The Meaning of “Series of Transactions” as Disclosed by a Unified Textual, Contextual, and Purposive Analysis

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PRÉCIS
L’expression « série d’opérations » est utilisée couramment dans la Loi même si elle n’y est pas définie expressément. Même de nombreuses années après la promulgation du paragraphe 248(10), la question de ce que constitue à juste titre une série d’opérations demeure toujours hautement controversée en droit fiscal canadien, et elle est encore au cœur d’un litige sur lequel se penchera la Cour suprême du Canada dans l’affaire Copthorne Holdings Ltd. c. Canada. Le présent article propose de réexaminer la définition de « série » et l’interprétation du paragraphe 248(10) que les tribunaux canadiens ont établies jusqu’à maintenant de façon à donner à « série » le sens que les auteurs estiment être juste au sens de la Loi. Essentiellement, le point de vue soutenu par les auteurs est qu’il n’y a pas de série au sens de la common law ou de série élargie présumée en vertu de la Loi, mais qu’on y trouve plutôt une seule notion de série. À l’appui de leur point de vue, les auteurs remettent tout d’abord en question la prémise de base sur laquelle repose l’interprétation actuelle de la notion de « série » par un examen de la jurisprudence pertinente. Ils entreprennent ensuite une analyse textuelle, contextuelle et téléologique unifiée afin de déterminer le sens approprié à attribuer au concept de la série au sens de la Loi ainsi que l’interprétation appropriée du paragraphe 248(10). Pour terminer, les auteurs mettent à l’épreuve la définition qu’ils proposent de la série au regard des faits établis dans les principales causes au Canada en cette matière.

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ABSTRACT

The expression “series of transactions” is prevalent in the Act but is not explicitly defined therein. Many years after the enactment of subsection 248(10), the question of what properly constitutes a series of transactions remains highly controversial in Canadian tax law, and it will again be the subject of debate before the Supreme Court of Canada in Copthorne Holdings Ltd. v. Canada. The purpose of this article is to reconsider the definition of “series” and the interpretation of subsection 248(10) provided thus far by Canadian courts, in order to establish what the authors believe to be the correct meaning of “series” under the Act. In essence, the thesis of this article is that there is no “common-law” series or “deemed” extended series under the Act; there is just the single notion of series. To demonstrate their views, the authors first deconstruct the basic premise upon which the current interpretation of the notion of “series” rests, by reviewing the relevant jurisprudence. They then undertake a unified textual, contextual, and purposive analysis to determine the proper meaning to be ascribed to the concept of series under the Act and the proper construction of subsection 248(10). Finally, the authors test their suggested definition of “series” against the facts of Canada's main cases in this area.

KEYWORDS: SERIES OF TRANSACTIONS • STATUTORY INTERPRETATION • CASES

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INTRODUCTION

The expression “series of transactions” is a standard feature of anti-avoidance rules throughout the Income Tax Act. This is in recognition of the fact that planned transactions, regardless of their intended result, rarely occur as a single step. For example, a sale of shares of a corporation commonly takes place in tandem with related steps to “purify” the corporation in order to access the capital gains exemption, or with transactions intended to step up the tax cost of the shares by crystallizing the corporation’s safe income.

Although the expression “series of transactions” is prevalent in the Act, it is not explicitly defined therein; rather, Parliament has, for the most part, left it to the courts to determine its meaning. The courts have, understandably, struggled with this task, since they are faced with applying the series concept to an almost unlimited variety of fact patterns. This struggle has culminated in a generic definition of “series” that is based on a UK judicial anti-avoidance rule, and is referred to by the courts as a “common-law series.” The adoption by Canadian courts of the common-law series concept has led, in turn, to the construction of subsection 248(10) as giving rise to a “deemed” or “extended” series—that is, an aggregation of transactions or events that is broader than that which would otherwise result under the common-law meaning of series.

Many years after the enactment of subsection 248(10), the question of what properly constitutes a series of transactions remains highly controversial. It will again be the subject of debate when the Supreme Court of Canada hears the Copthorne case. In deciding this case, the Supreme Court will have the opportunity to redefine the notion of series and, in particular, to revisit prior decisions interpreting subsection 248(10).

The purpose of this article is to reconsider the definition of “series” and the interpretation of subsection 248(10) provided thus far by the courts, in order to establish what we believe is the correct meaning of “series” under the Act. The thesis of this article, simply put, is that there is no “common-law” series or “deemed” series under the Act; there is just the single notion of series. As will be demonstrated, the selection of a UK judge-made general anti-avoidance rule as the basis for a definition of “series” under the Act has resulted in an unduly narrow concept of series, effectively compelling the courts to adopt an unnecessarily broad construction of the rule in subsection 248(10) in order to arrive at satisfactory results in difficult cases.

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.
3 2009 DTC 5101 (FCA); aff’g. 2007 DTC 1230 (TCC); leave to appeal to the Supreme Court of Canada granted January 28, 2010 (Case 33283).
In the analysis that follows, we first deconstruct the basic premise upon which the current interpretation of the term “series” rests, by reviewing the relevant jurisprudence. We then undertake a unified textual, contextual, and purposive analysis to determine the proper meaning to be ascribed to the concept of series under the Act and the proper construction of subsection 248(10). Finally, we test our proposed definition of “series” against the facts of Canada’s main cases in this area, to establish whether it measures up in the real world and whether it constitutes a practical and predictable definition for the purposes of the Act.

BACKGROUND

The expression “series of transactions” and its variants populate a significant number of provisions in the Act. The expression is most notably found in specific anti-avoidance rules, such as those contained in sections 55, 85.1, 88, and 94, and, of course, in section 245, the general anti-avoidance rule (GAAR). It is also a component of the transfer-pricing rules in section 247.

For example, the anti-capital-gains-stripping rule in subsection 55(2) deems proceeds of disposition or a capital gain to arise, instead of a tax-deductible inter-corporate dividend,

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4 In this article, the term “series” and “series of transactions” are used interchangeably (although, as noted in the introduction, our focus is on the meaning of the term “series”). The notion of a series of transactions is often extended to include “events,” but in this article, for the sake of brevity, we do not refer to “events,” nor do we address the meaning of either an “event” or a “transaction.” However, we note that very interesting issues may arise in this regard. For example, in a recent technical interpretation, the Canada Revenue Agency (CRA) dealt with the question of whether a tax election may be a “transaction” for the purposes of the general anti-avoidance rule (GAAR). The CRA opined that “when a designation or an election provided in the ITA is made by one or more taxpayers, this constitutes a transaction for the purposes of the application of section 245.” See CRA document no. 2009-0329981C6, October 9, 2009.

5 The term “series of transactions” is used in sections 20.3, 82, 83, 89, 107.4, 110.6, 112, 129, 132.11, 181.2, 188, 188.1, 233.1, 245, 247, 248, and 256. The term “series of transactions or events” is used in sections 44.1, 53, 55, 69, 85, 85.1, 88, 95, 104, 110.6, 112, 127, 132.11, 149.1, 149.2, 183.1, 191, 193, 195, 207.01, 209, 212.2, 233.2, 245 (through statutory extension), 247 (through statutory extension), 256, and 261. The term “series” is also used by reference to certain specific transactions or events in the following sections: 13 (of extensions or renewals), 15 (of loans or other transactions and repayments), 20 (of borrowings or other transactions and repayments, or of payments and refunds of contributions), 40 (of contributions), 60 (of periodic payments), 60.01 (of periodic payments), 96 (of loans or other transactions and repayments), 104 (of periodic payments), 110.2 (of periodic payments), 143.2 (of loans or other indebtedness and repayments), 146 (of periodic payments), 146.1 (of loans or other transactions and repayments), 147 (of appropriations and repayments), 147.1 (of periodic payments), 207.5 (of payments and refunds of contributions), 207.6 (of periodic payments), 212 (of securities lending arrangements, loans, or other transactions), 227 (of loans or other transactions and repayments), 233.2 (of loans or other transactions and repayments), 259 (of loans or other transactions and repayments), and 260 (of securities lending arrangements, loans, or other transactions).
[w]here a corporation resident in Canada has received a taxable dividend in respect of which it is entitled to a deduction under subsection 112(1) or (2) or 138(6) as part of a transaction or event or a series of transactions or events, one of the purposes of which (or, in the case of a dividend under subsection 84(3), one of the results of which) was to effect a significant reduction in the portion of the capital gain that, but for the dividend, would have been realized on a disposition at fair market value of any share of capital stock immediately before the dividend and that could reasonably be considered to be attributable to anything other than income earned or realized by any corporation after 1971 and before the safe-income determination time for the transaction, event or series [emphasis added].

Subsection 245(3), which defines the term “avoidance transaction” (one of the conditions for the application of GAAR), reads in part as follows:

An avoidance transaction means any transaction . . .

(b) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit [emphasis added].

As we have noted, the expression “series of transactions” is not defined in the Act; however, subsection 248(10) states:

For the purposes of this Act, where there is a reference to a series of transactions or events, the series shall be deemed to include any related transactions or events completed in contemplation of the series.6

With respect to the ordinary meaning of the expression “series of transactions,” courts have adopted the basic formulation that a series of transactions involves a number of transactions that are preordained in order to produce a given result, with no practical likelihood that the preplanned events would not take place in the order ordained.

With respect to subsection 248(10), as will be seen below, there remains a significant level of controversy regarding the proper meaning of the “in contemplation

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6 We are of the view that the application of subsection 248(10) is not limited only to those instances where the exact expression “series of transactions or events” appears in the Act. Significantly, this expression is the broadest of the “series” references in the Act and should be seen to include the narrower references in other provisions. In this regard, see the decision of the Federal Court of Appeal in OSFC, infra note 7, where Rothstein J stated, at paragraph 37, “I read subsection 248(10) to apply whether a series is a series of transactions, a series of events, or a series of transactions and events.” Also consider that subsection 248(10), as discussed in detail below, is intended to clarify the meaning of the word “series” and not the meaning of the words “transaction” and “event.” Therefore, subsection 248(10) should apply to all “series” references in the Act.
of” requirement. Canadian courts appear to have accepted that contemplation can be applied both prospectively and retrospectively.

We next review the main Canadian cases on the notion of “series of transactions” with a view to deconstructing the series concept as currently understood by our courts.

DECONSTRUCTING “SERIES”

Critical Review of the Jurisprudence

OSFC

The current series test originates in the 2001 Federal Court of Appeal decision in OSFC Holdings Ltd. v. The Queen. In this GAAR case, a mortgage lender, Standard Trust Company (Standard), became insolvent. In order to maximize the recovery from the disposition of Standard’s assets, its liquidator devised a plan to sell Standard’s mortgage portfolio and monetize Standard’s substantial accrued tax losses. Pursuant to the plan, in October 1992, Standard implemented a series of transactions whereby it transferred on a tax-deferred basis its STIL II mortgage portfolio to the STIL II Partnership in consideration for a 99 percent interest.

By reason of subsection 18(13) (as it then read), the portfolio would be recorded by the partnership, for income tax purposes, at Standard’s cost ($85,368,872) notwithstanding that the then current market value (approximately $33,262,000) was significantly inferior. In January 1993, negotiations began between the appellant and the liquidator, with the STIL II portfolio together with accrued tax losses of some $52 million being offered as a package deal. Finally, on May 31, 1993, the appellant purchased Standard’s 99 percent interest in the STIL II Partnership.

In transactions prearranged before the closing of the purchase, the taxpayer then syndicated its STIL II Partnership interest into another partnership, SRMP, in which it retained a 24 percent interest. As planned,

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7 2001 DTC 5471 (FCA); aff’g. 99 DTC 1044 (TCC); leave to appeal to the Supreme Court of Canada refused 294 NR 398.

8 A wholly owned subsidiary of Standard purchased a 1 percent interest.

9 Therefore, at the end of its first fiscal year, the STIL II Partnership would incur a net loss for income tax purposes of some $52 million by reason of the sale of properties at their fair market value and the writedown of the remaining inventory properties from Standard’s original investment to their fair market value.

10 The consideration for the purchase was as follows:

- $17.5 million payable to Standard, of which $14.5 million was in the form of a promissory note and the balance was cash payable on closing;
- an additional amount, referred to as “the earn-out,” which was to be determined by a formula whereby the appellant and Standard would share any proceeds from the disposition of the STIL II portfolio in excess of $17.5 million, with the appellant’s proportionate share increasing as the proceeds increased; and
- an amount, up to a maximum of $5 million, payable to Standard for the tax losses to be recognized by the partnership, contingent on the partners being successful in deducting those losses from their other income.
the taxpayer ultimately claimed a non-capital-loss deduction of $12,572,274 from the disposition of the mortgage portfolio. The Federal Court of Appeal held that GAAR denied the benefit of this loss to the taxpayer.

Central to the court’s GAAR analysis was the discussion of the series test in paragraph 245(3)(b). With respect to the ordinary meaning of the undefined term “series,” very early in his reasons, Rothstein J (as he then was) placed reliance on the “pre-ordained series” test, developed by the UK House of Lords in Furniss v. Dawson\textsuperscript{11} and Craven v. White\textsuperscript{12} in the context of articulating its “new approach” to tax avoidance. Rothstein J also referred to the “mutual interdependence” and “end result” tests developed by US courts for the purposes of the US step transaction doctrine. After citing commentary by Michael Hiltz (formerly the director of the Reorganizations and Non-Residents Division, Specialty Rulings Directorate, Revenue Canada, Taxation)\textsuperscript{13} and by David A. Dodge (formerly the senior assistant deputy minister in the Department of Finance),\textsuperscript{14} Rothstein J concluded:

In view of Mr. Dodge’s express reference to Furniss v. Dawson, I think it may reasonably be inferred that Parliament, in enacting paragraph 245(3)(b), adopted the approach to a “series of transactions” developed by the House of Lords. For that reason, I do not think the “mutual interdependence” or “end results” tests are applicable and I would, subject to subsection 248(10), adopt the House of Lords approach. \textit{Thus, for there to be a series of transactions, each transaction in the series must be pre-ordained to produce a final result. Pre-ordination means that when the first transaction of the series is implemented, all essential features of the subsequent transaction or transactions are determined by persons who have the firm intention and ability to implement them. That is, there must be no practical likelihood that the subsequent transaction or transactions will not take place.}\textsuperscript{15}

On the basis of this analysis, Rothstein J went on to rule as follows:

I have no difficulty concluding that the three Standard transactions were pre-ordained. All their essential features were planned by E\&Y [the liquidator] who, with court approval, had the intention and ability to implement them. They were implemented over a period of one week in October 1992. The result they were intended to produce was the transfer of the STIL II portfolio from Standard to the STIL II Partnership, which would be recorded by the partnership at Standard’s cost, i.e., the price paid by the partnership to which was added Standard’s loss, by reason of subsection 18(13) of the Income Tax Act. In other words, the intended result was the packaging of Standard’s loss in a

\textsuperscript{11} [1984] AC 474 (HL).

\textsuperscript{12} [1989] AC 398 (HL).


\textsuperscript{15} Supra note 7 (FCA), at paragraph 24 (emphasis added).
form that would be marketable to an arm’s length purchaser. They clearly constituted a series under the House of Lords’ definition.

That then leaves the appellant’s acquisition of its STIL II Partnership interest from Standard. This transaction was not completed until May 31, 1993 with the closing occurring on June 29, 1993. The appellant did not come on the scene until January 1993 and the negotiations leading to the transactions were “difficult.” Under the House of Lords’ definition, this fourth transaction would not be part of a series with the Standard transactions since the fourth transaction was not pre-ordained and was not practically certain to occur when the Standard transactions were implemented.16

Rothstein J then went on to conclude that, by virtue of the deeming rule in subsection 248(10), the purchase of the partnership interest by the taxpayer was included in the initial “common-law” series. To reach this result, he interpreted subsection 248(10) as follows:

I am of the opinion that subsection 248(10) broadens the meaning of series from that defined by the House of Lords.

Subsection 248(10) requires three things: first, a series of transactions within the common law meaning; second, a transaction related to that series; and third, the completion of the related transaction in contemplation of that series.

