Federal Court of Appeal | Cour d'appel fédérale

Date: 20251110

Docket: A-122-24

Citation: 2025 FCA 204

CORAM: **WEBB J.A.**
ROUSSEL J.A.
BIRINGER J.A.

BETWEEN:

DEML INVESTMENTS LIMITED

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Calgary, Alberta, on February 13, 2025,
with additional post-hearing submissions filed on May 29, June 13, and June 20, 2025.

Judgment delivered at Ottawa, Ontario, on November 10, 2025.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: ROUSSEL J.A.
BIRINGER J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The Minister of National Revenue (the Minister) applied the general anti-avoidance rule (the GAAR) in section 245 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) to deny a capital loss claimed by DEML Investments Limited (DEML) on a sale of an interest in a partnership in 2010. DEML carried back almost all of the net capital loss attributable to this capital loss to its 2007 taxation year to offset a taxable capital gain realized by DEML in that

taxation year. A capital loss is realized when a capital property is sold and the adjusted cost base (ACB) of that property and any outlays and expenses incurred to sell that property exceed the proceeds of disposition for that property (paragraph 40(1)(*b*) of the Act). There is no indication that any amount was claimed for any outlays or expenses that were incurred to sell the partnership interest that resulted in the capital loss in issue. As well, there is no dispute that the proceeds of disposition for that interest were $6,700,000.

[2] The Tax Court of Canada dismissed DEML's appeal (2024 TCC 27). DEML has appealed this Judgment to this Court.

[3] For the reasons that follow, I would allow DEML's appeal, in part.

[4] Any reference to a provision of the Act in these reasons is a reference to the provision as it was written in the taxation year applicable to the transactions completed in this appeal. There are also several amounts that are relevant in this appeal. Instead of repeating all the digits in the amounts throughout these reasons, the amounts are, in certain parts of these reasons, rounded to the nearest $100,000.

I. Background

[5] The hearing before the Tax Court proceeded on the basis of an Agreed Statement of Facts and various documents submitted by the parties. There was no oral testimony. There is no

dispute concerning the transactions that were completed or the tax implications of the transactions, other than the application of the GAAR.

[6] In 2008, Direct Energy Marketing Limited (Direct Energy) (the parent company of DEML) negotiated with Transglobe Energy Corporation (Transglobe) to acquire certain resource properties (the Resource Properties) from Transglobe. The Resource Properties included petroleum and natural gas rights (which are Canadian resource properties as defined in subsection 66(15) of the Act), depreciable property included in Class 41 as defined in Schedule II to the *Income Tax Regulations*, C.R.C., c. 945, and miscellaneous property of nominal value.

[7] Transglobe completed a number of transactions prior to the transfer of the properties from Transglobe to Direct Energy. Direct Energy and DEML completed a number of transactions following the acquisition of properties from Transglobe and prior to the sale of the partnership interest which gave rise to the capital loss in issue.

[8] The transactions are set out in the Agreed Statement of Facts submitted at the Tax Court hearing. The transactions can be grouped together as follows:

A. Pre-Acquisition Transactions

1. In 2008, Transglobe incorporated two companies (1377116 Alberta Ltd. (137) and 1389673 Alberta Ltd. (138)) as wholly-owned subsidiaries of Transglobe.

2. 137 and 138 formed a partnership (DERP 2).

3. Transglobe transferred:

(a) a 99% interest in the Resource Properties to 137 and elected under subsection 85(1) of the Act to have:

(i.) the depreciable property transferred at $11,286,000 (paragraph 19 i) of the Reply filed with the Tax Court); and

(ii.) the Canadian resource properties transferred at $34,859,099 (paragraph 19 i) of the Reply filed with the Tax Court); and

(b) the other 1% interest in the Resource Properties to 138 (with elected amounts that reflected the nominal interest that was transferred).

An amount equal to the elected amount for the Canadian resource properties ($34,859,099) would have been added to 137's cumulative Canadian oil and gas property expense (CCOGPE) on the transfer of the Canadian resource properties by Transglobe to 137 (A in the definition of CCOGPE in subsection 66.4(5) of the Act). Likewise, an amount equal to the elected amount for the depreciable property ($11,286,000) would have been added to 137's undepreciated capital cost (UCC) for Class 41. In paragraph 19 i) of the Reply filed with the Tax Court, the Minister assumed that the fair market value of the Class 41 assets transferred to 137 was equal to the elected amount for these assets.

4. 137 and 138 then transferred their respective interests in the Resource Properties to DERP 2 and filed elections under subsection 97(2) of the Act with elected amounts for 137 of $11.3 million for its 99% interest in the depreciable property and $1 for its 99% interest in the Canadian resource properties (paragraph 9 Step 4 of the reasons of the Tax Court Judge). The elected amount for 138 for the depreciable property reflected its nominal interest in the depreciable property. 138 elected $1 for its interest in the Canadian resource properties.

The elected amounts in relation to the transfer of the Resource Properties by 137 to DERP 2 would have been added to the ACB of 137's partnership interest in DERP 2 (paragraph 97(2)(b) of the Act). In paragraph 19 j) of the Reply filed with the Tax Court, the Minister assumed that the ACB of 137's partnership interest in DERP 2 was then $11,286,101. The CCOGPE account of 137 still reflected the $34.9 million that was added to it on the transfer of the Canadian resource properties by Transglobe to 137. This amount was not affected by the transfer of the Canadian resource properties to DERP 2 as the elected amount for the Canadian resource properties to DERP 2 was $1. Furthermore, paragraph 96(1)(d) of the Act stipulates that the income or loss of a partnership is to be computed as if no deduction were permitted under the various provisions related to resource expenses (including section 66.4 for CCOGPE). As a result, for a partnership, the CCOGPE is maintained at the partner level and not at the partnership level. Also paragraph (b) of the definition of Canadian oil and gas property expense (COGPE) in subsection 66.4(5) of the Act and subsection 66.4(6) of the Act reflect this treatment of COGPE for partnerships.

B. Acquisition Transaction

5. On April 30, 2008, Direct Energy acquired from Transglobe the shares of 137 for $50,688,330 and the shares of 138 for $512,003 (paragraph 7 Step 5 of the Agreed Statement of Facts). As a result, the ACB to Direct Energy of the shares of 137 was $50.7 million.

