Date: 20080319

Dockets: A-151-07, A-149-07
A-150-07, A-152-07
A-153-07, A-154-07
A-155-07, A-156-07
A-157-07, A-158-07
A-159-07, A-160-07

Citation: 2008 FCA 105

CORAM: **DÉCARY J.A.**
SHARLOW J.A.
TRUDEL J.A.

A-151-07

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

JOHN MACKAY

Respondent

A-149-07

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

DEREK ROSS LEE

Respondent

A-150-07

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

ROBERT MACDONALD

Respondent

A-152-07

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

BEACH AVENUE HOLDINGS COMPANY LTD.

Respondent

A-153-07

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

TIMOTHY WALLACE

Respondent

A-154-07

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

JOHN CASSILS

Respondent

A-155-07

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

MARIA WONG

Respondent

A-156-07

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

ROBERT GLASS

Respondent

A-157-07

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

JOHN ZAYTSOFF

Respondent

A-158-07

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

BRIAN MCGAVIN

Respondent

A-159-07

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

AEBAG HOLDINGS LTD.

Respondent

A-160-07

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

ROBERT LEE LTD.

Respondent

Heard at Vancouver, British Columbia, on February 7, 2008.

Judgment delivered at Ottawa, Ontario on March 19, 2008.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: DÉCARY J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This appeal is a consolidation of twelve appeals from a judgment of Justice Campbell of the Tax Court of Canada (2007 TCC 94) involving transactions similar to those considered in *Mathew v. Canada*, [2005] 2 S.C.R. 643, 2005 SCC 55 and *OSFC Holdings Ltd. v. Canada (C.A.)*, [2002] 2 F.C. 288, [2001] 4 C.T.C. 82, 2001 D.T.C. 5471. In those cases, the Minister of National Revenue was held to have been correct to use the general anti-avoidance rule (the "GAAR") in section 245 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) to disallow the transfer of losses from a corporation to taxpayers unrelated to that corporation. The transactions in issue in these twelve cases resulted in a similar transfer of losses, but Justice Campbell held that the GAAR did not apply. The issue is whether Justice Campbell erred in law in reaching that conclusion.

The general anti-avoidance rule

[2] Section 245 of the *Income Tax Act* reads in relevant part as follows:

245. (1) In this section,	245. (1) Les définitions qui suivent s'appliquent au présent article.
"tax benefit" («*avantage fiscal* ») means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this Act but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty;	«attribut fiscal » ("*tax consequences*") S'agissant des attributs fiscaux d'une personne, revenu, revenu imposable ou revenu imposable gagné au Canada de cette personne, impôt ou autre montant payable par cette personne, ou montant qui lui est remboursable, en application de la présente loi, ainsi que tout montant à prendre en compte pour calculer, en application de la présente loi, le revenu, le revenu imposable, le revenu imposable gagné au Canada de cette personne ou l'impôt ou l'autre montant payable par cette personne ou le montant qui lui est remboursable.
"tax consequences" («*attribut fiscal* ») to a person means the amount of income, taxable income, or taxable income earned in Canada of, tax or other amount payable by or refundable to the person under this Act, or any other amount that is relevant for the purposes of computing that amount;	«avantage fiscal » ("*tax benefit*") Réduction, évitement ou report d'impôt ou d'un autre montant exigible en application de la présente loi ou augmentation d'un remboursement d'impôt ou d'un autre montant visé par la présente loi. Y sont assimilés la réduction, l'évitement ou le report d'impôt ou d'un autre montant qui serait exigible en application de la présente loi en l'absence d'un traité fiscal ainsi que l'augmentation d'un remboursement d'impôt ou d'un autre montant visé par la présente loi qui découle d'un traité fiscal.
"transaction" («*opération* ») "transaction" includes an arrangement or event.	«opération » ("*transaction*") Sont assimilés à une opération une convention, un mécanisme ou un événement.
(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	(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

series of transactions that includes that transaction.

(3) An avoidance transaction means any transaction

(*a*) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit; or

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

(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction

(*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

(i) this Act,

(ii) the *Income Tax Regulations*,

(iii) the *Income Tax Application Rules*,

(iv) a tax treaty, or

(v) any other enactment that is 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

(*b*) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.

d'opérations dont cette opération fait partie.

