 (1992), 92 DLR (4th) 643, at 667 (SCC).

69 [1991] 3 SCR 154, at 196. See also *Lloyds Bank Canada et al. v. International Warranty Company Limited*, 89 DTC 5279 (Alta. QB); and *The Queen v. Estabrooks Pontiac* (1982), 144 DLR (3d) 21 (NBCA).

communication regarding the availability of an amount of a tax deduction, deemed tax payment, or tax reduction that would meet the test in paragraph (b) of the tax shelter definition would have to provide information about the quantum and timing of such amounts that was of sufficient seriousness to meet the meaning ascribed by law to a "statement or representation."

It is recognized that, at first blush, the phrase "statements or representations" in the tax shelter definition, and particularly the term "statements," could be read expansively to include any oral or written communication. On the basis of such a reading, it would follow that a property would be a tax shelter if any person, including a potential purchaser of an interest in the property, the purchaser's banker or financial or tax adviser, the purchaser's co-investor, or a CRA employee in response to a query from the purchaser, made any statement or representation, even of a descriptive or general nature, about a Canadian tax matter or financial assistance in relation to such interest. On closer examination, however, such reading simply does not stand up.

When general principles of construction are applied in determining the proper interpretation of the phrase "statements or representations," it seems reasonably clear that the phrase is intended to describe communications in respect of tax matters or financial assistance that have sufficient formality as to be relied on by an objective person. As we have explained, one general principle of construction that is relevant is the associated words rule. That rule applies where two or more words are linked by "and" or "or" and the words are interpreted so as to have a common thread or meaning that restricts their scope to their broadest common denominator. Another general principle is the presumption against tautology: words in a statutory provision must be given a meaningful function or role in the interpretation of the provision and not treated as being meaningless or mere surplusage. If the term "statements" in section 237.1 were given an expansive meaning to include any communication, whether or not intended to induce an action, the use of the term "representations" would be rendered redundant and meaningless. However, an interpretation of "statements" that gives it a narrow meaning that is more consistent with the meaning of "representations" ensures that the latter has a role to play in applying the provision and is not mere surplusage.

Reading the phrase "statements or representations" as having a shared or common meaning is consistent with common usage in myriad Canadian statutory and common-law applications, which accord these terms slightly different but substantively similar meanings. Further, in the French-language version of the Act, the phrase that is used in place of "statements or representations" provides strong and cogent support for a common-meaning reading of these terms. Finally, the penal nature of section 237.1, as evidenced by the harsh consequences for investors and promoters when the provision applies, means that the provision should be given a strict interpretation and that any ambiguity as regards its application should be resolved in favour of the affected person. An expansive interpretation of the phrase "statements or representations" would be inconsistent with the well-established approach that has been developed by the Canadian courts in applying penal provisions.

TWO CONFLICTING DECISIONS ON THE "STATEMENTS OR REPRESENTATIONS" REQUIREMENT

As discussed earlier in this article, we believe that the language, context, and underlying purpose of the tax shelter rules intend to establish a bright-line test, such that promoters, potential investors, and tax or financial advisers can ascertain, with a reasonable degree of certainty, whether section 237.1 could apply to a particular investment. In this respect, we have concluded (for reasons set out in detail above) that, pursuant to the definition of a tax shelter in subsection 237.1(1), the existence of statements or representations on certain tax matters or financial assistance is a fundamental requirement for the application of section 237.1. Moreover, the phrase "statements or representations" used in section 237.1 means formal communications, although not necessarily legal ones, that are intended to be relied on by potential purchasers and that relate to tax matters (either available tax deductions, deemed tax payments, or tax reductions) or specifics of the financial protections that are to be available to purchasers. The remainder of the article provides a detailed description of the recent decisions in *Maege* and *Baxter*, where the courts took fundamentally different positions on the validity of these conclusions. In general, *Maege* rejected these conclusions and *Baxter* endorsed them.[70]

Maege

Maege involved the claim of two taxpayers for investment tax credits and losses relating to their investments in a partnership along with four other investors. No identification number had been obtained in respect of the investments. The Crown's position was that subsection 237.1(6) applied to deny the taxpayers' claims of such

70 Many cases prior to *Maege* and *Baxter* have dealt with the tax shelter rules, but for the most part the decisions in these cases provide no real insight into the proper interpretation of section 237.1. See, for example, *Peddle v. The Queen*, 97 DTC 1386 (TCC); *Burton v. The Queen*, 98 DTC 2064 (TCC); *MNR v. Norris*, [2002] 3 CTC 346 (FCTD); *Petit v. The Queen*, 2003 DTC 1419 (TCC); *Blier et al. v. The Queen*, 2003 DTC 970 (TCC); *Labelle v. The Queen*, [2004] 2 CTC 3053 (TCC); *Maya Inc. v. The Queen*, 2003 DTC 947 (TCC); *Haggarty et al. v. The Queen*, 2003 DTC 899 (TCC); *Bastien v. The Queen*, [2004] 4 CTC 2167 (TCC); *Bernier v. AG of Canada*, 2004 DTC 6726 (FCA); *Clayton v. The Queen*, [2004] 1 CTC 2265 (TCC); *Quinn v. The Queen*, 2004 DTC 3328 (TCC); and *Hexalog Ltée v. The Queen*, 2005 DTC 184 (TCC). Not only is there little or no discussion as to the proper interpretation of section 237.1, but in many of these cases, the court accepts the Crown's assertion that the property is a tax shelter, without undertaking much analysis of the relevant facts or law. An instructive example is *Peddle*, where the Tax Court seemed to conclude that the subject property was a tax shelter because the taxpayer had failed to file the special form required by subsection 237.1(6). In another case, *Petit*, supra, at paragraph 22, the Tax Court concluded that an investment in a licence was not a tax shelter because "documentary evidence provided as part of the sale of the licence . . . is not clear in establishing that the amount of the loss claimed, as being deductible in calculating the Appellant's income from acquiring the non-exclusive licence, would be greater than the actual cost for the investor" (translation).

credits or losses, apparently on the basis that the partnership was a tax shelter.[71] The court held that the investment made by each partner in the partnership was a tax shelter.