Thus, before applying subsection 248(10), “series” must be construed according to its common law meaning, which I have found to be pre-ordained transactions which are practically certain to occur. To that is added “any related transactions or events completed in contemplation of the series.” Subsection 248(10) does not require that the related transaction be pre-ordained. Nor does it say when the related transaction must be completed. As long as the transaction has some connection with the common law series, it will, if it was completed in contemplation of the common law series, be included in the series by reason of the deeming effect of subsection 248(10). Whether the related transaction is completed in contemplation of the common law series requires an assessment of whether the parties to the transaction knew of the common law series, such that it could be said that they took it into account when deciding to complete the transaction. If so, the transaction can be said to be completed in contemplation of the common law series.17

On this basis, the Federal Court of Appeal held that the mortgage company and the appellant, being the parties to the acquisition transaction, “knew of” the prior packaging series and “took it into account” when deciding to complete the acquisition transaction. Therefore, the appellant’s acquisition of its partnership interest was a transaction that was related to the initial series and was, in the court’s view, completed in contemplation of that series.

OSFC was a difficult case in that it presented the court with hard choices in terms of the fundamental approach to the transactions at issue. One approach would have

16 Ibid., at paragraphs 25-26 (emphasis added).
17 Ibid., at paragraphs 34-36 (emphasis added).
been to analyze the situation solely from OSFC’s perspective. In other words, the
court could have analyzed the presence of an “avoidance transaction” from the stand-
point of the taxpayer only and ignored the transactions implemented by Standard.
In this respect, from the taxpayer’s perspective, there was only one transaction: the
purchase of Standard’s 99 percent interest in the STIL II Partnership.\(^\text{18}\) For the pur-
poses of paragraph 245(3)(a), this purchase was arranged primarily for tax purposes—
OSFC sought mainly to (indirectly) acquire the accrued losses in the STIL II
Partnership—and therefore constituted an avoidance transaction that could give rise
to the application of GAAR. However, Rothstein J may have foreseen difficulties in
the context of the abuse analysis under subsection 245(4), in that it was not obvious
which provision had been abused by the mere purchase of a partnership interest.
This probably explains why the court chose another approach.

Rothstein J effectively analyzed the transactions from the perspectives of both
Standard and OSFC. It is implicit in the court’s approach that because OSFC “bought
into” the Standard series, it effectively ratified the transactions as its own. This view
is reasonable considering that the loss-packaging transactions at issue were intended
to benefit both parties; were relied upon by both parties to achieve their shared ob-
jective; and, from both Standard’s and OSFC’s perspectives, were interdependent
with the purchase of the partnership interest, to the point that either one of these
transactions would have been meaningless without the other. On this premise, we
believe that the Federal Court of Appeal reached the correct result in finding a series
for the purposes of paragraph 245(3)(b).

However, in reaching the right conclusion, the court, we respectfully submit,
misconstrued the Act’s notion of series and the role of subsection 248(10). The
court held that subsection 248(10) requires, first, “a series of transactions within the
common law meaning” and, second, a transaction related to that common-law series.
We will argue, instead, that subsection 248(10) serves merely to clarify, and cannot
be dissociated from, the ordinary meaning of the term “series” and that it does not
require the identification of a separate common-law series to operate. Furthermore,
in defining what it called a “common law series,”\(^\text{19}\) the court adopted the notion of a
preordained series of transactions, which is a component of a UK judge-made anti-
avoidance rule. We will argue that this approach to defining “series” may not have
been appropriate, because the considerations involved in crafting a general anti-
avoidance rule are not the same as those involved in defining “series,” and because
a “preordained series” is merely a subset of the concept of series under the Act and
thus has a narrower meaning than the unqualified term “series.” Having selected an
unduly narrow meaning of “series,” the Federal Court of Appeal, in order to reach

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\(^{18}\) This ignores the subsequent syndication, which in any event was accepted to have formed a
series with the initial purchase of the partnership interest.

\(^{19}\) The expression “common-law series” is in fact a misnomer because there is no common law of
series. As discussed below, the House of Lords case law articulates an interpretive anti-avoidance
rule, a component of which is the existence of a “preordained series.”
what is admittedly the right result, may have felt compelled to stretch the plain meaning of the expression “in contemplation of” beyond its normal bounds, in order to hold that it requires an assessment of whether the parties to the later (non-common-law series) transaction “knew of” the earlier common-law series, such that it could be said that they “took it into account” when deciding to complete the later transaction. We will argue that this interpretation is inconsistent with the textual meaning of the word “contemplate” and with a contextual and purposive interpretation of subsection 248(10).

**Canutilities**

That the Federal Court of Appeal was arguably off to a false start in *OSFC*, when it adopted a series test based on a UK judge-made anti-avoidance rule, is suggested by the court’s correction of the “series” test in its 2004 decision in *The Queen v. Canutilities Holdings Limited et al.*20

This case involved three public corporations—ATCO, Canadian Utilities Holdings Limited (“CUH”), and Canadian Utilities Limited (“CU”)—which entered into a series of transactions to sell their controlling interest (approximately 87 percent of the voting shares) in another public corporation (“ATCOR”) to an arm’s-length purchaser (“Forest”).21 In connection with the sale, ATCOR and a newly formed subsidiary of ATCO amalgamated to form a new corporation (“Amalco”). Upon the amalgamation, all of the shares of ATCOR were converted into class A, class B, and class C redeemable-retractable shares of Amalco, with CU obtaining class A shares and CUH and ATCO both receiving class B shares. The purchaser, Forest, then subscribed, through a subsidiary, for 1 million common shares of Amalco for approximately $130 million, and subsequently caused Amalco to redeem all of its class A and class B shares for proceeds totalling approximately $130 million.22 As a result of the redemption of the Amalco shares, in computing their tax liability for the 1996 taxation year, CU included a deemed dividend under subsection 84(3) of approximately $26 million and CUH included a deemed dividend of approximately $19 million. Both CU and CUH deducted the amount of the deemed dividends under subsection 112(1). The deemed dividends to both CU and CUH were treated as being subject to part IV tax. However, in paying normal course dividends23 following the redemptions, CU and

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20 2004 DTC 6475 (FCA); rev’g. (in part) 2003 DTC 1029 (TCC); leave to appeal to the Supreme Court of Canada refused 334 NR 199.

21 Prior to the share sale, ATCO owned 100 percent of the voting shares of CUH; ATCO and CUH together owned 67 percent of the voting shares of CU; and ATCO, CU, and CUH together owned approximately 87 percent of the voting shares of ATCOR, thus holding a controlling interest.

22 The Forest subsidiary then acquired all of the outstanding Class C shares of Amalco for aggregate proceeds of approximately $57 million.

23 Historically, CU had paid dividends on its common and preferred shares virtually every year since 1950. Furthermore, it had increased its common share dividends every year for 30 consecutive years. CUH had paid dividends since 1994 on its preferred shares.
CUH claimed dividend refunds under subsection 129(1), thus offsetting all or part of their part IV tax liability. The Canada Revenue Agency (CRA) reassessed CU and CUH on the basis of the application of subsection 55(2), thus treating the amounts of the deemed dividends received by CU and CUH upon the redemption of their respective class A and class B shares of Amalco as proceeds of disposition. As a result, the part IV tax liability and the dividend refunds claimed by CU and CUH were nullified by the reassessments.

The main issue in Canutilities was whether the payment of the normal course dividends formed part of a series of transactions, one of the results of which was to effect a significant reduction in the capital gain that would have been realized on a disposition at fair market value of the class A and class B shares of Amalco by CU and CUH, respectively. If such normal course dividends did form part of the same series as the redemptions, subsection 55(2) would apply.

The taxpayers and the CRA appeared to accept that a series of transactions existed, comprising at least the conversion of the ATCOR shares held by CU and CUH into class A and class B redeemable shares of Amalco, as well as the funding of Amalco by the Forest subsidiary and the subsequent redemption of the class A and class B shares of Amalco resulting in the deemed dividends (“the basic series”). The contentious element was whether the declaration and payment of the normal course dividends formed part of the basic series.

On this point, the Tax Court of Canada found that the normal course dividends did not form part of the basic series. In reversing this decision, the Federal Court of Appeal revisited the preordination test that it had adopted in OSFC. In this regard, Rothstein J stated:

In endorsing the preordination test, the court in OSFC used the term “adopt[ing] the House of Lords approach.” This was a reference to a statement by Lord Oliver of Aylmerton in Craven v. White at 514:

As the law currently stands, the essentials emerging from Furniss v. Dawson, [1984] A.C. 474 appear to me to be four in number: (1) that the series of transactions was, at the time when the intermediate transaction was entered into, pre-ordained in order to produce a given result; (2) that the transaction had no other purpose than tax mitigation; (3) that there was at that time no practical likelihood that the pre-planned events would not take place in the order ordained, so that the intermediate transaction was not even contemplated practically as having an independent life, and (4) that the pre-ordained events did in fact take place.

The trial judge may have thought that OSFC adopted all four factors described in Craven v. White as the common law test for series of transactions or events. However, I agree with appellant’s counsel that this cannot be so. The four factors listed in Craven v. White do more than define a series.\(^{24}\)

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\(^{24}\) Supra note 20 (FCA), at paragraphs 51-52 (emphasis added).
Rothstein J went on to acknowledge that the UK decisions did much more than to posit a series test, in that they created a judicial anti-avoidance measure. He then stated that the second and third parts of the test articulated by Lord Oliver in Craven v. White

are not concerned with when individual transactions are sufficiently connected that the court may consider them as having the composite effect they were intended to have. Rather, they are concerned with whether one transaction in that series was inserted solely for tax purposes, and, as a matter of judicial anti-avoidance, should not be given what would otherwise be its legal effect.25

Accordingly, the Federal Court of Appeal held that applying those tests would be inappropriate in the context of Canada's statutory anti-avoidance rules. The court further stated that the fact that the particular transaction has a genuine independent purpose and existence is not sufficient to conclude that it was not preordained to produce a given composite result. Thus, on the basis of the findings of fact of the Tax Court, the Court of Appeal concluded that both the series of transactions involving the redemption of the class A and class B shares of Amalco and the normal course dividends were preordained to produce a single composite result. It accordingly found that the normal course dividends formed part of the same “common-law” series that included the redemptions without having to resort to subsection 248(10) and, as a result, it concluded that subsection 55(2) applied.

In deciding Canutilities, Rothstein J, correctly in our view, qualified what was perceived to be the wholesale adoption in OSFC of Lord Oliver’s four-part test in Craven v. White. Indeed, the acceptance of the second element of Lord Oliver’s version of the UK judge-made anti-avoidance rule as a component of the notion of series in the Act would effectively incorporate a tax purpose test into those provisions of the Act that do not contain one, and would appear to render superfluous the existing purpose tests in those provisions that do contain one. As for Lord Oliver’s third element, it appears that Rothstein J retained the “no practical likelihood” requirement while abandoning the “no independent life” criterion. In any event, we will argue further below that the adoption of the preordination test in our tax law is not consistent with Parliament’s intended meaning of “series,” as reflected in the enactment of subsection 248(10).

Canada Trustco and Mathew

Canada Trustco Mortgage Co. v. Canada26 and Mathew v. Canada27 were the first two GAAR cases to reach the Supreme Court of Canada, in 2005. Canada Trustco involved a circular set of transactions that resulted in the taxpayer claiming substantial capital

25 Ibid., at paragraph 55.
26 2005 DTC 5523 (SCC); aff’g. 2004 DTC 6119 (FCA); aff’g. 2003 DTC 587 (TCC).
27 Sub nom. Kaulius v. The Queen, 2005 DTC 5538; aff’g. 2003 DTC 5644 (FCA); aff’g. 2002 DTC 1637 (TCC).
cost allowance. The Mathew case was related to OSFC in that it involved the taxpayers who had bought interests in the SRMP partnership, which was used by OSFC to syndicate its interest in the STIL II Partnership. It is notable that, in both cases, the existence of an “avoidance transaction,” and hence the application of the series criterion, was conceded before the Supreme Court. Therefore, the only matter in issue was whether the avoidance transaction resulted in abusive tax avoidance pursuant to subsection 245(4). Nonetheless, the court undertook to explain and provide guidance in respect of all the elements of GAAR. Unfortunately, and with respect, in our view the court paid only passing attention to the difficult “series” issue and ultimately reinforced the false premises on which the formulation of the notion of series had thus far been based in Canadian jurisprudence. In this regard, McLachlin and Major JJ stated the following:

The meaning of the expression “series of transactions” under s. 245(2) and (3) is not clear on its face. We agree with the majority of the Federal Court of Appeal in OSFC and endorse the test for a series of transactions as adopted by the House of Lords that a series of transactions involves a number of transactions that are “pre-ordained in order to produce a given result” with “no practical likelihood that the pre-planned events would not take place in the order ordained”: Craven v. White, [1989] A.C. 398, at p. 514, per Lord Oliver; see also W.T. Ramsay Ltd. v. Inland Revenue Commissioners, [1981] 1 All E.R. 865.

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

It is highly unlikely that Parliament could have intended to include in the statutory definition of “series of transactions” related transactions completed in contemplation of a subsequent series of transactions, but not related transactions in the contemplation of which taxpayers completed a prior series of transactions.


Arguably, Canada Trustco further confounded the already confusing Canadian case law on “series.” First, as stated above, we will argue that the “preordained series” component of the anti-avoidance rule articulated in Craven v. White is not an appropriate choice for the definition of “series” under the Act. Second, with respect

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28 Canada Trustco, supra note 26 (SCC), at paragraphs 25 and 26 (emphasis added).

29 As we shall see, the House of Lords in Ramsay, infra note 47, did not apply this preordination requirement. It should also be noted that the Supreme Court in Canada Trustco did not refer to the qualification of the “preordained series” test by the Federal Court of Appeal in Canutilities.
to subsection 248(10), the expression “because of” suggests a relationship of cause and effect, whereas the expression “in relation to” has a much broader and vaguer meaning. Also, the Supreme Court regrettably chose to entrench the fundamental misapprehension regarding the proper meaning of the expression “in contemplation of” in stating that “[t]he phrase can be applied to events either before or after the basic avoidance transaction found under s. 245(3).”

As we shall see, the above statements in Canada Trustco resulted in a great deal of uncertainty in subsequent cases and, in particular, forced Canadian courts to struggle with ways to qualify and adapt the Supreme Court’s conception of the “contemplation” requirement in subsection 248(10).

MIL

The difficulty with the Canadian “series” test, as developed in OSFC and Canada Trustco, became plain in MIL (Investments) SA v. The Queen. This 2006 decision of the Tax Court of Canada dealt with a claim for an exemption from Canadian tax under the Canada-Luxembourg tax treaty in respect of a capital gain on a sale of shares. The taxpayer, MIL (Investments) SA (“MIL”), had owned shares in Diamond Field Resources Ltd. (“DFR”), which had discovered one of the world’s largest nickel mines at Voisey Bay, Labrador. In 1996, DFR agreed to a takeover by Inco, and MIL sold its shares, realizing a capital gain of approximately Cdn$425 million. The minister disputed MIL’s claim of a treaty exemption in light of the series of transactions that preceded the share sale.

MIL was a corporation owned by a non-resident of Canada (Boulle) and initially incorporated in the Cayman Islands. Before June 1995, MIL owned 11.9 percent of DFR. On June 8, 1995, MIL exchanged, on a tax-deferred basis, 703,000 DFR shares for 1,401,218 common shares of Inco, thereby reducing its shareholdings in DFR to 9.817 percent. On July 17, 1995, MIL was continued under the laws of Luxembourg. On May 22, 1996, the DFR shareholders approved the Inco takeover of DFR, to take effect on August 21, 1996, with the result that MIL received Cdn$427,475,645 for the disposition of its DFR shares (“the sale”). MIL claimed an exemption from Canadian tax on the resulting capital gain of Cdn$425,853,942 under article 13 of the Canada-Luxembourg tax treaty. The CRA denied the claim for treaty benefits on this gain mainly on the basis of GAAR.