(3) L'opération d'évitement s'entend :

a) soit de l'opération dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s'il est raisonnable de considérer que l'opération est principalement effectuée pour des objets véritables — l'obtention de l'avantage fiscal n'étant pas considérée comme un objet véritable;

b) soit de l'opération qui fait partie d'une série d'opérations dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s'il est raisonnable de considérer que l'opération est principalement effectuée pour des objets véritables — l'obtention de l'avantage fiscal n'étant pas considérée comme un objet véritable.

(4) Le paragraphe (2) ne s'applique qu'à l'opération dont il est raisonnable de considérer, selon le cas :

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) la présente loi,

(ii) le *Règlement de l'impôt sur le revenu*,

(iii) les *Règles concernant l'application de l'impôt sur le revenu*,

(iv) un traité fiscal,

(v) tout autre texte législatif qui 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) qu'elle entraînerait, directement ou indirectement, un abus dans l'application

de ces dispositions compte non tenu du présent article lues dans leur ensemble.

(5) Without restricting the generality of subsection (2), and notwithstanding any other enactment,

(*a*) any deduction, exemption or exclusion in computing income, taxable income, taxable income earned in Canada or tax payable or any part thereof may be allowed or disallowed in whole or in part,

(*b*) any such deduction, exemption or exclusion, any income, loss or other amount or part thereof may be allocated to any person,

(*c*) the nature of any payment or other amount may be recharacterized, and

(*d*) the tax effects that would otherwise result from the application of other provisions of this Act may be ignored,

in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction.

(5) Sans préjudice de la portée générale du paragraphe (2) et malgré tout autre texte législatif, dans le cadre de la détermination des attributs fiscaux d'une personne de façon raisonnable dans les circonstances de façon à supprimer l'avantage fiscal qui, sans le présent article, découlerait, directement ou indirectement, d'une opération d'évitement :

a) toute déduction, exemption ou exclusion dans le calcul de tout ou partie du revenu, du revenu imposable, du revenu imposable gagné au Canada ou de l'impôt payable peut être en totalité ou en partie admise ou refusée;

b) tout ou partie de cette déduction, exemption ou exclusion ainsi que tout ou partie d'un revenu, d'une perte ou d'un autre montant peuvent être attribués à une personne;

c) la nature d'un paiement ou d'un autre montant peut être qualifiée autrement;

d) les effets fiscaux qui découleraient par ailleurs de l'application des autres dispositions de la présente loi peuvent ne pas être pris en compte.

[3] In *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, at paragraph 66, Chief Justice McLachlin and Justice Major, writing for the Court, set out the following analytical framework for determining when to apply the GAAR (emphasis in original):

1. Three requirements must be established to permit application of the GAAR:

   (1) A *tax benefit resulting from a transaction* or part of a series of transactions (s. 245(1) and (2));

   (2) that the transaction is an *avoidance transaction* in the sense that it cannot be said to

have been reasonably undertaken or arranged primarily for a *bona fide* purpose other than to obtain a tax benefit; and

(3) that there was *abusive tax avoidance* in the sense that it cannot be reasonably concluded that a tax benefit would be consistent with the object, spirit or purpose of the provisions relied upon by the taxpayer.

2. The burden is on the taxpayer to refute (1) and (2), and on the Minister to establish (3).

3. If the existence of abusive tax avoidance is unclear, the benefit of the doubt goes to the taxpayer.

4. The courts proceed by conducting a unified textual, contextual and purposive analysis of the provisions giving rise to the tax benefit in order to determine why they were put in place and why the benefit was conferred. The goal is to arrive at a purposive interpretation that is harmonious with the provisions of the Act that confer the tax benefit, read in the context of the whole Act.

5. Whether the transactions were motivated by any economic, commercial, family or other non-tax purpose may form part of the factual context that the courts may consider in the analysis of abusive tax avoidance allegations under s. 245(4). However, any finding in this respect would form only one part of the underlying facts of a case, and would be insufficient by itself to establish abusive tax avoidance. The central issue is the proper interpretation of the relevant provisions in light of their context and purpose.

6. Abusive tax avoidance may be found where the relationships and transactions as expressed in the relevant documentation lack a proper basis relative to the object, spirit or purpose of the provisions that are purported to confer the tax benefit, or where they are wholly dissimilar to the relationships or transactions that are contemplated by the provisions.

7. Where the Tax Court judge has proceeded on a proper construction of the provisions of the *Income Tax Act* and on findings supported by the evidence, appellate tribunals should not interfere, absent a palpable and overriding error.