The purpose here is not to debate the court's decision on the particular facts and evidence before it. Although the reported summary of the relevant facts and evidence is not detailed, there seems to be enough evidence to support the court's conclusion that the taxpayers had invested in a tax shelter pursuant to section 237.1 (as it then read).

We do, however, strongly question the interpretive approach used by the court in applying the tax shelter definition, particularly its conclusions as to the proper meaning of "statements or representations." With respect, we believe that the court's reasoning is simply wrong on several key points. Contrary to the court's reasoning, we believe that the phrase "statements or representations" in section 237.1 is critical in determining whether the provision applies in a particular case; that this was Parliament's intention in using the phrase; and that a considered reading of the language, context, and purpose of section 237.1 admits of no other conclusion.

In *Maege*, the two taxpayers were investors in a partnership that engaged in scientific research and experimental development involving solar energy, environmental conservation, and greenhouse technologies. The partnership was funded by federal and provincial sources as well as private investments. The particular project in which the taxpayers invested involved an organic colouring agent that could be used in food colouring and cosmetics. One of the taxpayers, Ms. Maege, was an accountant. She seemed to be involved on behalf of the partnership in dealing with potential investors, including the other taxpayer, Mr. Jevremovic, who was a chemical engineer. In each of the relevant tax years, each taxpayer made an investment in the partnership and received an allocation of a share of the partnership losses and federal and provincial tax credits that exceeded the amount of the taxpayer's investment. The taxpayers gave evidence that they expected short-term losses from their investments for the first few years during the research phase of the project, followed by medium-to-long-term profits. In fact, this income was never realized. Technical problems, which were eventually resolved, delayed the marketing of the technology developed by the partnership. As a consequence of this delay, the funding dried up and the partnership terminated.

According to the evidence, Ms. Maege provided potential investors with some tax information respecting an investment in the partnership. Although the specifics of this information are unclear, Ms. Maege testified that prospective purchasers understood that each investor would be allocated a share of the business loss from the partnership corresponding to the investor's interest in the partnership and, in addition, would receive the benefit of investment tax credits. In addition, Mr. Jevremovic and other potential investors were given an offering memorandum, which included

71 *Maege*, supra note 4, at paragraph 4.

the statement "That as an incidental consideration was the possibility to deduct the tax losses and the investment tax credit."[72]

Counsel for the taxpayers argued that Ms. Maege may have provided, but did not herself seek or receive, tax information relating to the investment in the partnership; in other words, no statements or representations were made to Ms. Maege in respect of her investment. With respect to Mr. Jevremovic, counsel argued that he may have received some tax information, in the form of the general tax statement in the offering memorandum, but that this did not constitute the type of specific statement or representation on tax matters required by section 237.1.

Rip J held that the partnership interest of each taxpayer was an investment in a tax shelter. On the facts, this conclusion is not surprising, but the reasoning is. Ms. Maege was active in persuading potential investors to invest in the partnership and was knowledgeable about tax matters, including the tax benefits of an investment in the partnership. Thus, her counsel argued that while she may have made statements or representations about such tax benefits to potential investors, none were made to her because she did not require any. Rip J rejected this argument. His basic reason was that the financial and tax aspects of each interest met the numerical formula test in the tax shelter definition. He described this formula as follows:

> In terms of the financial aspects of an investment and whether or not it is a tax shelter, the provisions defining "tax shelter" can be reduced to a simple equation: there may be a tax shelter if A > (B – C) where A is the aggregate of deductions against income (including losses), B is the amount of the investment or cost, and C is the amount of prescribed benefits received (in this case, tax credits.) Applied to Mr. Jervemovic's 1990 tax year, for example, the calculation would be 10,000 > (10,000 – 5,094), militating towards a finding that the scheme is a tax shelter for the purposes of subsection 237.1(1).[73]

With respect, the reduction by Rip J of the tax shelter definition to a determination of whether, on the basis of the relevant tax results, the numerical formula was met is simply wrong. For the reasons we have noted, this approach ignores and is contrary to the clear language of the tax shelter definition—including, in particular, the phrase "statements or representations"—as well as the context of the definition and the purpose of section 237.1.

Rip J rejected the argument that for section 237.1 to apply, statements or representations must be made concerning certain tax matters or financial assistance. On this point, he placed considerable emphasis on the words "having regard to" in conjunction with the phrase "statements or representations" in the tax shelter definition.

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72 Ibid., at paragraph 16.

73 Ibid., at paragraph 30. In this connection, although not much turned on the point, somewhat surprisingly the CRA asserted—and the court accepted—that the investment tax credits of each taxpayer were prescribed benefits (within the meaning of current clause (b)(ii)(B) of the tax shelter definition) rather than amounts that were deductible in computing the taxpayer's tax payable (within the meaning of current clause (b)(i)(B)).

