Federal Court of Appeal | Cour d'appel fédérale

**Date: 20260220**

**Docket: A-197-24**

**Citation: 2026 FCA 35**

2026 FCA 35 (CanLII)

**CORAM:** **WOODS J.A.**
**MACTAVISH J.A.**
**WALKER J.A.**

**BETWEEN:**

**HIS MAJESTY THE KING**

**Appellant**

**and**

**DAC INVESTMENT HOLDINGS INC.**

**Respondent**

Heard at Toronto, Ontario, on October 7, 2025.

Judgment delivered at Ottawa, Ontario, on February 20, 2026.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: MACTAVISH J.A.
WALKER J.A.

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**REASONS FOR JUDGMENT**

**WOODS J.A.**

I. Introduction

[1] This income tax appeal concerns tax measures applicable to Canadian-controlled private corporations (CCPCs) that minimize any tax deferral advantage arising from holding investments through a corporation.

[2] In this case, transactions involving the respondent, DAC Investment Holdings Inc. (DAC), were undertaken to circumvent these measures and to enable DAC to benefit from tax deferral in relation to an anticipated capital gain on a sale of shares. The shares to be sold were transferred on a tax-deferred basis from one corporation to another. Both corporations were CCPCs and DAC, the transferee, had no other assets. Then, DAC effected a continuation from Ontario to the British Virgin Islands (BVI).

[3] For purposes of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA), the continuance resulted in DAC being deemed to be incorporated in the BVI and to no longer qualify as a CCPC. Accordingly, the tax deferral was achieved, subject to the application of the general anti-avoidance rule (GAAR) set out in section 245 of the ITA.

[4] The Minister of National Revenue reassessed DAC pursuant to the GAAR and denied the tax deferral.

[5] The Tax Court allowed DAC's appeal (2024 TCC 63, *per* D'Arcy J.). The Crown now appeals to this Court.

[6] For the reasons that follow, I conclude that the GAAR is applicable and would allow the appeal.

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## II. Facts

[7] An Agreed Statement of Facts (ASF) and a Supplementary Agreed Statement of Facts (Supp. ASF) are reproduced below. I use the defined terms set out in the ASF in these reasons. There was no witness testimony before the Tax Court and the parties filed no documentary evidence except for the formal continuance documents.

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[8] The ASF states:

> 1. The Appellant, DAC Investment Holdings Inc., was incorporated under the *Business Corporations Act* (Ontario) on September 11, 2001.
>
> 2. The Appellant was incorporated as "Link-Line Group of Companies Inc." before changing its name to "2005430 Ontario Inc." on October 10, 2014, and then to "DAC Investment Holdings Inc." on April 27, 2015.
>
> 3. David Civiero has been the sole director and has held directly or indirectly at least 50% of the common shares of the Appellant since its incorporation.
>
> 4. At all material times, Mr. Civiero resided in Ontario.
>
> 5. On or around October 22, 2011, Mr. Civiero acquired Convertible Promissory Notes from Soberlink, Inc. (**Soberlink**), which were subsequently converted into common shares of Soberlink. Mr. Civiero purchased additional common shares of Soberlink on or around June 26, 2013.
>
> 6. On or around December 31, 2013, Jacal Holdings Ltd. (**Jacal**) acquired from Mr. Civiero all common shares of Soberlink held by Mr. Civiero (the **Soberlink Shares**).
>
> 7. Mr. Civiero has been the sole director and has held all of the common shares of Jacal since its incorporation on December 11, 1996.
>
> 8. On October 3, 2014, Soberlink received a non-binding indication of interest from a potential buyer.

9. On April 14, 2015, the Appellant acquired the Soberlink Shares from Jacal pursuant to a section 85 "rollover" transaction.

10. On that date, the Appellant's only assets were the Soberlink Shares.

11. At the time of the transfer, and since their respective incorporation dates, the Appellant and Jacal were each a Canadian-controlled private corporation (**CCPC**), as that term is defined in subsection 125(7) of the *Income Tax Act* (Canada) (the **ITA**).

12. On April 15, 2015, Soberlink's CEO informed Mr. Civiero that the sale of a division of Soberlink was close to completion. In order to effect this sale, the Soberlink Shares would be sold to a third party.

13. On April 29, 2015, the Appellant was continued into the British Virgin Islands as a company incorporated under the *BVI Business Companies Act, 2004* (the **BVI Companies Act**) and was issued a certificate of registration by the Registrar of Corporate Affairs.

14. As a result of the continuance, the Appellant's 2015 taxation year ended on April 28, 2015.

15. As a consequence of the continuance, the BVI Companies Act applied to the Appellant as if the Appellant had been incorporated under that statute.

16. At all relevant times following the Appellant's continuance, the Appellant's central management and control remained in Ontario, Canada.

17. On May 14, 2015, the Appellant sold the Soberlink Shares to an arm's length party and realized a capital gain in the amount of $2,359,295.