C. Winding-up of 137 and Transfer of the Resource Properties from DERP 2

6. On January 28, 2009, Direct Energy transferred the shares of 137 to DEML and elected under subsection 85(1) of the Act to transfer the shares of 137 at their ACB ($50.7 million). There is no reference in the Agreed Statement of Facts to the transfer of the shares of 138 to DEML. However, since the parties agreed that, as part of the transactions related to the sale of the Redwater Properties to Orion Oil and Gas Corporation (Orion), as described below, DEML also sold its shares of 138 to Orion, at some point the shares of 138 must have been transferred to DEML.

7. On January 29, 2009, 137 distributed its property to DEML on the winding-up of 137 and made a designation under paragraph 88(1)(d) of the Act which resulted in an increase (a bump) of $39,402,330 (from $11,286,101 to $50,688,431) in the ACB of DEML's partnership interest in DERP 2 acquired from 137 (paragraph 9 Step 8 of the Reasons of the Tax Court Judge).

The bump amount under paragraph 88(1)(d) of the Act at issue in this appeal ($39,402,330) is the difference between the ACB of the shares of 137 held by DEML ($50,688,431) and the ACB of 137's partnership interest in DERP 2 ($11,286,101). The ACB of the shares of 137 reflects the amount paid by Direct Energy to Transglobe to acquire these shares. The ACB of 137's partnership interest arose on the transfer of the Resource Properties to DERP 2.

Since DEML is treated as the same corporation as, and a continuation of, 137 for the purposes of determining its CCOGPE, DEML added $34,859,099 to its CCOGPE (subsection 88(1.5) of the Act).

8. On January 30, 2009, DERP 2 distributed the Resource Properties to DEML.

The ACB of DEML's partnership interest in DERP 2 decreased by the amount equal to the fair market value of the Resource Properties transferred from DERP 2 to DEML (subparagraph 53(2)(c)(v) of the Act). DEML's CCOGPE increased by the amount equal to the fair market value of the petroleum and natural gas rights (the Canadian resource properties) transferred from DERP 2 to DEML (A in the definition of CCOGPE in subsection 66.4(5) of the Act). DEML also added an amount equal to the fair market value of the Class 41 assets distributed to DEML to its UCC for this class.

At the year end of DERP 2 (January 31, 2009), the deemed proceeds of disposition for the Canadian resource properties (the fair market value of these properties) resulted in an increase in the ACB of DEML's partnership interest in DERP 2 (subparagraph 53(1)(e)(viii) of the Act) and a corresponding reduction of DEML's CCOGPE (subsection 66.4(6) of the Act and F in the definition of CCOGPE in subsection 66.4(5) of the Act).

As a result of the transactions as set out in the Agreed Statement of Facts, the Tax Court Judge found, at paragraph 9 of his reasons, Step 9, that the ACB of DEML's partnership interest in DERP 2 was $34,402,673. The balance in DEML's CCOGPE would have been $34,850,099 (paragraph 22 a) of the Crown's memorandum). It is not clear whether this amount should have been $34,859,099 (the amount identified above in [8] 3. and [8] 7.). However, nothing turns on whether the correct amount was $34,850,099 or $34,859,099. DEML does not dispute the amount as stated in the Crown's memorandum.

9. On February 1, 2009, DEML transferred the assets it acquired from DERP 2 to another partnership (LP1) of which DEML was a minority partner. The other partners were related to DEML. There is no indication in either the Agreed Statement of Facts or the Reasons of the Tax Court Judge of the amount elected for the transfer of these assets to LP1. Since, as noted above, the CCOGPE account is maintained at the partner level, presumably the elected amount for the Canadian oil and gas properties was $1, which would mean that the CCOGPE account of DEML would not be impacted by this transfer of Canadian resource properties.

D. Sale of the Redwater Properties

10. DEML agreed to sell certain of the Resource Properties in the Redwater district (the Redwater Properties) to an arm's length purchaser – Orion.

11. On November 29, 2010, LP1 transferred the Redwater Properties (valued at $6,700,000) to DEML. DEML then transferred these properties back into DERP 2 at an elected amount of $6.7 million and added $6.7 million to the ACB of its partnership interest in DERP 2.

12. On November 30, 2010, DEML sold its partnership interest in DERP 2 and its shares in 138 to Orion for $6.7 million and claimed a capital loss of $45,850,237. The Tax Court Judge found at paragraph 9, Step 12 that DEML had reported an ACB of $52,550,237 for its partnership interest in DERP 2 and had reported proceeds of disposition for this interest of $6,700,000 (which would result in a capital loss of $45,850,237). This would mean that essentially there was only a nominal ACB and proceeds of disposition for the shares of 138. DEML carried back a net capital loss of $22,439,997 (50 % of $44,879,994) to its 2007 taxation year pursuant to paragraph 111(1)(b) of the Act to offset a taxable capital gain realized in that year.

II. Decision of the Tax Court

[9] At the Tax Court hearing, DEML conceded that there was a tax benefit as a result of carrying back the net capital loss that was attributable to the capital loss claimed on the sale of its interest in DERP 2 to offset a taxable capital gain realized in 2007 and that certain transactions undertaken in relation to the realization of this loss were avoidance transactions. As a result, the only issue before the Tax Court was whether any of the avoidance transactions were abusive, *i.e.* whether the outcome or result of such transaction is an outcome that:

(a) 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.

(Paragraphs 30 and 31 of the Reasons of the Tax Court Judge, citing paragraph 69 of the decision of the Supreme Court of Canada in *Deans Knight Income Corp. v. Canada*, 2023 SCC 16, (*Deans Knight*)).

[10] The Tax Court Judge found that the transactions abused the capital loss provisions of the Act (paragraphs 3(*b*), 38(*b*), 39(1)(*b*), 40(1)(*b*), 111(1)(*b*), the definitions of "adjusted cost base" in section 54 and "net capital loss" in subsection 111(8) of the Act – paragraph 45 of the Reasons of the Tax Court Judge) because, in his view, the capital loss was an artificial loss since DEML still held the Resource Properties (except the Redwater properties that were sold to Orion):

> [56] As the purpose of the capital loss provisions is to recognize real losses, there is clear abuse where artificial losses are deducted. That is even more so when those losses are based on non-capital [Canadian resource properties], that

> will also be deducted through CCOGPE pools at a 100% inclusion rate thus creating a double deduction. As the Appellant stated, [a Canadian resource property] is not capital property and does not have an ACB - therefore, how can it be the economic basis for a capital loss.
>
> [57] The avoidance transactions at issue undermine the integrity of the capital gains and loss scheme of the Act, in addition to benefitting from the CCOGPE tax pool.
>
> [58] Accordingly, I conclude that from a GAAR perspective that in this matter there was abuse of the identified capital loss provisions arising from the avoidance transactions.