In his view, supported in substantial part by the parallel phrase "à la lumière" in the French version of the definition (as it then read), an investment could be a tax shelter absent any statements or representations. After noting that "a fundamental principle of statutory interpretation is that a legislature is presumed to say what it means and mean what it says," he stated:

> Parliament modified the phrase "statements or representations" and "déclarations ou annonces" with the equivocal "having regard to" and "à la lumière." We must presume that it did so for a reason. In the context of the foregoing "statements or representations made or proposed to be made" and "déclarations ou annonces faites ou envisagées" are one possible indicator of whether a tax shelter arrangement exists, but the absence of explicit statements or representations about the investment opportunity is not determinative. Each case will be decided on its own particular facts.[74]

Rip J then went on to state (presumably with reference to Ms. Maege):

> It also appears that in the context of the definition of "tax shelter" a "representation" need not be an explicit written or verbal assertion but can also include a mental or intellectual element, and appears to encompass representations to one's self.[75]

In support of this somewhat startling conclusion, Rip J relied, in part, on the *Shorter Oxford English Dictionary*, which includes among several possible meanings of "representation"

> [t]he action of placing a fact, etc., before another or others by means of discourse; a statement or account, esp. one intended to influence opinion or action; the action of presenting to the mind or imagination; an image thus presented; a clearly-conceived idea or concept.[76]

Moreover, according to Rip J, the importance of the subjective state of mind of the taxpayer who acquires an interest in a property is "further reinforced by the definitions of 'propose' or 'proposal,' which seems to include one's own personal intentions."[77]

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74 Ibid., at paragraph 38.

75 Ibid., at paragraph 39.

76 Ibid., quoting the *Shorter Oxford English Dictionary*, 3d ed., vol. 2. The other listed meanings in the *Shorter Oxford* include the following: "1. a. Presence, bearing, air . . . b. Appearance . . . 2. An image, likeness, or reproduction in some manner of a thing . . . b. A material image, or figure; in later use, *esp.* a drawing or painting (*of* a person or thing) . . . c. The action or fact of exhibiting in some visible image or form . . . 3. The exhibition of character and action upon the stage; . . . 4. The action of placing a fact, etc., before another or others by means of discourse; a statement or account, *esp.* one intended to influence opinion or action . . . 5. A formal or serious statement of facts, reasons or arguments, made with a view to effecting some change, preventing some action, etc.; hence a remonstrance, protest or expostulation."

77 *Maege*, supra note 4, at paragraph 40.

There are several flaws in Rip J's reasoning. The most fundamental is that, notwithstanding his endorsement of the basic principle of statutory construction that every word in a provision must be intended by Parliament to have meaning,[78] he seems not to have noticed that variations of the phrase "statements or representations" in the preamble recur throughout the numerical formula that follows. Thus, Rip J's reduction of the tax shelter definition to a determination of whether the taxpayer's tax results meet the numerical formula reflects an extremely important omission: it neglects to note that in applying the formula, the tax shelter definition expressly directs that the only amounts that are relevant are (in clause (b)(i)(A) of the current definition) amounts (or partnership losses) that are *represented* to be deductible in computing income (including, where the property is a right to income, an amount or loss in respect of that right that is *stated or represented* to be so deductible), and (in clause (b)(i)(B)) any other amount *stated or represented* to be deemed under the Act to be paid or to be deductible in computing the person's income, taxable income, or tax payable under the Act, other than an amount so *stated or represented* that is included in computing a loss described in clause (b)(i)(A). (The version of the definition that applied to the taxation years in issue in *Maege*, prior to the gifting arrangement amendments in 2003, was different in structure but contained substantially the same wording as the current version in the preamble and formula.)

Stated simply, Rip J seems to have overlooked the fact that the "statements or representations" requirement in the preamble is effectively reiterated in the main body of the definition to expressly describe those amounts that are relevant in applying the numerical formula. Thus, deductible amounts that are not represented are not counted or relevant in the formula. In our view, the fact that, for the purposes of the numerical formula, the only amounts to be included are those deductions or other amounts that are stated or represented to be deductible or otherwise tax-relevant completely undercuts the reasoning of Rip J that an investment can be a tax shelter even if no statements or representations are explicitly made or proposed to be made.

To buttress this point, it is important to note that the requirement for statements or representations is repeated in regulation 231(6), which designates certain types of "financial assistance" as prescribed benefits. The only prescribed benefits to which this requirement does not apply are those referred to in regulation 231(6.1)—that is, certain amounts that are limited-recourse amounts because of subsection 143.2(1), (7), or (13).

There are other serious problems with Rip J's reasoning. Most important, he reduces the rule for determining whether section 237.1 penalties apply to the application of a numerical formula in which, if the aggregate of the taxpayer's tax deductions in respect of a property exceeds the cost of the property less the prescribed benefits in respect of the property, the property is a tax shelter. In doing so, he effectively

78 "If Parliament had intended to make 'statements or representations' the critical or definitive aspect of tax shelter schemes they would have not used as equivocal a phrase as 'having regard to' or 'à la lumière' as a modifier to 'statements or representations' and 'déclarations ou annonces' ": ibid., at paragraph 36.

ignores a key element of the legislative structure of section 237.1—namely, that it is designed to ensure that a promoter (as defined) registers a property that is a tax shelter before it is marketed to potential investors. In fact, section 237.1 has no application unless there is a promoter, a point that the CRA has recognized in its administration of the provision.[79]

