SCC Court File Number: 39113

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

- and -

ALTA ENERGY LUXEMBOURG SARL

RESPONDENT
(Respondent)

FACTUM OF THE RESPONDENT
(ALTA ENERGY LUXEMBOURG SARL, RESPONDENT)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

THORSTEINSSONS LLP
Bay Wellington Tower
181 Bay Street, Suite 3300
Toronto, Ontario
M5J 2T3

Matthew G. Williams /
E. Rebecca Potter
Tel: (416) 864-9104 /
(416) 864-0855
Email: mgwilliams@thor.ca /
erpotter@thor.ca

Counsel for the Respondent

SUPREME ADVOCACY LLP
340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Respondent

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
British Columbia Region
900 – 840 Howe Street
Vancouver, British Columbia
V6Z 2S9

Michael Taylor /
Natalie Goulard

Tel: (604) 775-6014 /
(514) 496-6546
Email: michael.taylor@justice.gc.ca /
natalie.goulard@justice.gc.ca

Counsel for the Appellant

DEPUTY ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Civil Litigation Branch
50 O'Connor Street
Ottawa, Ontario
K1A 0H8

Christopher M. Rupar

Tel: (613) 670-6290
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Agent for the Appellant

TABLE OF CONTENTS

Page

PART I – OVERVIEW AND FACTS 1
A. Overview 1
B. Facts 2
a. The Tax Court of Canada Judgment 6
b. The Federal Court of Appeal Judgment 7
PART II – ISSUE 7
PART III – ARGUMENT 8
A. Introduction 8
B. The GAAR: Step One of the Abuse Analysis 10
a. Textual Analysis: A Clear, Practical, and Predictable Test 10
b. Contextual Analysis: No Undefined "Substantial Economic Connection" Test 12
c. Purposive Analysis: Tax Avoidance and the OECD Commentary 15
d. Conclusions on the Object, Spirit, and Purpose 21
C. The GAAR: Step Two of the Abuse Analysis 22
D. A Word About "Treaty Shopping" 23
E. Conclusion 25
PART IV – COSTS 26
PART V – ORDER SOUGHT 26
PART VI – SUBMISSIONS ON CONFIDENTIALITY 26
PART VII – TABLE OF AUTHORITIES (WITH HYPERLINKS) 27
PART VII – TABLE OF AUTHORITIES (WITHOUT HYPERLINKS) 29

PART I – OVERVIEW AND FACTS

A. Overview

1. Canada has entered into carefully crafted tax treaties with over 90 countries. While each treaty represents a unique bargain between two nations, each with its own interests, all treaties share two basic features:

   a. All treaties establish the criteria for application. In the *Canada-Luxembourg Income Tax Convention, 1999*,[1] Article 1 specifies the criteria for application as being a "resident of a Contracting State" and Article 4 provides a definitive definition of that term.

   b. All treaties then build on that foundation with distributive rules to allocate between the contracting states the jurisdiction to impose tax in particular circumstances.

2. In this case, the Appellant has admitted that the Respondent was a resident of Luxembourg for the purpose of Article 4(1) of the Treaty predicated on it being subject to comprehensive taxation therein. The Appellant has not retracted that admission.

3. The distributive rule at issue in this appeal is the "business property exemption" provided in Article 13(4) of the Treaty, which allocates the jurisdiction to tax the gain at issue to Luxembourg, provided that a Luxembourg Treaty resident disposes of shares which derive their value principally from immovable property located in Canada and a business was carried on in that property.[2] The Appellant has accepted the finding of the Tax Court of Canada that a business was carried on in the property.

---

[1] *Convention Between the Government of Canada and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital*, 10 September 1999 (the "Treaty").

[2] A similar exemption is included in 40 other tax treaties entered into by Canada. See full list produced in Steve Suarez, "How the MLI Will Change Capital Gains Taxation in Canada", (2020) 98 Tax Notes International 657, at 660 **(RBOA, Tab 6)**.

4. Implicit in the business property exemption is a bargain that Canada was prepared to make: to forgo the tax arising on the disposition *if* a business was carried on in Canada.

5. Notwithstanding Her admissions, the Appellant says that the bargain agreed to by Canada need not be honoured. Contrary to the clear instructions of this Court, the Appellant is asking this Court to use the general anti-avoidance rule (the "GAAR") in the *Income Tax Act* (Canada)[3] to change the result not by animating the provisions of the Treaty but by fundamentally altering the criteria under which a person is entitled to the benefit of the Treaty.

6. By asserting that benefits of a tax convention are intended to be available only to persons who have "sufficient substantive economic connections to one of the contracting states to qualify as a resident", the Appellant seeks to use the GAAR not to explain the practical and well-understood test agreed upon by the drafters but to add to that test an ill-defined element that finds no foothold in the Treaty and would operate to frustrate the certainty and predictability sought by the drafters.

7. The ramifications of such a sweeping change extend beyond the business property exemption found in the Treaty in question; it would fundamentally alter the application of the whole of the Treaty and all other treaties based on the OECD Model.[4]

8. The purpose of this Treaty is expressed in the provisions agreed upon by the drafters. If Canada now seeks to revisit its bargain, the GAAR is not the appropriate tool with which to do so.

B. <u>Facts</u>

9. The following are the facts that are necessary to understand the issue on appeal, including facts which are not mentioned in or which require clarification from the Appellant's factum.

---

[3] *Income Tax Act*, RSC 1985, c 1 (5th Supp), as amended, s245 (the "Act").
[4] Organisation for Economic Co-operation and Development, Committee on Fiscal Affairs, *Model Tax Convention on Income and on Capital* (the "OECD Model").

