Federal Court of Appeal

Cour d'appel fédérale

Date: 20251121

Docket: A-302-23

Citation: 2025 FCA 207

[ENGLISH TRANSLATION]

CORAM: **LOCKE J.A.**
GOYETTE J.A.
PAMEL J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

QUEBECOR INC.

Respondent

Hearing held at Montreal, Quebec, on March 12, 2025.

Judgment rendered at Ottawa, Ontario, on November 21, 2025.

REASONS FOR JUDGMENT: GOYETTE J.A.

CONCURRED IN BY: LOCKE J.A.
PAMEL J.A.

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REASONS FOR JUDGMENT

GOYETTE J.A.

[1] In the 2000s, Quebecor Inc. and 3662527 Canada Inc. (366), a corporation that Quebecor Inc. controlled indirectly, found themselves in inverse situations. Quebecor owned shares in Abitibi Consolidated Inc., which had a low tax cost and a high value. As a result, if Quebecor had disposed of its shares, it would have had to pay tax on a capital gain of $191.8 million. Conversely, 366 held shares in Videotron Telecom Ltd., which had a high tax cost but a low value. Accordingly, if 366 had disposed of its shares, it would have realized a

capital loss of $200.5 million. A series of transactions was therefore implemented to take advantage of the unrealized loss related to the shares held by 366 to increase the cost of the shares held by Quebecor.

[2] Finding that this series of transactions constituted an abuse of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act), the Minister of National Revenue issued notices of determination denying the increased tax cost of the shares that Quebecor held in Abitibi and made the corresponding adjustments.

[3] Quebecor appealed that decision to the Tax Court of Canada. That Court allowed the appeal, finding that the Crown, as representative of the Minister, had failed to discharge its burden of establishing that the transactions in question were abusive: *Québecor Inc. v. The King*, 2023 TCC 142 (TCC decision). Although the Crown has submitted different arguments before this Court, I find that it has still not discharged its burden. I would therefore dismiss its appeal.

I. Statutory context

[4] The Crown submits that the series of transactions at issue contravenes two schemes under the *Income Tax Act*: the scheme governing capital gains and losses, and the scheme applicable to the winding-up of Canadian business corporations. To make the Crown's position and these reasons easier to understand, it is useful to provide a summary outline of these schemes. The statutory provisions referred to below are from the *Income Tax Act*.

A. *Capital gains and capital losses scheme*

[5] A capital gain or capital loss corresponds, as the case may be, to the accrued economic gain or loss that a taxpayer realizes upon the disposition of a capital asset: paragraphs 39(1)(a) and (b). A capital gain or capital loss is calculated by subtracting the adjusted cost base (the tax cost, hereinafter the “cost”) of the property from its proceeds of disposition (or “proceeds”): subsection 40(1). For example, if a taxpayer buys a property for $100 and subsequently sells it for $50, the taxpayer realizes a capital loss of $50, i.e., the proceeds of disposition of $50 minus the cost of $100. Only half of the capital gain is taxable, and only half of the capital loss is deductible: paragraphs 38(a) and (b). Thus, in our example, the taxpayer has a deductible capital loss of $25, i.e., half of the capital loss of $50. Finally, a deductible capital loss may be deducted from the amount of a taxable capital gain realized during the same taxation year, the three taxation years preceding, or any of the taxation years following: paragraph 111(1)(b).

[6] At the same time, the Act contains provisions commonly referred to as “stop-loss rules” (“*règles de minimisation de pertes*” in French) that affect the recognition of capital losses, either permanently or temporarily: see in particular sections 13, 40, 69, 93 and 112; Jim Samuel, “Stopping the Losses: The Application of Stop-Loss Rules to Transactions Involving Foreign Affiliates” (2010) 58:4 *Can. Tax J.* 897 at 901–902. These rules apply to persons bound by a certain relationship—i.e., affiliated persons—such as two corporations controlled by the same corporation: subparagraph 251.1(1)(c)(i). For example, under subsection 40(3.4), when a corporation disposes of a property to an affiliated person and realizes a loss, the loss will be deemed to be nil. In general, the loss will be suspended and may be claimed only once the property is disposed of outside the affiliated group. The premise underlying stop-loss rules is that

the “true” realization by the group of the loss takes place only once the property is transferred out of the group: *Canada v. Cascades*, 2009 FCA 135 at para. 34. Otherwise, it would be possible to take advantage of a decrease in a property’s value by transferring it to an affiliated person in order to realize a loss deductible from a gain, while still preserving the possibility of benefiting from a subsequent increase in the property’s value.

B. *Scheme applicable to the winding-up of Canadian corporations*

[7] The scheme for winding-up Canadian corporations actually comprises two sub-schemes: that governed by subsection 88(1) and that to which subsection 88(1) does not apply.

(1) Tax-free winding-up sub-scheme governed by subsection 88(1)

[8] Subsection 88(1) applies when three conditions are met: (1) a subsidiary has been wound up; (2) before the winding-up, not less than 90% of the issued shares of each class of the capital stock of the subsidiary were owned by another taxable Canadian corporation—the “parent”; and (3) all of the shares of the subsidiary that were not owned by the parent were owned by persons with whom the parent was dealing at arm’s length.

[9] When these three conditions are met, the winding-up is “tax free” for both the subsidiary and the parent. Metaphorically speaking, the subsidiary disappears and the parent takes its place. This happens because property distributed to the parent is deemed to have been disposed of by the subsidiary for proceeds of disposition equal to the cost amount to the subsidiary of that property, and this cost has become the cost to the parent of the property: paragraphs 88(1)(a)

and (c). Accordingly, there is neither gain nor loss for the subsidiary. Moreover, the shares in the subsidiary that the parent owned are generally deemed to have been disposed of at cost, with the consequence that there is neither gain nor loss for the parent: paragraph 88(1)(b).

(2) Taxable winding-up sub-scheme not governed by subsection 88(1)

[10] When subsection 88(1) does not apply, the winding-up is governed by several provisions of the Act and produces tax consequences. These reasons will refer to this winding-up as a "taxable winding-up".

[11] In such situations, the wound-up corporation is deemed to have disposed of its property for proceeds equal to its fair market value: paragraph 69(5)(a). It therefore realizes a capital gain or capital loss depending on the relationship between the fair market value and the cost of the property it distributes to its shareholders. The shareholders to whom the wound-up corporation distributes its property are deemed to have acquired the property at its fair market value: paragraph 69(5)(b).