In addition, it is difficult to understand the basis on which Rip J could completely discount, as he did, the importance of the phrase "statements or representations" to the determination of whether a property is a tax shelter, or how he could conclude that one could make representations to oneself. In fact, Rip J relied on the phrase "having regard to" in the preamble to conclude that making or proposing to make statements or representations is not mandatory for a property to be a tax shelter. With respect, this conclusion makes no sense. It seems self-evident that the phrase "having regard to" is simply part of an objective test, established by Parliament, which is intended to be used to determine, on the facts of a particular case, whether a property is a tax shelter. The phrase "can [or "may"] reasonably be considered, having regard to" a particular thing, matter, or event—in this case, statements or representations made or proposed to be made—contemplates an objective test that is frequently applied in the Act. In fact, by his reasoning, Rip J has converted the objective test contemplated in the tax shelter definition into a subjective one. One of his reasons for doing so was his apparent concern that taxpayers should be treated equally under the tax shelter rules—that is, a taxpayer with more tax knowledge should not be in a better position with respect to the potential application of the provision than a taxpayer with less tax knowledge. Unfortunately, the approach adopted by Rip J would treat taxpayers differently on the basis of their tax knowledge, but in the opposite way: a taxpayer with more tax knowledge, being capable of making representations to himself, would be in a less favourable position with respect to the potential application of the provision than a taxpayer with less tax knowledge.

The preamble of the tax shelter definition (in both the former version and paragraph (b) of the current version) contemplates that a property is a tax shelter on the basis of an objective determination: whether it is reasonable to consider, having regard to statements or representations made or proposed to be made in respect of the property, that if a person acquired an interest in the property, a tax advantage would result, as calculated under the formula that follows (former paragraphs (a) and (b), and current subparagraphs (b)(i) and (ii)).

Rip J cited a decision of the Ontario Superior Court, *Concerned Citizens of King Township v. King*, as partial authority for his analysis of the phrase "having regard to," noting in particular the court's observation that

> "have regard to" falls somewhere on the scale that stretches from "recite them then ignore them" to "adhere to them slavishly and rigidly."[80]

79 See supra note 32.

80 (2000), 19 MPLR (3d) 103, at paragraph 19 (Ont. SCJ).

After recognizing that the phrase has an elastic meaning, but without much further explanation, Rip J concluded that it was Parliament's intention that, for the purposes of section 237.1, these words could be ignored. It is difficult to understand the thinking behind this conclusion. One would have thought that where a phrase has such an elastic meaning, the proper meaning in a particular provision would depend on the context and the purpose of that provision. In our view, this interpretive framework points to a meaning for the phrase that is closer to the other end of the scale described in *Concerned Citizens of King*. Moreover, a closer examination of that case casts further doubt on Rip J's conclusion.

Concerned Citizens of King dealt with the proper interpretation of former sections 2 and 3 of the Planning Act (Ontario), a statute that deals with land-use planning. Sections 2 and 3 (as they then read) directed various provincial and local authorities (including ministers, municipal councils, commissions, boards, and agencies) to "have regard to" certain specified matters in exercising their particular authority in relation to planning matters. In fact, the statutory directions in those provisions to have regard to certain matters were mandatory. The Ontario court effectively confirmed as much in the portion of the decision that follows the sentence quoted by Rip J above:

> The question is whether the Board had "regard to" provincial policies within the meaning given to that expression in *Juno Developments (Parry Sound) Ltd. v. Parry Sound (Town)* (1997), 35 O.M.B.R. 1 (Ont. Div. Ct.) per Molloy J. at p. 10:
>
> > It has been held that the Board is required to have regard to the Provincial Policy Statements issued under s. 3 of the Planning Act. In other words, to consider them carefully in relation to the circumstances at hand, their objectives and the statements as a whole and what they seek to protect: *Ottawa Carleton (Regional Municipality) Official Plan, Amendment 8 (Re)* (1991), 26 O.M.B.R. 132 at pp. 180-182.[81]

Further, and perhaps more germane in the context of *Maege*, the direction "to have regard to" certain matters in the former provisions of the Planning Act refers to an objective that is general rather than specific in nature—namely, to consider certain matters in the course of exercising authority in relation to a planning matter. In contrast, the context of the phrase "having regard to" in the tax shelter definition contemplates a specific end or objective—determining whether it is reasonable to consider, having regard to statements or representations made or proposed to be made, that the deductions or other tax-relevant amounts stated or represented to be deductible would equal or exceed the taxpayer's cost of the investment, net of prescribed benefits.

A particularly troubling aspect of the *Maege* decision in the Tax Court of Canada is Rip J's conclusion that, in the context of the tax shelter definition, one can make

81 Ibid., at paragraph 20.

a representation on tax matters or prescribed benefits to oneself. With respect, we find no basis for this conclusion on any reading of the provision, whether one applies a textual, a contextual, or a purposive analysis. Basing the characterization of a property as a tax shelter on what a taxpayer knew, and when the taxpayer knew it, cannot have been what Parliament intended. Moreover, Rip J's conclusion on this point seems to erode the CRA's confirmed administrative position that a property cannot be a tax shelter solely as a consequence of statements or representations made to a taxpayer by his or her own tax advisers. If a representation made to oneself on tax matters can (as Rip J maintains) cause a property to be a tax shelter, then why should this not also be true of representations made by tax advisers? For the reasons that we have discussed earlier in this article, that approach to section 237.1 is contrary to its purpose.