[4] In *Mathew* and *OSFC*, it was conceded that there was a tax benefit and an avoidance transaction. The dispute related to the third requirement of the GAAR, namely whether the tax avoidance was abusive. In this case, it was conceded in the Tax Court that there was a tax benefit, but not that there was an avoidance transaction. Justice Campbell concluded that there was no avoidance transaction, making it unnecessary for her to go further in the analysis.

[5] In this Court, the principal issue is whether Justice Campbell erred in law in concluding that there was no avoidance transaction. The question of whether the tax avoidance is abusive arises only if Justice Campbell erred in finding no avoidance transaction.

The facts

[6] The facts are not in dispute and are fully stated in the reasons of Justice Campbell. For the purposes of this appeal, only a summary is necessary.

[7] In this summary I use the term “respondents” to refer to the respondents collectively. The reasons of Justice Campbell set out in detail which respondents were involved in various aspects of the transactions that are the subject of these appeals. As all of the respondents finally agreed to all of the transactions, I have not considered it necessary for the purposes of this appeal to identify the role of particular individuals.

[8] At some point before 1992, National Bank of Canada (the “Bank”) made a loan to the then owners of the Northills Shopping Centre in Kamloops, British Columbia, secured by a mortgage on

the shopping centre. By 1992 the amount receivable on the loan was approximately $16 million, and the loan was in default. The Bank commenced foreclosure proceedings in 1992. A receiver manager was appointed and the Bank was given the right to conduct the sale of the Northills Shopping Centre. It was listed for sale for $12.5 million.

[9] The respondents were all involved in some manner in the business of investing in, developing and selling real estate. In August of 1993, the respondents learned of the opportunity to purchase the Northills Shopping Centre. After some negotiations, the Bank agreed in principle to transfer the Northills Shopping Centre to the respondents for $10 million. The respondents were satisfied that, with that purchase price, they would be able to sell the Northills Shopping Centre at a profit after investing in some improvements.

[10] There was evidence, which Justice Campbell accepted, that the respondents wished to hold the Northills Shopping Centre in partnership, that they wished to have the partnership acquire the property through mortgage foreclosure proceedings, and that both of those business arrangements were common in commercial property acquisitions. For the purposes of this appeal, I will assume that the respondents made those choices for valid business reasons, other than for tax reasons, although it is not clear from the record what those business reasons were.

[11] At some point after the respondents had identified the acquisition of the Northills Shopping Centre as a feasible business opportunity, it occurred to them that the acquisition could be structured in a way that would permit the respondents to obtain the benefit of the $6 million loss that had

accrued on the mortgage receivable while it was held by the Bank. For the purposes of this appeal, I will assume that the respondents would have agreed to acquire the Northills Shopping Centre for $10 million even without the opportunity to acquire the $6 million accrued loss on the mortgage receivable. That assumption seems reasonable because it appears from the record that respondents' business plan for the Northills Shopping Centre, based on a $10 million acquisition cost, was developed before any thought was given to income tax issues. In addition, the parties had agreed to the $10 million price some days before engaging in discussions as to how the acquisition would be structured to accomplish the transfer of the $6 million loss.

[12] The transactions that are the subject of these appeals were devised by the respondents and proposed to the Bank, which accepted them. The Bank and the respondents agreed in advance to the sequence and timing of the transactions. They were all aware that the transactions were intended to accomplish the acquisition of the Northills Shopping Centre by the respondents through a structure that met the respondents' business objectives, and also to permit the transfer to the respondents of the accrued $6 million loss on the mortgage receivable.

[13] I summarize as follows the transactions in issue in this case and their intended income tax consequences (assuming the GAAR does not apply):

(a) On November 5, 1993, the Bank and its newly incorporated subsidiary, Northills Shopping Centre Ltd., formed a limited partnership (the "Partnership") named Northills Shopping Centre Limited Partnership. The new subsidiary was the general partner. The Bank was a limited partner. The Partnership's first fiscal year would end on December 31, 1993. For the

purposes of issues raised in this appeal, it is not significant that the Bank was a limited partner rather than a general partner. For income tax purposes, a limited partner and a general partner are treated alike, with certain exceptions that do not apply in this case.

(b) On November 23, 1993, the Bank assigned to the Partnership the mortgage receivable and its interest in the foreclosure proceedings, taking as consideration 10,000 limited partnership units of the Partnership at $1,000 each, for a total of $10 million. The Bank agreed to remain a partner of the Partnership for at least 30 days.