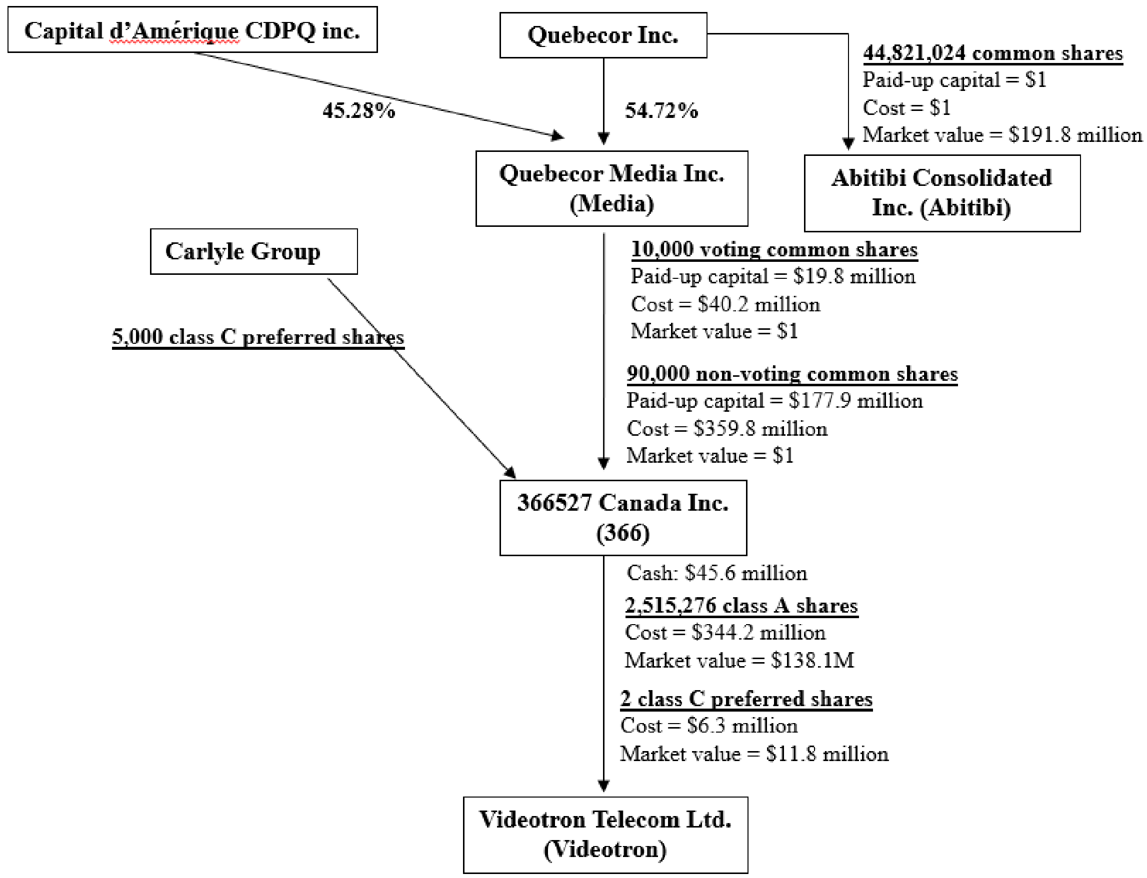
[12] An important fact: If the wound-up corporation is affiliated to the shareholder or shareholders to whom it distributes its property and this distribution gives rise to a capital loss, the stop-loss rule in subsection 40(3.4) discussed above does not apply: paragraph 69(5)(d). The wound-up corporation can therefore deduct the loss from the amount of a capital gain realized during its last taxation year or during the three taxation years preceding, even if the property remains in the affiliated group: subparagraph 3(b)(ii) and paragraph 111(1)(b).

[13] As for shareholders who owned shares in a corporation that undergoes a taxable winding-up, they are deemed to have received a dividend equal to the amount by which the value of the funds or property distributed to them exceeds the amount of the paid-up capital of their shares, the paid-up capital generally corresponding to the amount paid when the shares were issued: subsections 84(2) and 89(1).

II. Factual background

[14] The decision of the Tax Court of Canada contains a full account of the facts. The following paragraphs will focus on the essential facts, while simplifying them and rounding the numbers. Unless otherwise indicated, the facts are drawn from the agreed statement of facts.