10. In 2011, Alta Resources LLC and Blackstone Group LP formed a Delaware limited liability corporation, to acquire and develop unconventional oil and natural gas properties in North America.[5]

11. When the parties ultimately decided to develop the Duvernay shale property in northwestern Alberta, they incorporated Alta Energy Partners Canada Ltd. ("Alta Canada"), a wholly owned Canadian subsidiary of the Delaware limited liability corporation, to carry on that business.[6]

12. As is typical of private equity funds, Blackstone raised equity by securing capital commitments from endowments, pension funds and insurance companies, funds of funds, high net worth individuals, and a host of other institutional investors.[7] Approximately half of the investors were citizens or residents of the United States and the other half were not.[8]

---

[5] Reasons for Judgment of the Tax Court of Canada, at para 10 [TCC Reasons] **(Appellant's Record, Tab 2)**.

[6] TCC Reasons, at para 13 **(Appellant's Record, Tab 2)**.

[7] TCC Reasons, at para 11 **(Appellant's Record, Tab 2)**.

[8] TCC Reasons, at para 14 **(Appellant's Record, Tab 2)**. Note, in paragraphs 1, 125, and 128(a) of the Appellant's factum, the Appellant makes reference to shareholders from the Cayman Islands. Blackstone utilized Cayman partnerships as the pooling vehicles for investment purposes. The Tax Court's finding was that approximately half of the investors were not residents of the United States and the testimony from which this finding was made noted that the investors in the pooling vehicles were from "all over the world". See Trial Testimony of Chaim Miller, p 316 line 26 to p 318 line 2, and p 319 line 10 to p 320 line 18 **(Appellant's Record, Tab 57)**.

13. The initial decision to use a Delaware limited liability corporation to pool the investments of the various investors was based on an assumption that the resource properties would be located in the United States. The individual responsible for establishing the investment structure testified at trial that he would have established a foreign based holding company had he known that the investment would be in assets outside the United States.[9]

14. On April 19, 2012, the Respondent was incorporated under the laws of Luxembourg to hold participations in Luxembourg and foreign companies.[10] Its sole shareholder was Alta Energy Canada Partnership ("AECP").[11]

15. On the same day, the Delaware limited liability corporation sold all its shares of Alta Canada to the Respondent.[12] The sale of Alta Canada shares to the Respondent was a taxable transaction in Canada, meaning that any gain that might arise in respect of the shares of Alta Canada would accrue while those shares were held by the Respondent, in Luxembourg.[13]

16. Alta Canada ultimately invested almost $300 million in its Canadian business,[14] which amount was completely at risk.[15]

---

[9] TCC Reasons, at para 19 **(Appellant's Record, Tab 2)**.

[10] TCC Reasons, at para 22 **(Appellant's Record, Tab 2)**. Note also that there is no evidence to suggest that the board of managers of the Respondent is a nominee board as indicated by the Appellant in paragraph 128(f) of the Appellant's factum. To the contrary, the Respondent has a properly constituted board of managers that met and made decisions in the ordinary course. See Statement of Agreed Facts, Accepted at the Tax Court of Canada hearing, at paras 58, 68 [Agreed Facts] **(Appellant's Record, Tab 10)**.

[11] TCC Reasons, at para 22 **(Appellant's Record, Tab 2**).

[12] TCC Reasons, paras 23-24 **(Appellant's Record, Tab 2**).

[13] TCC Reasons, at para 25 **(Appellant's Record, Tab 2**).

[14] Agreed Facts, at paras 31, 37, 38, 43, and 44 **(Appellant's Record, Tab 10**); and Trial Testimony of Jennifer McCarthy, p 499 line 10 -19 **(Appellant's Record, Tab 58)**.

[15] Trial Testimony of Joseph Greenberg, p 111 line 21 to p 112 line 13, and p 124 line 2 to p 126 line 17 **(Appellant's Record, Tab 55)**.

17. In August 2013, the Respondent's board of managers agreed to sell Alta Canada to Chevron Canada Ltd. ("Chevron").[16] The sale closed in September 2013 for $679,712,251[17] and the Respondent realized a capital gain in excess of $380 million on the disposition of the shares of Alta Canada.[18]

18. Pursuant to a Direction to Pay, the Respondent directed its proceeds of the sale (less an amount paid to the Minister of National Revenue) to AECP. In exchange, AECP issued promissory notes to the Respondent which were set-off, in part, by an existing interest-free loan and participating loan.[19] After the offsets, the Respondent held notes of $7 million.[20]

19. There is no debate before this Court that the transactions were legally binding and honoured in accordance with their terms; these transactions were not a sham. Neither was the Respondent acting as agent for any other party or parties. Indeed, the assessment was correctly premised on the fact that a capital gain was realized by the Respondent as the lawful recipient of the sale proceeds.[21]

20. The Respondent sought and obtained confirmation from the Luxembourg tax authorities that the restructuring was in compliance with tax legislation and administrative policies in Luxembourg.[22]

21. The Appellant has agreed that the Respondent is a resident of Luxembourg for purposes of Article 4(1) of the Treaty.[23]

---

[16] Agreed Facts, at para 104 **(Appellant's Record, Tab 10)**.
[17] Agreed Facts, at paras 107, 110 **(Appellant's Record, Tab 10)**.
[18] Reasons for Judgment of the Federal Court of Appeal, at para 10 [FCA Reasons] **(Appellant's Record, Tab 4)**. Note that, despite the Appellant's acknowledgement of this fact at paragraph 27 of Her factum, the Appellant later states at paragraphs 125, 126, 128 of Her factum that the Respondent did not realize any gain in Luxembourg. That is incorrect.
[19] Agreed Facts, at paras 110-111, 113-115 **(Appellant's Record, Tab 10)**.
[20] Agreed Facts, at paras 112, 116 **(Appellant's Record, Tab 10)**.
[21] TCC Reasons, at para 88 **(Appellant's Record, Tab 2)**.
[22] TCC Reasons, at para 21 **(Appellant's Record, Tab 2)**.
[23] Agreed Facts, at para 122 **(Appellant's Record, Tab 10)**.