[11] The Tax Court Judge then considered whether the bump provisions of subsection 88(1) of the Act were abused. The Tax Court Judge found that these provisions were abused:

> [69] I note also that the "bump" provisions well fit the category of capital loss provisions of the Act. After all, it is the ACB that is "bumped"; and the ACB is a primary factor in the determination of the amount of a capital gain or loss. Thus the "no artificial loss" OSP of capital loss provisions of the Act encompass also the subsection 88(1) "bump" provisions. Hence, in the context of a GAAR analysis, abuse of these provisions would include the "bump" provisions where the ACB was "bumped" in creation of the artificial loss here underlying the Capital Loss leading to the Tax Benefit.
>
> [70] Put another way, it seems incomprehensible that an artificial loss would signal misuse of capital loss provisions of the Act without equally indicating misuse of the very "bump" provisions of the Act used to achieve the artificial loss through the "bumping" of an ACB.

[12] As a result, the Tax Court dismissed DEML’s appeal.

III. Post-Hearing Submissions

[13] At the hearing before the Tax Court, DEML did not raise as an issue whether the GAAR should only apply to a portion of the capital loss that was claimed by DEML. The proceeding appears to have been conducted on the premise that the entire capital loss was attributable to the paragraph 88(1)(*d*) bump in the ACB of DEML's partnership interest in DERP 2, even though the Tax Court Judge correctly stated the amount of the bump in paragraph 9 Step 8 of his Reasons as $39,402,330 and the amount of the capital loss in issue as $45,850,237 in paragraph 9 Step 12 of his Reasons.

[14] The Tax Court Judge first considered whether there was an abuse of the capital loss provisions. Following his conclusion that these provisions were abused, he then turned to the Crown's second abuse submissions:

> [59] I now address the Respondent's second abuse submission, that avoidance transactions undertaken to achieve the Capital Loss/Tax Benefit, through augmenting the ACB of the Appellant's DERP2 partnership interest, abused provisions of the Act. The provisions are paragraphs 88(1)(b), (c) and (d), subparagraphs 39(1)(b)(i) and (ii), paragraphs 3(b), 38(b) and 111(b) and the definitions "adjusted cost base" in section 54 and "net capital loss" in subsection 111(8), subparagraph 53(1)(e)(viii), section 66.4 and subsection 66(13) of the Act.

[15] There is no reference to the portion of the capital loss attributable to "augmenting the ACB of [DEML's DERP 2] partnership interest". The reasons of the Tax Court Judge are written as if the entire capital loss in issue was attributable to the paragraph 88(1)(*d*) bump. Given the lack of any submissions from DEML that there was a portion of the capital loss that was not attributable to the paragraph 88(1)(*d*) bump, this is not surprising.

[16] However, the capital loss that was denied was $45,850,237 and the amount of the paragraph 88(1)(*d*) bump was $39,402,330. Therefore, it is obvious that the entire capital loss is not attributable to the paragraph 88(1)(*d*) bump. Of the capital loss claimed by DEML and denied as a result of the application of the GAAR, $6,447,907 must be attributable to something other than the paragraph 88(1)(*d*) bump.

[17] The ACB of DEML's partnership interest in DERP 2 would be reflected in the capital loss claimed. At the hearing of this appeal, it became apparent that there was an unexplained gap in the computation of this ACB.

[18] The Tax Court Judge found that the ACB of DEML's partnership interest in DERP 2, immediately following the paragraph 88(1)(*d*) bump, was $50,688,330 (paragraph 9, Step 8 of his Reasons). In Step 9, the Tax Court Judge changes this amount to $50,688,431. Since:

(a) the parties, in the Agreed Statement of Facts, agreed that the ACB of DEML's partnership interest in DERP 2, immediately following the paragraph 88(1)(*d*) bump, was $50,688,431, and

(b) the Tax Court Judge used the amount of $50,688,431 in determining the revised ACB of DEML's partnership interest in DERP 2 immediately following the distribution of the property of DERP 2 to DEML (paragraph 9, Step 9 of his Reasons),

it would appear that the reference to $50,688,330 was a typographical error and the ACB of this partnership interest to DEML was $50,688,431.

[19] The Tax Court Judge found that the ACB of DEML's partnership interest in DERP 2 immediately following the distribution of the property of DERP 2 to DEML (paragraph 9, Step 9 of his Reasons) was ($8,675,032). He also found that, following the allocation of income by DERP 2 at its year end, the ACB of DEML's partnership interest in DERP 2 was $34,402,673.

[20] Following the distribution by DERP 2 of its property to DEML and the allocation of income at DERP 2's fiscal year end, there were no other transactions identified in either the Agreed Statement of Facts or the reasons of the Tax Court Judge that would alter the ACB of DEML's partnership interest in DERP 2, other than the transfer of the Redwater Properties to DERP 2. Therefore, based on the Tax Court judge's findings, the ACB of DEML's partnership interest in DERP 2 immediately before the transfer of the Redwater Properties to DERP 2 would have been $34,402,673.

[21] The parties and the Tax Court Judge all agreed that the transfer of the Redwater Properties to DERP 2 increased the ACB of DEML's partnership interest in DERP 2 by $6,700,000. This would mean that the ACB of DEML's partnership interest in DERP 2 following the transfer of the Redwater Properties to DERP 2 (and therefore, immediately before the sale of this partnership interest to Orion) would have been:

ACB Prior to the transfer of the Redwater Properties:	$34,402,673
Increase in the ACB to reflect the Redwater Properties:	$6,700,000
Revised ACB:	$41,102,673

[22] However, the parties and the Tax Court Judge all agreed that the proceeds of disposition for the sale of DEML's partnership interest in DERP 2 were $6,700,000 and the ACB of this partnership interest was $52,550,237, resulting in a claimed capital loss of $45,850,237. There is no explanation in either the Agreed Statement of Facts or the reasons of the Tax Court Judge of how the ACB of DEML's partnership interest in DERP 2 was determined to be $52,550,237.