Initially, the minister’s GAAR position was based on the assumption that the tax benefit at issue arose indirectly from an initial “common-law” series of transactions comprising (1) the June 8, 1995 rollover of 703,000 shares of DFR to Inco for 1,401,218 common shares of Inco, which reduced the taxpayer’s and Boulle’s combined ownership of DFR to below 10 percent; (2) the “final dividend,” which was implemented for Luxembourg tax purposes; and (3) the continuation of the taxpayer into Luxembourg (collectively, “the series”). In other words, the Crown,

30 Canada Trustco, supra note 26 (SCC), at paragraph 26 (emphasis added).
31 2006 DTC 3307 (TCC); aff’d. 2007 DTC 5437 (FCA).
somewhat surprisingly, did not initially argue that the sale was part of the series. Rather, it was only in response to the taxpayer’s argument that the sale, which gave rise to the tax benefit, needed to be part of the series for paragraph 245(3)(b) to apply that the minister advanced the following argument, seemingly to the effect that the series was deemed to include the sale pursuant to subsection 248(10):

The Appellant also asserts that the August 1996 sale was neither preordained nor contemplated when the Transactions were undertaken. However, common sense and evidence point to DFR being a willing takeover target.\textsuperscript{12}

In deciding for the taxpayer, the Tax Court refused to find that the ultimate sale was part of the series. First, the court noted that the final dividend was relevant only for Luxembourg tax purposes, thus implying that the dividend could not be part of the series for the purposes of paragraph 245(3)(b). Then, relying on evidence that showed that DFR took active steps to prevent its takeover, the court concluded that the sale could not be included in the series because of a mere possibility, at the time of the series, of a future potential sale of any shares.

The Tax Court, in our view, correctly adopted a forward-looking approach to subsection 248(10), by asking whether the ultimate sale was contemplated at the time of the series. To support his conclusions, Bell J rightly suggested the following qualifications to the Supreme Court’s statements in \textit{Canada Trustco} on the notion of series:

There must be a strong nexus between transactions in order for them to be included in a series of transactions. In broadening the word “contemplation” to be read in the sense of “because of” or “in relation to the series,” \textit{the Supreme Court cannot have meant mere possibility, which would include an extreme degree of remoteness. Otherwise, legitimate tax planning would be jeopardized, thereby running afoul of that Court’s clearly expressed goals of achieving “consistency, predictability and fairness.”}\textsuperscript{13}

In 2007, on appeal by the Crown, the Tax Court’s decision was affirmed by the Federal Court of Appeal from the bench.

The Tax Court’s decision in \textit{MIL} is interesting in that, despite the Supreme Court’s statements in \textit{Canada Trustco}, neither the Crown nor the court seemed to resort to retrospective contemplation. It is indeed remarkable that the Crown used the contemplation notion correctly, assessing whether the August 1996 sale was contemplated at the time that the series was implemented in 1995.

\textit{Copthorne}

The courts’ discomfort with the standards of “contemplation” prescribed by the Supreme Court in \textit{Canada Trustco} became readily apparent in \textit{Copthorne Holdings Ltd.}

\textsuperscript{32} Supra note 31 (TCC), at paragraph 61 (emphasis in original).

\textsuperscript{33} Ibid., at paragraph 65 (emphasis added).
v. The Queen. The facts of this case are very complex, but may be conceptually summarized as follows. The alleged avoidance transaction giving rise to a challenge under GAAR involved the “preservation” (or, some might argue, the “manufacturing” or “enhancement”) of paid-up capital (PUC) through the sale, in 1993, of the high PUC shares of a related corporation by a resident subsidiary to its non-resident parent. The purpose of this transaction (referred to as “the 1993 share sale”) was to allow a horizontal, instead of a vertical, amalgamation of the subsidiary and the related corporation. It was implemented as an incidental aspect of a series of transactions (“the 1993 series”) that was designed to offset capital gains realized on one investment with capital losses realized on another investment made within the Canadian corporate group controlled by Hong Kong businessman Li Ka-Shing and his family. A second series of transactions (“the 1995 series”) was implemented in 1995, following the announcement in 1994 of amendments to Canada’s foreign accrual property income (FAPI) regime that would have an adverse effect on the business interests of the Li family. The 1995 series included a redemption of certain class D preferred shares (“the redemption”) of a predecessor corporation of the appellant held by a related non-resident corporation, which crystallized the benefit of the “preserved” PUC by allowing a large cross-border return of capital free of withholding tax.

The minister issued a GAAR assessment for unremitted withholding tax on the basis that the PUC of all of the class D preference shares was overstated and thus a taxable dividend was deemed to have been paid pursuant to subsection 84(3); as a result, the Canadian payer corporation was required to have withheld an amount equal to 15 percent of the deemed dividend, which was the applicable rate under the Canada-Barbados income tax treaty.

The series of transactions upon which the minister relied in applying GAAR began with the alleged “avoidance transaction” (the 1993 share sale) and concluded with the redemption. The parties agreed that the 1993 share sale and the amalgamation (which occurred on January 1, 1994) were part of one series of transactions (the 1993 series) and that the transactions implemented in late 1994 and 1995, which included the redemption, constituted a second series of transactions (the 1995 series).

Both the Tax Court of Canada and the Federal Court of Appeal affirmed the GAAR assessment against the taxpayer. Regarding the “avoidance transaction” issue under subsection 245(3), the question addressed to the Federal Court of Appeal was whether the Tax Court had erred in concluding that the 1995 redemption formed part of the 1993 series, within the meaning of subsection 248(10). The Court of Appeal affirmed the Tax Court’s decision. It based its “series” analysis on the prior decisions in OSFC, Canada Trustco, and MIL and developed the following interpretation of subsection 248(10):

34 Supra note 3.
35 See appendix 1 for a more detailed description of the Copthorne transactions.
In my view, if a series is a motivating factor with respect to the completion of a subsequent transaction, the transaction can be said to have been completed “in contemplation of the series” and a direct causal relationship between the series and the transaction, as argued by the appellant, need not be established. In my opinion, this standard is reconcilable with the test as stated in *OSFC* and as broadened in *Canada Trustco*.

In light of this interpretation, the Federal Court of Appeal concluded that subsection 248(10) added the redemption to the 1993 series, which included the 1993 share sale, to form one extended series. Ryer J stated:

> [T]he complexity of the tax loss utilization transactions that were undertaken in the First Series belies any suggestion that the PUC that was preserved in those transactions was not within the contemplation of the appellant when it undertook the 1995 Redemption. Thus, in my view, the conclusion that the PUC preservation that occurred in the First Series was, to use my formulation, a motivating factor in relation to the completion of the 1995 Redemption, is unassailable.

On this basis, the Court of Appeal affirmed the Tax Court’s conclusion that the 1995 redemption formed part of the 1993 series.

We believe that, fundamentally, the question before the courts in *Copthorne*—that is, whether the 1995 redemption was part of the 1993 series by virtue of subsection 248(10)—was the wrong one. Aside from the 1993 share sale, the 1993 series and the 1995 series had nothing in common and could never constitute a single series. The objective of the 1993 series was the utilization of the accrued losses on an investment held by one member of the Li corporate group against the gain from a sale of real property held by another member of the group, whereas the objective of the 1995 series was, in part, the extraction of the Li family investment from Canada. The right question, in our view, is whether the 1993 share sale together with the 1995 redemption (or the 1995 series) constitutes a series. Unfortunately, both the parties and the courts seem to have misinterpreted the statement of the Federal Court of Appeal in *Canutilities* that “[i]n proposing a series, the Minister may choose whatever transactions he considers relevant” and to have acquiesced to the position that subsection 248(10) allows for retrospective contemplation.

Regarding this last point, *Copthorne* exemplifies the inappropriate results arising from a retrospective application of subsection 248(10). In the context of intragroup transactions, such as the ones in *Copthorne*, it is only too easy to find that, when a

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36 *Copthorne*, supra note 3 (FCA), at paragraph 46 (emphasis added).
37 Ibid., at paragraph 50.
38 Supra note 20 (FCA), at paragraph 64. This statement does not mean that a series is, in any particular case, whatever the minister says it is regardless of the law on point, since the notion of series in the Act no more “belongs” to the minister than it does to the taxpayer. Rather, it simply means that, as a procedural matter, the minister will select the transactions that, on the basis of his understanding of the facts, he considers to form a series at law when assessing a taxpayer.
subsequent transaction is completed, prior transactions were known and were taken into account. After all, one would expect a prudent taxpayer to take into account relevant past transactions before engaging in current ones. A retrospective approach will inevitably lead to the conclusion, as in Copthorne, that relevant preceding transactions were a “motivating factor” in relation to the completion of the subsequent ones. Of course, this is merely hindsight at work.

It is significant that, on January 28, 2010, the Supreme Court of Canada agreed to hear the taxpayer’s appeal in Copthorne.39

**Conclusion**

As we have seen, Canadian courts have interpreted the notion of a series of transactions in the Act, on the basis of the UK case law establishing a judicial anti-avoidance rule, to mean a number of transactions that are “pre-ordained in order to produce a given result” with “no practical likelihood that the pre-planned events would not take place in the order ordained.”

Further, Canadian courts have held that subsection 248(10) requires a pre-existing series to which this provision adds any related transaction completed in contemplation of the pre-existing series. The courts appear to consider it settled that the contemplation criterion in subsection 248(10) may operate both prospectively and retrospectively.

Finally, Canadian courts have interpreted the contemplation criterion somewhat inconsistently. In OSFC, the Federal Court of Appeal thought that it required a determination of whether the taxpayer “knew of” or “took into account” a prior series. The Supreme Court in Canada Trustco elaborated that “in contemplation” must be read not in the sense of actual knowledge but in the broader sense of “because of” or “in relation to” the series. In MIL, the Tax Court of Canada stated that, in broadening the word “contemplation” to be read in the sense of “because of” or “in relation to” the series, the Supreme Court cannot have meant mere possibility, which would include an extreme degree of remoteness. Most recently, in Copthorne, the Federal Court of Appeal thought that if a series is a “motivating factor” with respect to the completion of a subsequent transaction, the transaction can be said to have been completed in contemplation of the series and a direct causal relationship between the series and the transaction need not be established.

We have argued that the courts’ interpretation of the notion of series in the Act and subsection 248(10) has been based on flawed premises. We will next attempt to reconstruct what we believe should be the proper meaning of “series” under the Act, having particular regard to the context and purpose of subsection 248(10).

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39 It is likely not a coincidence that the Supreme Court bench that ruled on the application for leave to appeal included Rothstein J, who decided the OSFC and Canutilities cases at the Federal Court of Appeal.
RECONSTRUCTING “SERIES”
Principles of Interpretation

In this part of the article, we will attempt to develop a cogent interpretation of the expression “series of transactions” in the Act. It is appropriate to begin with a brief review of the relevant Canadian principles of statutory interpretation.

It is uncontroversial that the modern rule of statutory interpretation requires that all statutes be interpreted according to a unified textual, contextual, and purposive approach. This principle was best expressed by the Supreme Court of Canada in *Canada Trustco* as follows:

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

As a result of the Duke of Westminster principle (Commissioners of Inland Revenue v. Duke of Westminster, [1936] A.C. 1 (H.L.)) that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable, Canadian tax legislation received a strict interpretation in an era of more literal statutory interpretation than the present. There is no doubt today that all statutes, including the *Income Tax Act*, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.

The provisions of the *Income Tax Act* must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently.40

Against this background, we set out our analysis of the text, context, and purpose of the expression “series of transactions” in the Act and subsection 248(10).

“Series of Transactions”

*Text*

The term “series” is not defined in the Act and is not a term of art. Therefore, a textual, contextual, and purposive analysis of its meaning under the Act must start

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40 Supra note 26 (SCC), at paragraphs 10-12 (emphasis added).
with an examination of the relevant dictionary definitions. The *Concise Oxford Dictionary*, 8th ed., defines “series” mainly as follows: “a number of things of which each is similar to the preceding or in which each successive pair are similarly related; a sequence, succession, order, row, or set.” *Webster’s Ninth New Collegiate Dictionary* provides the following principal meaning of “series”: “a number of things or events of the same class coming one after another in spatial or temporal succession.”

In light of these definitions, we think the ordinary meaning of the term “series” includes the following elements:

- First, a “series” requires the presence of “a number of things.” This suggests the presence of two or more elements. Conversely, a single item cannot constitute a series.
- Second, the elements of the series must be “similar,” “related,” “of the same class,” or a “set.” This suggests a logical connection or a degree of dependence among the elements of the series, in the sense that they are component parts of a larger whole.\(^{41}\)
- Third, the items must come “one after another in spatial or temporal succession.” In other words, the components of the series must be ordered such that they follow each other in a predetermined sequence. This indicates that a series is something that is planned.

What is not evident from an examination of the dictionary definitions is the level or degree of nexus that must exist between two or more related transactions for them to properly constitute a “series” for the purposes of the Act. This is where the context and purpose of the notion of series under the Act become significant.

**Context**

**Literary Context: Accompanying Purpose or Result Test**

As previously stated, the notion of series is a standard feature of anti-avoidance rules in the Act. An examination of the immediate literary context\(^{42}\) reveals that the expression “series of transactions” is almost invariably accompanied by a purpose or result test. For example, subsection 55(2) is triggered where a corporation resident in Canada has received a tax-free intercorporate dividend “as part of a transaction or event or a series of transactions or events, one of the purposes of which (or, in the

\(^{41}\) In *Meeuse v. The Queen*, 94 DTC 1397, at paragraph 16 (TCC), Bowman J confirmed this element of the term “series” with respect to what constitutes a “series of loans and repayments,” stating, “I do not think that a mere succession of loans is sufficient to constitute them a series without more.”

\(^{42}\) As defined in *Sullivan and Driedger*, “[t]he literary context consists of any legislative text that may be looked at for the purpose of carrying out a textual analysis. This includes the immediate context, the Act as a whole and the statute book as a whole.” Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, ON: Butterworths, 2002), 260.
case of a dividend under subsection 84(3), one of the results of which) was to effect a significant reduction of the non-safe-income capital gain that would otherwise have been realized on a disposition at fair market value of any share of capital stock immediately before the dividend. Similarly, paragraph 245(3)(b) provides that an avoidance transaction is a transaction “that is part of a series of transactions, which . . . would result, directly or indirectly, in a tax benefit.”

The purpose and result tests\(^{43}\) accompanying the expression “series of transactions” confirm our textual analysis that a series is a planned, logical whole. They also reveal the requisite logical link between the transactions of a series by requiring that the composite whole that is the series must have either a common purpose or a common result—in the case of anti-avoidance rules, one that the Act identifies as undesirable. Thus, it follows that, to be part of a series, transactions must work together or combine to achieve a common purpose or result.

**Legal Context: The UK Preordained Series Test**

As we have seen, in interpreting the notion of series under the Act, Canadian courts have relied heavily on UK case law of the 1980s\(^{44}\) that departed from a strict adherence to the *Duke of Westminster* principle\(^{45}\) and shaped the United Kingdom’s judge-made approach to tax avoidance. Therefore, that UK case law is part of the legal context\(^{46}\)

\(^{43}\) It is beyond the purpose of this article to discuss the distinction between the result and purpose tests. Ostensibly, a result test suggests a purely objective examination, whereas a purpose test, which operates by reference to the series (and not to the taxpayer), arguably suggests a dual subjective-objective criterion.


\(^{45}\) As defined by *Sullivan and Driedger*, “[t]he legal context consists of the body of substantive law that may be looked at for the purpose of inferring legislative intent. It includes the statute law of the jurisdiction, relevant case law, the common law . . . and international law. On occasion it includes the law of a foreign jurisdiction.” Sullivan, supra note 42, at 260 (emphasis added).
of our notion of series and must be carefully examined. An introductory word of caution is important though. These cases did not involve the interpretation of a statutory series concept like the one in the Act; instead, they sought to articulate a cogent interpretational approach to tax avoidance in the absence of a statutory general anti-avoidance rule. Accordingly, as one might expect, the statements of principle contained in these cases vary and are, of necessity, a function of the particular facts in each instance.