a. The Tax Court of Canada Judgment

22. The Crown raised two arguments before the Tax Court of Canada. First, the Crown argued that Alta Canada did not carry on business in the subject property such that the business property exemption provided in Article 13(4) of the Treaty did not apply. In the alternative, the Crown argued that the GAAR should apply.[24]

23. The Trial Judge first concluded that the specific requirement for the business property exemption as agreed upon by the treaty partners in Article 13(4) of the Treaty was satisfied: a business was undertaken in the property.[25]

24. The parties agreed that there was a "tax benefit" and an "avoidance transaction" for the purpose of the GAAR.[26] In undertaking his abuse analysis under the GAAR, the Trial Judge understood and followed the two-step approach established by this Court.[27] He acknowledged that transactions may be found to be abusive even though they comply with the literal, contextual and purposive meaning of the words of the statute,[28] but rightly eschewed "a vague policy supporting a general approach to the interpretation of the Treaty as a whole".[29]

25. As part of his contextual analysis, the Trial Judge considered the OECD Model and its commentaries[30] and observed that the OECD Model does not include the business property exemption at issue in this case.[31] He concluded that "it is apparent that the parties intended to depart from the model treaty".[32]

26. Following his textual, contextual and purposive analysis, the Trial Judge concluded that the words of the text reflect the rationale underlying the business property exemption in Article 13(4) of the Treaty: to exempt residents of Luxembourg from Canadian taxation where there is an

[24] TCC Reasons, at paras 1-7 **(Appellant's Record, Tab 2)**.
[25] TCC Reasons, at paras 56, 69 **(Appellant's Record, Tab 2)**.
[26] TCC Reasons, at para 7 **(Appellant's Record, Tab 2)**.
[27] TCC Reasons, at paras 70-100 **(Appellant's Record, Tab 2)**.
[28] TCC Reasons, at para 71 **(Appellant's Record, Tab 2)**; citing *Copthorne Holdings Ltd v Canada*, 2011 SCC 63, at para 70 [*Copthorne*].
[29] TCC Reasons, at para 77 **(Appellant's Record, Tab 2)**.
[30] TCC Reasons, at paras 82-84 and 92-93 **(Appellant's Record, Tab 2)**.
[31] TCC Reasons, at para 83 **(Appellant's Record, Tab 2)**.
[32] TCC Reasons, at para 83 **(Appellant's Record, Tab 2)**.

investment in immovable property used in a business; and the significant investments of the Respondent constituted such an investment.[33]

b. The Federal Court of Appeal Judgment

27. At the Federal Court of Appeal, the Crown conceded that the Respondent satisfied the requirements for the business property exemption, leaving the application of the GAAR as the only issue.[34]

28. As did the Tax Court of Canada, the Federal Court of Appeal understood and applied the two-step process in the abuse analysis.[35]

29. After considered each of the Crown's submissions, the Federal Court of Appeal determined that the object, spirit and purpose of the Treaty provisions in issue is reflected in the words as chosen by the treaty partners and that, in this case, the Treaty operated as intended.[36]

PART II – ISSUE

30. The Respondent generally agrees with the questions in issue as stated in the Appellant's factum, but would restate the issue as follows: The question is whether the Federal Court of Appeal erred by concluding that the underlying rationale of the relevant provisions is no broader than the text itself and thus the transactions did not result in a misuse or abuse of those provisions.

---

[33] TCC Reasons, at para 100 **(Appellant's Record, Tab 2)**.
[34] FCA Reasons, at paras 25-26 **(Appellant's Record, Tab 4)**.
[35] FCA Reasons, at paras 27-80 **(Appellant's Record, Tab 4)**.
[36] FCA Reasons, at para 80 **(Appellant's Record, Tab 4)**.

PART III – ARGUMENT

A. Introduction

31. In order for the business property exemption to apply, there are two discrete tests that must be satisfied under the Treaty: (i) the Respondent must be a resident of Luxembourg for the purposes of the Treaty; and (ii) a business must have been carried on in the property of Alta Canada. The Appellant has admitted that the Respondent is a resident of Luxembourg for the purposes of the Treaty,[37] and the Appellant has accepted the Tax Court's finding that a business was being carried on in the property of Alta Canada.[38]

32. Notwithstanding that the constituent elements as agreed by the Treaty partners have been admitted, the Appellant attempts to invoke the GAAR to deny the Respondent the benefit of the claimed exemption.[39]

33. In a GAAR analysis the objective is to determine the underlying rationale of the relevant statutory provisions and thereby discover the intention of Parliament.[40] This is consonant with the object of treaty interpretation where the objective is to ascertain the "true intention" of the treaty partners.[41]

34. To avoid subjective value judgments of what is right or wrong, or what tax law ought to do, this Court has established a two-step methodology for conducting the GAAR abuse analysis.[42] The first step requires the Crown to establish the object, spirit or purpose of the provisions that are relied on for the tax benefit.[43] The second step is to determine whether the transactions defeated or frustrated that object, spirit or purpose.[44]

---

[37] Agreed Facts, at para 122 (**Appellant's Record, Tab 10)**.
[38] FCA Reasons, at para 25 (**Appellant's Record, Tab 4)**.
[39] Appellant's factum, at para 131.
[40] *Copthorne*, at para 113.
[41] *Crown Forest Industries v Canada*, [1995] 2 SCR 802, at para 43 [*Crown Forest*], citing *JN Gladden Estate v The Queen*, [1985] 1 CTC 163 (FCTD).
[42] *Copthorne*, at paras 68-71.
[43] *Canada Trustco Mortgage Co v Canada,* 2005 SCC 54, at paras 55 and 65 [*Canada Trustco*]; *Copthorne*, at para 123.
[44] *Canada Trustco*, at para 55.