[23] When counsel for DEML was asked about this discrepancy at the hearing of this appeal, counsel was unable to explain how the amount of $52,550,237 was determined. Counsel for the Crown, however, referred the Court to an internal memorandum prepared by DEML dated May 26, 2011 (the DEML Memo) that is in the record. This memo set out the following calculation of the ACB of DEML's partnership interest in DERP 2 immediately before the sale of this partnership interest to Orion:

Transaction	**Adjustment to the ACB**
Transglobe acquisition	$11,286,000
88(1)(*d*) bump	$39,402,330
UCC Distribution	($12,112,166)
COGPE Distribution	($43,787,834)
Negative COGPE allocation Feb 1, 2009	$43,349,956
COGPE additions allocated Jan 31/09	($187,559)
CDE [Canadian Development Expenses] allocation Jan 31/09	($1,123,494)
CEE [Canadian Exploration Expenses] allocation Jan 31/09	($61,655)
Income Allocation January 31, 2009	$9,084,659
Transfer of assets to DERP 2	$6,700,000
DIL ACB in DERP 2 at Nov 2010	$52,550,237

[24] Neither party addressed the calculation of the ACB of DEML's partnership interest in DERP 2 as set out in the DEML Memo at the Tax Court hearing (even though the DEML Memo is in the record that was placed before the Tax Court on consent). In this appeal, the Crown simply referred the Court to the DEML Memo in response to questions from the panel concerning the gap in the calculation of the ACB based on the findings of the Tax Court Judge concerning the ACB, as noted above. As a result, the parties were asked to provide the following additional submissions:

> 1. Whether, based on the parties' agreement that the DEML Memo is admitted on consent, there is any dispute that the DEML Memo reflects how DEML computed the ACB of its partnership interest in DERP 2 that was used to determine the capital loss that DEML claimed, and which was denied. If there is a dispute, the parties' submissions shall include an explanation of why there is a dispute. The parties shall identify any other documents in the record that are relevant to the question of how DEML determined the ACB of its partnership interest in DERP 2. The parties are also to address whether the DEML Memo is a business record for the purposes of section 30 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, and if so, what implications would arise from the DEML Memo being a business record; and
>
> 2. If the DEML Memo reflects how DEML determined the ACB of its partnership interest in DERP 2, is it appropriate to apply the GAAR to any portion of the capital loss attributable to the increase in the ACB of DEML's partnership interest in DERP 2 as a result of the allocation of $9,084,659 of income as of January 31, 2009?

[25] The parties provided their written submissions. Before addressing the submissions, it should be noted that the Minister, in paragraph 19 dd) of the Reply filed with the Tax Court, made an assumption of fact with respect to the ACB of DEML's partnership interest as claimed by DEML in its tax return in reporting the capital loss in issue. The parties, in paragraph 12 of their Agreed Statement of Facts filed with the Tax Court, also agreed on this ACB.

[26] The following table shows the ACB of DEML's partnership interest in DERP 2 as claimed by DEML in computing its capital loss:

(a) as assumed by the Minister in the Reply;

(b) as agreed upon by the parties; and

(c) as indicated in the DEML Memo:

ACB (Reply)	ACB (Agreed Statement of Facts)	ACB (DEML Memo)
$52,550,237	$52,550,237	$52,550,237

[27] Even though the ACB of DEML's partnership interest in DERP 2 as indicated in the DEML Memo is exactly equal to the ACB as assumed by the Minister in the Reply and as agreed upon by the parties, neither party confirmed that the DEML Memo reflected an accurate calculation of this ACB.

[28] The Crown, in paragraph 1(a) of its additional submissions, stated:

> The [Crown] has found nothing in the record before this Court that provides a basis for the [Crown] to confirm, or to deny, that the calculation in the DEML Memo is, as a historical fact, the calculation of the ACB used by [DEML] in computing the capital loss at issue.

[29] However, the DEML Memo itself purports to be a calculation of the ACB of DEML's partnership interest in DERP 2 at the relevant time and the Crown did agree that the ACB of this interest at the relevant time was the exact amount as indicated in this memo. As a result, it is not

clear whether the Crown agreed that the ACB was $52,550,237 without knowing how DEML calculated this amount.

[30] Although the Crown did identify other documents in the record that "are similar to the DEML Memo", none of these documents indicate an ACB of $52,550,237 (the agreed upon ACB).

[31] DEML, in paragraph 2(a) of its written representations, stated:

> The DEML Memo does not contain a complete or accurate calculation of the ACB of the DERP2 partnership interest.

[32] If the calculation is not complete, then there must be some other amount that is missing. Including an additional amount would alter the result and change the ACB to an amount other than the amount that was agreed upon.

[33] With respect to DEML's submission on the accuracy of the calculation of the ACB of DEML's partnership interest in DERP 2 as set out in the DEML Memo, since the final result of the DEML Memo was the exact amount agreed upon by the parties there must be at least two errors in the calculation of the ACB as set out in the DEML Memo and the net effect of all the errors must be nil, if the ACB as agreed upon by the parties was the ACB as reported by DEML in filing its tax return.

[34] DEML also did not identify any other document that reflected how the ACB, that the parties agreed was the ACB used by DEML in claiming the capital loss in issue, was determined.

[35] Since neither party is prepared to accept that the DEML Memo reflected how DEML determined the ACB of its partnership interest in DERP 2, this raises the question of why the parties agreed that this memo would be admitted on consent without any qualification or restriction on the use of the document being identified in the material submitted with the document. It also raises questions about how any of the other documents in the six volumes of documents comprising almost 1,700 pages were to be used by the Tax Court or this Court.

[36] In any event, this is an appeal where the GAAR was applied by the Minister and confirmed by the Tax Court to deny the entire capital loss. An appreciation of how the ACB was determined will assist in identifying what provisions of the ITA may have been abused.

[37] The DEML Memo identifies a significant addition of $9,084,659 to the ACB for the income allocation at the end of DERP 2's fiscal period ending on January 31, 2009. According to the Agreed Statement of Facts, Direct Energy acquired the shares of 137 and 138 (the two corporate partners of DERP 2) on April 30, 2008 (shortly after DERP 2 was formed and acquired the Resource Properties on April 22, 2008). The Resource Properties were distributed by DERP 2 to DEML on January 30, 2009. Therefore, there was a period of 9 months during which DERP 2 owned the Resource Properties and presumably was carrying on business and could have earned income.