The flaws in Rip J's reasoning with respect to the meaning of "representation" are particularly evident in his analysis of the French version of the relevant parts of the tax shelter definition (as it then read). In the French version, the phrase "statements or representations" is expressed as "déclarations ou annonces." Rip J acknowledged that these words "appear to indicate a communication to the public."[82] In this connection, he noted that the definition of "annonce" in *Le Petit Robert* refers to an "action d'annoncer, de faire savoir quelque chose au public, verbalement ou par écrit." Similarly, in defining the word "déclarations," *Le Petit Robert* refers to "action de déclarer; discours ou écrit par lequel on déclare." The word "déclarer" is defined in part as "faire connaître . . . d'une façon expresse, manifeste."[83] Notwithstanding that the ordinary meaning of the phrase "déclarations ou annonces" seems to point fairly clearly to the requirement that there must be a communication made from one person to another, and that it must be of a public nature, Rip J concluded otherwise. He did so on the basis that, in his view, it is sufficient that déclarations ou annonces be "faites" (made) or "envisagées" (envisaged or contemplated). Thus, he concluded that

> [i]n the French language as well as the English language of this provision, "déclarations" and "annonces" may be contemplated or considered, even if not made.[84]

This is the same reasoning that Rip J used when considering the proper meaning of the phrase "statements or representations made or proposed to be made." Referring to the ordinary meaning of the word "proposed," he concluded that it is sufficient that a statement or representation be contemplated or considered, and that this could occur in one person's mind, without any requirement that there be a communication with another person. He stated:

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82 *Maege*, supra note 4, at paragraph 41.

83 Ibid., quoting *Le Petit Robert : Dictionnaire alphabétique et analogique de la langue française* (Montréal: DICTOBERT, 1993).

84 *Maege*, supra note 4, at paragraph 41.

> The role of the mental element in the determination of whether a taxpayer is involved in a tax shelter is further reinforced by the definitions of "propose" or "proposal," which seems to include one's own personal intentions. Again, according to the *Shorter Oxford English Dictionary*, the word can mean:
>
> > to put forward for consideration; to put before the mind; to state, propound, to set before one's mind as something to be expected; to put forward for acceptance; to put before one's own mind as something that one is going to do; to design, purpose, intend.[85]

This reasoning is clearly wrong in the context of the tax shelter definition. According to the language of the provision, the word "proposed" cannot mean statements or representations that are merely contemplated and never communicated. The statute specifically refers to statements or representations made *or proposed to be made*; it is not sufficient that they be simply proposed. In other words, the statements or representations must, in fact, be made—that is, communicated—or it must be proposed, or contemplated, that such statements will be made or communicated. Thus, contrary to Rip J's interpretation, it is not the statements or representations themselves that must be proposed or contemplated, but the making or communication of such statements or representations. There is a world of difference between the two, and, with respect, Rip J failed to recognize this. As a result, his interpretation of the phrase "statements or representations made or proposed to be made" is fundamentally flawed.

In a short judgment that is perfunctory in its analysis, the Federal Court of Appeal affirmed the decision of the Tax Court of Canada in *Maege*. While the decision may appear to implicitly concur with Rip J's conclusion that a property can be a tax shelter on the basis of the numerical formula in the tax shelter definition, notwithstanding the absence of specific statements or representations, on a careful reading, it is by no means clear that this is, in fact, what the Federal Court of Appeal concluded. The pertinent passage from the decision is as follows:

> The appellants submit that they did not invest in a tax shelter. They argue that their decision to invest was not made on the basis of "statements or representations" to the effect that, should the venture turn out to be unprofitable, the investor would recover his investment as a deductible loss, in addition to profiting from the federal and provincial investment tax credits. According to them it is the quality of the project, which after analysis, led them to invest.
>
> In this respect, Rip J. explained in his reasons that the existence of a tax shelter does not depend on the motivation of the investor, but rather on the equation provided for in section 237.1 of the Act (reasons, at paragraph 30). In this case, the product of this equation shows that the requirements of section 237.1 were met. We detect no error in this regard.

85 Ibid., at paragraph 40.

> As for the appellant Maege, counsel submitted that, although she was, as a promoter of the venture the author of "statements or representations" within the meaning of section 237.1, no statement was made to her. In this respect, we agree with Rip J., when he says that the fact that the appellant Maege did not make statements to herself is irrelevant. What is relevant is that she knew that beneficial tax consequences would arise as a result of her investment, as had been announced.[86]

On the one hand, parts of this text can be read as tacit support for the view that, for section 237.1 to apply to treat a property of a taxpayer as a tax shelter, there must be statements and representations that, when viewed objectively, can be taken to have held out certain tax consequences for potential purchasers of the property. Thus, the court states that a taxpayer cannot avoid tax shelter status for property acquired by arguing that, while statements or representations on tax matters were made in respect of the property, those statements did not motivate the taxpayer to acquire the property. Unfortunately, however, the court's view as to whether statements or representations constitute a requirement for finding that an investment is a tax shelter is equivocal at best. For example, the court refers with approval to paragraph 30 of the Tax Court decision, in which Rip J based his finding of a tax shelter on the application of the numerical formula in the tax shelter definition. However, when paragraph 30 is read together with paragraph 31, where Rip J disagreed that statements or representations need to be made for a property to be a tax shelter, the Tax Court decision effectively reduces the test for a tax shelter under section 237.1 to the mere application of the numerical formula. As discussed above, such a reading of the provision significantly expands the ambit of the tax shelter rules, and appears contrary to Parliament's intention.

Baxter

In *Baxter*, a taxpayer acquired an interest in a licence to use software that was developed to assist trading in futures contracts. The taxpayer claimed capital cost allowance in respect of the cost of the licence. As part of a multipronged challenge, the CRA reassessed the taxpayer to deny the tax deductions on the basis that the licence was a tax shelter under section 237.1 and no identification number had been obtained. The evidence was that while statements or representations on tax matters had been made to some investors who had acquired an interest in the licence, notwithstanding the Crown's pleadings, there was no evidence introduced before the court that such statements or representations had been made to the taxpayer.