35. The first step is undertaken without regard to the circumstances of any particular transaction.[45] It is important that such an objective determination of the object, spirit or purpose of the relevant provisions be made because only then can a benchmark be established against which all transactions, including the subject transactions, can be measured. Absent such a standard, the GAAR becomes a standardless sweep.

36. Tax law should be certain, predictable, and fair.[46] A taxpayer should be able to read the relevant provisions, in context and purposively, and to discern therefrom the knowledge upon which to conduct a transaction. As such, this Court has cautioned that a GAAR analysis must be of the specific provisions of the legislation, it cannot be an "at large" analysis unmoored from those provisions:

> The courts cannot search for an overriding policy of the Act that is not based on a unified, textual, contextual and purposive interpretation of the specific provisions in issue …
>
> [T]o search for an overriding policy of the *Income Tax Act* that is not anchored in a textual, contextual and purposive interpretation of the specific provisions that are relied upon for the tax benefit would run counter to the overall policy of Parliament that tax law be certain, predictable and fair, so that taxpayers can intelligently order their affairs.[47] [emphasis added]

37. The onus rests on the Appellant to demonstrate the object, spirit and purpose of the relevant provisions:

> 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.[48]

38. The Appellant has identified subsections 2(3), 115(1), and 248(1) of the Act and Articles 1, 4, 13(4) and (5) of the Treaty as the specific provisions relied upon by the Respondent for the tax benefit.[49]

---

[45] *Canada Trustco*, at para 44, 55; and *Copthorne*, at paras 69-71 and 122.
[46] *Copthorne*, at para 67.
[47] *Canada Trustco*, at paras 41-42.
[48] *Canada Trustco*, at para 65.
[49] Appellant's factum, at para 63.

39. Subsections 2(3), 115(1), and 248(1) of the Act give effect to treaty exemptions for Canadian tax purposes. In particular, paragraph 115(1)(b) operates to include in income and tax dispositions that are not "treaty-protected property". Whether the subject property, being the shares of Alta Canada, is "treaty protected property" is determined by the Treaty. That being the case, the focus of the inquiry must be on Articles 1, 4, and 13 of the Treaty.

40. To satisfy Her onus of demonstrating that the object, spirit or purpose of the Treaty differs from the provisions of the text, the Respondent relies on two assertions: "that the benefits of bilateral tax conventions are intended to be available only to persons who have sufficient economic connections to one of the contracting states to qualify as resident";[50] and that the Commentary to the OECD Model should govern the interpretation of the Treaty to deny the benefit.[51]

41. For the reasons that follow, a textual, contextual and purposive analysis evidences no intention by the drafters to depart from the carefully defined criteria negotiated and agreed upon by the treaty partners as found in Articles 1, 4, and 13 of the Treaty.

B. <u>The GAAR: Step One of the Abuse Analysis</u>

a. Textual Analysis: A Clear, Practical, and Predictable Test

42. Article 1 of the Treaty describes the persons[52] covered by the Treaty as follows: "This Convention shall apply to persons who are resident of one or both of the Contracting States." Article 1 says no more. Thus, the threshold requirement is that a person be a "resident of a Contracting State".

---

[50] This assertion is made in the Appellant's "contextual" analysis. See Appellant's factum, at paras 82-106, specifically quoting para 100.

[51] This assertion is made in the Appellant's "purposive" analysis. See Appellant's factum, at paras 107-119.

[52] "Person" is defined to include an individual, an estate, a trust, a company, a partnership and any other body of persons. See Article 3(1)(d) of the Treaty.

43. The Treaty does not leave the meaning of the term "resident of a Contracting State" unresolved. Instead, consistent with the OECD Model, the term is specifically defined for the purposes of the Treaty in Article 4. It states:

> For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of that person's domicile, residence, place of management or any other criterion of a similar nature. … [emphasis added]

44. The use of the verb "means" indicates that the definition is intended to be dispositive.[53] Such clarity provides a stable foundation for those negotiating the distributive provisions of the Treaty that follow and affords persons the requisite certainty, predictability, and fairness needed to order their affairs.

45. In *Crown Forest*, this Court specified that the most similar element among the enumerated criteria in Article 4 is that, standing alone, they would each constitute a basis on which states generally impose full tax liability on world-wide income.[54] Thus, for the purposes of the Treaty, the liability to full taxation is the agreed and required nexus between a person and the state to qualify the person as a resident of that Contracting State and, as such, to be entitled to the benefit of the Treaty.

46. The definition unequivocally leaves it to the domestic laws of each Contracting State to determine whether the person is subject to full tax liability therein. Luxembourg decides for Luxembourg. Canada decides for Canada.[55] Each respects the other's decision.

47. In this case it is agreed that, for the purposes of the Treaty, the Respondent is a resident of Luxembourg on the basis that, under Luxembourg law, it is subject to full taxation therein. The test in Article 4 is satisfied.

---

[53] *R v Hauser*, [1979] 1 SCR 984, at 1009.
[54] *Crown Forest*, at paras 40 and 45.
[55] For example, under the laws of Canada, a corporation is deemed, by paragraph 250(4)(a) of the Act, to have been resident in Canada throughout a taxation year if the corporation was incorporated in Canada, subject, as such, to taxation on their worldwide income.