[38] In the Reply filed with the Tax Court, the Minister made the following assumption of fact:

> 19. In determining [DEML]'s tax liabilities for the taxation years ending November 30, 2007 and November 30, 2010, the Minister made the following assumptions of fact:
>
> …
>
> s) The revised ACB of the DERP2 partnership units held by the Appellant at January 31, 2009 was now $46,125,338, calculated as follows:

COGPE balance prior to distribution		($4,936,568)
Add: COPGE distributed January 31		$43,162,396
Sub-total		$38,225,828
Add: taxable income distribution	$9,084,659	
CEE	($61,655)	
CDE	($1,123,494)	
Sub-total		$7,899,510
Revised ACB of DERP2 held by [DEML]		$46,125,338

[39] The Crown made the following submission in relation to paragraph 19 (s) of the Reply in the submissions filed in response to DEML's submissions:

> 3. However, paragraph 19(s) in the Reply does not assist this issue. The allegations in paragraph 19(s) of the Reply do not speak to assumptions made by the Minister regarding the historical fact of how the appellant computed its ACB in the partnership interest. The paragraph does not state "In computing its ACB in the partnership interest, the appellant made adjustment X". Rather, the allegations in that paragraph speak to the

> Minister's understanding of how the ACB provisions of the *Income Tax Act* apply to the assumed transactions (a question of mixed [*sic*] and law).

[40] There are two problems with this submission. First, paragraph 19(s) states:

> In determining [DEML]'s tax liabilities for the taxation years ending November 30, 2007 and November 30, 2010, the Minister made the following assumptions of fact:
>
> …
>
> The revised ACB of the DERP2 partnership units held by the Appellant at January 31, 2009 was now $46,125,338, calculated as follows:
>
> [Emphasis added]

[41] The opening part of paragraph 19 clearly indicates that the Minister was making an assumption of fact (not an assumption of mixed fact and law) and the language of paragraph (s) confirms that the Minister's assumption of fact was that the ACB "was now $46,125,338" based on including, *inter alia*, the income allocation of $9,084,659. The Reply is a document prepared by the Crown and at this stage it is not appropriate for the Crown to attempt to argue that the language used in this document should be interpreted in a way that does not reflect the plain meaning of the words used. Although the Minister referred to the $9,084,659 as a "taxable income distribution", since this amount was added to the ACB of DEML's partnership interest in DERP 2, presumably this was added pursuant to paragraph 53(1)(*e*) of the Act as DEML's share of DERP 2's partnership income.

[42] The second problem with this submission is that the Crown is now arguing that a statement of mixed fact and law was included in the paragraph setting out the Minister's assumptions of fact. In *AgraCity Ltd v. Canada*, 2015 FCA 288, this court noted:

> [41] In *Anchor Pointe Energy Ltd. v. Canada*, 2003 FCA 294, [2004] 5 C.T.C. 98 and *Canadian Imperial Bank of Commerce v. The Queen*, 2013 FCA 122, [2013] 4 C.T.C. 218, this Court emphasized the requirement that assumptions of fact must be restricted to only the facts and are not to include statements of mixed fact and law. The facts are to be extricated from such statements.

[43] In *The King v. Preston et al.*, 2023 FCA 178, this Court found that it would not necessarily follow that an assumption of mixed fact and law included with the Minister's assumptions of fact would be struck from a Reply:

> [36] Not all assumptions of mixed fact and law are prejudicial or likely to lead to delay or an abuse of process. Not all leave the taxpayer uninformed about the facts on which the Minister relies. As expressly recognized in *CIBC* [*Canadian Imperial Bank of Commerce v. Canada*, 2013 FCA 122], a statement of mixed fact and law may stand as an assumption if there is no prejudice, no debate about the legal principles, or the facts are simple-and, I would add, if letting it stand better serves the trial process.
>
> [Emphasis added]

[44] If, as the Crown now submits, paragraph 19(s) is a statement of mixed fact and law that does not reflect any assumption of fact made by the Minister with respect to the ACB of DEML's partnership interest in DERP 2, then the Reply would have included an improper assumption that should have been struck.

[45] In my view, it is not appropriate for the Crown, at this stage (when the matter is before this Court), to attack its own pleading and argue that an improper assumption of mixed fact and law was made that should, presumably, have been struck from the Reply. Therefore, even if this is an assumption of mixed fact and law, the underlying fact (the ACB of DEML's partnership interest in DERP 2 included the income allocation of $9,084,659) is an assumption of fact made by the Minister in reassessing DEML to deny the capital loss based on the application of the GAAR.

[46] The allocation of income of $9,084,659 to DEML at DERP 2's fiscal period ending on January 31, 2009, would have resulted in this income being included in DEML's income for the purposes of the Act. It would also increase the ACB of DEML's partnership interest in DERP 2 by the same amount (paragraph 53(1)(*e*) of the Act). If the GAAR is applied to reduce any part of the ACB of DEML's partnership interest in DERP 2 that is attributable to this income allocation, it would result in double taxation to DEML – once as a result of the income allocation and again as a capital gain (or reduced capital loss) on a sale of the interest in the partnership. There is no allegation that there is an abuse of paragraph 53(1)(*e*) of the Act, which would add the amount of income allocated to DEML by DERP 2 (and which must be included in computing the income of DEML) to the ACB of DEML's partnership interest in DERP 2.

[47] In responding to the second question that was submitted to the parties:

> 2. If the DEML Memo reflects how DEML determined the ACB of its partnership interest in DERP 2, is it appropriate to apply the GAAR to any portion of the capital loss attributable to the increase in the ACB of DEML's partnership interest in DERP 2 as a result of the allocation of $9,084,659 of income as of January 31, 2009?

the Crown stated:

> 5. The respondent maintains its submissions that the results of the avoidance transactions abused the OSP [object, spirit and purpose] of both the capital loss provisions and of the ss. 88(1) bump provisions. However, the respondent concedes that the abusive portion of the capital loss should be limited to the $39,402,330 claimed as the increase in cost/ACB in connection with the Step 7 and Step 8 avoidance transactions.

[48] The Crown's response to the question of whether the GAAR should be applied to any portion of the capital loss attributable to the partnership income allocated to DEML is that "the abusive portion of the capital loss should be limited to the $39,402,330 claimed as the increase in cost/ACB in connection with the Step 7 and Step 8 avoidance transactions" (the paragraph 88(1)(*d*) bump). The logical conclusion is that the Crown is conceding that if the ACB included the income allocation of $9,084,659, the GAAR should not have been applied to the extent that the capital loss that was claimed reflected an amount added to the ACB of DEML's partnership interest in DERP 2 as a result of the income allocation of $9,084,659. This is the conclusion that DEML reached in paragraph 11 of its response to the Crown's submissions. In its reply to DEML's submissions, the Crown did not take issue with DEML's conclusion.