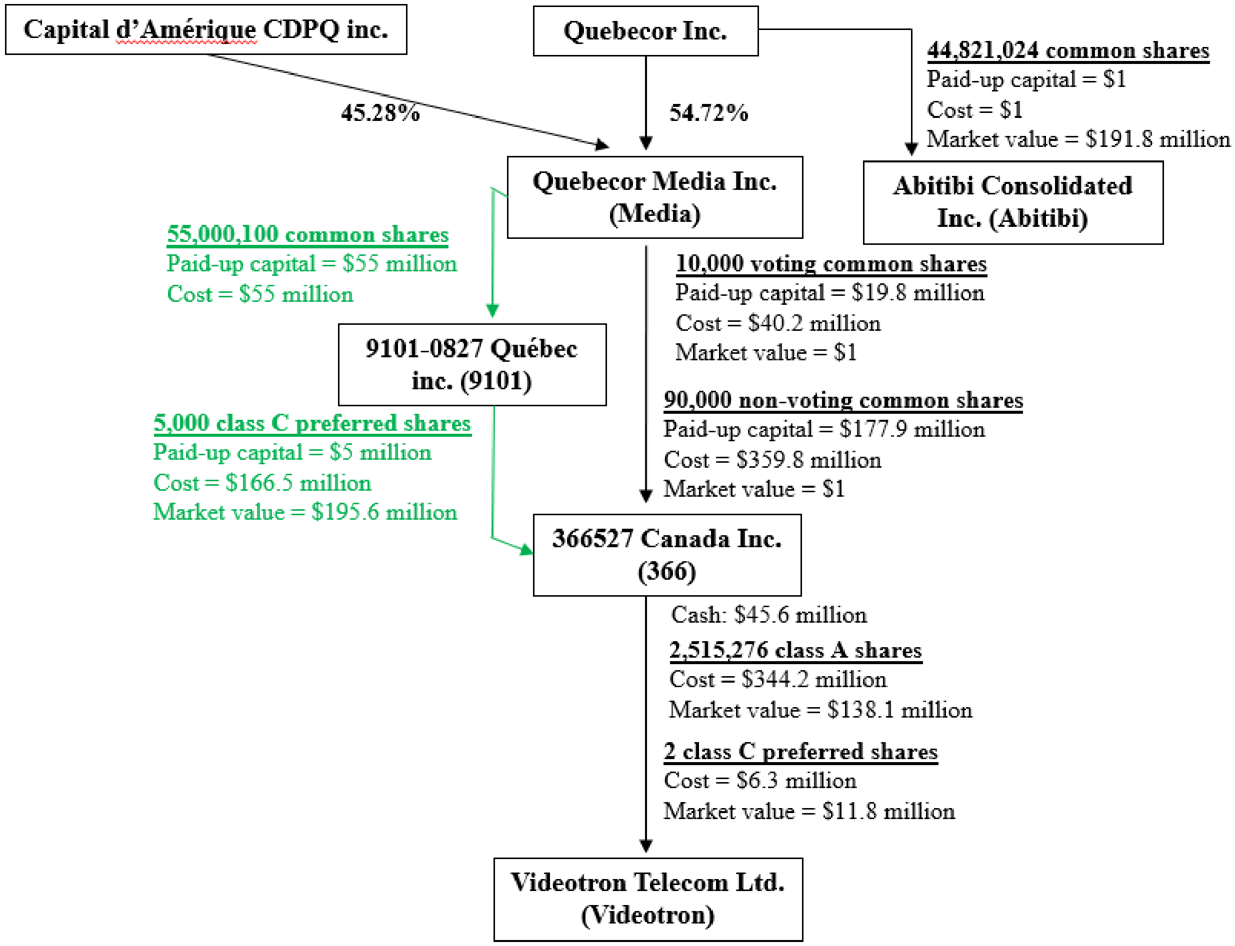
[15] Before the series of transactions at issue, the situation was the following:



[16] As the corporate diagram shows, and as noted at the beginning of these reasons, if Quebecor had disposed of its shares in Abitibi, it would have had to recognize a capital gain of $191.8 million (proceeds of $191.8 million minus a cost of $1). Conversely, if 366 had disposed of its shares in Videotron, it would have realized a capital loss of $200.6 million (class A shares: proceeds of $138.1 million minus cost of $344.2 million = loss of $206 million, and class C shares: proceeds of $11.8 million minus cost of $6.3 million = gain of $5.5 million, for a net loss of $200.6 million). A series of transactions was therefore implemented to take advantage of the loss related to the Videotron shares, with a view to increasing the cost of the Abitibi shares held by Quebecor: letter from KPMG to Quebecor dated August 31, 2005, Appeal Book at 186, 208. For this series of transactions to take place, Quebecor had to obtain the agreement of the other

indirect shareholder of 366, Capital d’Amérique CDPQ inc., which it obtained in exchange for compensation.

[17] Although several of the transactions from this series took place on December 14, 2005, some had taken place in previous years. Among others, in 2003, a newly created corporation, 9101-0827 Québec inc. (9101), issued shares to Quebecor Media Inc. (Media). Also in 2003, when the opportunity arose to acquire the 5,000 class C preferred shares in 366 that were held by a third party at the time (Carlyle Group), it was 9101 that made the acquisition instead of Media. After this acquisition, Media did not own at least 90% of the issued shares of each class of the capital stock in 366. As a result, the tax-free winding-up sub-scheme in subsection 88(1) of the Act could not govern the winding-up of 366. The following diagram illustrates how the shares were held after the acquisition by 9101:

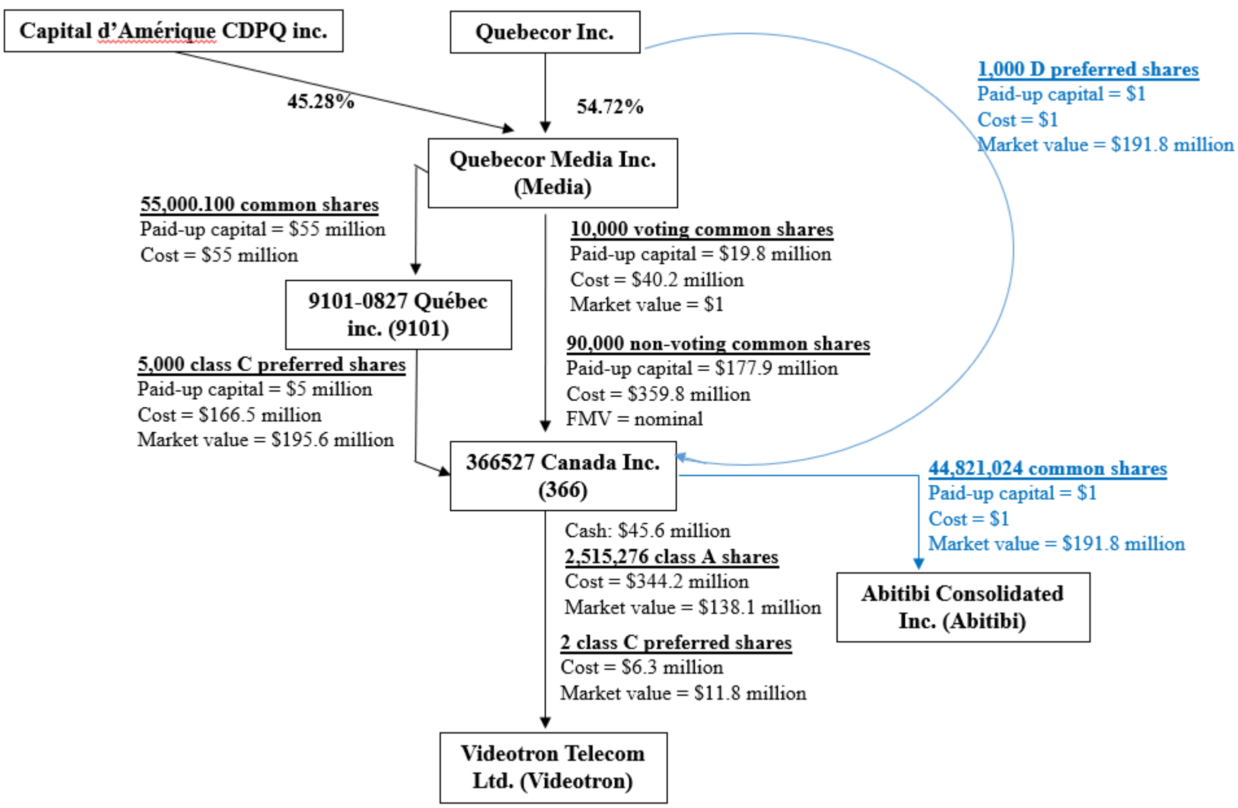


[18] As for the transactions of December 14, 2005, they can be divided into two groups. The first group includes the transactions that increased the price of Quebecor's shares in Abitibi. The second group includes the transactions that materialized 366's unrealized loss in respect of its Videotron shares.

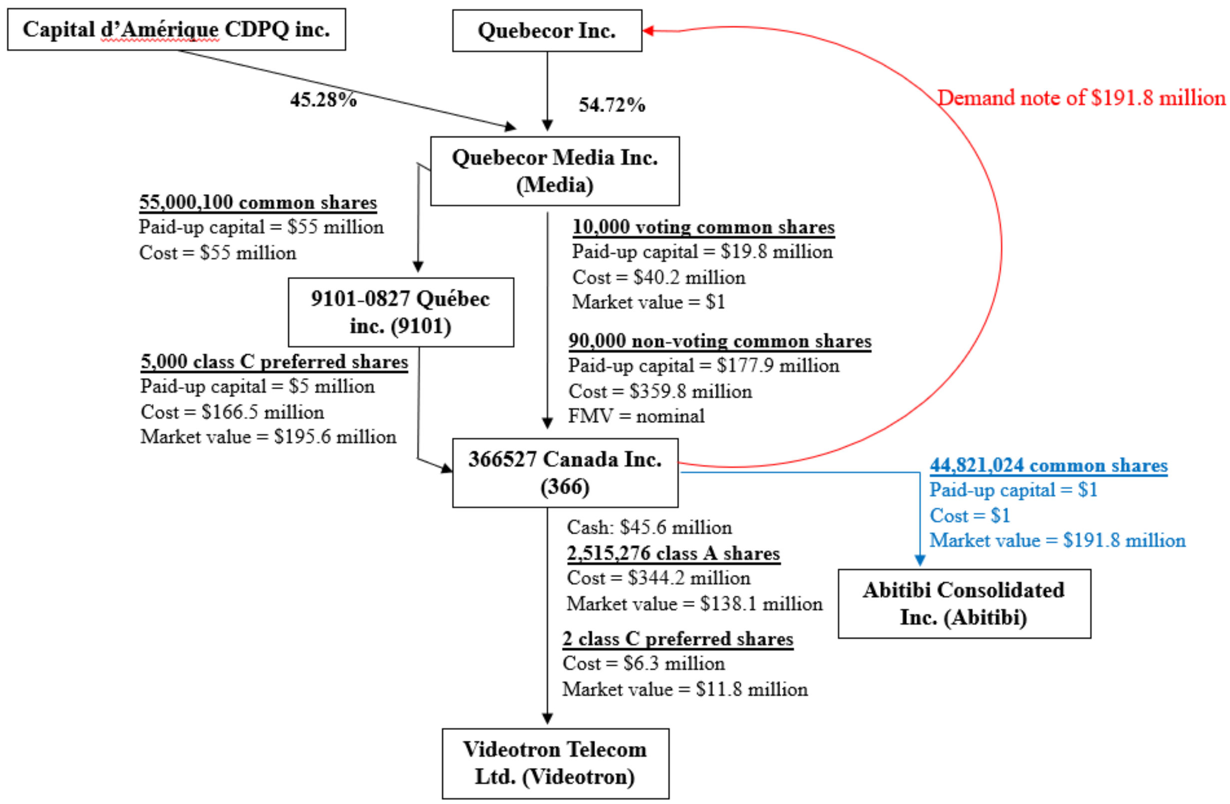
A. *Increase in price of Quebecor's shares in Abitibi*

[19] First, Quebecor transferred its Abitibi shares to 366. As the Act permits, Quebecor elected proceeds of disposition of $1: paragraphs 85(1)(b) and (c). It therefore realized neither a

gain nor a loss (proceeds of $1 minus cost of $1), and this amount of $1 became the cost to 366 of the shares in Quebecor: paragraph 85(1)(a). In consideration for the transfer, 366 issued to Quebecor 1,000 class D preferred shares with a cost and paid-up capital of $1 and a fair market value of $191.8 million. This first transaction can be illustrated as follows:

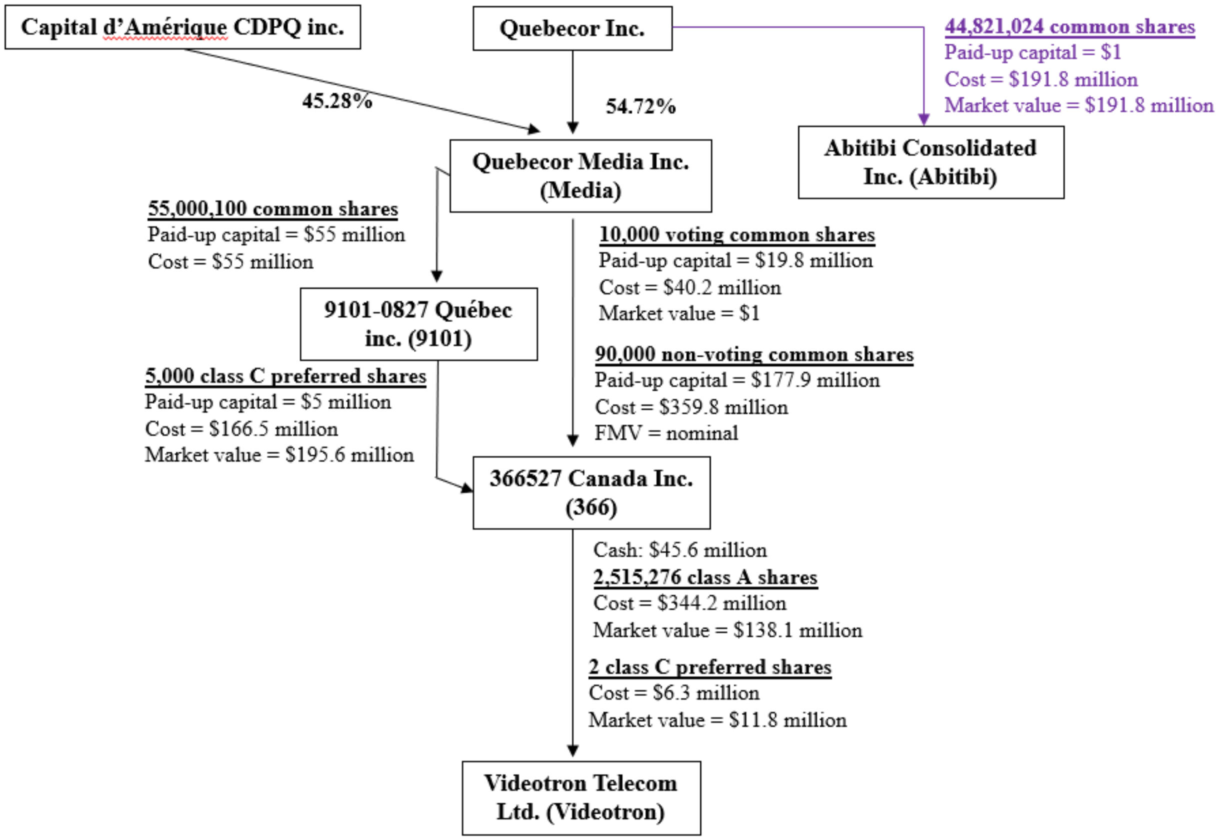


[20] 366 immediately bought back the class D shares it had just issued to Quebecor in exchange for a demand note in the amount of $191.8 million. Because this amount was greater than the paid-up capital of these shares ($1), instead of taxing a capital gain, the Act deemed that Quebecor had received a taxable dividend of $191.8 million: subsection 84(3) and section 54, definition of "proceeds of disposition". But because this was an intercorporate dividend, Quebecor was able to deduct the dividend from its income: subsection 112(1). The result of the second transaction can be illustrated as follows:



[21] Quebecor subsequently exchanged its demand note against the 44,821,024 common shares in Abitibi owned by 366. Because Quebecor exchanged a note valued at $191.8 million to obtain shares in Abitibi, the cost to it for these shares was established at $191.8 million. Moreover, in transferring the Abitibi shares to Quebecor, 366 disposed of these shares for proceeds of disposition equal to their fair market value, namely, $191.8 million: paragraph 69(1)(b). Since its cost for these shares was $1, the capital gain realized by 366 was $191.8 million.

[22] As the corporate diagram below shows, the three transactions described above increased the cost of the Abitibi shares held by Quebecor from $1 to $191.8 million:



B. *Materialization of the unrealized loss in respect of the Videotron shares*

[23] The three transactions also generated a capital gain of $191.8 million for 366. It will be recalled, however, that a capital loss can be deducted from a capital gain. It will also be recalled that 366 had an unrealized loss of $200.6 million in respect of the Videotron shares it held. This loss therefore had to be materialized, and this was accomplished through the winding-up of 366.

[24] Given that Media did not own 90% of the shares of each class in 366, the taxable winding-up rules applied. Under these rules, 366 disposed of its assets at their fair market value: subsection 69(5). This had no consequence on the cash amount of $46.5 million that 366 distributed—the "cost" of this cash was equal to its value. However, regarding the class A shares

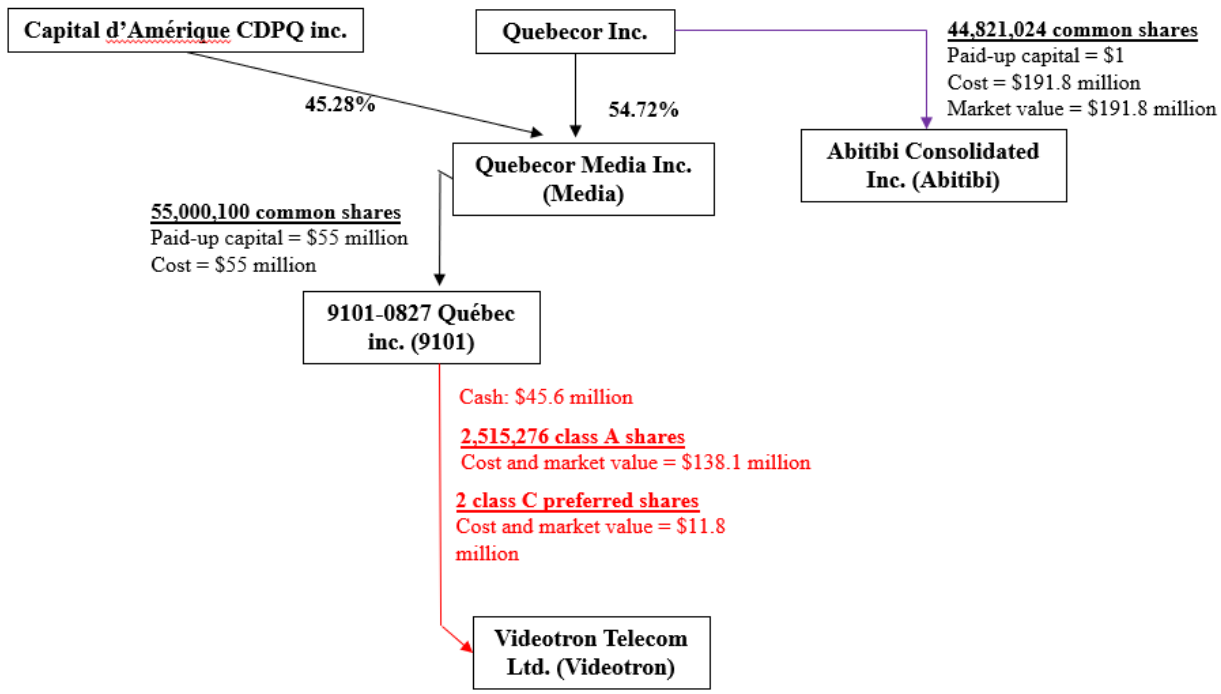
in Videotron, 366 declared a capital loss of $206 million (proceeds of $138.1 million minus cost of $344.2 million). It deducted this loss from the gain of $5.5 million realized on its C class shares (proceeds of $11.8 million minus cost of $6.3 million) and—even more significantly—from the gain of $191.8 million realized when it disposed of its Abitibi shares to Quebecor to pay for the demand note.