48. Residence established, the business property exemption in Article 13(4) of the Treaty imposes one additional condition: that a business be carried on in the property. There is no dispute that this test has also been satisfied. There are no further conditions.

49. There is no ambiguity in the text. The result is as foreseen.

b. Contextual Analysis: No Undefined "Substantial Economic Connection" Test

50. The Appellant has conceded that the Respondent is a resident of Luxembourg for the purposes of the Treaty. Nonetheless, the Appellant submits that a contextual analysis reveals an unstated intention that "the benefits of bilateral tax conventions are intended to be available only to persons who have sufficient substantive economic connections to one of the contracting states to qualify as a resident".[56] According to the Appellant, a decision by Canada or Luxembourg to subject a person to full tax liability under its respective domestic laws is not enough: the result must be further tested to ensure "sufficient substantive economic connections".

51. The Appellant does not specify what substantive economic connections would be sufficient to satisfy Her test.[57] If being subject to full tax liability constitutes a close economic connection, then the Appellant's test is consonant with Article 4. If the Appellant's test requires more, than it is necessarily different from the requirements of Article 4 and the terms agreed upon by the treaty partners.

52. A proper contextual analysis demonstrates that the introduction of the Appellant's unstated test fundamentally alters the agreement not only concluded by Canada and Luxembourg but by all contracting states that have adopted the language of Articles 1 and 4 of the OECD Model.

53. At the earliest stage in the development of model treaties, it was considered essential that treaty partners be capable of determining, with certainty, the applicability of their treaties. There would be no workable way to negotiate the distributive provisions that followed without a

[56] Appellant's factum, at para 100.

[57] The Appellant alludes to various criteria (e.g., office space, employees, phone lines, email addresses, capital, business activity) but never specifically describes the threshold.

preliminary determination about applicability. The need for certainty was made clear by the "four economists" in their report to the Fiscal Committee of the League of Nations in 1923:

> It is clear … that, in order to avoid double taxation, domicile or habitual residence must everywhere be interpreted alike for the purposes of taxation. One of the very first points preliminary to making international conventions or agreements on double taxation is to define the terms so that there will be no possibility of misinterpretation.[58] [emphasis added]

54. It would be counterintuitive for the drafters to specifically define the term that is most fundamental to the application of a tax treaty (to avoid the possibility of misinterpretation) but, in so doing, to rely on unexpressed conditions for what constitutes a "resident" and unstated criteria as to what constitutes "sufficient substantive economic connections".

55. The 1958 Report of the Fiscal Committee of the OEEC contained a draft Article on "fiscal domicile" that, with minor modification, is the predecessor to Article 4 of both the OECD Model and the Treaty. The certainty demanded in determining the application of a tax treaty was provided in this early draft by directing the inquiry to the domestic law of a particular Contracting State:

> For the purposes of this Convention, the term "resident" of a Contracting State means any person who, under the law of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other similar criterion.[59] [emphasis added]

56. Thus, from the earliest days, it was established that states would accept and would not test the determination made under the law of the other state. As made clear in the accompanying Commentary:

> The Conventions for the avoidance of double taxation do not concern themselves with testing the national rules of law of the Contracting States laying down the cases in which a person is to be treated fiscally as "domiciled" and, consequently, is "fully liable to taxation" in that State. The Conventions do not lay down standards which the national rules of law on "domicile" have to fulfil in order that claims for full tax liability can be

---

[58] Gijsbert W.J. Bruins, Luigi Einaudi, Edwin R.A. Seligman, and Sir Josiah Stamp. Report on Double Taxation Submitted to the Financial Committee Economic and Financial Commission. League of Nations documents no. E.F.S.73.F.19 (Geneva: League of Nations, April 5, 1923), at 4029.

[59] Organisation for European Economic Co-operation, *The Elimination of Double Taxation: Report of the Fiscal Committee of the OEEC* (Paris: OEEC, 1958), at 35 **(RBOA, Tab 2)**.

> accepted between the Contracting States. In this respect the States take their stand entirely on the national legislations.[60]

57. That being the agreement, the source state would accept the determination of full tax liability in the other state. The Commentary remained largely unchanged when Canada and Luxembourg negotiated the Treaty in 1999, continuing to make it clear that there is no standard or condition which the domestic law of each state must satisfy in order to satisfactorily impose full tax liability:

> Conventions for the avoidance of double taxation do not normally concern themselves with the domestic laws of the Contracting States laying down the conditions under which a person is to be treated fiscally as "resident" and, consequently, is fully liable to tax in that State. They do not lay down standards which the provisions of the domestic laws on "residence" have to fulfil in order that claims for full tax liability can be accepted between the Contracting States. In this respect the States take their stand entirely on the domestic laws.[61] [emphasis added]

58. There is no suggestion in the Commentary that one state's determination of full tax liability is to be conditional on the acceptance of the other, or that there is some need for a state to justify the legitimacy of its decision to tax.[62] There is no external "test". To the contrary, as made clear in the Commentary, "States take their stand entirely on the domestic laws".[63]

59. The drafters specified the requisite nexus to the State that the parties have agreed upon – that nexus being full tax liability *as determined by each state*. This was a practical decision that

---

[60] *Ibid.*, at 55-56 **(RBOA, Tab 2)**.

[61] Organisation for Economic Co-operation and Development, Committee on Fiscal Affairs, 1998 Model Tax Convention on Income and on Capital, (Paris: OECD, 1998), Commentary on Article 4, at p 63, para 4 [1998 OECD Model] **(RBOA, Tab 1)**.