[49] Given the Minister's assumption of fact in paragraph 19(s) of the Reply, the Crown cannot now take the position that the ACB of DEML's partnership in DERP 2 did not include this income that was allocated to DEML by DERP 2. As a result, as conceded by the Crown, "the abusive portion of the capital loss should be limited to the $39,402,330 claimed as the increase in cost/ACB" as a result of the paragraph 88(1)(*d*) bump. As noted above, if the GAAR is applied to reduce the capital loss to the extent that it is attributable to the amount added to the ACB of

DEML's partnership interest in DERP 2 as the allocation of partnership income to DEML, this would result in double taxation. In my view, the concession of the Crown that the abusive portion of the capital loss should be limited to the amount attributable to the paragraph 88(1)(*d*) bump (and hence not include the portion attributable to the allocation of partnership income to DEML) is appropriate.

[50] This changes the issues from those issues that were raised before the Tax Court. At the Tax Court, the Crown asserted that the entire capital loss that was claimed arose as a result of an abuse of the capital loss provisions and also as a result of an abuse of the paragraph 88(1)(*d*) bump provisions (paragraph 34 of the Reasons of the Tax Court Judge). Since the entire capital loss is no longer in issue and the Crown concedes that the abuse analysis should be limited to the amount attributable to the paragraph 88(1)(*d*) bump, there is no need to comment on the Tax Court Judge's analysis of whether the entire capital loss arose as a result of an abuse of the capital loss provisions. The focus in this appeal is on whether the addition to the ACB of DEML's partnership interest in DERP 2 as a result of the paragraph 88(1)(*d*) bump was abusive.

[51] The Crown also raised an alternative argument in their submissions with respect to the fair market value of the property distributed by DERP 2 to DEML (the transactions described in paragraph [8] 8. above). However, this is an appeal related to the application of the GAAR, not an appeal related to the determination of the fair market value of any property. There was no alleged abuse of any of the provisions that resulted in the various adjustments to the ACB related to the transfer of assets to DERP 2 or the removal of assets from DERP 2. The alleged abuse

related to the paragraph 88(1)(*d*) bump arose on the winding-up of 137. There is no basis to consider the Crown's proposed alternative argument.

IV. Issue

[52] The issue in this appeal is whether there is an abuse of paragraphs 88(1)(*c*) and (*d*) of the Act which resulted in an increase in the ACB of DEML's partnership interest in DERP 2.

V. Analysis

[53] Since DEML owned all of the shares of 137 and since the ACB of the shares of 137 held by DEML exceeded the cost amount of the property held by 137, paragraphs 88(1)(*c*) and (*d*) of the Act, in 2009, allowed DEML to bump the ACB of the partnership interest of DERP 2 acquired by DEML from 137. The bump could only be applied to certain capital property. Subparagraphs 88(1)(*c*)(iii) to (vi) of the Act set out the properties that were "ineligible properties". The Crown does not dispute that the partnership interest in DERP 2 transferred from 137 to DEML was a capital property and was not an "ineligible property" as defined in subparagraphs 88(1)(*c*)(iii) to (vi) of the Act. The partnership interest therefore qualified for the bump, subject to the application of the GAAR.

[54] A Canadian resource property is not a capital property. Capital property is defined in section 54 of the Act as a property the disposition of which will give rise to a capital gain or capital loss. The disposition of a Canadian resource property will not give rise to a capital gain or

capital loss. Rather, the proceeds of disposition for such property will be deducted in computing the cumulative resource expense for that property. For an oil and gas property (such as the petroleum and natural gas rights that are part of the Resource Properties), the amount by which the proceeds of disposition exceed any related outlays and expenditures and certain other specified deductions, is deducted in computing the CCOGPE of the vendor of that property (F in the definition of CCOGPE in subsection 66.4(5) of the Act).

[55] If the total of all amounts deducted in computing CCOGPE of a particular taxpayer exceed the total of all amounts added in computing CCOGPE, the net result is deducted in computing the cumulative Canadian development expense (CCDE) of that taxpayer and if the CCDE is negative, that amount is included in income of that taxpayer (L in the definition of CCDE in subsection 66.2(5) of the Act, paragraph 59(3.2)(*c*) and subsection 66.2(1) of the Act. Paragraph 2 of Interpretation Bulletin IT-125R4 – Dispositions of Resource Properties).

[56] If there is a positive balance in the CCOGPE at the end of a taxation year, in general, a taxpayer can claim up to 10% of such balance as a deduction in computing its income (subsection 66.4(2) of the Act).

[57] Subparagraph 88(1)(*d*)(ii.1) was added to the Act in 2012. As a result of the addition of this subparagraph, there would be no bump in the ACB of DEML's partnership interest in DERP 2 on the winding-up of 137 if the transactions were done now, as this provision restricts the bump that is available for an interest in a partnership when the partnership holds a Canadian

resource property. However, this paragraph is not applicable to the winding-up of 137 as it occurred in 2009.

[58] There is no dispute that the transactions undertaken by Direct Energy, DEML and 137 met the technical qualifications of the Act to allow DEML to bump the ACB of the partnership interest in DERP 2 that DEML acquired from 137 on the winding-up of 137 in 2009. There is also no dispute that there was a tax benefit and that the transactions resulting in the paragraph 88(1)(*d*) bump were avoidance transactions. The issue is the third step in the GAAR analysis as identified by the Supreme Court in *Deans Knight* in paragraph 51 — the determination of whether the avoidance transactions giving rise to the tax benefit were abusive.

[59] In determining whether an avoidance transaction is abusive, the GAAR requires a Court to look behind the words used in the Act to determine the object, spirit or purpose of the relevant provisions. As noted by the Supreme Court in *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63 (*Copthorne*):

> [66] The GAAR is a legal mechanism whereby Parliament has conferred on the court the unusual duty of going behind the words of the legislation to determine the object, spirit or purpose of the provision or provisions relied upon by the taxpayer. 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….