18. The Appellant reported a taxable capital gain of $1,179,648 in relation to the sale of the Soberlink Shares.

19. The Appellant filed its tax return for the taxation year ended April 30, 2016 (the **2016 Taxation Year**) on the basis that:

    a) the Appellant was a corporation resident in Canada, subject to tax on its worldwide income under the ITA;

    b) the Appellant was a "private corporation" as that term is defined in subsection 89(1) of the ITA; and

    c) the Appellant was not a CCPC.

20. The Appellant did not pay any dividends during the 2016 Taxation Year.

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21. The Appellant earned only the gain on the disposition of the Soberlink Shares and a foreign exchange gain during the 2016 Taxation Year.

22. The Appellant's 2016 Taxation Year was assessed by the Minister of National Revenue (the **Minister**), as filed, on January 16, 2017.

23. By notice of reassessment dated December 23, 2020 (the **Reassessment**), the Minister reassessed the Appellant's 2016 Taxation Year by (a) increasing Part I tax by $239,219 and (b) assessing arrears interest of $57,935.19.

24. In determining the Appellant's liability to tax, the Minister determined that the general anti-avoidance rule (the **GAAR**) applied.

25. The additional $239,219 of Part I tax assessed by the Minister was the result of two changes:

    a) assessing refundable tax on CCPC's investment income pursuant to section 123.3 of the ITA in the amount of $91,003; and

    b) denying the general rate reduction otherwise available to the Appellant under section 123.4 of the ITA in the amount of $148,216.

26. The Appellant objected to the Reassessment by notice of objection dated February 3, 2021.

27. More than 90 days having elapsed after service of the objection and, the Minister having not notified the Appellant that the Minister has vacated or confirmed the Reassessment or reassessed, the Appellant appealed the Reassessment to this Court pursuant to paragraph 169(l)(b) of the ITA.

28. The Appellant concedes that it received a tax benefit, as that term is defined in the ITA, and that this tax benefit is derived from (a) section 123.3 not being applicable, and (b) section 123.4 being applicable.

29. The quantum of this tax benefit is computed in accordance with the chart at Appendix "B".

30. The Appellant concedes that the following transactions were avoidance transactions, as that term is defined in section 245 of the ITA:

    a) the rollover of the Soberlink Shares from Jacal to the Appellant, and

    b) the continuance of the Appellant into the BVI on April 29, 2015.

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> 31. The Appellant abandons the argument that if the GAAR is found to apply, the Minister is required to redetermine the Appellant's "refundable dividend tax on hand", as formerly defined in subsection 129(3) of the ITA, and the Appellant's "eligible refundable dividend tax on hand" and "non-eligible refundable dividend tax on hand", as presently defined in subsection 129(4) of the ITA.
>
> 32. The Respondent concedes that the Appellant did not make any misrepresentation that is attributable to neglect, carelessness, or wilful default, and that the Appellant did not commit any fraud in filing the return for the 2016 Taxation Year or in supplying any information under the ITA in respect of the 2016 Taxation Year.

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[9] The Supp. ASF states:

> 1. From 2015 through 2019, David Civiero was the sole common shareholder of the Appellant.

[10] As mentioned at paragraph 25 of the ASF, the Minister reassessed DAC pursuant to the GAAR by increasing tax payable pursuant to section 123.3 of the ITA and by denying a tax deduction that had been claimed pursuant to section 123.4.

[11] It is useful to briefly describe these provisions. Section 123.3 levies a refundable tax on investment income earned by a CCPC. Section 123.4 permits a deduction from tax which results in a tax rate reduction. The provision applies generally to corporations but the rate reduction does not apply to specified types of income, which include investment income of a CCPC.

[12] Both provisions have the effect that tax cannot be deferred on investment income earned by a CCPC. Below, I collectively refer to these provisions, section 123.3 and the exclusion in section 123.4, as anti-deferral measures.

III. Tax Court of Canada

[13] The Tax Court described the GAAR, including its three components—a tax benefit, an avoidance transaction, and an abuse.

[14] As stated in the ASF, DAC conceded that it had received a tax benefit and that there were two avoidance transactions: (1) the rollover of Soberlink Shares from Jacal to DAC; and (2) the continuance of DAC into the BVI. Accordingly, the main issue in the Tax Court was whether the avoidance transactions were abusive.

[15] The Crown argued in the Tax Court that DAC abused the anti-deferral measures in sections 123.3 and 123.4, as well as subsection 250(5.1) and the definitions of CCPC and Canadian corporation in the ITA.

[16] The Tax Court first determined these provisions' object, spirit and purpose, and then determined whether the provisions were abused.

[17] As for the object, spirit and purpose of the relevant provisions, the Tax Court rejected the Crown's main argument that the object, spirit and purpose was to address tax deferral for all private corporations, not just CCPCs. In the view of the Tax Court, the object, spirit and purpose was limited to CCPCs.