[62] This is why Canada should not be required to justify its decision to subject a corporation incorporated in Canada to comprehensive tax merely by virtue of its place of incorporation (see paragraph 250(4)(a) of the Act).

[63] 1998 OECD Model, Commentary on Article 4, at p 63, para 4 **(RBOA, Tab 1)**.

was consciously made by the drafters following the guidance provided in the OECD Commentary.[64]

60. The clarity of Articles 1 and 4 provides Contracting States with the stable foundation necessary to negotiate the distributive provisions of their treaties and also affords taxpayers certainty, predictability, and fairness. To modify that fundamental definition by imposing an unstated and undefined test is the antithesis of what Articles 1 and 4 seek to achieve and would have profound ramifications for all treaties under the OECD Model.

61. With the scope of the Treaty understood, we are able to turn, as did the drafters, to the distributive provision at issue – Article 13(4).

62. Consistent with the OECD Model, Article 13(4) generally allocates to Canada the jurisdiction to tax the gain arising on the alienation of shares that derive their value principally from immovable property in Canada. However, in a departure from the OECD Model, Canada and Luxembourg included in Article 13(4) the business property exemption pursuant to which the treaty partners agreed that gains derived by a resident of Luxembourg on the alienation of such shares would be taxed by Luxembourg if a business was being carried on in the property.

63. This agreement to allocate jurisdiction to tax differs from the OECD Model and represents a deliberate bargain struck between Canada and Luxembourg. The terms of the bargain are clear: if a business is undertaken in Canada, Canada is prepared to forgo the tax, if any, on the disposition of the subject shares. On the facts of this case, the terms of this bargain have been satisfied.

c. Purposive Analysis: Tax Avoidance and the OECD Commentary

64. A tax treaty cannot have a purpose divorced from the intention of its drafters, and the intention of the drafters can only reflect the conditions existent at the time of the negotiation. In

[64] The first paragraph of the Commentary on Article 1 of the OECD Model (as it read in 1999) noted that the use of the defined concept of residence was deemed preferable for practical purposes. See 1998 OECD Model, Commentary on Article 1, at p 47, para 1 **(RBOA, Tab 1)**.

order to glean the drafters' intentions in negotiating the Treaty, one must understand the circumstances in 1999.[65]

65. The Appellant submits that since at least 1977, the OECD Commentary to Article 1 has stated that tax treaties "are not intended to provide avenues for taxpayers to engage in tax avoidance"[66] and that OECD member states "clearly considered that some uses of tax treaties would be improper or abusive".[67] A closer look at the OECD Commentary to Article 1 evidences a more equivocal attitude toward tax avoidance by the OECD.

66. The OECD Commentary to Article 1, as it read in 1977, identified a number of possible concerns that member states *may* regard as an "improper use" of tax treaties. However, the Commentary reached no consensus as to what was or was not appropriate nor what should or should not be included in a particular treaty.[68] As made clear in the Commentary, those decisions were to be left to the member states:

> It may be appropriate for Contracting States to agree in bilateral negotiations that any relief from tax should not apply in certain cases, or to agree that the application of the provisions of domestic laws against tax avoidance should not be affected by the Convention.[69] [emphasis added]

67. Subsequently, the OECD Council elaborated on this conclusion, stating that, pursuant to the principle of *pacta sunt servanda*, treaty benefits must be granted in the absence of any clauses that restrict the use of their provisions.[70] By signing a tax treaty, states promise to provide tax benefits to the residents of their treaty partners.

---

[65] A similar observation was made by this Court in the context of contractual negotiations in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, at para 58 [*Sattva*].

[66] Appellant's factum, at para 114.

[67] Appellant's factum, at para 115.

[68] Organisation for Economic Co-operation and Development, Committee on Fiscal Affairs, 1977 Model Tax Convention on Income and on Capital, (Paris: OECD, 1977), Commentary on Article 1, at pp 47-48, paras 7-10 [1977 OECD Model] **(ABOA, Tab 21)**.

[69] 1977 OECD Model, Commentary on Article 1, at p 48, para 10 **(ABOA, Tab 21)**.

[70] Organisation for Economic Co-operation and Development, *Double Taxation Conventions and the Use of Conduit Companies* (Paris: OECD, 1986), at para 43 **(ABOA, Tab 24)**.

68. At the time Canada and Luxembourg negotiated the Treaty in 1999, the OECD Commentary provided a menu of options speaking to tax avoidance that "concerned" States could choose to include in their treaties.[71]

69. Included among the potential options: the concept of "beneficial ownership";[72] a "look-through" provision to pierce the corporate veil;[73] the "exclusion approach" to exclude specified entities from treaty benefits; [74] a "subject-to-tax" provision to limit treaty benefits to companies that are subject to the normal tax regime in the state of residence;[75] and the "channel approach" which denies treaty benefits to income used mainly to satisfy claims of persons resident in third party states.[76]

70. Significantly, the OECD made no recommendations to its member states as to whether or not to use any of these options.[77] Such determination was left to be negotiated by particular drafters based on their particular objectives.