[60] In *Deans Knight*, the Supreme Court noted:

> [58] To determine whether a transaction is abusive, courts must identify the object, spirit and purpose of the provisions alleged to have been abused, with reference to the provisions themselves, the scheme of the Act and permissible

> extrinsic aids (*Trustco*, at para. 55). The object, spirit and purpose of the provisions has been referred to as the "legislative rationale that underlies specific or interrelated provisions of the Act" (*Copthorne*, at para. 69, citing V. Krishna, *The Fundamentals of Income Tax Law* (2009), at p. 818).
>
> [59] At this juncture, it is critical to distinguish the rationale behind a provision from the means chosen to give that rationale effect within the provision. The drafting process reflects the task of translating government aims into legislative form in order to create intelligible, legally effective rules (see, e.g., Canada, Privy Council Office, *Guide to Making Federal Acts and Regulations* (2nd ed. 2001), at pp. 122-29). The means selected by drafters and adopted by Parliament are relevant indicia within the broader text, context and purpose analysis, since they may shed light on the rationale underlying the provision. However, the means do not necessarily provide a full answer as to why the provision was adopted (*Canada v. Oxford Properties Group Inc.*, 2018 FCA 30, [2018] 4 F.C.R. 3, at para. 101). This is not to imply that Parliament cannot translate its aims into effective legislation -- quite the opposite: when drafting legal tests, Parliament is seeking to establish a general standard that is most faithful to its objectives from the options which are available and practicable. But even the most carefully drafted provision can be abused, which is why the GAAR exists to protect the provision's underlying rationale.

[61] Therefore, it is necessary to determine the rationale behind paragraphs 88(1)(*c*) and (*d*) of the Act. In *Canada v. Oxford Properties Group Inc.*, 2018 FCA 30 (*Oxford Properties*), this Court noted:

> [76] In a vertical amalgamation, paragraph 88(1)(*a*) deems the parent corporation to have acquired the property of its subsidiary at the subsidiary's tax cost. Prior to the windup, however, it is possible that the parent's tax cost of the shares in its subsidiary (the ACB of the shares) will exceed the tax cost of the subsidiary's underlying property. Upon a vertical amalgamation, these shares will disappear. Without further adjustment, the tax cost in those shares would also disappear, thereby giving rise to potential double taxation in the event that the underlying property is subsequently sold. This is because the deemed cost of the underlying property in the hands of the parent, being equal to the subsidiary's tax cost, would not reflect any appreciation in value up to the time of the wind-up.
>
> [77] The bump provided for in paragraphs 88(1)(*c*) and (*d*) rectifies this situation by first calculating the difference between the ACB of the parent's shares and the tax cost of the subsidiary's property. This amount is then allowed to be added to the tax cost of the non-depreciable capital property which the parent

> inherited from its subsidiary. In other words, the tax cost of this property is bumped. The bump essentially allows any ACB that would otherwise be lost on a vertical amalgamation to be preserved and transferred to different property that is taxed the same way.
>
> [78] Subparagraph 88(1)(*c*)(iii) prohibits the parent from bumping the cost of "ineligible property" which includes depreciable property. The issue the bump seeks to address is the disappearance of the shares and the tax cost (the share's ACB) embedded therein. Preserving and transferring ACB that would otherwise be lost to an asset that is taxed with the same rate of inclusion is the way in which this is accommodated. Allowing property that is taxed on the basis of a 50 percent rate of inclusion to augment the value of property that is taxed on the basis of a 100 percent rate of inclusion would result in an obvious revenue loss. That explains why depreciable property or other types of property that give rise to a 100 percent rate of inclusion cannot be bumped.

[62] In essence, the rationale of the bump provisions (paragraphs 88(1)(*c*) and (*d*) of the Act) is to allow a parent company to preserve some or all of the ACB of the shares of a subsidiary company that would be lost when those shares disappear on the winding-up of the subsidiary (or the vertical amalgamation of the subsidiary with its parent company as was the case in *Oxford Properties*) by allowing the parent company to add some or all of that lost ACB to the ACB of non-depreciable capital property acquired by the parent company on the winding-up of the subsidiary. This would reduce the potential for double taxation identified in paragraph 76 of *Oxford Properties*. As noted in *Oxford Properties*, the property to which the ACB is effectively transferred must be a non-depreciable capital property that would be taxed at the same rate of inclusion as the shares of the subsidiary that will disappear on the winding-up of the subsidiary.

[63] In *Oxford Properties*, the issue was whether there was an abuse of the bump provisions to avoid the application of subsection 100(1) of the Act. If a person disposes of an interest in a partnership to a person described in subsection 100(1.1) of the Act, the taxable capital gain on

the sale of that interest that is attributable to any appreciation in value of the depreciable property held by the partnership will not be included in income at the capital gains rate of 50%, but rather 100% of such gain will be included in income as a taxable capital gain.

[64] To avoid the application of subsection 100(1) of the Act in *Oxford Properties*, a series of complex transactions was undertaken over approximately five years. A summary of the transactions is set out in paragraphs 7 to 13 of *Oxford Properties*. The transactions included the use of tiered partnerships and the paragraph 88(1)(*d*) bump that Oxford Properties used to increase the ACB of the partnership interest that it held prior to the sale of this interest to a person described in subsection 100(1.1) of the Act. The partnership held real estate properties with a low ACB and a low undepreciated capital cost.

[65] As noted above, subparagraph 88(1)(*d*)(ii.1) was added to the Act in 2012. This subparagraph also restricts the bump available for a partnership interest where the partnership holds depreciable property. As a result of the addition of this paragraph to the Act, the transactions as completed in *Oxford Properties* would not have resulted in the bump in the ACB of the partnership interests that were claimed, if they would have been undertaken after this provision was added to the Act. In addressing the implications of this amendment, which was made after the transactions in *Oxford Properties* were done, this Court stated:

> [90] However, the question whether new subparagraph 88(1)(*d*)(ii.1) operates as new law in a GAAR context must be assessed having regard to the meaning of the prior provisions, when construed with a focus on their underlying rationale or reason for being. In this respect, it can be seen from the Tax Court Judge's own analysis of the provisions as they stood before the amendment (reasons, paragraphs 142-146 and 164-168), that new subparagraph 88(1)(*d*)(ii.1) conveys in express terms a rationale which was already present in these provisions.

> Notably, these provisions already drew the distinction between depreciable and non-depreciable property and the only reason for making this distinction is to take into account the distinctive tax treatment afforded to each type of property under the Act in determining which is eligible for a bump and which is not. The use of tiered partnerships to bypass this distinctive treatment frustrates the reason for the distinction which these provisions already drew.