[25] Consequently, 366 took its final bow without having to pay any income tax.

[26] Because it is not relevant to determining the issue before the Court, there is no need to detail the tax consequences of the winding-up of 366 on its shareholders. It is sufficient to note that:

- as holder of preferred shares the value of which ($195.6 million) was equal to the value of the property held by 366 ($45.6 million in cash plus $150 million in Videotron shares), 9101 received all of 366’s assets, and this distribution gave rise to no income tax; and
- Media received nothing and realized a capital loss of $400 million corresponding to the cost of its shares in 366 ($40.2 million for the voting shares and $359.8 million for the non-voting shares) minus their proceeds of disposition ($1 in both cases).

[27] After the winding-up of 366, the situation was as follows:



[28] In 2007 and 2010, Quebecor disposed of its Abitibi shares and of those it had obtained after the amalgamation of Abitibi with another corporation. Given the high cost of its shares and the fact that these shares had a nominal value at the time, Quebecor realized losses.

C. *Notice of determination*

[29] Relying on the general anti-avoidance rule, the Minister of National Revenue issued a notice of determination in which he reduced the cost of the Abitibi shares held by Quebecor from $191.8 million to $1, denied the losses, and performed the corresponding adjustments.

III. Decision of the Tax Court of Canada

[30] The Tax Court of Canada had to determine whether the general anti-avoidance rule applied to the transactions at issue.

[31] The general anti-avoidance rule is found in section 245 of the Act. It applies when the following three questions are answered affirmatively: (1) Is there a tax benefit? (2) Is one or more of the transactions giving rise to the tax benefit an avoidance transaction? (3) Is the tax avoidance abusive? *Magren Holdings Ltd. v. Canada*, 2024 FCA 202 at para. 175; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 66; *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63 at para. 33; *Deans Knight Income Corp. v. Canada*, 2023 SCC 16 at para. 51. There is abuse where the outcome of the series of transactions frustrates the object, spirit and purpose of a provision of the Act or of the Act as a whole: *Trustco* at para. 44; *Copthorne* at paras. 69–71; *Deans Knight* at para. 58.

[32] Despite Quebecor’s admission (TCC decision at paras. 53–54), the Tax Court of Canada nevertheless considered whether avoidance transactions giving rise to a tax benefit had taken place. It found that they had, since the objective of the transactions at issue was to increase the cost of the Abitibi shares held by Quebecor, and this increase constituted a tax benefit: TCC decision at paras. 225–231.

[33] Regarding the issue of abuse, the Crown argued that Quebecor had abused the two schemes outlined above: the capital gains and capital losses scheme, and the scheme governing

the winding-up of corporations, which the Crown called the scheme that "relates to the computation of the income of corporations resident in Canada and their shareholders": TCC decision at para. 127.

[34] The Crown alleged that the purpose of the capital gains and losses system is to tax economic gains and grant relief from economic loss, taking into account the cost of the property to the taxpayer, i.e., the amount paid to acquire the property, which is composed of amounts that have been taxed: TCC decision at paras. 131–143. The Crown further argued that the transactions at issue frustrated this scheme, because they increased the cost of the Abitibi shares held by Quebecor by an amount not subject to tax: TCC decision at paras. 169–170, 283.

[35] The Tax Court of Canada rejected this argument. In its view, the increase in the cost of Abitibi shares took place when 366 gave Quebecor the demand note, i.e., the transaction described above, at paragraph 20. For the Tax Court of Canada, the fact that this exchange resulted in Quebecor receiving a taxable capital dividend that was deductible because it was an intercorporate dividend did not mean that the dividend was not subject to tax. Absent evidence to the contrary, it was still possible that the dividend would eventually be transferred to "final recipients" who would pay the income tax: TCC decision at paras. 286–289.

[36] Concerning the abuse of the corporation winding-up scheme, the Crown contended that if 9101 had not been incorporated, the tax-free winding-up scheme under subsection 88(1) would have applied to the winding-up of 366, and 366 would have been deemed to have disposed of its Videotron shares for proceeds of disposition equal to their cost. Thus, 366 would not have had a

capital loss. By avoiding the application of subsection 88(1), 366 was entitled to a loss of $206 million. However, this loss was already reflected in the $400 million loss realized by Media on the winding-up of 366. Ultimately, the $206 million loss also made it possible to increase the cost of Abitibi shares held by Quebecor—all without taxation: TCC decision at paras. 176–181.

[37] These arguments did not convince the Tax Court of Canada. First, it determined that the Crown had not established that Parliament had intended to bar the incorporation of a corporation to prevent a winding-up from being governed by subsection 88(1) instead of by the other provisions of the Act: TCC decision at paras. 294–300. Regarding the argument that the $206 million loss realized by 366 was reflected in the $400 million loss realized by Media, the Tax Court of Canada seems to have rejected it on the basis that Media's loss was real, since it resulted from a slowdown in Media's business and the economy in general and was therefore reflected in the decreased value of the shares held by 366: TCC decision at para. 301.

IV. Issue and standard of review

[38] Given that Quebecor admits that it received a tax benefit and that the transactions at issue are avoidance transactions, the only issue before this Court is whether the series of transactions is abusive.

[39] The standard of review in matters involving the general anti-avoidance rule depends on the stage of the abuse analysis that a party contests. There are two stages to the abuse analysis. The first involves ascertaining the object, spirit, and purpose of the provisions at issue. This is a

question of law, requiring appellate courts to apply the standard of correctness: *Deans Knight* at para. 78; *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 at para. 50; *Trustco* at para. 44; *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 26–37. The second stage involves determining whether the transactions at issue are abusive. This analysis is "necessarily fact-intensive" and is therefore subject to review only where there has been a palpable and overriding error, absent an extricable error of law: *Deans Knight* at para. 121; *Trustco* at para. 44; *Canada v. Oxford Properties Group Inc.*, 2018 FCA 30 at para. 39; *Housen* at para. 10.