In the Tax Court of Canada, Bell J held that the interest acquired by the taxpayer was not a tax shelter, primarily because there was no evidence that statements or representations on tax matters had been made to the taxpayer. In so concluding, he adopted a relatively narrow interpretation of the tax shelter definition, compared with that of Rip J in *Maege*. Unfortunately, most of Bell J's reasoning no longer has

86 *Maege*, supra note 5, at paragraphs 3-5.

application, because the principal reason for his conclusion that the subject property was not a tax shelter is based on language in the provision that has since been amended. Nevertheless, his reasoning is compelling and consistent with the language, context, and purpose of section 237.1, including, in particular, the part of the tax shelter definition that was the focus of the tax shelter issue in the case—namely, the extended phrase "in respect of which it can reasonably be considered, having regard to statements or representations made or proposed to be made in connection with the property."

With respect to that part of the definition, a key issue in *Baxter* was whether it was necessary for statements or representations to have been made to the taxpayer, as argued by the taxpayer's counsel, or whether it was sufficient for statements or representations to have been made to someone in respect of the property, as argued by the Crown. On the facts, the Crown seems to have conceded that it had not introduced any specific evidence that such statements or representations had been made to the taxpayer. After reviewing the relevant language in section 237.1, Bell J rejected the Crown's interpretation of the provision on the basis that such an interpretation produced an inappropriate result, as follows:

> Tax legislation can and does have effects which may seem harsh but that harshness must be the result of legislative precision. I cannot interpret the lack of words requiring the statements or representations to be made to the taxpayer as having the result of unfairly sweeping the taxpayer into consequences which may have been justifiably unforeseen. In a self-assessing system how can one expect a taxpayer *bona fide* investing in what appears to be a totally legitimate investment, to be prejudiced by something he doesn't know and can't know, and yet being required to file a tax return as if that taxpayer did know?[87]

That said, however, Bell J went on to note the Crown's argument that it seemed a reasonable inference (even, presumably, where specific evidence had not been introduced), based on the legal opinions and promotional material that the taxpayer had seen, as well as documents that the taxpayer had signed, that statements or representations had been made to the taxpayer that he would receive tax deductions equal to his investment in the first two taxation years after the investment was made.[88] Without commenting on the merit of this argument, Bell J went on to conclude, on an unrelated ground, that the interest in the licence acquired by the taxpayer was not a tax shelter. In the relevant taxation years, subparagraph (a)(i) of the tax shelter definition, as it then read, included in the formula amounts that were represented to be deductible and that were expected to be incurred. There is no longer any requirement that an amount must be expected to be incurred in order to be included under the formula. Relying on the decisions in *McKee v. The Queen*[89] and *Harris v.*

87 *Baxter*, supra note 6 (TCC), at paragraph 60.

88 Ibid.

89 77 DTC 5345 (FCTD).

MNR[90] (both of which dealt with the proper interpretation of former subsection 137(1), which denied a deduction for a disbursement or expense incurred that, if allowed, would unduly or artificially reduce income), Bell J concluded that the taxpayer's claim for capital cost allowance did not constitute an amount that was incurred by the taxpayer or any other person.

Given the basis for Bell J's conclusion that the interest in the licence acquired by the taxpayer was not a tax shelter, his detailed reasons are of limited relevance to the current application of section 237.1. However, his comments are instructive as to the proper interpretation of that provision. In particular, they reflect a fundamentally different and, we believe, a more accurate approach to such interpretation.

Most notably, Bell J correctly appreciated that section 237.1 could have no application to a taxpayer in relation to a property unless (as the provision then read) representations were made to the taxpayer respecting the tax consequences if the taxpayer acquired an interest in the property. In contrast to the approach adopted by Rip J in *Maege*, which is fundamentally flawed in this regard, in *Baxter* Bell J recognized that representations must be made because, in applying the formula, the only relevant amounts were those that were represented to be deductible. As discussed earlier, the tax shelter definition has since been amended to expand the formula in subparagraph (b)(ii) to include amounts that are stated or represented to be deductible; however, the result is effectively the same as that confirmed by Bell J in *Baxter*. When Rip J concluded that a property could be a tax shelter even without any statements or representations on tax matters, and reduced the determination of whether a property was a tax shelter to the application of a simple numerical formula, he clearly missed the point. The key tax amounts for the formula are those in respect of which there has been a statement or representation; no other tax amounts are relevant in applying the formula.

Further, the meaning that Bell J accords to the term "representation" in *Baxter* is in sharp contrast to that adopted by Rip J in *Maege*. As discussed above, Rip J referred to the *Shorter Oxford English Dictionary* to select from among a range of possible meanings an interpretation that included "a mental or intellectual element." From this he inferred that "representation" in the tax shelter definition "appears to encompass representations to one's self."[91] On this interpretation, the term "representation" is seemingly broad enough to include, for example, an artist's drawing of a tree; moreover, it appears to follow that the drawing is no less a representation if no one other than the artist has seen it. But clearly that is not the meaning of the term "representation" as used in the context of the tax shelter definition, especially when the subject matter of the representation that is made must be certain enumerated tax matters or financial assistance, and when the term is used in conjunction with the term "statements." In this connection, in *Baxter*, Bell J cited the legal meaning of the term "representation" in *Black's Law Dictionary*, 6th ed., as a "statement of fact

90 66 DTC 5189 (SCC).