_**W.T. Ramsay v. Inland Revenue Comrs.**_ is the leading decision of the House of Lords on the “new approach” to tax avoidance in the United Kingdom. In this 1981 case, the House of Lords struck down a plan whereby a farming company that had realized a chargeable gain on the sale of farmland sought to mitigate the tax payable by implementing a series of circular and self-cancelling loan and share transactions that were designed to manufacture a paper loss. The “**Ramsay principle**” is contained in the following statement by Lord Wilberforce, who wrote the leading speech:

>If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded: to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded. . . .

> To force the courts to adopt, in relation to closely integrated situations, a step by step, dissecting, approach which the parties themselves may have negated, would be a denial rather than an affirmation of the true judicial process. In each case the facts must be established, and a legal analysis made: legislation cannot be required or even be desirable to enable the courts to arrive at a conclusion which corresponds with the parties’ own intentions.

With reference to the statement that the courts are not bound to consider individually each step in a composite transaction, Lord Wilberforce went on to say that

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48 Before **Ramsay**, the winds of change had already been felt in three other tax-avoidance cases. In _Black Nominees Ltd. v. Nicol_ (1975), 50 TC 229 (HCJ (Ch. Div.)), the court held that the taxpayer—an actress—could not avoid income tax by undertaking transactions that had no business purpose apart from the avoidance of such tax payable on her future earnings. In _Floor v. Davis_, [1978] Ch. 295 (CA), the dissenting judgment of Eveleigh LJ held that the taxpayer failed to avoid a tax on capital gains in respect of a taxable transaction by undertaking an exchange of shares with a company in the Isle of Man, because the transaction had no business purpose apart from avoiding that tax. In _Chinn v. Hochstrasser_, [1981] AC 533, the House of Lords held that a taxpayer failed to avoid a tax on capital gains in respect of a taxable transaction by means of the sale of a reversion to and purchase of shares from a company in the Channel Islands, because those transactions had no business purpose apart from the avoidance of tax.

49 Supra note 47, at 323-24, and 325 (emphasis added).
this is particularly so “where . . . it is proved that there was an accepted obligation once a scheme is set in motion, to carry it through its successive steps,” and that it may be so where “there is an expectation that [the series] will be so carried through, and no likelihood in practice that it will not.”

As noted, Ramsay introduced an interpretational approach to tax avoidance. The fundamental characteristic of this so-called new approach is a step transaction test. In his reasoning, Lord Wilberforce did not seek to define exhaustively the notions of “series of transactions,” “wider transaction,” “a series or combination of transactions,” and “closely integrated situations.” It was not strictly necessary for him to do so since he was not interpreting a statutory series test and, moreover, the transactions in Ramsay were so closely integrated that they obviously constituted a series. Nevertheless, two definitional elements stand out: the requirement of intention to create a series; and the statement, regarding evidence of the intention to create a series, that, in particular, a series will exist where every step has been precontracted or where there is no likelihood in practice that the steps of the series will not be carried out.

The Ramsay principle was extended to a linear series of transactions in the 1982 House of Lords decision in IRC v. Burmah Oil. In this case, the House of Lords struck down a scheme implemented by the taxpayer to convert a bad debt owing to it by a subsidiary company, which was a non-deductible loss, into a loss realized on the liquidation of that subsidiary, which would be tax-deductible. Lord Diplock commented on the Ramsay decision as follows:

It would be disingenuous to suggest, and dangerous on the part of those who advise on elaborate tax-avoidance schemes to assume, that Ramsay’s case did not mark a significant change in the approach adopted by this House in its judicial role to a pre-ordained series of transactions (whether or not they include the achievement of a legitimate commercial end) into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been payable. The difference is in approach. It does not necessitate the overruling of any earlier decisions of this House; but it does involve recognising that Lord Tomlin’s oft-quoted dictum in IRC v. Duke of Westminster . . ., “Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be,” tells us little or nothing as to what methods of ordering one’s affairs will be recognised by the courts as effective to lessen the tax that would attach to them if business transactions were conducted in a straightforward way.

Burmah is significant in that it first qualified the expression “series of transactions” by adding the word “preordained,” an element that, as we shall see, has lived on in the subsequent UK case law. It is not clear what was meant by the term “preordained”: Did the Law Lords mean merely “preordered” or “preplanned,” or did

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50 Ibid., at 324.
51 [1982] STC 30 (HL).
52 Ibid., at 32 (emphasis added).
they use the word's narrower meaning of “predestined”? As we shall see, this became the crucial issue in resolving subsequent cases.

The decision in *Burmah* was followed by the 1984 *Furniss v. Dawson* case (which, together with *Craven v. White*, was relied on by the Federal Court of Appeal in *OSFC*). In *Furniss v. Dawson*, the taxpayers held shares in two companies that manufactured clothing (“the operating companies”). In September 1971, Dawson agreed, in principle, to sell to Wood Bastow Holdings Ltd. (“Wood Bastow”) his family’s entire shareholding in the operating companies. Because a direct sale to Wood Bastow would have attracted immediate capital gains taxation, Dawson and his advisers devised a plan whereby capital gains tax would be deferred by carrying out, before the sale to Wood Bastow, a tax-deferred transfer of the shares in the operating companies to a newly incorporated Isle of Man corporation (“Greenjacket”) in exchange for shares of the latter. The share-for-share exchange was effected on December 16, 1971. The sale of the operating companies to Wood Bastow took place, as planned, on December 20, with the difference that it was Greenjacket, not the Dawsons, that was the vendor. Although this was a chargeable disposal, the expected result was that no gain would accrue to Greenjacket. However, the House of Lords found that the insertion of Greenjacket was not effective in avoiding immediate capital gains tax. Lord Brightman wrote the leading speech and explained the court’s reasoning as follows:

The formulation by Lord Diplock in *Inland Revenue Commissioners v. Burmah Oil Co. Ltd.* . . . expresses the limitations of the *Ramsay* principle. *First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction.* This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end. The composite transaction does, in the instant case; it achieved a sale of the shares in the operating companies by the Dawsons to Wood Bastow. It did not in *Ramsay*. Secondly, there must be steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax—not “no business *effect*.” If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.

In the instant case the inserted step was the introduction of Greenjacket as a buyer from the Dawsons and as a seller to Wood Bastow. That inserted step had no business purpose apart from the deferment of tax, although it had a business effect. If the sale had taken place in 1964 before capital gains tax was introduced, there would have been no Greenjacket. . . .

The result of correctly applying the *Ramsay* principle to the facts of this case is that there was a disposal by the Dawsons in favour of Wood Bastow in consideration of a sum of money paid with the concurrence of the Dawsons to Greenjacket. Capital gains tax is payable accordingly. I would therefore allow the appeals.

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53 Supra note 11.

54 This plan had previously been considered in *Floor v. Davis*, supra note 48.

55 *Furniss v. Dawson*, supra note 11, at 527-28 (emphasis added).
Although Lord Brightman made reference to a “pre-ordained series of transactions” and “one single composite transaction,” *Furniss v. Dawson* does not enlighten us with respect to the exact meaning of those terms. Presumably, this is because, as in *Ramsay* and *Burmah*, the House of Lords was not interpreting a statutory series concept but rather formulating a general interpretive approach to tax avoidance, and because the transactions at issue were so closely integrated that it is difficult to see how they could not constitute a series.

The true relevance and importance of the series test came to the forestage in three sister cases decided together by the House of Lords in 1988: *Craven v. White*, *IRC v. Bowater*, and *Baylis v. Gregory*. The three cases had certain features in common. In each case, there had been a disposition by the taxpayers of assets to one or more companies, followed by a disposition of those assets by the company or companies to an ultimate third-party purchaser. The first disposition had no commercial purpose other than the avoidance of tax (though this was disputed in *Craven v. White*). In none of the cases was there a contractual obligation to effect the second disposition at the time the first was made. In each case, the Crown, relying on the *Ramsay* principle, asserted that, for the purpose of ascertaining the fiscal consequences, the two steps or transactions involved should be treated as a single, composite transaction under which there was a “disposal” by the taxpayers in favour of the ultimate purchaser. Each of the three cases was decided in favour of the taxpayer because the transactions at issue could not be integrated into a preordained series. In essence, the majority of the House of Lords reasoned that a sequence of steps would constitute a preordained series only when it is practically certain that all steps would occur. Of particular note is that the three cases involved a different degree of nexus between the transactions.

*Craven v. White* involved a first type of nexus: at the time of the first transaction, another transaction was anticipated, but it was not certain to materialize. *Craven v. White* involved the same basic tax plan as that in *Furniss v. Dawson*, but otherwise the two cases are fundamentally different. In *Craven v. White*, the taxpayers held shares in a company (“Queensferry”). In 1976, they were negotiating, at the same time and in parallel, two possible deals: a merger of the business with a company (“Cee-N-Cee”) and, in the alternative, a sale to another company’s subsidiary (“Oriel”). The taxpayers acquired an Isle of Man company (“Millor”), which would be used as a vehicle either for the merger with Cee-N-Cee or for the sale to Oriel. As in *Furniss v. Dawson*, the taxpayers effected a share-for-share exchange with the Manx company, which occurred on July 19, 1976. However, in contrast to *Furniss v. Dawson*, at the time of the transfer to Millor it was uncertain whether a transaction would take place with Cee-N-Cee or Oriel. Ultimately, after difficult negotiation, the sale to Oriel went ahead and was completed on August 19, 1976, with Millor being the vendor. The majority of the House of Lords held that although on July 19, 56 Supra note 12.
1976 there was a strong possibility that the sale would go ahead, there was no practical certainty that it would. Therefore, the rolldown to Millor and the sale to Oriel had to be treated separately for tax purposes, with the effect that the taxpayers successfully avoided immediate capital gains tax.

The Bowater case represents a second type of nexus: at the time of the first transaction, a further transaction that was not certain to materialize was anticipated, subsequently collapsed, but was ultimately completed. Bowater concerned the proper application of a development land tax. That tax was imposed on the amount of development value realized within a financial year. A material feature of the tax was an exemption on the first £50,000 of value. Also, there was no rule restricting this exemption when a transfer within a related group of companies was involved. In November 1978, a piece of land was owned by a sister company of the taxpayer. At that time, the owner of the land entered into negotiations with a third-party purchaser, Milton Pipes. A firm price was agreed upon, but closing was subject to satisfactory agreements and planning permission. There were problems with obtaining the planning permission and so, in July 1980, the purchaser withdrew. Meanwhile, on March 7, 1979, the sister company had sold the land to the taxpayer, which had then sold the land on March 25, on a taxable basis and in equal shares, to five other companies in the group. In February 1981, Milton Pipes reopened negotiations, and the land was ultimately sold to it in October 1981. The Inland Revenue sought to withhold the £50,000 exemption for each of the five companies that owned the land by treating the sale to Milton Pipes as having been made directly by the taxpayer. The House of Lords held for the taxpayer on the basis that, on March 25, 1979, the sale to Milton Pipes was not preordained.

Finally, Baylis v. Gregory belongs to a third category of nexus: at the time of the planning of the first transaction, a further transaction was anticipated, but it collapsed before the first transaction was completed; ultimately, a similar transaction involving a different party was effected at a later time. In this case, the taxpayers held the majority of the shares of a company called PGI. In 1973, a sale of the shares of PGI was being negotiated with a third party, Cannon. As in Furniss v. Dawson and Craven v. White, it was planned that an Isle of Man company would be interposed before the sale. On February 13, 1974, negotiations with Cannon broke off. Nonetheless, on February 19, 1974, an Isle of Man company was set up and, on March 11, a share-for-share exchange was effected between the taxpayers and that company. Two years later, a different purchaser, Hawtin, appeared, and on January 30, 1976, the shares in PGI were sold by the Manx company to Hawtin for cash. The Inland Revenue assessed the taxpayers on the basis that they had sold the shares in PGI directly to Hawtin. The House of Lords affirmed the decisions of the lower courts in favour of the taxpayers.

The House of Lords decided the three appeals together. In essence, the crucial issue before their Lordships concerned the proper meaning of the preordination requirement that had been introduced in Burmah.

Craven v. White was the most controversial of the three cases; in the other two, counsel for the Crown stopped just short of conceding the case. Whereas the House
of Lords was unanimous in its decision for the taxpayers in *Bowater* and *Baylis v. Gregory*, two Law Lords dissented in *Craven v. White*.

Lord Oliver, with whom Lord Keith of Kinkel agreed, wrote the leading speech for the majority. In holding for the taxpayers, Lord Oliver now-famously summarized the House of Lords’ approach to tax avoidance as follows:

As the law currently stands, the essentials emerging from *Furniss v. Dawson* [1984] A.C. 474 appear to me to be four in number: (1) that the series of transactions was, at the time when the intermediate transaction was entered into, *pre-ordained in order to produce a given result*; (2) that that transaction had *no other purpose than tax mitigation*; (3) that there was at that time *no practical likelihood that the preplanned events would not take place in the order ordained*, so that the intermediate transaction was not even contemplated practically as having an independent life, and (4) that the *pre-ordained events did in fact take place*.  

Significantly, in developing these four criteria, Lord Oliver took up the pre-ordination requirement from *Furniss v. Dawson* and *Burmah*, but restricted its scope by adding the third requirement set out above. Lord Oliver’s explanation of his approach is also revealing:

I do not, for my part, think that *Furniss v. Dawson* goes further than that. The intellectual basis for the decision was *Ramsay* and the criteria for the application of the *Ramsay* doctrine were those enunciated by Lord Brightman. On those criteria, I see no escape from the conclusion reached in all the three appeals in the High Court and in the Court of Appeal that the appellants must fail. Nor do I readily see that the criteria are logically capable of expansion so as to apply to any similar case except one in which, when the intermediate transaction or transactions take place, *the end result which in fact occurs is so certain of fulfilment that it is intellectually and practically possible to conclude that there has indeed taken place one single and indivisible process*. To permit this it seems to me essential that the intermediate transaction bears *the stamp of interdependence at the time when it takes place*. A transaction does not change its nature because of an event, then uncertain, which subsequently occurs and *Ramsay* is concerned not with re-forming transactions but with ascertaining their reality. *There is a real and not merely a metaphysical distinction between something that is done as a preparatory step towards a possible but uncertain contemplated future action and something which is done as an integral and interdependent part of a transaction already agreed and, effectively, predestined to take place*. In the latter case, to link the end to the beginning involves no more than recognising the reality of what is effectively a single operation *ab initio*. In the former it involves quite a different process, viz. that of *imputing to the parties, ex post facto, an obligation (either contractual or quasi contractual) which did not exist at the material time but which is to be attributed from the occurrence or juxtaposition of events which subsequently took place*. That cannot be extracted from *Furniss v. Dawson* as it stands nor can it be justified by any rational extension of the *Ramsay* approach. *It involves the invocation of a different principle altogether, that is*

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57 Ibid., at 514 (emphasis added). As noted earlier, this statement was relied on by Rothstein J in *OSFC* and later qualified in *Canutilities*: see supra notes 24 and 25 and the related text.
to say, the reconstruction of events into something that they were not, either in fact or in intention, not because they in fact constituted a single composite whole but because, and only because, one or more of them was motivated by a desire to avoid or minimise tax. That may be a very beneficial objective but it has to be recognised that the rational basis of Ramsay and Furniss v. Dawson then becomes irrelevant and is replaced by a principle of nullifying a tax advantage derived from any “associated operation.”

The majority in *Craven v. White* also included Lord Jauncey, who expressed a slightly more nuanced approach:

There might be circumstances in which at the time of the first transaction arrangements for the effecting of the second transaction had reached a stage at which it could properly be found as a fact that the first transaction was interdependent although a final price or specific buyer had not then been identified. Arrangements for a sale by auction might be such a situation.  