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[18] As for abuse, the Tax Court determined that the anti-deferral measures were not abused because they produced the result Parliament intended. In the course of its analysis, the Tax Court made the following findings:

(a) "Parliament has chosen, for policy reasons, to have different sets of rules for different corporations" (reasons at para. 212).

(b) "Parliament recognized that a corporation may move from the taxing regime for a CCPC to the taxing regime for a non-CCPC" (reasons at para. 214).

(c) Parliament "allows for the proper application of numerous provisions of the Act whose application is conditional on the corporation either being a CCPC or not being a CCPC at a point in time or throughout a period" (reasons at para. 217).

(d) There is no abuse of the provisions at issue: "[DAC] chose to move from one taxing regime with its pluses and minuses to another taxing regime with different pluses and minuses" (reasons at para. 223). On the plus side, DAC avoided the application of section 123.3. On the minus side, DAC lost access to the favourable tax rate for business income, and refunds of a portion of the tax applicable to investment income when dividends are paid. It also lost the benefit of the rollover provisions in section 85 and the tax deferral rules for amalgamations and wind-ups (reasons at para. 224).

(e) Sections 123.3 and 123.4 are not abused because they produced the result that Parliament intended (reasons at paras. 227-228).

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(f) There is no abuse of subsection 250(5.1) because its object, spirit and purpose is "to equate the place of continuance of a corporation with its place of incorporation" to ensure that the ITA produces the results intended by Parliament (reasons at para. 229).

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## IV. Standard of Review

[19] The Tax Court judgment is subject to appellate standards of review as set out in *Housen v. Nikolaisen*, 2002 SCC 33. Determinations of fact and mixed fact and law are entitled to a high degree of deference and attract the palpable and overriding error standard. Determinations of law (including extricable legal questions) are subject to correctness review.

## V. Analysis

### A. *Introduction*

[20] The GAAR scheme was succinctly described in *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63 [*Copthorne*]: "Where a transaction is an avoidance transaction (a transaction that would result in a tax benefit and whose primary purpose was to obtain the tax benefit), the tax benefit resulting from the transaction will be denied. However, the tax benefit will not be denied if the avoidance transaction would not result in an abuse or misuse of the *Income Tax Act*" (at para. 32).

[21] The GAAR determination may be divided into three distinct steps: (1) Was there a tax benefit? (2) Was the transaction giving rise to the tax benefit an avoidance transaction? (3) Was the avoidance transaction giving rise to the tax benefit abusive? (*Deans Knight Income Corp. v. Canada*, 2023 SCC 16 at para. 51 [*Deans Knight*]).

[22] In this appeal, only the third step is at issue. The parties agree that there is a tax benefit and two avoidance transactions, as described in the ASF above at paragraphs 28 and 30.

[23] The Supreme Court has identified specific circumstances that will lead to a finding of abuse—the avoidance transactions will be abusive where the outcome or result of those transactions (a) is an outcome that the provisions relied on seek to prevent; (b) defeats the underlying rationale of the provisions relied on; or (c) circumvents certain provisions in a manner that frustrates the object, spirit and purpose of those provisions (*Deans Knight* at para. 69).

[24] Accordingly, the question to be decided is whether the Tax Court erred in concluding that "the result of the avoidance transactions did not defeat or frustrate the object, spirit and purpose of the provisions at issue" (reasons at para. 232).

[25] The Tax Court reasoned that the transactions did not result in abusive tax avoidance because Parliament only intended the anti-deferral measures to apply to CCPCs and DAC was not a CCPC when the capital gain on the sale of the Soberlink Shares was realized. Further, in the Tax Court's view, Parliament intended that taxpayers may change their status to move from

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the taxing regime for CCPCs to the regime for non-CCPCs, and therefore DAC's change of status is not abusive (reasons at paras. 214, 227-228).

[26] As I will explain, the Tax Court expressed Parliament's intent too broadly. The result of these transactions is to defeat Parliament's objective that an individual not be allowed to defer tax on investment income by holding investments in a corporation. Parliament did not intend the result that was achieved in this case. Although the statutory provisions relied on do not prevent this result, the GAAR was enacted to address situations such as this.

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B. *Issues*

[27] The central issues raised by the Crown in this appeal are:

(a) Does the object, spirit and purpose of the anti-deferral measures extend to all private corporations whether they are CCPCs or not?

(b) If not, did the Tax Court err in concluding that the avoidance transactions were not abusive?

[28] As I explain below, it is not necessary to consider issue (a), which is the Crown's main position, because issue (b) is dispositive of this appeal. At the hearing, the Crown emphasized issue (a). However, I decline to comment on issue (a) and leave the issue for another case. I am mindful that the Supreme Court instructed courts to approach a GAAR decision with caution

because the decision could affect other transactions that are not before the court (*Copthorne* at para. 67).