71. In 1999, Canada and Luxembourg made their choices. They chose to include some of these measures in the Treaty (e.g., the concept of beneficial ownership in Articles 10, 11, and 12) and, with full knowledge of each others' tax systems as well the menu of options described by the OECD, they chose to exclude others. The OECD Commentary should not be used to introduce terms into a treaty which were not negotiated and agreed upon by the treaty partners.[78]

---

[71] 1998 OECD Model, Commentary on Article 1, at pp 49-52, paras 10, 14, 15, 17, 19 **(RBOA, Tab 1)**.
[72] 1998 OECD Model, Commentary on Article 1, at p 49, para 10 **(RBOA, Tab 1)**.
[73] 1998 OECD Model, Commentary on Article 1, at p 50, para 14 **(RBOA, Tab 1)**.
[74] 1998 OECD Model, Commentary on Article 1, at pp 50-51, para 15 **(RBOA, Tab 1)**.
[75] 1998 OECD Model, Commentary on Article 1, at p 51, para 17 **(RBOA, Tab 1)**.
[76] 1998 OECD Model, Commentary on Article 1, at p 51, para 19 **(RBOA, Tab 1)**.
[77] 1998 OECD Model, Commentary on Article 1, at p 49, para 12 **(RBOA, Tab 1)**.
[78] See *Sattva*, at para 57.

72. During the same period, Canada made different choices with different treaty partners. For example, discrete purpose tests were included in the tax treaties negotiated with Nigeria (1992),[79] Ukraine (1996),[80] Kazakhstan (1996),[81] Uzbekistan (1999),[82] and Peru (2001),[83] which operate to deny particular benefits where the purpose of the subject transaction was to benefit from such treatment.

73. The treaties negotiated with Kazakhstan and Peru also include a provision that allowed the parties to "look-through" a corporation to deny all treaty benefits to a resident entity that is beneficially owned or controlled by residents of other countries if the tax imposed on the entity is substantially lower than it would have been if the entity were owned or controlled by residents of the state in which the entity resides.[84] Clearly when Canada negotiated the Treaty with Luxembourg, it was aware of the possibility that a corporation resident in one state could be owned or controlled by residents of another.

---

[79] *Agreement Between the Government of Canada and the Government of the Federal Republic of Nigeria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains*, 4 August 1992, at Art 10(7), 11(8), and 12(7).

[80] *Convention Between the Government of Canada and the Government of Ukraine for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, 4 March 1996, at Art 11(8), and 12(8).

[81] *Convention Between the Government of Canada and the Government of the Republic of Kazakhstan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, 25 September 1996, at Art 11(8), and 12(7).

[82] *Convention Between the Government of Canada and the Government of the Republic of Uzbekistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, 17 June 1999, at Art 11(8), and 12(7).

[83] *Convention Between the Government of Canada and the Government of the Republic of Peru for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, 20 July 2001, at Art 10(7), 11(7), and 12(7).

[84] *Convention Between the Government of Canada and the Government of the Republic of Kazakhstan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, 25 September 1996, at Art 28(3); *Convention Between the Government of Canada and the Government of the Republic of Peru for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, 20 July 2001, at Art 28(3).

74. Different negotiations, between different countries, pursuing different objectives, led to different bargains and different results.[85] As observed by Brian Arnold:

> There is scant evidence that the government can point to in order to demonstrate that treaty shopping is abusive, especially in light of the fact that anti-treaty-shopping rules are included in only some treaties, and even in those treaties they are applicable to only some types of income.[86]

75. Canada and Luxembourg did not seek to modify the general qualification for entitlement to the Treaty as set out in Articles 1 and 4 nor did they introduce a limitation to the entitlement to the business property exemption in Article 13(4) beyond the substantive requirement that a business be carried on in the property. To read in such a limitation would be to change the bargain struck by the treaty partners.

76. It would also be wrong to suggest that Canada would have only agreed to cede its jurisdiction to tax the proceeds of the share disposition if it was assured that Luxembourg would tax the gain as would Canada. Clearly that would not be the case. As explained by the Tax Court Judge in this case:

> Parties to a tax treaty are presumed to know the other country's tax system when they negotiate a tax treaty; they are presumed to know the tax consequences of a tax treaty when they negotiate amendments to that treaty. The OECD commentaries highlight that some states – like Luxembourg – generally do not tax capital gains: OECD commentary on Article 13, 28.12. It is then the responsibility of the state that does tax capital gains to prevent a double exemption if it wishes to do so.

---

[85] For example, effective January 1, 2008, a reciprocal limitation of benefits ("LOB") provision was introduced in the *Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital*, 21 September 2007. Prior to that time, the LOB provision applied only to limited U.S. treaty benefits. More recently, Canada and Israel considered it necessary and appropriate to negotiate the inclusion of a distinct purpose test in Article 13 of their tax treaty. See *Convention between the Government of Canada and the Government of the State of Israel for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, 21 September 2016, at Art 13.

[86] Brian J Arnold, *Reforming Canada's International Tax System: Toward Coherence and Simplicity*, (Toronto: Canadian Tax Foundation, 2009), at 361 **(RBOA, Tab 3)**.

> When the Treaty was negotiated, the Canadian treaty negotiators were aware of the fact that Luxembourg allowed its resident to avoid Luxembourg income tax on gains arising from the sale of shares of foreign corporations in broad circumstances. In this light, if Canada wished to curtail the benefits of the Treaty to potential situations of double taxation, Canada could have insisted that the exemption provided for under Article 13(5) be made available only in the circumstance where the capital gain was otherwise taxable in Luxembourg. Canada and Luxembourg did not choose this option. It is certainly not the role of the Court to disturb their bargain in this regard.[87] [emphasis added]

77. The Treaty, as negotiated by the parties, was duly ratified by Parliament. Canada must be taken to have known and accepted the consequences of its terms.