Lords Templeman and Goff dissented from the majority decision in *Craven v. White*. In essence, both disagreed with the majority's narrow construction of the preordination criterion. In particular, Lord Goff said:

The word “pre-ordained” in the expression “pre-ordained series of transactions” means simply “decided in advance” or, to adopt the words of Lord Fraser of Tullybelton in *Furniss v. Dawson*, at p. 513, “planned as a single scheme.” Of course, in a composite transaction each step must, by definition, be planned in advance; but where one refers not to the composite transaction but to the series of transactions which constitute it, the word “pre-ordained” is added to show that that series of transactions does indeed constitute a composite transaction. . . .

I do not regard the “practical certainty” test as apposite. This is because “pre-ordained” does not mean “pre-destined”; it means decided or planned in advance, but not foredoomed—unless the expression is used in connection with a decision by some supernatural agency, such as fate.

In summary, the review of the UK case law above indicates that, after initially adopting a simple concept of series for the “new approach” to tax avoidance (*Ramsay*), the House of Lords gradually restricted this notion, first by qualifying it with the term “preordained” (*Burmah* and *Furniss v. Dawson*), and then by interpreting “preordained” to mean “no practical likelihood that the preplanned events would not take place in the order ordained” (*Craven v. White*). It seems clear that the UK case law ultimately adopted a notion of series that requires a very high level of nexus between the component transactions, and most likely has a narrower meaning than the expression “series of transactions” *simpliciter*.

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59 Ibid., at 532.
60 Ibid., at 523 and 524.
The UK case law does, however, confirm some of the defining characteristics of the notion of series, as revealed by the dictionary definitions discussed above. Thus, in *Craven v. White*, Lord Oliver confirmed that the component parts of the series must be related such that the series operates as a logical whole to produce a given result. Lord Oliver also confirmed that for a series to exist, it must be complete, in that all of the necessary and sufficient components of the series must in fact take place.

**LEGAL CONTEXT: THE US STEP TRANSACTION DOCTRINE**

As we have seen, in the context of the “series” analysis in *OSFC*, the Federal Court of Appeal considered, but refused to apply, the “mutual interdependence” and “end result” tests developed by US courts for the purposes of the US step transaction anti-avoidance doctrine. Nonetheless, we feel it is instructive, in interpreting the Canadian notion of series, to briefly review the US law on step transaction.61

Like the United Kingdom, the United States has not (yet) enacted a comprehensive statutory general anti-avoidance rule. Instead, since the landmark decision in *Gregory v. Helvering*,62 US courts have been applying various, often overlapping, judge-made doctrines, such as substance over form, step transaction, business purpose, sham transaction, and economic substance, to challenge tax-motivated transactions.

The US step transaction doctrine is considered to have been developed as part of the substance-over-form doctrine, which US courts have applied in order to tax transactions on the basis of their economic substance rather than their apparent legal form.63 The step transaction doctrine will therefore not be applied unless the substance of a particular transaction is found to differ from its form.64

The origins of the step transaction doctrine can be traced back to the 1938 decision of the US Supreme Court in *Minnesota Tea Co. v. Helvering*, which synthesized the principle in the following terms: “[A] given result at the end of a straight path is not made a different result because reached by following a devious path.”65 Indeed, under the step transaction doctrine, separate transactions or steps may be collapsed and treated as one overall transaction in situations where the mechanical application of the tax rules to each individual step would not result in the proper taxation of the overall transaction, in light of its true substance.

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63 See *Associated Wholesale Grocers, Inc. v. US*, 927 F. 2d 1517 (10th Cir. 1991).


65 302 US 609, at 613 (1938).
In most cases, the result of the application of the step transaction doctrine by a
court will be a collapsing of the various steps in order to disregard certain unneces-
sary transactions. Alternatively, the order of the steps can be varied. Interestingly,
however, US courts have cautioned that the step transaction doctrine cannot be used
to recharacterize transactions so as to “manufacture facts that never occurred to
create an otherwise non-existent tax liability.”

An additional interesting aspect of the step transaction doctrine is that, while it
is often used as an anti-avoidance measure, it can also be relied on by a taxpayer for
the taxpayer’s own benefit. This is an interesting distinction from Canadian anti-
avoidance concepts, such as GAAR, which cannot be used by Canadian taxpayers to
self-assess and thus “self-recharacterize” their own transactions.

US courts have retained three different and alternative formulations of the basic
premises necessary in order to apply the step transaction doctrine. These three
threshold tests are known as the “binding commitment” test, the “end result” test,
and the “mutual interdependence” test. As mentioned above, only the last two were
referred to in OSFC.

Under the binding commitment test, the step transaction doctrine will be applied
if, at the time the first step takes place, there is a binding commitment or agreement
to complete the remaining steps. Nevertheless, the existence of a formal agree-
ment is not a prerequisite; the US Tax Court has held that

[a binding commitment or even an agreement in principle that each step of a plan will
occur is not a prerequisite for finding that a firm and fixed plan existed, although un-
certainty regarding one or more steps of the plan is a factor we must consider.

The US Tax Court has indicated that the binding commitment test is the most
rigorous of the three. It is seldom used by the government and is applicable only
where a substantial period of time has passed between the steps that are subject to
scrutiny. Obviously, this binding commitment test is substantially similar to the
UK preordained series of transactions test.

The end result test will treat individual steps as a single composite transaction
where every one of those steps reflects a single intent to achieve a particular result.

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66 Greene v. US, 13 F. 3d 577, at 583 (2d Cir. 1994). See also Grove v. CIR, 490 F. 2d 241 (2d Cir.
1973).

67 This test is described in the decision of the US Supreme Court in Commissioner v. Gordon, 391
US 83 (1968).

68 See Merrill Lynch & Co. v. Comm’r, 120 TC 12, at 100 (2003).

69 However, since, as previously stated, the step transaction doctrine can be used to a taxpayer’s
advantage, the binding commitment test may prove particularly useful to taxpayers in achieving
a greater level of certainty that the step transaction doctrine will apply where the substance of
the transactions in question differs from their form.

This test focuses on the subjective intent of the parties, at the time the first step was effected, to achieve a single end result. This test is described in *Greene v. US* as follows:

Under the end result test, the step transaction doctrine will be invoked if it appears that a series of separate transactions were prearranged parts of what was a single transaction, cast from the outset to achieve the ultimate result.\(^71\)

Accordingly, under this test, each intermediate step that is intended by the parties to serve the accomplishment of a particular end result will be disregarded.

Under the mutual interdependence test, individual steps will be disregarded and collapsed into a single transaction if those steps are so interdependent that, taken individually, each step would be meaningless without the others. The interdependence test is an objective test that focuses on the particular relationship between individual steps. It seeks to determine

whether under a reasonably objective view the steps were so interdependent that the legal relations created by one of the transactions seem fruitless without the completion of the series.\(^72\)

Regarding the three tests for the US step transaction doctrine, Keinan makes a particularly thoughtful observation, arguing that, in effect, they constitute only one, two-pronged step transaction test:

In my view, while most courts in cases involving the step transaction principle state that there are three [alternative] tests, as a practical matter, there is only one two-prong test. As set forth above, the binding commitment test is rarely used and the IRS [Internal Revenue Service] clearly avoids using it in its argument because it is the hardest to prove. In my view, this test should not be enumerated as one of three tests and could simply become a strong indicator that the step transaction [doctrine] ought to apply. As to the other two tests, in my view, they should become a two-prong test pursuant to which the step transaction doctrine would apply to collapse certain steps if both tests are met.\(^73\)

According to Keinan, this two-pronged test has a subjective element, represented by the end result test, and an objective element, represented by the mutual interdependence test. Hence, the end result is a combined subjective-objective test. We will argue below that the Canadian series test is, in this respect, similar to the US step transaction doctrine.

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71 *Green*, supra note 66, at 583.

72 *Kornfeld v. CIR*, 137 F. 3d 1231, at 1235 (10th Cir. 1998).

73 Keinan, supra note 61, at 74.
Purpose
In *OSFC*, Rothstein J began his analysis of the series issue as follows:

In *The Fundamentals of Canadian Income Tax*, 6th ed. (Scarborough: Carswell, 2000), at page 888, Professor Krishna explains that for the purposes of the GAAR a series of transactions:

... refers to the integration of individual and separate steps into a composite transaction. The linkage of the separate steps into a “series” results from their interdependence and the manner in which the transactions are structured. Thus, we must determine: when is a sequence of events (e.g., A to B, then B to C) considered a single composite [transaction], such as A to C?\(^{74}\)

Indeed, the simple purpose of the notion of series, as it is employed in the Act, is to identify situations where a particular transaction and one or more, usually tax-motivated, other transaction(s) are sufficiently integrated and related to be considered together, rather than on a transaction-by-transaction basis, in ascertaining the tax consequences of the transactions. For example, where the anti-avoidance rule in subsection 55(2) applies, the normal tax consequences of an intercorporate dividend are set aside and the dividend is treated as proceeds of disposition from the sale of the share with which it has been aggregated into a series, in order to thwart the capital-gains-stripping mischief at which this provision is directed. Similarly, paragraph 245(3)(b) applies where a tax-driven transaction\(^{75}\) is sufficiently integrated with one or more other transactions so that, together as a series, they would result, directly or indirectly, in a tax benefit. Therefore, put simply, the purpose of the series concept, in our view, is to identify a plan, scheme, or arrangement to which the Act is intended to apply as a whole (rather than applying to each transaction individually, which is the norm). This conclusion is supported by the textual meaning of the word “series” read in context, as discussed above.

Naturally, the purpose of the particular anti-avoidance rule in which the series concept is used will be instructive in establishing which transactions are relevant to the possible series. However, it is in establishing the degree of connection between these transactions that subsection 248(10) plays an essential role in clarifying the ordinary meaning of the term “series.” This is what we focus on next.

Subsection 248(10)

“The Series Shall Be Deemed To Include”
Subsection 248(10) was proposed in November 1985 and enacted in 1986.\(^{76}\) It reads, in its current English and French versions, as follows:

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\(^{74}\) Supra note 7 (FCA), at paragraph 18 (emphasis added).

\(^{75}\) That is, a transaction that may not reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain a tax benefit.

\(^{76}\) SC 1986, c. 6, section 126(6).
(10) For the purposes of this Act, where there is a reference to a series of transactions or events, the series shall be deemed to include any related transactions or events completed in contemplation of the series.

This provision has been described as “inelegant . . . and unhelpful” and “not a model of clarity.” The fundamental uncertainty about subsection 248(10) concerns its function. Two textual elements of this provision seem, in our view, to have misled Canadian courts in this regard. The first difficulty in identifying the object of subsection 248(10) lies with the confusing use of the word “series” in the provision. As discussed earlier, in OSFC, the Federal Court of Appeal felt that subsection 248(10) requires an existing preordained series of transactions, to which this provision could add a related transaction completed in contemplation of that pre-existing series.

In addition, the fact that subsection 248(10) is framed as a deeming provision appears to have misled the courts into believing that it was intended to extend the meaning of “series” beyond its normal limits, rather than merely to clarify its basic elements. Thus, in OSFC, the Federal Court of Appeal said that “[t]he deeming nature of subsection 248(10) implies an enlargement of the common law series.”

The controversy as to whether the related transaction is to be added to an existing series or whether it can form a series together with one other transaction was identified by Tiley at the 1988 annual conference of the Canadian Tax Foundation:

Second (and this is the possibly serious flaw I referred to earlier), the series includes related transactions that are “completed in contemplation of the series.” Yet, as I have said, the concept of “the series” or “a series” itself remains undefined. Subsection 248(10) does not explain whether the related (and completed) transaction is to be added to an existing series or whether it can be added to one other transaction to make a series. Two situations must be distinguished. In one, the related transaction is followed by two others, which together make a series; clearly, the related transaction is deemed to be included in the series. In the other situation, the related transaction is followed by one other, which therefore, as a single transaction, cannot itself be a series. Can the related transaction be added to the other single transaction to make a series? That is, when a transaction is completed in contemplation of the series, is the series what results from the addition of the deemed inclusion? I do not know the answer, but I assume that it will be yes; otherwise, the provision will not work as the draftsmen hope (which may be different from what the legislators are taken in law to intend), but it is going to matter.

78 OSFC, supra note 7 (FCA), at paragraph 28.
79 See the text accompanying note 17, supra.
80 OSFC, supra note 7 (FCA), at paragraph 33.
81 Supra note 77, at 8:4-5 (emphasis added).
We agree with Tiley that subsection 248(10) must operate to allow a transaction to be added to one other transaction to form a series. This is because subsection 248(10) merely tries to clarify the meaning of “series” under the Act, not to manufacture a series that would not otherwise exist. The text of subsection 248(10) confirms this interpretation.

First, regarding the use of the word “series,” subsection 248(10) operates “where there is a reference to a series of transactions or events [emphasis added].” This first use of the word denotes a textual reference to the concept of series as used in a particular provision of the Act, not an actual series. Significantly, the two subsequent uses of the word “series” are preceded by the definite article: “the series shall be deemed to include any related transactions or events completed in contemplation of the series [emphasis added].” In our view, these subsequent references are merely references to the notional series first referred to, and not a pre-existing series. A less ambiguous version of subsection 248(10) could, in our view, read as follows:

For the purposes of this Act, where there is a reference to a series of transactions or events [in a provision, in applying that provision] the series [so referred to] shall be deemed to include any related transactions or events completed in contemplation of the series.

This minor reformulation of subsection 248(10) helps to make it clear that it is merely a rule of application that serves to ensure that the proper scope is given to the term “series of transactions” wherever it appears in the Act; the rule is not intended to manufacture a series that would not otherwise exist, by adding an otherwise independent transaction to an existing series. Indeed, what purpose would that serve?

Second, as Rothstein J correctly pointed out in OSFC, subsection 248(10) is not a definition provision, but neither is it a typical deeming rule: the phrasing “where there is a reference to a series of transactions or events, the series shall be deemed to include” is unusual; a more typical deeming provision would have read “a series of transactions or events shall be deemed to include.” We believe that framing subsection 248(10) as a quasi-deeming rule was the best option for the drafter. An exhaustive definition was inappropriate since Parliament’s clear intention was to let the courts flesh out such a fact-dependent term on a case-by-case basis. An inclusive definition was risky because it would be dependent on the ordinary meaning of “series,” which was highly uncertain, considering the lack of Canadian jurisprudence on point at the time that subsection 248(10) was enacted and the ongoing upheavals in the UK case law. This, in our view, explains the quasi-deeming nature of subsection 248(10): it was the best solution available to the Department of Finance in clarifying the key elements of the notion of series, as it perceived them.

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82 OSFC, supra note 7 (FCA), at paragraphs 28-33.
Arguably, the correctness of this interpretation is also confirmed by the French version of the provision, which reads somewhat differently from the English version. In direct translation, it states:

For the purposes of this Act, where there is a reference to a series of transactions or events, the series shall be deemed to include any related transactions or events completed in order to realize the series [emphasis added].

This wording suggests that the series is realized or completed only once all the related transactions or events have been included in the series. This is perfectly logical and consistent with the ordinary meaning of “series” as discussed earlier in this article.

Considering the foregoing, we believe that the intended function of subsection 248(10) is to clarify. This is confirmed by the Department of Finance technical notes issued at the time the provision was enacted. The technical notes explain that “[n]ew subsection 248(10) clarifies that a reference in the Act to a series of transactions or events includes any related transaction or event completed in contemplation of the series.”