[40] Before this Court, the Crown takes a different position from the one it defended before the Tax Court of Canada. There is consequently no need to rule on certain conclusions of the Tax Court regarding the issue of abuse, and these reasons should not be interpreted as approving all of that Court's conclusions. That said, like the Tax Court of Canada, I am of the opinion that the avoidance transactions at issue do not abuse the provisions invoked by the Crown. If there is abuse, it is not what the Crown alleges.

V. Analysis

[41] In this case, the Crown's main argument is based on the number of losses the Act recognizes on the winding-up of corporations.

A. *There is no abuse of the scheme applicable to windings-up*

[42] According to the Crown, whether a winding-up is taxable or tax-free, the object, spirit, and purpose of the legislative provisions applicable to windings-up involve recognizing only one

loss [TRANSLATION] "for the same economic interest, either on the shares of the subsidiary held by the parent or on the subsidiary's assets": Crown's Memorandum of Fact and Law at paras. 58–84.

[43] In support of its statement, the Crown provides two examples: that of a corporation that purchases shares in a subsidiary for $100, and that of two unrelated corporations that purchases shares in a subsidiary for $15 and $85, respectively. In both examples, the subsidiary uses the amount of $100 to purchase a property, which has lost all of its value on the winding-up of the subsidiary.

[44] In the first example, which involves a single parent corporation and therefore a tax-free winding-up, the subsidiary is deemed to have disposed of the property for an amount equal to its cost ($100) and the parent is deemed to have disposed of its shares in the subsidiary also for an amount equal to its cost ($100): subsection 88(1). It follows that neither the subsidiary nor the parent realizes a loss. However, the parent may claim a loss if it eventually disposes of the property and this property has a low value at the time. The Crown describes this situation as giving rise to [TRANSLATION] "a single preserved loss".

[45] In the second example, that involving two parent corporations, neither of which owns 90% of the shares—i.e., the taxable winding-up—the property is disposed of at fair market value. Therefore, the subsidiary realizes a loss of $100, and the parents realize respective losses of $15 and $85, for a total of $100. However, according to the Crown, there is [TRANSLATION] "a single realized loss": that of the parents. As for the loss realized by the subsidiary in respect of its

property, the Crown claims that it does not exist because the parents will not be able to use it and because the loss will disappear unless the subsidiary can use it during its last taxation year: Crown's Memorandum of Fact and Law at para. 81.

[46] Based on its two examples, the Crown submits that the transactions at issue are abusive because their [TRANSLATION] "overall result … breaches the principle of matching under the winding-up scheme by allowing … two levels of losses for the same economic interest": (1) the loss of $206 million realized by 366, which increased the costs of Abitibi shares for Quebecor, and (2) the loss of $400 million realized by Media, which included the underlying loss of $206 million: Crown's Memorandum of Fact and Law at paras. 85–87.

[47] In my view, this argument is without merit.

[48] First, the premise of "a single loss" or "matching" does not seem to be supported in the Act. In the example it provides of the subsidiary with two parents, the Crown itself recognizes that, in addition to the parent corporations' losses, the subsidiary would be entitled to the "realized loss" in respect of its property on the winding-up if it is able to use it during its last taxation year: Crown's Memorandum of Fact and Law at paras. 79 and 81. In fact, this is precisely the situation we are concerned with here: during its last taxation year, 366 realized a gain of $191.8 million from the disposition of the demand note, and it was able to deduct or "use" its capital loss to offset this gain.

[49] Second, in *Canada v. Produits Forestiers Donohue Inc*., 2002 FCA 422, this Court rejected the argument that the Act read as a whole contemplates a form of matching between the value of a corporation's property and the value of its shares: *Produits Forestiers Donohue* at para. 13. In so doing, this Court stated the following:

> Under corporate law, a business corporation's property belongs to the corporation and not the shareholders. The Act recognizes this legal reality, as it recognizes the effects of private law. The entire system of taxation of corporations and their shareholders is conceived in terms of this legal reality. <u>This is what explains, as the trial judge notes, that a gain or loss may be realized at the same time by a shareholder in respect of his shares and by the corporation in respect of its own property (reasons, paragraph 76)</u>. There is no principle that would allow the effect of these transactions to be consolidated by matching them. The principle underlying the Act, if there is one, is contrary to the one invoked by the Minister.
>
> (*Produits Forestiers Donohue* at para. 18; emphasis added)

[50] This Court has noted that it is open to Parliament to override corporate law and take into account a subsidiary's assets for the purpose of altering the tax consequences on the shareholder of a sale of its shares in the subsidiary. Indeed, this is what Parliament did in paragraph 40(2)(h), which reduces the shareholder's loss to take into account certain dispositions of property by the subsidiary: *Produits Forestiers Donohue* at para. 19. However, without such a legislative intervention, the matching the Crown refers to does not seem to exist.

[51] The Crown asserts that *Produits Forestiers Donohue* is not useful in this case because it was rendered before the Supreme Court of Canada had established the analytical framework that must guide the application of the general anti-avoidance rule: Crown's Memorandum of Fact and Law at paragraph 97. However, the Crown does not explain how the analysis in *Produits Forestiers Donohue* diverges from the framework established by the Supreme Court.

[52] The Crown also alleges that *Produits Forestiers Donohue* is not useful because the series of transactions in that case did not include transactions seeking to avoid the tax-free winding-up rules in subsection 88(1), as was the case here: Crown's Memorandum of Fact and Law at para. 97. For this argument to be persuasive, the Crown would have had to submit that the winding-up scheme, like paragraph 40(2)(h) discussed above, creates a form of matching by eliminating the subsidiary's loss in respect of its property when that loss is reflected in the value of the subsidiary's shares. However, that is not what the Crown put forward.

B. *There is no abuse of the capital gains and capital losses scheme*

[53] The Crown submits that, in addition to abusing the winding-up scheme, the series of transactions at issue produced a result that is inconsistent with the capital gains and capital losses taxation scheme, in that it allowed Quebecor to benefit from an artificial increase in the cost of its shares in Abitibi. According to the Crown, this artificial increase and the resulting avoidance of a capital gain is attributable to 366's loss, which [TRANSLATION] "should have disappeared on the winding-up": Crown's Memorandum of Fact and Law at paras. 88–95.