91 See supra notes 75 and 76 and the accompanying text.

made to induce another to enter into a contract."[92] While it may not be that the term "representation" should be restricted to its legal meaning when used in section 237.1, it does seem clear that the term should, at the least, be accorded one of its primary meanings—namely, a communication from one person to another that is intended to induce an action by the recipient. There is no basis in the language, context, or purpose of section 237.1 to accord the term a meaning that would treat a thought about a tax matter, or the preparation of a memorandum to oneself on a tax matter, as constituting a statement or representation made about such tax matter.

In *Baxter*, the Federal Court of Appeal has gone some distance toward undoing the flawed reasoning of Rip J in *Maege* (having failed to address this concern in the appeal of that case). The Appeal ruling in *Baxter* first sets out a helpful framework to be used in determining whether a property is a tax shelter as defined in subsection 237.1(1). At the outset, the court makes it clear that the tax shelter definition embodies a test involving a hypothetical acquisition of property by a hypothetical purchaser (what we referred to earlier as an objective or reasonable person test). Briefly stated, would a hypothetical purchaser believe, on the basis of statements or representations made in respect of the property on tax matters or financial assistance, that if he acquired the property, he would be entitled to receive certain tax benefits as calculated under the formula set out in the definition? The court fleshes out the proper framework for applying section 237.1, after noting that not every property sold will be a tax shelter, as follows:

> The definition requires that statements or representations must be made, at some time, in connection with the property that is offered for sale. If no statements or representations have been made in connection with a property, then that property cannot constitute a tax shelter. Because the property that is contemplated by the definition of tax shelter is a property that is assumed to have been acquired by the prospective purchaser and the statements or representations are required to have been made in connection with that property, it follows that the statements or representations must have been made prior to any actual sale of the property that is offered for sale. Further, while the definition does not specify to whom or by whom the statements or representations must be made, in my view they must be made to the prospective purchasers of the property by or on behalf of the person who proposes to sell the property.[93]

The court goes on to describe the subject matter of the required statements or representations as "essentially a description of an amount that the prospective purchaser would be able to deduct, in computing income in respect of the property, as a consequence of an assumed acquisition of the property."[94] The court states that

92 *Baxter*, supra note 6 (TCC), at paragraph 58.

93 Ibid. (FCA), at paragraph 9.

94 Ibid., at paragraph 10.

there is no guidance as to the form that such statements or representations must take, that the statements or representations do not have to induce the acquisition (although they would, the court presumes, have that objective), and that the statements or representations need not be in writing. However, it is clear, according to the court, that

> there must be a communication to prospective purchasers which would inform them that a deductible amount would become available to each of them as a consequence of an acquisition by any of them of the property that is offered for sale.[95]

The court summarizes the essence of the tax shelter determination as follows:

> Having regard to these elements, the question posed by the definition of tax shelter is whether, in light of the statements or representations that have been communicated to the prospective purchaser, it may reasonably be considered, that is to say, objectively determined, that at the end of any particular taxation year of the prospective purchaser that ends within the four year period, the amount that has been announced or communicated to be deductible to the prospective purchaser as a consequence of the prospective acquisition of the property equals or exceeds the cost to the prospective purchaser of that property, determined at the end of the particular taxation year in question, less the amount of all "prescribed benefits" expected to be received or enjoyed, directly or indirectly, in respect of that property by the prospective purchaser.[96]

Having set out the framework for its approach to the interpretation of section 237.1, the court applied it to conclude that the interest in the software licence that had been acquired by the taxpayer constituted a tax shelter. As a preliminary point, the court reversed the decision of the Tax Court on an important technical point that Bell J had used as the basis for his decision that the interest in the licence was not a tax shelter. Bell J had concluded that capital cost allowance was not a relevant tax deduction in the tax shelter definition, as it then read, because capital cost allowance was not an amount that could be incurred. The Federal Court of Appeal disagreed. It held that capital cost allowance was merely the statutory method by which the cost of depreciable property was deductible, and such cost was clearly an amount that could be incurred by a taxpayer.[97] Dealing next with the question of whether a property of a taxpayer could be a tax shelter if statements or representations on tax matters of the type contemplated in section 237.1 were made to other

95 Ibid., at paragraph 11.

96 Ibid., at paragraph 14.

97 On this point, the court noted that the disclosure material provided to prospective purchasers of the licences to use the software stated that the full acquisition cost of such licences should be deductible over two fiscal years. In the court's view, given this statement, "[i]t is incongruous to contend that . . . such advice did not constitute statements or representations to those prospective purchasers that fulfilled the mathematical requirement of the definition of tax shelter" (ibid., at paragraph 57).

prospective purchasers, but not to the taxpayer, the court reversed Bell J's decision on this point as well, concluding that it could. In the court's view, such statements or representations did not have to be made to the taxpayer; it was sufficient that they were made to other prospective purchasers. The court stated:

> The Tax Opinion and the Appraisals contained income tax assertions that constituted statements or representations of the kind required by the definition of tax shelter. Those items were provided by or on behalf of TCL Trafalgar to the independent sales agents for use by them in the marketing of TIP licences to prospective purchasers and those items were in fact used by the agents in their marketing efforts. Each of TCL Trafalgar and the independent sales agents was a promoter. It is therefore apparent that the statements or representations in question were made, that is to say announced, communicated or made known, by or on behalf of a promoter to prospective purchasers of the TIP licences. Accordingly, the communication requirements in relation to the statements or representations component of the definition of tax shelter were met.[98]

While one may disagree with some aspects of the Appeal Court's reasoning in the *Baxter* decision, for the most part the court seems to have settled on a reasonable interpretation of the key elements of section 237.1—in particular, the need for statements or representations on certain tax matters or financial assistance, and the nature of such statements or representations. The decision should therefore bury the flawed reasoning in the decisions in *Maege*, which concluded that a property might be a tax shelter even if no statements or representations of the type described in section 237.1 are made or proposed to be made. As well, the decision in *Baxter* seems to dispose of the metaphysical reasoning of the Tax Court decision in *Maege* that a person can make "representations" on tax matters to himself simply by thinking about such matters.