Contrary to the holding in OSFC, the purpose of subsection 248(10) is not to expand the ordinary meaning of “series” by adding to a pre-existing series one or more transactions that would normally not be part of that series, but to confirm the essential elements of the ordinary meaning of the word “series.” In our respectful view, what OSFC failed to recognize is that the UK decisions in Furniss v. Dawson and Craven v. White did not establish the ordinary meaning of the word “series” but instead used the narrower notion of a preordained series of transactions, which is really just a type of series. That the UK courts would adopt a narrow view of series in this context is not surprising, considering that their objective was not to define “series” but to fashion a general approach to tax avoidance, of which “series” would be one component. The considerations involved in crafting such an approach, particularly in a tax regime that has adopted the Duke of Westminster principle as one of its pillars, are different from those involved in defining the term “series” and, specifically, from those relevant to defining that term under the Act. Indeed, the “series” concept is not, in and of itself, a tax-avoidance component of the three-factor test

Of course, both versions of the Act are official and must be considered in interpreting a particular provision. Giving a proper meaning to bilingual legislation, such as the Act, gives rise to a different set of interpretational issues, considering that the texts of the English and French versions of the Act may not be entirely consistent with each other. The basic principle governing the interpretation of bilingual legislation is known as the shared- or common-meaning rule. The leading case on interpreting bilingual legislation is The Queen v. Cie Imm. BCN Ltée, [1979] 1 SCR 865. In that case, the Supreme Court of Canada adopted a common meaning of the expressions “disposed of” and “aliénés,” as found in the English and French versions of regulation 1100(2) respectively, based on a contextual and purposive interpretation of the Act.

Canada, Department of Finance, Technical Notes to a Bill Amending the Income Tax Act and Related Statutes (Ottawa: Department of Finance, November 1985), clause 126(6) (emphasis added).
in GAAR but rather—as in the case of a single transaction—merely something the tax results of which can be denied by GAAR.

In this respect, it is relevant to point out, as Rothstein J did in OSFC, that at the time that subsection 248(10) was enacted, there was no Canadian case law on point. At the same time, however, as noted above, there was an upheaval in UK tax law. While Ramsay initially seemed to adopt an unqualified version of a series test for its “new approach” to tax avoidance, subsequent decisions, starting with Burmah and Furniss v. Dawson, introduced the preordination requirement, which ultimately narrowed the overall scope of the concept. In November 1985, when subsection 248(10) was first proposed (over four years after Ramsay and almost two years after Furniss v. Dawson), the Department of Finance and CRA must have been aware of and sensitive to the developments in the UK case law, particularly the cases of Craven v. White, Bowater, and Baylis v. Gregory, which in 1985-86 were making their way through the UK court system.85 Accordingly, it is our view that the Department of Finance introduced subsection 248(10) in order to pre-empt the possible importation into Canadian tax law of a narrower version of the notion of series, such as the one ultimately adopted by a majority of the House of Lords in Craven v. White. We submit that this provides a cogent explanation of the function of subsection 248(10). It is perhaps, therefore, somewhat ironic that Canadian courts adopted the “preordained series” test, which is the very thing that subsection 248(10) sought to prevent.

Considering the above, we next focus on the two key notions contained in subsection 248(10): the “related” and “in contemplation of” criteria.

“Related”

Subsection 248(10) clarifies that transactions that form part of a series must be “related.” When are transactions “related” for the purposes of subsection 248(10)? The term “related” is not defined in this context.86 According to Webster’s Ninth New Collegiate Dictionary, “related” means “connected by reason of an established or discoverable relation.” Arguably, therefore, the reference to transactions that are “related” merely confirms the second characteristic of the concept of series discussed above. In other words, in order to form part of a series, transactions must be logically

85 See supra notes 13 and 14. Unlike IRC v. Bowater and Baylis v. Gregory, Craven v. White had been won by the Crown before the special commissioners. However, in 1985-86, the High Court held for the taxpayer in each of the three cases: see the judgment dated May 24, 1985 in Craven v. White, [1985] 1 WLR 1024 (Ch. Div.), per Gibson J; the judgment dated October 18, 1985 in IRC v. Bowater Property Developments, [1985] STC 783 (Ch. Div.), per Warner J; and the judgment in Baylis v. Gregory, [1986] 1 WLR 624 (Ch. Div.), per Vinelott J. After subsection 248(10) was enacted, in 1987 the UK Court of Appeal affirmed the High Court’s decisions ([1987] 3 All ER 27), and in 1989 the House of Lords in turn affirmed the Court of Appeal’s decision (supra note 12).

86 The expression “related persons” is defined in subsection 251(2), which provides that individuals connected by blood, marriage, common-law partnership, or adoption are related to each other for the purposes of the Act.
and specifically connected to each other. The “final dividend” in MIL, for example, was considered to be not sufficiently connected or interrelated with the other transactions to be part of the same series.

“In Contemplation of”

Subsection 248(10) states that, for a transaction to form part of a series, it must be completed “in contemplation of” the series. As the courts have implicitly recognized, the contemplation criterion is the key feature of this provision. This is so because the expression “in contemplation of” is intended to clarify the degree of nexus that must be satisfied for two or more related transactions to constitute a series; that is, the threshold degree of nexus is “contemplation.”

But what is the meaning of the “contemplation” requirement in subsection 248(10)? This term is not defined in the Act. The Concise Oxford Dictionary, 8th ed., defines the verb “contemplate” to mean “regard as possible; intend; have as one’s purpose”; Webster’s Ninth Collegiate Dictionary defines it to mean “to view as contingent or probable or as an end or intention.” These definitions suggest a more or less active consideration of or intention to undertake future transactions.

Considering the above dictionary definitions and in light of the relevant context and purpose of subsection 248(10), in our view, two principal elements comprise the meaning of the word “contemplate”: (1) prospectivity and (2) intention to complete the series of transactions.

Contemplation Is Not Retrospective

Contrary to the Canadian jurisprudence on point, it is unambiguous that the act of contemplation is prospective in nature only and, hence, subsection 248(10) requires that at the time of the initial transaction, a determination was made by the taxpayer as to whether the transaction was being completed in contemplation of a series, such that the taxpayer intended at that time that the transaction would be a part of a larger, composite whole. This is confirmed by the various uses of the verb “to contemplate” and its variants in provisions of the Act other than subsection 248(10).

In the view of Revenue Canada, a preliminary transaction will form part of a series determined with reference to subsection 248(10) if, at the time the preliminary transaction is carried out, the taxpayer intends to implement the subsequent transactions constituting the series, and the subsequent transactions are eventually carried out.

87 See, for example, sections 15, 55, 80, 88, 126, and 207.6, and subsection 248(21). In this regard, it is revealing that subsection 207.6(2) uses the term “contemplation” in the context of “benefits that are to be received or enjoyed by any person on, after or in contemplation of [emphasis added].” Paragraph 55(3.1)(a) is also notable for its arguably redundant wording: “in contemplation of and before [emphasis added].”

88 Hiltz, supra note 13, at 7:6 (emphasis added). Remarkably, this excerpt was cited, though not followed, by Rothstein J in OSFC, supra note 7 (FCA), at paragraph 22.
The following excerpt from the speech of Lord Jauncey in *Craven v. White* is also apposite:

The character of the first transaction falls to be determined *at the time when it takes place*. Was it then an *independent* transaction or was it an *interdependent* part of a composite transaction? *I do not consider that a transaction which was initially independent in fact could properly be rendered interdependent ex post facto by subsequent events although it is possible that a transaction which judged at the time had the character of an interdependent transaction could lose that character by the subsequent and unexpected failure to materialise of the second transaction.*

Had Parliament sought to give subsection 248(10) a retrospective effect, as well as a prospective one, it would not have chosen the words “completed in contemplation of,” which in normal parlance refer to things done in view of things that may happen later. Rather, it would have selected more neutral language, such as “related transactions . . . entered into because of” the series. However, given that this was not the language chosen by Parliament, the judicial reformulation of the expression “in contemplation of” to mean “in relation to” or “because of,” or to connote a “motivating factor,” comes dangerously close to an exercise in redrafting subsection 248(10) to make its language better correspond with a retrospective function. With respect, not only is this inappropriate, but, as we discuss next, it leads to an unintended enlargement of the anti-avoidance rules in the Act and makes it difficult—that is, more difficult than it already is—for taxpayers to intelligently manage their affairs.

As noted, the series concept is prevalent in a number of anti-avoidance rules in the Act. The operation of these rules often depends on whether a taxpayer has the requisite purpose in carrying out a series, which purpose is established at the time the series is entered into, based on what the taxpayer intended and knew at that time. However, if a series under the Act could be established by connecting a transaction occurring at a later time with a common-law series that happened at an earlier time, on the basis that the taxpayer had the anterior common-law series in his contemplation when he carried out the later transaction, the taxpayer’s purpose for the extended series could be determined at the end of the series, not at its beginning. Since the law presumes that persons intend the reasonable and probable consequences of their actions, and since prudent taxpayers would be expected to be cognizant of their past transactions when engaging in current ones, an examination of a taxpayer’s purpose at the end of the series effectively transforms the purpose test, in these anti-avoidance rules, into a result test, or at least creates a presumption of series, which the taxpayer must then rebut. This is a rather astonishing enlargement of these anti-avoidance rules—one made even more remarkable by the fact that the Department of Finance technical notes indicate that subsection 248(10) was merely a clarifying amendment, enacted to ensure that the expression “series of transactions” was given its intended scope. One would expect a clarifying amendment to preserve the normal ambit of the anti-avoidance rules in which the term “series” is used, not to enlarge it.

89 Supra note 12, at 532 (emphasis added).
The fact that subsection 248(10) may be applied retrospectively is also incompatible with the goals of “consistency, predictability and fairness” promoted by the Supreme Court of Canada in Canada Trustco. In light of the acceptance of retrospective contemplation in that case, it appears that the tax consequences of a current transaction may be undone merely on the basis that the transaction is being carried out “because of” a past transaction; however, in a sense, all current transactions are accomplished “because of” some transaction(s) that occurred in the past. As a practical matter, how can taxpayers discern which past transactions are relevant and which are not? Much more troubling, though, is the fact that, under this retrospective approach, the tax effects of past transactions can conceivably be undone because of current transactions that the taxpayer had no intention of carrying out at the time of those past transactions.

Consider the following example. Mr. A is a Canadian resident who owns a Canadian-resident corporation, Canco 1, which has two divisions, D 1 and D 2. Mr. A wishes to segregate the operations of D 1 from those of D 2 for commercial, liability, and estate-planning reasons, and to have D 2 carried on through a new corporation that he owns, Canco 2. To this end, Mr. A purportedly effects a tax-deferred spinoff of D 2 from Canco 1 to Canco 2 under the paragraph 55(3)(a) exception to the anti-avoidance rule in subsection 55(2). Three years later, Mr. A receives an unsolicited offer for D 2 (now carried on through Canco 2) from an arm’s-length party, Mr. B. Because D 2’s assets have significant accrued recapture, Mr. A prefers to sell the shares of Canco 2, and a deal is struck whereby Mr. B will acquire the shares of Canco 2. For the exception in paragraph 55(3)(a) to operate, the sale to Mr. B may not be part of the same series that includes the deemed dividends arising as part of the earlier spinoff. Since Mr. A did not intend to sell his shares in Canco 2 to Mr. B (or to any other unrelated party, for that matter) at the time of the spinoff, one would expect that the sale of Canco 2’s shares would not be part of the same series as the deemed dividends. However, this eminently reasonable expectation is not a foregone conclusion under the current law.

According to the Supreme Court’s decision in Canada Trustco, the expression “in contemplation of” in subsection 248(10) must be read not in the sense of actual knowledge but in the broader sense of “because of” or “in relation to” the series. The phrase can be applied to events either before or after the basic avoidance transaction found under subsection 245(3). Under this formulation of the contemplation criterion, the sale of the shares of Canco 2 was not possible but for the earlier spinoff, and Mr. A obviously knew of the earlier spinoff and, therefore, presumably took it into account when selling the shares of Canco 2.

This innocent, everyday situation demonstrates the tremendous uncertainty created by attributing a retrospective application to subsection 248(10). This
uncertainty, we respectfully submit, undermines the *Duke of Westminster* principle, since taxpayers, such as Mr. A above, must be able to reasonably predict the tax consequences of their actions, in order to organize their affairs in an intelligent manner from day 1. Moreover, they must be able to select an efficient manner of conducting their affairs in the present, and not be consigned, as Mr. A would be, to adopting a course of action that maximizes their current taxes, lest they be visited with potentially harmful tax consequences attributable to some past event that, from a business and practical point of view, has no connection with the current transactions. (Of course, this assumes that Mr. A has been apprised of the trap that potentially awaits him, an unlikely scenario to begin with.) In this regard, the Act’s anti-avoidance rules are intended to serve as a deterrent to abusive tax-planning schemes. However, their deterrent effect may be questioned if they can operate whether or not the taxpayer has the intention to commit the mischief that the rules seek to forestall.

If the answer, in Mr. A’s case, is to not engage in the transaction at all or to sell assets instead, then it is certainly an unsatisfactory one, since we can see no tax policy justification for interfering with Mr. A’s later choice to sell the shares of Canco 2 to a third party. It is an accepted principle of tax policy that the Act should be neutral in terms of its influence on the business decisions that taxpayers make, unless Parliament has clearly sought to encourage (or discourage) a particular activity. The Act’s neutrality will certainly be put to the test if the tax consequences of present business decisions turn on past events simply because a taxpayer knew of them and took them into account in conducting his present affairs. This constraint on current choices will inevitably have a negative impact on the allocation of resources in our market-based economy.

A retrospective application of subsection 248(10) is also incompatible with our self-assessment system, since a taxpayer cannot self-assess a deemed series resulting from the lookback application of subsection 248(10) where the subsequent transaction (as will often be the case) takes place after the returns were filed for the period during which the “common-law” series occurred. If a taxpayer cannot self-assess, how can he avoid late interest charges and penalties? Fundamentally, we think that a self-assessment system presupposes a contemplation that is prospective only, and based on a firm present intention to transact, so that taxpayers are capable of self-assessment.

Retrospectivity can also result in mischief. For example, in theory at least, a taxpayer who has been reassessed on the basis of an initial series could argue that a future transaction was completed “because of” and thus “in contemplation of” the (reassessed) initial series, and accordingly results in a new, deemed series that has a different purpose/result from the original series; thus, the taxpayer could argue, the reassessment should be quashed. Indeed, who better than the taxpayer to claim that a future transaction was done in relation to a previous one? What if a taxpayer manufactured a future transaction to change the result of an earlier series that fell squarely within the confines of an anti-avoidance rule? Presumably, such a manufactured transaction would be done “because of” and “in relation to” the prior series.

In considering the issue of retrospectivity, it should be recalled that the concepts of transaction and series of transactions are merely neutral facts to which anti-avoidance
rules can apply; they are not themselves anti-avoidance features of the Act, and they are certainly not tools designed to thwart unacceptable tax planning. Yet, the retrospective application of subsection 248(10) seems to have been motivated precisely by that aim. Respectfully, care must be taken not to bias the meaning of “series,” whether by adopting an unduly narrow meaning, such as the one resulting from the preordination requirement, or an unduly broad meaning, such as the one resulting from a retrospective application of subsection 248(10), given the unsatisfactory consequences that either definition would have for both taxpayers and the government. The meaning of “series” should be elucidated via a unified textual, contextual, and purposive analysis, as prescribed by the Supreme Court of Canada. As will be seen below, this approach discloses a meaning of “series” that is well calibrated to the larger context of the Canadian tax regime in which it is used.

To summarize this first point, given (1) the dictionary meaning of the verb “contemplate,” (2) the context in which the expression “in contemplation of” is used—namely, a self-assessment system that rests on the bedrock of the Duke of Westminster principle and that seeks to promote consistency, predictability, and fairness for taxpayers—and (3) the clarifying purpose for which subsection 248(10) was enacted, we respectfully submit that retrospectivity has no place in a proper construction of subsection 248(10), and we urge the courts to revisit this issue.

**Contemplation Requires a Firm Present Intention To Implement the Series**

The act of contemplation is inherently subjective. In the context of subsection 248(10), it requires an element of consideration of, or intention in respect of, future transactions. This implies that what was contemplated must be analyzed from the perspective of the taxpayer (or the mind directing the taxpayer) who carried out the transactions at issue.91 However, subsection 248(10) refers to contemplation by reference to a transaction, not a taxpayer. This suggests to us that the taxpayer’s contemplation must be established on the basis of objectively ascertainable facts. Thus, we believe that the contemplation criterion implies a dual subjective-objective test, similar to Keinan’s two-pronged test in regard to the US step transaction doctrine.