[54] As stated above, the Crown itself recognized that 366 could deduct its loss during its last taxation year. Therefore, there was no artificial increase resulting from a loss that should have disappeared. What is more, no one is alleging that 366's loss was artificial: the Videotron shares had lost value.

C. *No other abuse can be found in the circumstances*

[55] In its memorandum, the Crown asks that the Court take into consideration the overall result of the series of transactions. Not only is this a legitimate request, it is a task that must be performed to determine whether the transactions constitute an abuse of the Act: *Lipson v. Canada*, 2009 SCC 1 at para. 34; *Copthorne* at para. 71; *Canada v. Landrus*, 2009 FCA 113 at paras. 66–67; *Birchcliff Energy Ltd. v. Canada*, 2019 FCA 151 at paras. 27–28; *Oxford Properties* at paras. 106–110, 118–119; *3295940 Canada Inc. v. Canada*, 2024 FCA 42 at para. 46.

[56] In this case, when the Court performs this task, it cannot accept the Crown's arguments. It can, however, make two findings.

(1) There was a transfer or consolidation of losses

[57] The first finding is that the result of the transactions at issue was to transfer losses between related persons. In this respect, it is sufficient to note that, in addition to being affiliated, Quebecor, 9101, Media, 366, and Videotron were related: paragraph 251(2)(b). Loss transfer transactions between related persons are also called "loss consolidation transactions".

[58] In the explanatory notes for section 245 when it was proposed for enactment in the Act, the Minister of Finance wrote that a transfer of losses between related persons, even when performed primarily for tax reasons, generally does not result in misuse or abuse of the Act: Canada, Department of Finance, *Explanatory Notes to Draft Legislation and Regulations*

Relating to Income Tax Reform (Ottawa: Department of Finance, April 1988) at 350. Based on these notes, the Minister of National Revenue has frequently stated that loss consolidation transactions are not subject to the general anti-avoidance rule: see in particular ITTN—Income Tax Technical News, January 11, 2002; ITTN-30—Income Tax Technical News, May 21, 2004, ITTN-34—Income Tax Technical News, April 27, 2006; ITTN-44—Income Tax Technical News, April 14, 2011; and Income Tax Folio S3-F6-C1, Interest Deductibility (Date modified: 2024-08-08) at para. 1.71.

[59] *Deans Knight* seems to be to the same effect. In that case, the issue was whether the general anti-avoidance rule applied to a series of transactions that sought to avoid the application of provisions according to which, if control of the corporation has been acquired, losses from before the acquisition cannot be carried over to be deducted from gains from after the acquisition. In its reasons, the majority of the Supreme Court remarked that a particular provision of the Act, subsection 256(7), describes certain circumstances where control of a corporation is deemed not to have been acquired. According to the majority, this provision "ensures that transfers can occur between *related parties* without the unused losses being denied due to a 'technical change in control of the corporation'": *Deans Knight* at para. 97 [emphasis in original]. Thus, the Supreme Court seems to have recognized that, in general, the transfer of losses between related parties does not constitute an abuse of the Act. The Tax Court of Canada expressed a similar opinion in this case: TCC decision at para. 280.

[60] In this context, it is difficult to fault Quebecor for having been a party to a series of transactions by which it was transferred the loss of 366, a corporation it was related to, for the

purpose of increasing the cost of its shares in Abitibi and thus reducing the capital gain on disposition of those shares.

(2) 366 claimed a loss in respect of a property still held by the group

[61] The second finding emerging from the consideration of the overall result of the series of transactions is that the property in respect of which 366 realized a loss—the Videotron shares—were still held by the affiliated group after the series of transactions. More specifically, after the transactions, it was 9101, a person affiliated to 366 (subparagraph 251.1(1)(c)(i)), that held the Videotron shares. And the stop-loss rule in subsection 40(3.4) did not apply to suspend the loss, because paragraph 69(5)(d) provides that the rule does not apply to property that was disposed of on a taxable winding-up.

[62] This finding raises a question: Was it abusive to have 9101 hold the class C shares in 366 so that 366 could undergo a taxable winding-up and thus realize a loss that otherwise would have been subject to the stop-loss rule in subsection 40(3.4)?

[63] At the hearing, the Court asked the Crown this question on more than one occasion. Every time, the Crown answered in the negative.

[64] Perhaps the Crown considers that it is not contrary to the object, spirit and purpose of the Act to perform a taxable winding-up to avoid the application of the stop-loss rules because the Act permits this result. In this respect, it is interesting to note that, before its winding-up, 366 could have disposed of its Videotron shares in favour of another affiliated person—Videotron,

for example—and the Act would have allowed it to claim a loss at the time of its taxable winding-up: clause 40(3.4)(b)(v)(B).

[65] Whatever the case may be, the Court has no information that would allow it to determine whether there was abuse of the stop-loss rules. As the Supreme Court of Canada stated:

> It is for the Minister who seeks to rely on the GAAR to identify the object, spirit or purpose of the provisions that are claimed to have been frustrated or defeated, when the provisions of the Act are interpreted in a textual, contextual and purposive manner. The Minister is in a better position than the taxpayer to make submissions on legislative intent with a view to interpreting the provisions harmoniously within the broader statutory scheme that is relevant to the transaction at issue.
>
> (*Trustco* at para. 65)

[66] In this case, the Crown has presented nothing with respect to abuse of the stop-loss rules, because it considers that such abuse does not exist. As for the abuse it does allege, it has not discharged its burden. Accordingly, the Court has no choice but to find that the general anti-avoidance rule does not apply to the transactions at issue. For these reasons, I would dismiss the appeal, with costs.

"Nathalie Goyette"
J.A.

"I agree.
George R. Locke J.A."

"I agree.
Peter G. Pamel J.A."

Certified true translation
Vera Roy, Senior Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	LOCKE J.A. PAMEL J.A.
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APPEARANCES:

Sara Jahanbakhsh Marie-Aimée Cantin	FOR THE APPELLANT
Wilfrid Lefebvre Catherine Dubé	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE APPELLANT
Norton Rose Fulbright Canada L.L.P. Montreal, Quebec	FOR THE RESPONDENT