[29] In discussing issue (b), I have assumed, without deciding, that the answer to issue (a) is no. In other words, the object, spirit and purpose of the anti-deferral measures does not extend further than CCPCs.

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C. *Were the avoidance transactions abusive?*

(1) Introduction

[30] The legal principles concerning abuse are well known. In general, a court must, first, determine the object, spirit and purpose of the relevant provisions and, second, determine whether the result of the transactions fell within or frustrated that object, spirit and purpose (*Deans Knight* at para. 56; *Copthorne* at paras. 69, 71).

(2) Object, spirit and purpose of relevant provisions

[31] The first stage in the abuse analysis is to determine the object, spirit and purpose of the provisions that are relied on for the tax benefit. In this case, the relevant provisions related to issue (b) are the anti-deferral measures in sections 123.3 and 123.4, and subsection 250(5.1) of the ITA.

[32] This stage raises an extricable question of law, subject to correctness review (*Deans Knight* at para. 78).

(a) *Section 123.3*

[33] In Canada's major tax reform in 1971, the Minister of Finance stated that the reform had the objective that "the taxation of investment income will be the same whether it is received directly or through a private corporation" (Canada, Department of Finance, Budget Speech by the Honourable E.J. Benson, Minister of Finance (18 June, 1971) [1971 Budget Speech]).

[34] This fundamental principle has stood firm ever since. In 1995, section 123.3 was enacted to increase the corporate tax rate on investment income in light of this principle. The section was designed to account for current tax rates and therefore increased the corporate tax rate to prevent tax deferral when investment income is earned through a corporation. The tax is refunded as dividends are paid. The rate prescribed in section 123.3 was increased in 2016 for the same reason.

[35] Section 123.3 provides:

| | |
|---|---|
| **Refundable tax on CCPC's investment income** | **Impôt remboursable sur revenu de placement — SPCC** |
| **123.3** There shall be added to the tax otherwise payable under this Part for each taxation year by a corporation that is throughout the year a Canadian-controlled private corporation an amount equal to 10 2/3% of the lesser | **123.3** Est à ajouter à l'impôt payable par ailleurs en vertu de la présente partie pour chaque année d'imposition par une société qui est une société privée sous contrôle canadien tout au long de l'année le montant |

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| | |
|---|---|
| of | représentant 10 2/3 % du moins élevé des montants suivants : |
| **(a)** the corporation's aggregate investment income for the year (within the meaning assigned by subsection 129(4)), and | **a)** son revenu de placement total pour l'année, au sens du paragraphe 129(4); |
| **(b)** the amount, if any, by which its taxable income for the year exceeds the least of the amounts determined in respect of it for the year under paragraphs 125(1)(a) to (c). | **b)** l'excédent éventuel de son revenu imposable pour l'année sur le moindre des montants déterminés à son égard pour l'année selon les alinéas 125(1)a) à c). |

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[36] The Tax Court described the object, spirit and purpose of this provision at paragraph 139:

> [139] A consideration of the text, context and purpose of section 123.3 leads to the conclusion that the object, spirit and purpose of the section, its rationale, is to, together with the refundable tax regime and the dividend gross-up and tax credit scheme, prevent the use of a CCPC to defer taxes that may be payable at a higher rate by the shareholders of the CCPC, while maintaining the integration of taxes paid by CCPCs and their shareholders.

[37] This is a description of the overall taxation scheme for investment income in the ITA, but section 123.3 only addresses the part of the scheme aimed at deferral.

[38] In my view, the object, spirit and purpose of section 123.3 is to reduce income tax deferral opportunities that individuals earning investment income directly might otherwise obtain by earning such income through a CCPC (Canada, Department of Finance, *Explanatory Notes Relating to the Income Tax Act* (Ottawa: December 2015) at 6).

(b) *Section 123.4*

[39] In 2001, section 123.4 of the ITA introduced a reduction in the corporate tax rate for all corporations except those that already enjoy an incentivized tax rate. The reduction was designed to increase the international competitiveness of business in Canada.

[40] Investment income of a CCPC already benefits from an incentivized corporate tax rate because a portion of the tax is refunded as dividends are paid. These refunds were introduced as part of the 1971 tax reform mentioned above. (Canada, Department of Finance, *The Budget Plan 2000: Better Finances, Better Lives* (Ottawa: 28 February 2000) at 222 [Budget Plan 2000]).