The critical issue, in our view, is: *How definite or specific must the taxpayer’s objectively ascertainable intention be, at the time of the first transaction, in order to constitute “contemplation” for the purposes of subsection 248(10) and thus the notion of series under the Act?* This question must be answered taking into account the goals of “consistency, predictability and fairness”: at the time of implementing a particular transaction, a taxpayer should have a clear idea of the tax implications of the transaction, taking into account the taxpayer’s future plans at that time.

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91 In this respect, we mentioned earlier that another approach to the facts in OSFC would have been to analyze matters only from OSFC’s perspective and to ignore the standpoint of Standard (and its trustee); however, in our view, Rothstein J’s approach in the particular circumstances of the case was reasonable.
Below are four degrees of connection or nexus between transactions. Each corresponds to a level of intention that could possibly serve as the requisite “contemplation” at the time the first transaction is completed to establish a series under the Act.

1. **Nexus 1: Preordination.** At the time the first transaction takes place, all the terms of the subsequent transaction(s) required to complete the series have been agreed in principle or formally in the form of a contract. This level of nexus corresponds to the UK preordained series of transactions test. It also reflects the US binding commitment test. It indicates a definite and clear intention to enter into the relevant transactions that comprise the series to the point where there is no practical likelihood that one or more of the transactions will not be implemented. In other words, nexus 1 corresponds to “done deal” situations.

2. **Nexus 2: Specific intention.** At the time the first transaction takes place, the taxpayer has a genuine and specific intention to enter into the subsequent transaction(s) required to complete the series, and such intention is sufficiently clear in terms of the essential elements of the subsequent transaction(s). Those elements will typically include the specific type of transaction, the subject property, the parties, the consideration, and the time frame in which the transaction will be completed. Not all of these elements will always be essential. For example, in the context of a sale by formal auction, the identity of the purchaser will typically not be material or known. The facts in *Craven v. White*, where one of two well-defined transactions was highly likely to happen, correspond to nexus 2. In other words, nexus 2 corresponds to situations where the taxpayer is ready, willing, and able to complete the series.

3. **Nexus 3: General intention.** At the time the first transaction takes place, the taxpayer has a genuine, but only general, intention to enter into the subsequent transaction(s) in that such intention is not sufficiently definite, developed, or specific to serve as the glue that binds the transactions of a series; that is, the taxpayer has not yet ascertained the essential elements of the subsequent transaction(s), such as the subject property, the possible parties, and the range of acceptable consideration. In other words, nexus 3 corresponds to situations where the first transaction takes place at an exploratory stage.

4. **Nexus 4: Strategic planning.** The first transaction is merely part of a strategic tax-planning exercise in that, at the time the first transaction takes place, the taxpayer has no genuine intention to enter into any particular subsequent transaction.

These categories are only convenient, successive ranges on a continuum or spectrum, extending from strict preordination on the narrow end to strategic planning on the broad end. Our inspiration for the four levels of nexus was the argument of the Crown in *Craven v. White*, supra note 12, at 465. In that case, the Crown argued the extreme position that the UK preordained series test should apply to nexus 1, nexus 2, nexus 3, and, possibly, nexus 4 situations.
indicates a series. In addition, we believe that the purpose of subsection 248(10) is to clarify that a nexus 2 situation also constitutes a series for the purposes of the Act (contrary to the outcome under the preordained series test developed as part of the UK approach to tax avoidance). In the context of a self-assessment system that subscribes to the Duke of Westminster principle and that seeks to promote consistency, predictability, and fairness for taxpayers, nexus 3 and nexus 4 situations should not be considered to result in a series under the Act. Nexus 3 and nexus 4 are incompatible with these basic tenets of our tax regime in that they require the use of hindsight to establish a series. This is the “hindsight barrier” that we refer to in appendix 2: it is a barrier that, if crossed, risks challenging the basic assumptions under which our tax system operates. Admittedly, hard cases will arise on the threshold between nexus 2 and nexus 3.

The following examples, broadly inspired by the UK “offshoring” cases like Furniss v. Dawson but based on subsections 85.1(3) and (4), illustrate our analysis. By way of background, subsection 85.1(3) allows a taxpayer to transfer shares of a foreign affiliate to another foreign affiliate of the taxpayer on a tax-deferred basis. Subsection 85.1(4) is an anti-avoidance rule that operates to deny such a rollover in the following circumstances:

Subsection (3) is not applicable in respect of a disposition at any time by a taxpayer of a share of the capital stock of a foreign affiliate, all or substantially all of the property of which at that time was excluded property (within the meaning assigned by subsection 95(1)), to another foreign affiliate of the taxpayer where the disposition is part of a series of transactions or events for the purpose of disposing of the share to a person who, immediately after the series of transactions or events, was a person (other than a foreign affiliate of the taxpayer) with whom the taxpayer was dealing at arm’s length [emphasis added].

The objective of subsection 85.1(4) is clear. If a Canadian resident sells shares in an operating foreign affiliate directly to a third party, any capital gain will be immediately taxable in Canada, whereas if the shares of the affiliate are instead sold by another foreign affiliate of the Canadian resident, the gain will not be FAPI and, thus, taxation of the taxable portion of the gain can be deferred indefinitely. Consequently, subsection 85.1(4) denies the rollover conferred by subsection 85.1(3) where, as part of a series, a Canadian resident transfers the shares in an operating foreign affiliate to another foreign affiliate and the transferee foreign affiliate sells the transferred shares to an arm’s-length party. The following four scenarios exemplify the application of these provisions to the four degrees of nexus discussed above.

Scenario 1 Nexus 1: Preordination.
A Canadian-resident corporation (Canco) owns all of the issued and outstanding shares in a foreign affiliate that carries on an active business (CFA 1). Canco has entered

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93 That is, shares of the capital stock of a foreign affiliate, all or substantially all of the property of which is excluded property.
into an agreement to sell the shares of CFA 1 to an arm’s-length purchaser. The sale of
the shares is scheduled to close three months after the execution of the agreement. The
sale is subject to customary conditions precedent, including due diligence and financing. After signing the agreement and before the closing of the sale, Canco transfers
its shares of CFA 1 to another wholly owned foreign subsidiary (CFA 2) in consideration
for shares of CFA 2. The sale closes as planned, and CFA 2 sells the shares in CFA 1 to
the arm’s-length purchaser.

Comment. This is a typical nexus 1 situation, very similar to the one in Furniss v. Dawson.
The rollover to CFA 2 forms part of a series with the sale of the CFA 1 shares to the arm’s-
length purchaser, and subsection 85.1(4) should normally apply to deny the rollover
otherwise afforded by subsection 85.1(3).

Scenario 2 Nexus 2: Specific intention.
Canco owns all of the shares of CFA 1. Canco wishes to sell the shares of CFA 1, but no
agreement in principle or binding contract has been entered into with a purchaser.
Canco has engaged professionals to work on the intended transaction and, in particular,
to determine the preferred manner of effecting the sale and a price range acceptable to
Canco. Canco’s broker has identified two potential arm’s-length purchasers for the
CFA 1 shares, and Canco has begun negotiations with one of them (purchaser 1). Canco
has also made overtures, as yet unanswered, to the other potential purchaser (purchaser 2), in an attempt to stimulate an auction process. In this context, Canco’s
tax counsel has advised that it is preferable, from a Canadian tax standpoint, for Canco
to first transfer its CFA 1 shares to a newly created foreign holding company, CFA 2.
This transfer is effected before a purchase agreement of any sort is entered into. After
protracted negotiations with purchaser 1 and some back-and-forth with purchaser 2,
a contract of sale is concluded with purchaser 1. The sale ultimately closes one month
after the contract is signed, whereby CFA 2 sells the shares of CFA 1 to purchaser 1.

Comment. This is a typical nexus 2 situation, very similar to the one in Craven v. White.
Although the ultimate sale is not preordained at the time of the transfer by Canco to
CFA 2, Canco has demonstrated a strong specific intention to dispose of the CFA 1
shares to a third party. This particular intention is reflected by the following facts:
professionals were engaged and advised Canco with respect to the subject property, the
type of sale, and the price range; a broker identified possible purchasers; and negotia-
tions commenced with one possible purchaser while overtures were made to another.
All of these facts objectively indicate Canco’s specific intention to sell the CFA 1 shares
at the time that it transferred the shares to CFA 2. Therefore, the rollover to CFA 2
forms part of a series with the sale of the CFA 1 shares to the arm’s-length purchaser,
and subsection 85.1(4) should normally apply to deny the rollover otherwise afforded
by subsection 85.1(3).

Scenario 3 Nexus 3: General intention.
Canco owns all of the shares of CFA 1 and has recently begun to consider a possible
sale of the shares. During one of the initial planning sessions, tax counsel advises
Canco that it could be advantageous, from a Canadian tax standpoint, for Canco to
first transfer its CFA 1 shares to a newly created foreign holding company, CFA 2, and
effect the sale through CFA 2. This transaction is implemented shortly thereafter. One
month later, Canco’s broker presents a short list of possible purchasers for the shares of CFA 1. One year later, after stop-and-go negotiations with several possible purchasers, the sale of the CFA 1 shares by CFA 2 is closed.

Comment. This is a typical nexus 3 situation. Although Canco has an intention to “transact” with respect to CFA 1, which is reflected in the hiring of professionals and the commencement of discussion and planning of a transaction, at the time of the subsection 85.1(3) rollover there is too little specificity and too much objective uncertainty regarding the possible future sale of the shares of CFA 1 to a third party for the transfer to CFA 2 to form a series with the future sale. Indeed, how can Canco intend to “sell” CFA 1’s shares to a third party without first ascertaining the main determinants of such a sale, such as the desired price; and, as a practical matter, how can Canco ascertain such things in a vacuum—that is, outside the immediate context in which a sale may take place one or more years later? It would be neither prudent nor practical for Canco to select the desired price on the basis of dated financial information and without reference to, for example, prevailing credit market conditions, interest rates and exchange rates, and any developments affecting Canco (such as lawsuits, labour strife, and inventory obsolescence) and Canco’s industry (such as new entrants, new technologies, and new laws, including new tax laws). Without the benefit of this context, it is unlikely that a taxpayer in Canco’s position could have formed the intention to “sell” the shares of CFA 1 to a third party. This is also why the mere lapse of time is generally an important factor in establishing whether a series exists: it is difficult, from a business and practical point of view, to properly evaluate the main terms of a transaction outside the immediate context in which the transaction occurs. While timing may not be everything, it is certainly an important factor in virtually every business deal that takes place today. Therefore, the more than one-year delay between the transfer of the shares of CFA 1 to CFA 2 and the sale also suggests that, by the time the sale occurred, the initial rollover was “old and cold.” Consequently, the rollover to CFA 2 does not form part of a series with the ultimate sale of the CFA 1 shares to the arm’s-length purchaser, and subsection 85.1(4) should normally not apply to deny the rollover afforded by subsection 85.1(3).

Scenario 4  Nexus 4: Strategic planning.
Canco forms and invests in a foreign corporation, CFA 1. This is done in furtherance of Canco’s strategic objectives to expand its operations outside Canada. After the one-year startup period, it is clear that CFA 1’s active business is viable. At that time, Canco’s tax counsel advises that it is good commercial and tax practice to hold CFA 1’s shares through a foreign holding corporation. On the basis of this advice, Canco transfers all of its shares in CFA 1 to a newly incorporated foreign subsidiary, CFA 2. Over the next three years, CFA 1’s operations continue to grow and prove to be a great success, and an arm’s-length party makes an unsolicited bid for Canco’s foreign operations. Ultimately, CFA 2 sells the shares of CFA 1 to the bidder.

Comment. This is a clear nexus 4 situation. At the time of the subsection 85.1(3) rollover, Canco had no intention to sell the shares of CFA 1 to a third party. Therefore, the rollover to CFA 2 does not form part of a series with the ultimate sale of the CFA 1 shares to the arm’s-length purchaser, and subsection 85.1(4) should normally not apply to deny the rollover afforded by subsection 85.1(3).
Conclusion

In summary, we believe that subsection 248(10) does not extend a pre-existing “common-law” series by adding to it an independent but related transaction that is completed in contemplation of that series. Instead, this provision is merely a clarification of the ordinary meaning of “series,” as conceived by Parliament. In this respect, the ordinary meaning of “series” must always be determined with reference to subsection 248(10) and, in our view, the defining characteristics of this notion are as follows:

1. There are two or more completed transactions.
2. Each transaction must be interrelated with the other transaction(s) that form part of the series in that each of them must be planned by the taxpayer (or the mind directing the taxpayer) to combine with the other(s) in order to form a whole that is intended to achieve a particular purpose or produce a given result.
3. The transactions that form part of the series must occur in a sequence predetermined by the taxpayer (or the mind directing the taxpayer).

With respect to the above characteristics, the following important points must be made.

First, for two or more related transactions to form part of a series, the requisite level of nexus, as clarified by subsection 248(10), is that at the time of entering into the initial transaction, the relevant taxpayer (or the mind directing the taxpayer) must “contemplate” any subsequent transaction(s) that would, together with the initial transaction, complete the series. Such contemplation will be considered to exist, on the basis of objectively ascertainable facts, either (1) where the series has been precontracted or has been agreed upon in principle so that there is no practical likelihood that the series will not be completed (nexus 1), or (2) where the taxpayer’s intention to complete any remaining transaction(s) is genuine and specific (nexus 2). In neither of these cases is hindsight required to establish the series.

Second, whether the taxpayer’s intention to complete any remaining transaction(s) is sufficiently specific to result in a series for the purposes of nexus 2 will, naturally, vary according to the particular circumstances of each case. Nevertheless, a distinction should be made depending on whether the subsequent transaction occurs with arm’s-length or non-arm’s-length persons. The requisite degree of specificity of intention may be attenuated in respect of non-arm’s-length transactions, since some of the terms and conditions that are typically negotiated in, and are material to the conclusion of, an arm’s-length transaction may not necessarily be essential in a non-arm’s-length situation. This is because a non-arm’s-length transaction normally involves a directing mind for whom certain usually important elements of the transaction may be viewed as mere details (since the determination of such elements will be under its control).\footnote{Preplanned intragroup transactions, once completed, will often constitute a series because at the time of the first transaction, there would normally be no practical likelihood that...}
Conversely, absent exceptional circumstances (such as, possibly, a formal auction process), arm’s length transactions will require a higher degree of specificity of intention to satisfy the standard of contemplation under nexus 2. For example, if at the time of completing the first transaction, a taxpayer intends to effect a second transaction consisting of the sale of the shares of a wholly owned operating subsidiary to an arm’s-length purchaser, the taxpayer’s intention with respect to the subsequent transaction will be sufficiently specific only if the taxpayer has entered into negotiations with a purchaser based on a set of essential terms and if, although there is no agreement in principle, there is no reason to believe, at that time, that the negotiations will imminently break down. This is because it generally cannot be said that a taxpayer intends to carry out the steps of a plan, at the time the first transaction is completed, unless the essential elements of the transaction with the third party have been identified by the taxpayer.

Third, and somewhat obviously, a particular series will exist only when the specific objective that is ultimately achieved is the one that was initially contemplated, and not some other objective that became contemplated in the course of events. The following example (based on the previous ones) best illustrates this point. Canco owns all of the shares of a foreign operating subsidiary, CFA 1. Canco specifically intends to attract a particular arm’s-length party (Forco) as a minority local partner for its foreign operations. For this purpose, Canco transfers its shares in CFA 1, pursuant to subsection 85.1(3), to a new foreign holding corporation, CFA 2. Canco intends that CFA 2 will serve as the joint venture entity for itself and Forco. In the process of negotiations with Forco, the discussions evolve to the point where Forco makes an unsolicited offer to Canco to purchase all of the shares of CFA 1. Initially, Canco rejects this offer, but after further negotiations, Canco realizes that this is a viable alternative. Ultimately, CFA 2 (which was initially intended to serve as a joint venture entity) disposes of the CFA 1 shares to Forco. In this case, the rollover of the CFA 1 shares to CFA 2 and the ultimate sale of the shares of CFA 1 to Forco should not form a series, because the sale was not contemplated when the rollover was effected. Therefore, the anti-avoidance rule in subsection 85.1(4) should not apply.