(c) For income tax purposes, the Bank's cost of the mortgage receivable was $16 million. But for subsection 18(13) of the *Income Tax Act*, the Bank would have been entitled to claim a deduction for the $6 million loss from the disposition of the mortgage receivable for $10 million. However, because the Bank and the Partnership did not deal with each other at arm's length at the time of the transfer and for a further 30 days, subsection 18(13) applied to deny the Bank the right to deduct the loss. At the same time, subsection 18(13) permitted the Partnership to add the loss to its cost of the mortgage receivable, as determined for tax purposes, increasing the cost from $10 million to $16 million. In effect, subsection 18(13) resulted in the transfer of the accrued $6 million loss on the mortgage receivable from the Bank to the Partnership.

(d) On December 29, 1993, the following transactions occurred:

(i) The respondents (and two others who are not parties to this appeal) became general partners of the Partnership. They acquired a total of 2,000 general partnership units for which they paid a total of $2 million.

(ii) The Bank made loans to the Partnership totalling approximately $9.7 million. Of that amount, $8.6 million was to be used to finance part of the redemption of the Bank's limited partnership units. The remainder was to be used to finance improvements to the Northills Shopping Centre.

(iii) The Partnership was formally substituted for the Bank in the foreclosure proceedings, and the Partnership acquired the Northills Shopping Centre by completing the foreclosure. For income tax purposes, the foreclosure resulted in the Partnership's $16 million cost of the mortgage receivable becoming the Partnership's cost of the Northills Shopping Centre.

(e) On December 30, 1993, the Partnership redeemed 8,600 of the Bank's limited partnership units for $8.6 million, using the money the Bank had lent to the Partnership. On December 31, 1993, the Partnership redeemed the Bank's remaining 1,400 limited partnership units for $1.4 million, using $1.4 million of the $2 million provided by the respondents to acquire their general partnership units. Upon the redemption of the Bank's limited partnership units, the Bank ceased to be a partner of the Partnership.

(f) On December 31, 1993, the Bank sold its shares of Northills Shopping Centre Ltd. to two of the respondents. At that point the Bank's only interest in the Partnership was as a creditor.

[14] The Partnership earned an operating profit in its first fiscal year ending December 31, 1993. As of the end of that year, the Partnership was permitted by subsection 10(1) of the *Income Tax Act* to write down the cost of the shopping centre to its then fair market value ($10 million). The Partnership took that write-down, resulting in a $6 million loss.

[15] The tax treatment of partnership profits and losses is governed by section 96 of the *Income Tax Act.* Under that provision, the $6 million loss from the write-down of the cost of the shopping centre, less the operating profit, was allocated to the persons (including the respondents) who were partners of the Partnership at the end of December 31, 1993.

[16] The respondents, when filing their income tax returns for the taxation year that included December 31, 1993, claimed deductions for their allocated portions of the net loss of the Partnership. In some cases the deduction resulted in a non-capital loss that was carried over to another year. The Minister applied the GAAR to reassess the respondents and to disallow the deduction of the Partnership loss and any resulting loss carryovers.

Discussion

[17] It is undisputed that the respondents derived a tax benefit from the deduction of the $6 million loss that had been transferred from the Bank to the Partnership. The question before Justice Campbell was whether the series of transactions that gave the respondents access to that loss was an avoidance transaction. For that reason, the focus of Justice Campbell's analysis was the

definition of “avoidance transaction” in subsection 245(3) of the *Income Tax Act*. That definition is quoted above, but I repeat it here for ease of reference.

245. (3) An avoidance transaction means any transaction	245. (3) L’opération d’évitement s’entend :
(*a*) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit; or	*a*) soit de l’opération dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s’il est raisonnable de considérer que l’opération est principalement effectuée pour des objets véritables — l’obtention de l’avantage fiscal n’étant pas considérée comme un objet véritable;
(*b*) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.	*b*) soit de l’opération qui fait partie d’une série d’opérations dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s’il est raisonnable de considérer que l’opération est principalement effectuée pour des objets véritables — l’obtention de l’avantage fiscal n’étant pas considérée comme un objet véritable.