98 Ibid., at paragraph 45. Later in the decision, the court remarked on the marketed nature of the relevant arrangements. The court stated, ibid., at paragraph 58, "In the circumstances under consideration, TCL Trafalgar, through its employees and agents, undertook an organized campaign to market TIP licences to the public. An important marketing feature was the favourable income tax deductions that were expected to be available to purchasers of TIP licences. The Tax Opinion and the Appraisals were requested and obtained to provide independent confirmation that the acquisition cost of TIP licences would be fully deductible to prospective purchasers of TIP licences over a two year period. These items were provided by or on behalf of TCL Trafalgar to the independent sales agents, as important marketing tools to be used by them in their sales efforts. The Tax Opinion and the Appraisals, in some instances, were given to prospective purchasers, thereby communicating or announcing to prospective purchasers that if they were to purchase TIP licences, the acquisition cost of those TIP licences would be fully deductible to them over a two year period. Accordingly, in my view, all of the requirements of the definition of tax shelter were met, all of the TIP licences that were marketed by or on behalf of TCL Trafalgar, including the TIP licence that was acquired by Mr. Baxter, were tax shelters and a tax shelter identification number should have been obtained before any of the TIP licences were sold."

One can certainly debate the correctness of the Federal Court of Appeal's decision on the technical point—that is, whether on the basis of the former wording of section 237.1, Bell J was right in concluding that, since the taxpayer's deduction was for capital cost allowance, there was no expense incurred of the type described in section 237.1. However, on the statements or representations issue, in his decision Bell J found that in the absence of clear language in the provision to the contrary, section 237.1 should not be interpreted to treat a property as a tax shelter to a taxpayer on the basis of statements or representations made to others but not to the taxpayer. In his view, the result would be antithetical to a cornerstone of the self-assessment tax system—that a taxpayer should know how to file a tax return at the time of filing. The Federal Court of Appeal held to the contrary.

In the facts and circumstances dealt with in *Baxter*, the decision of the Federal Court of Appeal on this point is understandable and reasonable. Where an investment in property is "marketed" to potential investors by way of a prospectus or information memorandum that contains related tax information, it would seem an inappropriate result if the property were treated as a tax shelter only for those investors who chose to read the documents, and not for other investors. However, where the "marketing" of an investment in property is done privately, the correctness of the decision of the Federal Court of Appeal is more questionable. If statements or representations in respect of an investment in a property are made to a potential investor such that they would cause the property to be a tax shelter, but those statements or representations are not made to other potential investors, and there is no reasonable basis on which the other investors could have known about them, it seems an unreasonable result that the property could be treated as a tax shelter to the other investors on the basis of such statements or representations.

TAKING STOCK AFTER MAEGE AND BAXTER

The opposing decisions in *Maege* and *Baxter* have created uncertainty about the proper interpretation of section 237.1. That outcome is unfortunate and could have been avoided; if the Supreme Court of Canada had granted leave to appeal in *Baxter*, it could have dealt squarely with the inherent conflict between the Federal Court of Appeal decisions in the two cases. But the repercussions from these decisions are not all bad.

The good news is that the decision of the Federal Court of Appeal in *Baxter* is well reasoned and represents a thoughtful attempt to establish a framework for the proper interpretation of section 237.1. The decision is particularly helpful in setting out two key conclusions relating to the phrase "statements or representations" in the tax shelter definition: first, that for section 237.1 to apply to treat a particular property as a tax shelter, the required statements or representations on certain tax or financial matters must be made or be proposed to be made in respect of an interest in the particular property; and second, such statements or representations, viewed objectively, must have sufficient nexus to that interest and its acquisition as to establish that the particular property constitutes a tax shelter. In effect, the Federal Court

of Appeal decision in *Baxter* rejected the reasoning on which the decisions in *Maege* were based. In *Baxter*, the Court of Appeal expressly acknowledged that a property in which a taxpayer holds an interest cannot be a tax shelter under section 237.1 unless the required statements or representations are made in connection with the property before the interest is acquired by the taxpayer. Further, as to the ambit and nature of such statements or representations, the Court of Appeal held that it must be reasonable to conclude from such statements or representations, viewed objectively, that a prospective purchaser would have expected to receive certain tax benefits or prescribed financial assistance as a result of the acquisition.[99]

The bad news is that we are left with two competing Court of Appeal decisions on the question of whether statements or representations must be made or be proposed to be made for section 237.1 to apply. Until this conflict is resolved by the Supreme Court of Canada, or perhaps by the Federal Court of Appeal, in another case, it is reasonable to expect that the CRA will take the position that the interpretation endorsed in *Maege* should be followed—that is, that making or proposing to make statements or representations is not a fundamental requirement for the application of section 237.1. Indeed, there is some evidence that the CRA has taken that position in relation to certain taxpayers.

99 Ibid., at paragraph 14.