Fourth, where related transactions follow in a close temporal sequence, this will normally be indicative of the presence of a series. Conversely, the longer the lapse of time between two transactions, the stronger the inference will be that the preceding transaction was “old and cold” by the time the subsequent transaction was ultimately completed. In Copthorne, the Federal Court of Appeal remarked on the “relatively close temporal connection between the 1993 Share Sale and the 1995 Redemption”95 and stated that, although not determinative, the one-year gap between the 1993 share sale and the 1995 redemption militated against accepting an assertion that

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95 Supra note 3 (FCA), at paragraph 51.
there was an “extreme degree of remoteness” between the two.\(^{96}\) Although, in our view and contrary to what the Federal Court of Appeal thought, the period of time separating the 1993 share sale and the 1995 redemption suggests that the two transactions were not related, we believe that the court was correct to remark on this matter as a non-determinative but nevertheless important indicator of the presence or absence of a series.

Finally, the requirement that the transactions forming part of the series must occur in a preplanned sequence suggests the lack of a genuine interruption in the flow of occurrence of the component transactions of the series. A genuine interruption will happen when an event that is beyond the taxpayer’s control (that is, that cannot be contrived) causes an upset in the taxpayer’s intention. For example, where a series is planned in a particular way but a component transaction subsequently fails, such as the ultimate arm’s-length sale in the UK *Bowater* case, this will suggest the absence of a series, even if the failed component transaction is ultimately resuscitated and implemented.

In light of the notions developed above, we next briefly re-examine the relevant Canadian case law on series.

**THE CANADIAN CASE LAW ON “SERIES” REDUX**

We believe that the Federal Court of Appeal would have reached the same result in *OSFC* had it employed the approach suggested herein to the interpretation of “series” in the Act. *OSFC* involved a nexus 1 series from the point of view of the taxpayer. When the taxpayer contracted to buy the partnership interest in the STIL II Partnership, it effectively ratified the loss-packaging transactions implemented by Standard and made them its own. This is because the Standard series was planned for the dual benefit of Standard and any buyer, including OSFC,\(^{97}\) and because OSFC sought and negotiated for the benefits of the packaging transactions, relied on those transactions to shape the nature of its transactions with Standard, and paid for such benefits (albeit on a conditional basis).\(^{98}\) Therefore, OSFC was effectively in the same position as if it had precontracted with Standard to implement the packaging transactions and then buy the partnership interest.

Similarly, *Canutilities* would have yielded the same result under the suggested approach. The situation in that case was either a nexus 1 or a nexus 2 situation. Of

\(^{96}\) Also, in *OSFC*, supra note 7 (FCA), Rothstein J noted, at paragraph 25, that the transactions forming part of the initial Standard series “were implemented over a period of one week in October 1992.”

\(^{97}\) From the point of view of Standard, the transactions also constituted a series because Standard specifically intended the series. To specifically intend the series, Standard did not need to know the identity of the purchaser of the STIL II Partnership interest because this was irrelevant for practical purposes.

\(^{98}\) The fact that OSFC paid for the losses on a conditional basis strongly suggests that it ratified the packaging transactions and, ultimately, reveals OSFC’s primary purpose in effecting the transactions, for the purposes of subsection 245(3).
course, the ordinary course dividends could not be “precontracted,” because a board of directors cannot bind itself as to the future declaration of a dividend. However, at the time that the basic series was implemented, it was practically certain or, at least, specifically intended that the ordinary course dividends would be declared and paid by CU and CUH and that these dividends would, together with the prior transactions, complete the series in that the application of subsection 55(2) would be avoided.

In our view, MIL would likewise have been decided no differently under the suggested approach, in light of the Tax Court’s findings of fact. Considering the Crown’s implicit acceptance that “the August 1996 sale was neither preordained nor contemplated when the [initial series was] undertaken,”99 apparently, from the Crown’s perspective, MIL was a nexus 3 situation. In this respect, the case is important because the Crown’s attempt to extend the notion of series to nexus 3 situations by arguing that DFR was a willing takeover target was rejected. In fact, it appears that, in the eyes of Bell J, the case involved a nexus 4 situation. In this respect, the Tax Court accepted the taxpayer’s evidence that, at the time of the initial series, there was no intention that DFR would be sold. Therefore, on the basis of the court’s decision, the initial series constituted merely steps in a strategic plan.

Finally, and with due respect, the interpretation of “series” suggested herein would be at odds with the result reached by the Federal Court of Appeal in Copthorne, in light of the evidence accepted by the Tax Court. As discussed, the question that should have been considered by the Court of Appeal was whether the 1995 redemption (or the 1995 series) was contemplated by the taxpayer when the 1993 share sale was effected. It is significant that the court answered this question in the negative: “the record indicates that the redemption was contemplated shortly after the introduction of the Proposed FAPI Amendments [in 1994].”100 Therefore, it seems that in 1993, when the PUC preservation transaction was effected, the 1995 redemption was not yet contemplated by the taxpayer. This would make Copthorne a nexus 3 or, more likely, a nexus 4 case. In this regard, every tax practitioner knows that “PUC is your friend”; hence, the 1993 share sale appears to have been merely good strategic planning designed to preserve a potentially valuable tax attribute.

CONCLUSION

Canadian courts have interpreted the notion of “series of transactions” in the Act, on the basis of the UK House of Lords case law, to mean a number of transactions that are preordained in order to produce a given result, with no practical likelihood that the preplanned events would not take place in the order ordained. Further, Canadian courts have held that subsection 248(10) requires a pre-existing series, to which this provision adds any related transaction completed in contemplation of the pre-existing series. The courts consider it settled that the contemplation in subsection 248(10) may operate both prospectively and retrospectively. We have argued

99 MIL, supra note 31 (TCC), at paragraph 61 (emphasis in original).
100 Copthorne, supra note 3 (FCA), at paragraph 51 (emphasis added).
that this interpretation of the notion of series in the Act is not consistent with a unified textual, contextual, and purposive analysis of the term “series” and subsection 248(10).

Our conclusions may be summarized as follows:

1. There is no “common-law” series and no “deemed” or “extended” series under the Act; there is just a series.

2. Subsection 248(10) does not connect a transaction to a pre-existing (common-law) series; it merely clarifies or elaborates on the basic elements of a series, as understood by Parliament, for the purposes of applying the provisions of the Act that refer to the notion of series.

3. The key “in contemplation of” element of subsection 248(10) establishes the degree of connection required between “related” transactions in order to constitute a series. A unified textual, contextual, and purposive analysis of this requirement reveals that
   a. the requisite degree of connection for subsection 248(10) exists
      i. when the series has been precontracted or has been agreed upon in principle, so that there is no practical likelihood that the series will not be completed (nexus 1), or
      ii. when the taxpayer’s intention to complete any remaining transaction(s) is genuine and specific (nexus 2); and
   b. such connection cannot be made using hindsight (such as in nexus 3 and nexus 4 situations) in the larger context of a self-assessment tax regime that subscribes to the Duke of Westminster principle and that seeks to promote consistency, predictability, and fairness for taxpayers.

On the basis of a unified textual, contextual, and purposive analysis of the series concept and the above conclusions, we suggest that the expression “series of transactions” may be interpreted as follows for the purposes of the Act:

A series of transactions comprises two or more related transactions planned by the taxpayer (or the mind directing the taxpayer) as one logical whole and completed in a predetermined sequence and without genuine interruption with the intention of achieving a particular common objective, purpose, or result. An initial transaction will form part of a series if, at the time that the transaction is carried out, it is contemplated that the subsequent transactions constituting the series will be implemented, and the subsequent transactions are eventually carried out. Such contemplation will be considered to exist, on the basis of objectively ascertainable facts, either (1) where the series has been precontracted or has been agreed upon in principle so that there is no practical likelihood that the series will not be completed, or (2) where the taxpayer’s intention to complete any remaining transaction(s) is genuine and specific.
We believe that this definition is consistent with the ordinary meaning of the expression “series of transactions,” the anti-avoidance context in which it is typically used, and the purpose it fulfills in the Act. It produces, in our view, the correct result in difficult cases, such as OSFC and Camutilities, and it provides taxpayers with the predictability and consistency they need in order to intelligently manage their affairs. A unified textual, contextual, and purposive approach to statutory interpretation is the method prescribed by the Supreme Court of Canada, and we are confident that it will illuminate the path toward a proper resolution of the series issue in the upcoming Copthorne case.

**APPENDIX 1 SUMMARY OF FACTS IN COPTHORNE**

The parties in *Copthorne Holdings Ltd. v. The Queen*[^1] filed a Joint Statement of Facts and Law, the relevant parts of which may be summarized as follows.

In 1981, Li Ka-Shing, a Hong Kong businessman, established a corporate structure to acquire the Toronto Harbour Castle Hotel. Specifically, an Ontario corporation, Copthorne Holdings Ltd. (“Copthorne I”), a predecessor of the appellant and a wholly owned subsidiary of a Netherlands corporation, Big City Project Corporation (“Big City”), was established for this purpose. In 1989, Copthorne I sold the Toronto Harbour Castle Hotel at a substantial capital gain. The proceeds were invested in a wholly owned Barbados subsidiary, Copthorne Overseas Investment Ltd. (“COIL”), which carried on a successful bond trading business through its Singapore branch.

A second corporate structure controlled by Li Ka-Shing’s son, Victor Li, was established in 1987 to invest in shares of Husky Oil Limited (“HOL”), a Canadian oil and gas company. This structure was made up of a chain of Ontario corporations: VHHC Investments Inc. (“VHHC Investments”); VHHC Holdings Ltd. (“VHHC Holdings”), a wholly owned subsidiary of VHHC Investments; and VHSUB Holdings (“VHSUB”), a wholly owned subsidiary of VHHC Holdings. Between 1987 and 1991, Victor Li, Ashfield BV (“Ashfield,” a Netherlands corporation that was indirectly owned by a trust whose principal beneficiary was Victor Li), and L.F. Holdings (a Barbados corporation controlled by Li Ka-Shing) invested capital in VHHC Investments. At the end of 1991, shares in VHHC Investments had aggregate paid-up capital (PUC) of $96,736,845. During this period, VHHC Investments used $67,401,279 of its capital to invest in shares of VHHC Holdings, which used the funds to invest, directly or indirectly, in HOL. At the end of 1991, shares in VHHC Holdings had aggregate PUC of $67,401,279. At the end of 1991, because of the fall in the value of the HOL investment resulting from declining oil and gas prices in the early 1990s, VHHC Investments had a substantial accrued loss on its shares of VHHC Holdings.

Thus, by 1992, Copthorne I had realized a substantial capital gain (from the sale of the hotel in 1989) while VHSUB owned shares in HOL with a substantial accrued

[^1]: Supra note 3.
capital loss. At that time, it was decided to “marry” the realized capital gain of Copthorne I with the accrued capital loss of VHSUB. To achieve this offset, in 1992, VHHC Investments sold its 67,401,279 common shares in VHHC Holdings to Copthorne I for $1,000, a price that reflected the fair market value of the shares at the time. VHHC Holdings then sold part of its VHSUB common shares to Copthorne I for their estimated fair market value of $1,245.77. Because the stop-loss rules applied, Copthorne I inherited the high adjusted cost base of the VHSUB shares. Finally, Copthorne I and VHHC Holdings sold their VHSUB shares to an unrelated purchaser for their low fair market value, thereby triggering the accrued capital loss. Copthorne I carried back this capital loss to 1989, to shelter the capital gain from the hotel sale. The parties agreed that the purpose of these transactions was to shift the inherent capital loss on the shares of VHHC Holdings in VHSUB to Copthorne I and was unrelated to the PUC of the shares. After the share sale by VHHC Investments to Copthorne I, the PUC of the shares of VHHC Holdings remained at $67,401,279.

In 1993, it was decided to amalgamate Copthorne I, VHHC Holdings, and two other Canadian corporations so that the losses incurred by one or more corporations could be used to shelter income earned by others, and so that the corporate structure of the Li family’s Canadian holdings would be simplified. Because VHHC Holdings became a subsidiary of Copthorne I, after the sale by VHHC Investments, the PUC in the shares of VHHC Holdings would be eliminated upon a vertical amalgamation of VHHC Holdings with Copthorne I. Thus, to preserve the PUC of $67,401,279 in the shares of VHHC Holdings, Copthorne I sold those shares for $1,000 to its parent corporation, Big City, in July 1993, prior to the amalgamation (“the 1993 share sale”). The parties agreed that the PUC of the VHHC Holdings shares was perceived in a general sense as potentially valuable. The appellant’s position was that in July 1993, there was no plan to return all or any part of the PUC on the shares of VHHC Holdings. Subsequently, on January 1, 1994, Copthorne I, VHHC Holdings, and two other Canadian corporations owned by the Li family were amalgamated to form Copthorne Holdings Ltd. (“Copthorne II”).

Subsequent to these transactions, in 1994, the Department of Finance released revised amendments to the foreign accrual property income (FAPI) regime. These amendments would have adversely affected COIL, by making all of COIL’s income FAPI; the Li family therefore decided to sell COIL’s bond trading business as a going concern to a new corporation resident in the British Virgin Islands, and to repatriate the proceeds from the disposition for investment outside Canada. The Li family also decided to simplify its Canadian corporate structure and consolidate it under a single offshore company. As part of this plan, L.F. Investments was incorporated in Barbados in November 1994. In December 1994, the shareholders of VHHC Investments sold their shares to L.F. Investments. In addition, Big City sold its shares in Copthorne II to L.F. Investments. Consequently, L.F. Investments owned the shares of Copthorne II with PUC of $67,401,280 and the shares of VHHC Investments with PUC of $96,736,845, for an aggregate PUC of $164,138,125. The PUC of $67,401,280 in respect of the shares of Copthorne II could be traced back to the original investment in VHHC Investments, which was reflected in the PUC of the shares of VHHC
Investments in the amount of $96,736,845. Effective January 1, 1995, Copthorne II, VHHC Investments, and two other Canadian corporations were amalgamated to form Copthorne Holdings Ltd. (“Copthorne III”). On the amalgamation, PUC of $164,138,125 was allocated to class D preference shares of Copthorne III. Immediately following the amalgamation, Copthorne III redeemed 142,035,895 of the class D preferred shares held by L.F. Investments (“the redemption”). No amount was withheld by Copthorne III in respect of this redemption because the class D preference shares of Copthorne III had an alleged aggregate PUC of $164,138,125 and therefore no deemed dividend arose. On January 1, 2002, Copthorne III amalgamated with five other companies and was continued as Copthorne Holdings Ltd., the appellant before the Tax Court of Canada.
APPENDIX 2 SERIES SPECTRUM

Degree of Intention at the Time That the First Transaction Is Completed (Time 1)

A series under the Act  
Hindsight barrier  
No series under the Act

248(10) clarification

Nexus 1  Preordained  
Nexus 2  Specific intention  
Nexus 3  General intention  
Nexus 4  Strategic planning

Contract concluded;  
that is, all  
subsequent  
transactions  
strictly  
preordained at  
time 1

No signed  
contract at  
time 1 but no  
practical  
likelihood that  
subsequent  
transactions will  
not be effected  
as planned at  
time 1

Specific intent  
to complete  
subsequent  
transactions  
with identified  
person at  
time 1, but  
practical  
likelihood exists  
that subsequent  
transactions may not occur  
as planned at  
time 1

Specific intent  
to complete  
subsequent  
transactions at  
time 1; identity  
of contracting  
party not known  
but not material  
to completion  
of subsequent  
transactions

General intent to  
“transact” at time 1;  
relevant factors  
affecting intent to  
contract not yet  
ascertained at time 1

No intention  
to enter into  
any further  
transactions at  
time 1/  
strategic  
planning

OSFC from  
perspective of buyer  
(in effect)

Canutilities  
Furniss v.  
Dawson

Craven v. White

OSFC from  
perspective of seller  
(similar to  
auction)

Cophorne  
MIL