[18] Justice Campbell, after discussing the portion of *Canada Trustco* that deals with subsection 245(3) (see *Canada Trustco*, paragraphs 27 to 35), concluded that there was no avoidance transaction because the respondents’ primary purpose of the entire series of transactions was to permit the respondents to realize a profit from the acquisition and sale of the Northills Shopping Centre, which was a *bona fide* purpose other than to obtain the tax benefit.

[19] Justice Campbell reasoned that subsection 245(3) of the *Income Tax Act* requires a determination of the purpose of each transaction within a series of transactions, but only as part of the analysis that must be undertaken to determine the primary purpose of the series. She concluded

that each transaction within the series of transactions in this case was undertaken primarily for *bona fide* purposes other than to obtain the tax benefit. However, she did not reach that conclusion by determining separately the purpose of each transaction within the series. Rather, she determined the primary purpose of the series of transactions and attributed that purpose to each transaction within the series. She considered that any other approach would undermine the object of subsection 245(3).

[20] The Crown argues that Justice Campbell erred in law when she failed to identify, within the entire series of transactions, the specific transactions that gave rise to the tax benefit, and then to determine whether those transactions were undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit. The respondents defend Justice Campbell's interpretation on the basis that it is mandated by the jurisprudence.

[21] I must respectfully disagree with Justice Campbell's interpretation of subsection 245(3). In my view, her interpretation is incorrect because it is not consistent with the language or the purpose of subsection 245(3), particularly paragraph 245(3)(*b*). As I read paragraph 245(3)(*b*), it requires a determination of the primary purpose of any transaction (or transactions) within a series of transactions that would result in a tax benefit if the GAAR does not apply. It follows that a subset of transactions within a series of transactions is an avoidance transaction unless the subset of transactions may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit. In my view, the conclusion that a series of transactions was undertaken primarily for *bona fide* non-tax purposes does not preclude a finding that the primary purpose of one or more steps within the series was to obtain a tax benefit. It seems

to me that this is what Chief Justice McLachlin and Justice Major had in mind when they wrote the following in *Canada Trustco* (at paragraph 34):

> If at least one transaction in a series of transactions is an "avoidance transaction", then the tax benefit that results from the series may be denied under the GAAR. This is apparent from the wording of s. 245(3). Conversely, if each transaction in a series was carried out primarily for *bona fide* non-tax purposes, the GAAR cannot be applied to deny a tax benefit.

[22] I agree with the Crown that Justice Campbell should have determined the primary purpose of the transactions by which the Bank became a partner of the Partnership at the outset, transferred the mortgage receivable to the Partnership before any of the respondents became partners, and remained a partner for more than 30 days after the transfer. Nothing in the record suggests that the non-tax business objectives of the respondents required those steps to be taken. If Justice Campbell had considered this point, she would have been compelled to conclude that the primary purpose of those transactions was to obtain the tax benefit.

[23] The respondents cite a number of cases in support of Justice Campbell's interpretation of subsection 245(3). In my view, none of them support the approach Justice Campbell took in this case. I will comment on two of the cases.

[24] The first case is *Canada v. Canadian Pacific Limited (F.C.A.)*, [2002] 3 F.C.R. 170. The issue in that case was whether the GAAR could be applied to disallow the tax benefit derived from borrowing foreign currency rather than Canadian currency. The Crown had argued in that case that the designation of the foreign currency was itself a "transaction", the purpose of which could be assessed under paragraph 245(3) separately from the purpose of the loan itself. This Court rejected

that approach. The respondents quote the underlined portion of the reasons of Justice Sexton, writing for the Court, at paragraph 26:

> The words of the Act require consideration of a transaction in its entirety and it is not open to the Crown artificially to split off various aspects of it in order to create an avoidance transaction. In the present case, the Australian dollar borrowing was one complete transaction and cannot be separated into two transactions by labelling the designation in Australian dollars as a separate transaction.

I see nothing in the *Canadian Pacific* case that precludes the possibility that, within a particular series of transactions, there may be one or more transactions undertaken primarily to obtain a tax benefit, even if the series as a whole is undertaken for a *bona fide* purpose other than to obtain the tax benefit. On the contrary, that possibility is recognized in paragraphs 16 and 17 of that case.