[41] Accordingly, investment income earned by a CCPC is not included in the section 123.4 rate reduction (subparagraph (b)(iii) of the definition of "full rate taxable income"). The relevant provisions are set out below (emphasis added):

| | |
|---|---|
| **Corporation Tax Reductions** | **Réductions de l'impôt des sociétés** |
| **Definitions** | **Définitions** |
| **123.4 (1)** … | **123.4 (1) […]** |
| ***full rate taxable income*** of a corporation for a taxation year is | ***revenu imposable au taux complet*** En ce qui concerne une société pour une année d'imposition : |
| … | […] |
| **(b)** if the corporation is a Canadian-controlled private corporation throughout the year, the amount by which that portion of the corporation's taxable | **b)** si la société est une société privée sous contrôle canadien tout au long de l'année, l'excédent de la partie de son revenu imposable pour l'année qui est assujettie à |

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| | |
|---|---|
| income for the year that is subject to tax under subsection 123(1) exceeds the total of | l'impôt prévu au paragraphe 123(1) sur le total des montants suivants : |
| … | […] |
| **(iii)** except for a corporation that is, throughout the year, a cooperative corporation (within the meaning assigned by subsection 136(2)) or a credit union, *the corporation's aggregate investment income for the year, within the meaning assigned by subsection 129(4);* and | **(iii)** *son revenu de placement total, au sens du paragraphe 129(4),* pour l'année, sauf si elle est, tout au long de l'année, une société coopérative, au sens du paragraphe 136(2), ou une caisse de crédit; |
| … | […] |
| **General deduction from tax** | **Déduction d'impôt générale** |
| **(2)** There may be deducted from a corporation's tax otherwise payable under this Part for a taxation year the product obtained by multiplying the corporation's general rate reduction percentage for the year by the corporation's full rate taxable income for the year. | **(2)** Est déductible de l'impôt payable par ailleurs en vertu de la présente partie pour une année d'imposition par une société le produit de la multiplication du pourcentage de réduction du taux général qui lui est applicable pour l'année par son revenu imposable à taux complet pour l'année. |

[42] The Tax Court described the object, spirit and purpose of section 123.4 at paragraph 158 of the reasons:

> [158] It is clear from the text of section 123.4 and the various statements made by the government when introducing and subsequently increasing the General Rate Reduction that the object, spirit and purpose of section 123.4 is to lower the general corporate tax rate, such that the highest non-refundable corporate tax rate levied under the Act is 15%. The 15% is composed of the 28% General Tax Rate minus the 13% General Rate Reduction provided for in section 123.4.

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[43] The Tax Court used the term “general corporate tax rate” above to refer to a rate that is not incentivized (reasons at para. 154). The Tax Court’s description of the object, spirit and purpose describes the legislation but not its rationale.

[44] In my view, part of the object, spirit and purpose, or rationale, of section 123.4 is to foster international competitiveness for Canadian business. As mentioned above, section 123.4 does not apply to already incentivized rates such as investment income of a CCPC.

[45] As far as I am aware, fostering competitiveness was the only reason stated by the Department of Finance for providing a tax rate reduction for corporations except where the rate was already incentivized. However, it is inconceivable that the Department of Finance was not aware, and took into account, that excluding investment income of a CCPC would have the effect of preserving the fundamental principle stated in the 1971 Budget Speech that investment income should be taxed the same whether it is received directly or through a private corporation.

[46] In my view, the object, spirit and purpose for excluding investment income of a CCPC from the section 123.4 tax rate reduction is two-fold: (1) the investment income already has a preferential tax rate; and (2) the exclusion preserves the fundamental principle that investment income should be taxed the same whether it is received directly or through a private corporation.

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(c) *Subsection 250(5.1)*

[47] Subsection 250(5.1) of the ITA was amended in 1994. In general, the amendment provides that a corporation that continues into another jurisdiction by articles of continuance (or similar constitutional documents) is deemed from the time of continuance to be incorporated in the new jurisdiction.

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[48] The amendment to subsection 250(5.1) was part of a new taxation regime designed to make corporate continuances fairer for taxpayers (Michael J. Flatters, "Proposed Amendments Relating to Corporate Continuance and Residence" (1993) 41:3 Can Tax J 567). Problems with the existing regime were well documented in several articles. In one, the authors described that the prior legislation "yields the unappetizing result of departure tax followed by continued Canadian taxation of the corporation as a resident corporation" (Robert Couzin & Robert J. Dart, "Proposed Technical Amendments" (1993) 41:2 Can Tax J 306 at 320). This is partly because, even though the corporation has continued out of Canada, it is still incorporated in Canada and is subject to tax provisions that apply to such corporations. The new regime was intended to avoid this result by having residence determine whether income or losses are subject to tax in Canada.

[49] The amended provision reads in relevant part:

| | |
|---|---|
| **Continued corporation** | **Prorogation d'une société** |
| **250 (5.1)** Where a corporation is at any time (in this subsection referred to as the "time of continuation") granted articles of continuance (or similar constitutional documents) in a | **250 (5.1)** Lorsqu'une société obtient, à un moment donné (appelé « moment de la prorogation » au présent paragraphe), des clauses de prorogation, ou des documents |

| | |
|---|---|
| particular jurisdiction, the corporation shall | semblables concernant sa constitution, dans un ressort donné, les présomptions suivantes s'appliquent : |
| **(a)** for the purposes of applying this Act (other than subsection 250(4)) in respect of all times from the time of continuation until the time, if any, of continuation in a different jurisdiction, be deemed to have been incorporated in the particular jurisdiction and not to have been incorporated in any other jurisdiction; and | **a)** pour l'application de la présente loi, à l'exception du paragraphe (4), depuis le moment de la prorogation jusqu'à la prorogation, le cas échéant, de la société dans un autre ressort, la société est réputée avoir été constituée dans le ressort donné et non dans un autre; |
| … | […] |