[66] The comments concerning the distinction that was drawn between non-depreciable capital property and depreciable property in relation to the paragraph 88(1)(*d*) bump are equally applicable here in relation to a Canadian resource property. The paragraph 88(1)(*d*) bump is only available for non-depreciable capital property and a Canadian resource property is not a capital property. The conclusion of this Court in *Oxford Properties* that "new subparagraph 88(1)(*d*)(ii.1) conveys in express terms a rationale which was already present in these provisions" is equally applicable here. The use of a partnership to bump up the ACB of the partnership interest when the partnership holds a Canadian resource property frustrates the distinction between a non-depreciable capital property and a Canadian resource property as it results in a bump in the ACB of a partnership interest when the underlying value of that partnership interest is attributable to a Canadian resource property. The tax treatment on a disposition of a partnership interest (a capital property) is fundamentally different from the tax treatment arising on a sale of a Canadian resource property. As noted above, the proceeds from a sale of petroleum and natural gas rights reduce the CCOGPE of the vendor.

[67] A further distinctive feature in this appeal is the treatment of the cost of acquiring a Canadian resource property. In this appeal, the Canadian resource properties were petroleum and natural gas rights. The acquisition cost of these rights was added first to the CCOGPE of 137 and then, on the winding-up of 137, to DEML's CCOGPE. The cost was not added to the CCOGPE

of DERP 2 since, as noted above, the CCOGPE account was maintained by the partners of DERP 2. As further noted above, the elected amount on the transfer of the Canadian resource properties to DERP 2 was $1. The implications of adding the cost of these rights to DEML's CCOGPE are more fully discussed below.

[68] In this appeal, the property to which the bump was applied was the partnership interest in DERP 2. If following the winding-up of 137, the ACB of DEML's partnership interest in DERP 2 is bumped up to $50.7 million and DEML were to sell the partnership interest in DERP 2 for $50.7 million (which was the same amount that Direct Energy paid to Transglobe to acquire the shares of 137), DEML would not realize any gain or loss on the sale of that partnership interest, but would still have the $34.9 million that was added to its CCOGPE that it could deduct, over time, in computing its income or use to shelter a sale of another oil and gas property (or properties).

[69] DEML's arguments focus on the technical application of the provisions of paragraph 88(1)(*d*) of the Act and the Canadian resource property rules. Essentially DEML argues that, at the relevant time, paragraph 88(1)(*d*) did not limit or restrict the bump available. DEML also argues that the Canadian resource property rules provided that the CCOGPE for a partnership was maintained at the partnership level and the CCOGPE was determined in compliance with the applicable provisions. As a result, DEML argues that the use of the bump provision in this case is not abusive. However, this argument does not address the duty of the Court to go behind the words of the legislation as stated in *Copthorne*:

> [66] The GAAR is a legal mechanism whereby Parliament has conferred on the court the unusual duty of going behind the words of the legislation to determine

> the object, spirit or purpose of the provision or provisions relied upon by the taxpayer. 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…

[70] By focusing only on the text of paragraph 88(1)(*d*) of the Act, DEML does not address the concerns related to the doubling up of tax attributes. There would be an increased ACB in the partnership interest attributable to the fair market value of the Canadian resource properties held by DERP 2, which is reflected in the ACB of the shares of 137 held by DEML since Direct Energy purchased these shares from Transglobe, but which is not reflected in the ACB of the partnership interest of DERP 2, as the elected amount for the transfer of these properties to DERP 2 was $1. At the same time, DEML maintains a significant balance in its CCOPGE account ($34.9 million) in relation to the same Canadian resource properties.

[71] In this appeal, it is also important to consider the tax consequences that would arise if the ACB of DEML's partnership interest is not bumped up on the winding up of 137. The ACB of this partnership interest to DEML, based on the transactions as disclosed in the Agreed Statement of Facts and the finding of the Tax Court Judge in paragraph 9, step 7 of his reasons, would have been $11.3 million. If that partnership interest would have been sold for $50.7 million (the amount paid by Direct Energy to Transglobe to acquire the shares of 137) while DERP 2 still owned the Resource Properties, the capital gain would have been $39.4 million ($50.7 – $11.3). This gain would have been attributable to the value of the Canadian resource properties, which would not have been eligible for the bump. Since the inclusion rate for capital gains was 50%, a capital gain of $39.4 million would have resulted in $19.7 being added to DEML's income as a taxable capital gain.

[72] However, the tax cost associated with the acquisition of these Canadian resource properties ($34.9 million) was reflected in DEML's CCOGPE. The full amount of $34.9 million was deductible to DEML, albeit at the rate of 10% per year. If DEML had other oil and gas properties, it could have sold them for $34.9 million without realizing any income inclusion from those sales.

[73] As a result, even though the amount included in DEML's income as a taxable capital gain would have been $19.7 million, since DEML still had a CCOGPE of $34.9 million attributable to these transactions, DEML could, over time, shelter more income ($34.9 million) than it would be required to report as a taxable capital gain ($19.7 million). There would be no double taxation concern as discussed in paragraph 76 of *Oxford Properties*. Rather, there would be a net tax reduction.

[74] In my view, allowing a bump of $39.4 million to the ACB of DEML's partnership interest in DERP 2 would contravene the rationale of the provisions of paragraphs 88(1)(*c*) and (*d*) of the Act. The rationale of these provisions is to allow a corporate parent to avoid the loss of the ACB of the shares of a subsidiary company on the winding-up of that subsidiary corporation. The loss of ACB would result, at some point, in a capital gain that would not have been realized if the ACB is preserved. The rationale of these provisions is not to allow a corporate parent to have access to both an increased ACB of a partnership interest held by that subsidiary and also access to the CCOGPE of the subsidiary maintained for the Canadian resource properties that are owned by that partnership.

VI. Conclusion

[75] As a result, in my view, the GAAR applies to deny that portion of the capital loss attributable to the paragraph 88(1)(*d*) bump. Since the capital loss claimed by DEML was $45,850,237, this capital loss should be reduced by $39,402,330 to $6,447,907. The net capital loss that would therefore be carried back to 2007 would be $3,223,954.

[76] I would allow the appeal, in part. I would set aside the judgment rendered by the Tax Court. Giving the Judgment that the Tax Court should have given, I would allow DEML's appeal from the reassessment issued by the Minister, in part, and refer the matter back to the Minister for reconsideration and reassessment on the basis that the capital loss claimed by DEML in 2010 should only be reduced by $39,402,330 which is the part thereof that is attributable to the amount added to the ACB of DEML's partnership interest in DERP 2 as a result of the application of paragraphs 88(1)(*c*) and (*d*) of the Act on the winding-up of 137. I would not award costs to either party in this appeal or in the Tax Court.

"Wyman W. Webb"
J.A.

"I agree.
Sylvie E. Roussel J.A."

"I agree.
Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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