[25] The second case is *Lipson v. Canada (F.C.A.)*, [2007] 4 F.C.R. 641, cited by the respondents as authority for the proposition that the primary purpose of a series of transactions is relevant in determining whether an avoidance transaction is abusive. The respondents argue that by the same reasoning, the primary purpose of a series of transactions is relevant in determining whether there is an avoidance transaction. I agree that it is always relevant to determine the primary purpose of a series of transactions. If the primary purpose of the entire series is to obtain a tax benefit, then the entire series is an avoidance transaction. However, the converse is not necessarily true. The existence of a *bona fide* non-tax purpose for a series of transactions does not exclude the possibility that the primary purpose of one or more transactions within the series is to obtain a tax benefit.

[26] The respondents argue that it was reasonable for Justice Campbell to conclude that the entire series of transaction was undertaken primarily for *bona fide* purposes other than to obtain the tax benefit represented by the transfer of the $6 million accrued loss on the mortgage receivable from the Bank to the respondents. I agree. Indeed, the Crown does not challenge that conclusion. However, Justice Campbell's erroneous interpretation of subsection 245(3) led her to stop the analysis at that point, when she should have gone on to consider the Crown's allegation that within the series of transactions there were one or more transactions that were undertaken primarily to obtain the tax benefit.

[27] To summarize, I conclude that the transactions by which the Bank became a partner of the Partnership, transferred the mortgage receivable to the Partnership, and maintained its status as a partner of the Partnership for at least 30 days after the transfer, comprised an avoidance transaction. The primary purpose of those transactions was to transfer the $6 million accrued loss on the mortgage receivable from the Bank to the Partnership so that the loss could be deducted by the respondents in computing their income.

[28] It remains only to consider whether the tax avoidance was abusive within the meaning of subsection 245(4). According to *Canada Trustco*, the Crown has the onus of establishing that an avoidance transaction is abusive (see item 2 of paragraph 66 of *Canada Trustco*). In this case, the Minister made the necessary allegations in its Tax Court pleadings, and the respondents did not allege the contrary. The respondents argue that they did not concede that point, they simply did not

dispute it because they chose to challenge the reassessments on the basis that there was no avoidance transaction. The result is the same in either case. The Crown wins that point by default.

[29] Even if the respondents had contested the Crown's allegation that the avoidance transaction was not abusive, their arguments would have failed in light of the decision of the Supreme Court of Canada in *Mathew*. As mentioned above, that case involved a loss transfer by means of a series of transactions that was similar to the series of transactions in this case. The Supreme Court of Canada held that the transactions that were intended to permit the loss transfer were abusive tax avoidance. The reasons for that conclusion are summarized as follows in paragraph 58 (my emphasis):

> We are of the view that to allow the appellants to claim the losses in the present appeal would defeat the purposes of s. 18(13) and the partnership provisions, and that the Minister properly denied the appellants the losses under the GAAR. Interpreted textually, contextually and purposively, s. 18(13) and s. 96 do not permit arm's length parties to purchase the tax losses preserved by s. 18(13) and claim them as their own. The purpose of s. 18(13) is to transfer a loss to a non-arm's length party in order to prevent a taxpayer who carries on a business of lending money from realizing a superficial loss. The purpose for the broad treatment of loss sharing between partners is to promote an organizational structure that allows partners to carry on a business in common, in a non-arm's length relationship. Section 18(13) preserves and transfers a loss under the assumption that it will be realized by a taxpayer who does not deal at arm's length with the transferor. Parliament could not have intended that the combined effect of the partnership rules and s. 18(13) would preserve and transfer a loss to be realized by a taxpayer who deals at arm's length with the transferor. To use these provisions to preserve and sell an unrealized loss to an arm's length party results in abusive tax avoidance under s. 245(4). Such transactions do not fall within the spirit and purpose of s. 18(13) and s. 96, properly construed.

[30] The same can be said in this case. I conclude that the avoidance transaction in this case was abusive within the meaning of subsection 245(4) of the GAAR. It follows that the Minister was correct to reassess the respondents to disallow the deduction of the transferred losses.

Conclusion

[31] For these reasons, I would allow each of the twelve appeals with costs in this Court and in the Tax Court of Canada. I would set aside the judgments of the Tax Court of Canada in each case, and dismiss each of the appeals from the income tax reassessments.

"K. Sharlow"
J.A.

"I agree
Robert Décary J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	**A-151-07**, A-149-07 A-150-07, A-152-07 A-153-07, A-154-07 A-155-07, A-156-07 A-157-07, A-158-07 A-159-07, A-160-07
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CONCURRED IN BY:	DÉCARY J.A. TRUDEL J.A.
DATED:	MARCH 19, 2008

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