[50] The new regime was not perfect (Allan R. Lanthier, "Corporate Immigration, Emigration, and Continuance" in *Tax Planning for Canada-US and International Transactions*, 1993 Corporate Management Tax Conference (Toronto: Canadian Tax Foundation, 1994)). Following a technical analysis of the regime, the author concludes at 4:42:

> The technical amendments package represents an ambitious effort on the part of the Department of Finance to set out, for the first time, an integrated and comprehensive set of rules governing corporate immigration, emigration, and continuance. There is, however, further work to be done, and there are a number of areas where corrective or alleviating revisions would be welcome.

[51] The Tax Court described the object, spirit and purpose of subsection 250(5.1) in its reasons at paragraph 185:

> [185] The rationale of subsection 250(5.1) is to equate the place of continuance of a corporation with its place of incorporation in order to ensure that, upon the continuation of a corporation in a different jurisdiction, the various provisions of the Act that refer to the place of incorporation, such as the residence deeming rule

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> in subsection 250(4) and the subsection 89(1) definition of Canadian corporation, produce the results intended by Parliament with respect to the taxation of the corporation under the Act.

[52] I agree with the Tax Court that the amendment to subsection 250(5.1) is intended to be part of a coherent tax scheme for corporate continuances. However, the Tax Court erred by not accurately setting out the object, spirit and purpose of the subsection because it did not describe what results Parliament intended. As stated by the Department of Finance when announcing the proposed legislation, the amendment to subsection 250(5.1) is part of an improved set of rules for all individuals and corporations moving into or leaving Canada. The rules will result in residence determining whether income or losses are subject to tax in Canada (Canada, Department of Finance, *Release No. 92-098* (Ottawa: 21 December 1992) at vii-viii).

[53] In my view, the object, spirit and purpose of subsection 250(5.1) is to make tax provisions fairer for corporations moving into or leaving Canada by way of continuance.

(d) *Canadian-controlled private corporation*

[54] The term “Canadian-controlled private corporation” is central to this appeal. It was first introduced in 1971 and is included in subsection 125(7) of the ITA.

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[55] As set out in the definition below, a CCPC must satisfy the following conditions:

(a) The corporation must be a "private corporation", as defined in s. 89(1) of the ITA. Generally, a private corporation is one that is resident in Canada, not a public corporation, and not controlled by a public corporation.

(b) The corporation must be a "Canadian corporation", as defined in s. 89(1) of the ITA. Generally, a Canadian corporation is one that is resident in Canada and incorporated in Canada.

(c) The corporation must be "Canadian-controlled" as described in the CCPC definition in s. 125(7) of the ITA. This generally refers to a corporation that is not controlled by non-residents.

[56] The definition reads in relevant part:

| **Definitions** | **Définitions** |
|---|---|
| **125 (7)** In this section, | **125 (7)** Les définitions qui suivent s'appliquent au présent article. |
| … | […] |
| ***Canadian-controlled private corporation*** means a private corporation that is a Canadian corporation other than | ***société privée sous contrôle canadien*** Société privée qui est une société canadienne, à l'exception des sociétés suivantes : |
| **(a)** a corporation controlled, directly or indirectly in any manner whatever, by one or more non-resident persons, by one or | **a)** la société contrôlée, directement ou indirectement, de quelque manière que ce soit, par une ou plusieurs personnes non-résidentes, par une ou plusieurs |

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| | |
|---|---|
| more public corporations … | sociétés publiques […] |
| … | […] |

(3) Did the Tax Court err in determining that the transactions did not frustrate the object, spirit and purpose of the relevant provisions?

(a) *Introduction*

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[57] The GAAR is not applicable unless it may reasonably be considered that an avoidance transaction would result in a misuse or abuse of provisions of the ITA (s. 245(4) of the ITA). The provision reads:

| | |
|---|---|
| **Application of subsection (2)** | **Application du par. (2)** |
| **(4)** Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction | **(4)** Le paragraphe (2) ne s'applique qu'à l'opération dont il est raisonnable de considérer, selon le cas : |
| **(a)** would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of | **a)** qu'elle entraînerait, directement ou indirectement, s'il n'était pas tenu compte du présent article, un abus dans l'application des dispositions d'un ou de plusieurs des textes suivants : |
| **(i)** this Act, | **(i)** la présente loi, |
| **(ii)** the Income Tax Regulations, | **(ii)** le *Règlement de l'impôt sur le revenu*, |
| **(iii)** the Income Tax Application Rules, | **(iii)** les *Règles concernant l'application de l'impôt sur le revenu*, |
| **(iv)** a tax treaty, or | **(iv)** un traité fiscal, |
| **(v)** any other enactment that is | **(v)** tout autre texte législatif qui |

| | |
|---|---|
| relevant in computing tax or any other amount payable by or refundable to a person under this Act or in determining any amount that is relevant for the purposes of that computation; or | est utile soit pour le calcul d'un impôt ou de toute autre somme exigible ou remboursable sous le régime de la présente loi, soit pour la détermination de toute somme à prendre en compte dans ce calcul; |
| **(b)** would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole. | **b)** qu'elle entraînerait, directement ou indirectement, un abus dans l'application de ces dispositions compte non tenu du présent article lues dans leur ensemble. |

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[58] The question in this second stage of the abuse analysis is whether an avoidance transaction falls within or frustrates the identified object, spirit and purpose of the provisions relied on for the tax benefit (*Copthorne* at para. 71). The avoidance transactions will be abusive where the outcome or result of the transaction (a) is an outcome that the provisions relied on seek to prevent; (b) defeats the underlying rationale of the provisions relied on; or (c) circumvents certain provisions in a manner that frustrates the object, spirit and purpose of those provisions (*Deans Knight* at para. 69).

[59] This second stage is fact-intensive and reviewable for palpable and overriding error, absent an extricable error of law (*3295940 Canada Inc. v. Canada*, 2024 FCA 42 at para. 43, leave to appeal to SCC refused, 41252 (November 21, 2024); *Deans Knight* at para. 121).

[60] There are two avoidance transactions at issue in this appeal: (1) the rollover of the shares of Soberlink from Jacal to DAC, and (2) the continuance of DAC into the BVI. These transactions work together to result in the acknowledged tax benefits for DAC. Since the

continuance is the transaction that enables the tax benefits, the abuse analysis will largely focus on the continuance.

(b) *Did the Tax Court err in concluding that the transactions were not abusive?*

[61] One of the Tax Court's central findings in its abuse analysis is that the avoidance transactions are not abusive because Parliament intended that a corporation that is a CCPC may take steps to become a non-CCPC. The Tax Court's conclusion is set out below:

> [226] … Prior to being continued in the British Virgin Islands, the Appellant was on one side of the dividing line and, after it was continued, it was on the other side of the dividing line. This is exactly what Parliament intended. As just discussed, Parliament recognized that a corporation could move from one side of the dividing line to the other. It enacted provisions to facilitate this movement.

[62] To put it starkly, the Tax Court suggests that Parliament intended that subsection 250(5.1) of the ITA may be used to circumvent anti-deferral measures that are a critical part of longstanding Canadian tax policy.

[63] The Tax Court supports its conclusion by noting that Parliament enacted certain provisions to facilitate movement from being a CCPC to a non-CCPC.

[64] It may be that Parliament enacted certain provisions to facilitate movement in specified cases. However, even if Parliament recognizes that generally a corporation may take steps to cease to be a CCPC, this does not mean that the GAAR cannot apply on the facts of a particular

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case. The Tax Court erred in law when it effectively determined otherwise. As noted in *Copthorne* at paragraph 66, "While the taxpayer's transactions will be in strict compliance with the text of the relevant provisions relied upon, they may not necessarily be in accord with their object, spirit or purpose. In such cases, the GAAR may be invoked by the Minister."

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[65] Another of the Tax Court's central findings is that DAC did not abuse the provisions at issue because it "chose to move from one taxing regime with its pluses and minuses to another taxing regime with different pluses and minuses" (reasons at para. 223). On the minus side, the Tax Court listed several favourable provisions in the ITA which applied to DAC when it was a CCPC but no longer applied to DAC following its continuation in the BVI (reasons at para. 224).

[66] Although DAC may have theoretically been subject to minuses, this does not mean that this factor should be taken into account in the factually-suffused abuse analysis. It is only relevant if the minuses were material to DAC.

[67] DAC's counsel suggested in argument that the minuses were material because DAC had suffered from a longer reassessment period and the GAAR reassessment actually occurred within that longer period. I am not persuaded that DAC was adversely affected because of this. Nor am I persuaded that potential minuses were material at all.

[68] Finally, even if there were minuses to the continuation, DAC acknowledges that the two transactions in question were undertaken to obtain tax benefits. It is not plausible that the

transactions would have been undertaken if DAC considered that the minuses outweighed the pluses.

[69] In summary, the pluses and minuses were an irrelevant factor in this case and the Tax Court erred by concluding that there was abuse on this basis.

[70] The Tax Court's finding that there was no abuse of the anti-deferral measures cannot stand in light of these errors. In addition, the finding that there was no abuse of subsection 250(5.1) is owed no deference because the Tax Court did not correctly state the provision's object, spirit and purpose, as I explained above.

[71] Accordingly, I will undertake a fresh analysis of whether the avoidance transactions abuse these provisions.

[72] First, there was an abuse of subsection 250(5.1). The object, spirit and purpose of this provision is to make tax provisions fairer for corporations moving into or leaving Canada by way of continuance. DAC's continuance fell outside of and frustrated this object, spirit and purpose.

[73] The continuance into the BVI had nothing to do with developing ties or business interests in the BVI. DAC remained a resident of Canada because its central management and control remained in Canada (reasons at para. 175). Further, aside from obtaining the tax benefits, DAC's continuance into the BVI is virtually inconsequential. The Certificate of Continuance provides

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that DAC is continued in the BVI as a company incorporated under the BVI Companies Act. There is no reason to think this is material to DAC other than the tax benefits.

[74] The use of subsection 250(5.1) was simply the means to achieve tax benefits. This was not the object or purpose of this provision.

[75] Turning to the anti-deferral measures in sections 123.3 and 123.4, these provisions have also been abused. The result of the continuance circumvents the anti-deferral provisions in a manner that frustrates the object, spirit and purpose of the provisions.

[76] I agree with the Crown when it says that if one can so easily obtain tax benefits by circumventing anti-deferral measures, the effectiveness of these measures is severely eroded. As mentioned earlier, Canada's system of taxing investment income of CCPCs ensures that tax is not deferred. In this case, the anti-deferral measures become elective in practice because they were circumvented so easily. Parliament did not intend this result.

[77] In summary, the Tax Court erred in finding that the GAAR did not apply. I find that the GAAR does apply. The continuance of DAC to the BVI was used as a means to circumvent the relevant anti-deferral measures. The transaction fell outside and frustrated the rationale of subsection 250(5.1). The anti-deferral measures in sections 123.3 and 123.4 of the ITA were also abused because the transactions defeated the anti-deferral rationale of these provisions.

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D. *Reasonable tax consequences*

[78] Under subsection 245(2) of the ITA, the application of the GAAR results in the denial of the tax benefits resulting from the avoidance transactions. As agreed by the parties, the tax benefits are derived from section 123.3 not being applicable and from section 123.4 being applicable to DAC following its continuation into the BVI. In addition, at the hearing, the Crown acknowledged that DAC likely would be allowed dividend refunds if dividends are actually paid.

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[79] DAC submits that, should this Court determine that the GAAR applies to the avoidance transactions, it is also reasonable to apply the normal reassessment period of a CCPC, which is three years, instead of the actual normal reassessment period for DAC, which is four years. This is significant because the reassessment at issue was not issued within the three-year normal reassessment period. Accordingly, the reassessment would be statute barred.

[80] This adjustment is not permitted under the legislation. The relevant provision is subsection 245(2) of the ITA which reads:

| **General anti-avoidance provision** | **Disposition générale anti-évitement** |
|---|---|
| **245 (2)** Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction. | **(2)** En cas d'opération d'évitement, les attributs fiscaux d'une personne doivent être déterminés de façon raisonnable dans les circonstances de façon à supprimer un avantage fiscal qui, sans le présent article, découlerait, directement ou indirectement, de cette opération ou d'une série d'opérations dont cette opération fait partie. |

[81] It is helpful to consider the legislative history of this provision. As originally proposed, the GAAR would permit adjustments that are reasonable in the circumstances, ignoring the transactions. However, this language was changed because it was considered too broad (Canada, Department of Finance, *Supplementary Information Relating to Tax Reform Measures* (Ottawa: 16 December 1987) at 100-101). Accordingly, subsection 245(2) limits the GAAR adjustments that may be made to denying the tax benefits that, but for the application of the GAAR, would result from the avoidance transactions. Accordingly, I find that an adjustment to the DAC reassessment period (such that the reassessment is statute barred) is not within the scope of permitted adjustments in accordance with subsection 245(2) of the ITA.

E. *Subsequent Amendments*

[82] Finally, I would mention that Parliament amended the ITA effective in 2022 to address concerns with tax planning of this nature. I agree with the parties that it would not be appropriate for the Court to make any inference in this appeal as to legislative intent as a result of this subsequent legislation. I have not done so.

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## VI. Conclusion

[83] I conclude that the GAAR applies to the transactions at issue. I would allow the appeal, with costs, and set aside the judgment of the Tax Court. Making the judgment the Tax Court should have made, I would dismiss the appeal in the Tax Court, with costs.

"Judith Woods"
J.A.

"I agree.
Anne L. Mactavish J.A."

"I agree.
Elizabeth Walker J.A."

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**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-197-24 |
| **STYLE OF CAUSE:** | HIS MAJESTY THE KING v. DAC INVESTMENT HOLDINGS INC. |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 7, 2025 |
| **REASONS FOR JUDGMENT BY:** | WOODS J.A. |
| **CONCURRED IN BY:** | MACTAVISH J.A.<br>WALKER J.A. |
| **DATED:** | FEBRUARY 20, 2026 |

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