Flaws in the Appellant's Reliance on the Revisions to the OECD Commentary in 2003

78. Rather than examining the relevant provisions of the Treaty to glean the drafters' purpose, the Appellant points to the OECD Commentary to Article 1, as "substantially revised in 2003", to support Her broad assertion that preventing tax avoidance is a seminal purpose of the Treaty.[88]

79. The revisions made to the OECD Commentary in 2003 concerning tax avoidance, in particular the revision to include as a purpose of treaties the prevention of tax avoidance, have been variously described as being "created out of thin air by the OECD in 2003"[89] and representing "a significant change in the stated attitude of the OECD to the relationship between tax treaties and tax avoidance."[90] They are a significant departure from the equivocal nature of the

---

[87] TCC Reasons, at paras 84-85. As made clear by the Federal Court of Appeal: "To the extent that the appellant argues that the Tax Treaty should not be interpreted so as to permit double non-taxation, the issue raised by GAAR is the incidence of Canadian taxation, not the foregoing of revenues by the Luxembourg fiscal authorities." *Canada v MIL (Investments) SA*, 2007 FCA 236, at para 8.

[88] Appellant's factum, at para 117.

[89] Brian J Arnold, "Tax Treaties and Tax Avoidance: The 2003 Revisions to the Commentary to the OECD Model", *Bulletin – Tax Treaty Monitor*, June 2004, 244, at 249 **(ABOA, Tab 1)**.

[90] *Ibid*, at 260 **(ABOA, Tab 1)**. See also Ken Snider, "Policy Forum: Canada's Anti-Treaty-Shopping Proposals and International Treaty Obligations" (2014) 62:3 Can Tax J 705, at 710-715 **(RBOA, Tab 5)**.

Commentary at the time this Treaty was negotiated and, as such, cannot be relevant in discerning the intention of the negotiators of this Treaty.[91]

80. In any event, even if the 2003 Commentary was relevant in discerning the intention of the drafters, the 2003 Commentary calls for both an avoidance transaction and an abuse analysis, as does the GAAR. Specifically, the "guiding principle" of the 2003 Commentary is that the benefits of a treaty should not be available where "a main purpose for entering into a transaction is to secure a more favourable tax position, and obtaining that tax position in the circumstances would be contrary to the object and purpose of the relevant treaty provision".[92]

81. It is circular to say it is abusive tax avoidance because tax avoidance is abusive. Even the 2003 Commentary demands more.

d. Conclusions on the Object, Spirit, and Purpose

82. The onus rests with the Appellant to demonstrate that the object, spirit and purpose of the relevant provisions of the Treaty produce a different result from the text as negotiated by the drafters. The Appellant's assertion of "economic connection" and reliance on the OECD Commentary have failed to satisfy that onus.

83. As made clear by Articles 1 and 4, the Treaty is to apply to a "resident of a Contracting State" as that term is defined by the Treaty. This is the foundation, established by the OECD Model, upon which all else follows. The definition of a "resident of a Contracting State" as agreed upon by the parties, achieves the certainty desired by looking to the domestic laws of each contracting state to determine whether a person is subject therein to full tax liability.

84. Building on that foundation, the specific tax benefit in question results by operation of the business property exemption found in Article 13(4) of the Treaty. As agreed by the parties, Canada was prepared to cede its jurisdiction to tax a gain on the disposition of shares that derive their value

---

[91] *Prévost Car Inc. v Canada*, 2009 FCA 57, at para 11. See also Michael N Kandev and Brandon Wiener, "Some Thoughts on the Use of Later OECD Commentaries After Prévost Car", (2009) 54:8 Tax Notes International 667, at 670 **(RBOA, Tab 4)**.

[92] The "relevant treaty provision" cannot be Article 1 as this Commentary, which is commentary in respect of Article 1, seeks an inquiry into the relevant treaty provision not an inquiry into itself.

principally from taxable Canadian property if, and only if, a business was being carried on in that property. This distributive rule, as negotiated between Canada and Luxembourg, is clear and unequivocal. There is nothing more.

85. In *Copthorne* this Court acknowledged the possibility that the rationale of a provision may be no broader than the text itself:

> I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.[93]

This is such a case.

C. The GAAR: Step Two of the Abuse Analysis

86. The second step of this Court's two-step methodology for conducting the abuse analysis is to examine the factual context of a case in order to determine whether the avoidance transactions defeated or frustrated the object, spirit or purpose of the provisions in issue.[94]

87. As clearly instructed by this Court, the second step of the abuse analysis must build from the first. The second step is not an opportunity to point to the result and assert that it should not be permitted. That is the essence of a smell test. The second step asks whether the result is contrary to the object, spirt and purpose as previously determined by the proper analytical approach mandated by this Court in the first step of the abuse analysis.

88. A proper analysis of the object, spirit and purpose of the relevant provisions do not admit of a second unstated test for the application of this Treaty. In this case, the Respondent, an admitted Treaty resident of Luxembourg,[95] realized a gain on the disposition of its shares of Alta

---

[93] *Copthorne*, at para 110.
[94] *Canada Trustco*, at para 55.
[95] The Respondent is not a "stranger" to the Treaty. In *Crown Forest* this Court characterized the corporation seeking the benefit of the Canada-U.S. Convention as a "stranger" to the treaty because that corporation, incorporated in the Bahamas and not subject to full tax in either Canada or the

Canada. That gain, realized in Luxembourg, was subject to comprehensive taxation by Luxembourg. From that point, the laws of Luxembourg applied and Canada's interest in the gain ceased.

89. The clear requirements of Articles 1, 4, and 13(4) were met. Canada and Luxembourg agreed that taxing jurisdiction would be allocated to Luxembourg in such a case. The result accords with the true intention of the treaty partners and that result must be respected.

D. A Word About "Treaty Shopping"

90. Repeated reference is made by the Appellant to "treaty shopping", including the Appellant's assertion that the Federal Court of Appeal "erroneously permitted an obvious treaty shopping transaction to succeed."[96] Implicit in the Appellant's assertion is that treaty shopping is inherently abusive and the courts should prevent it. Such an assertion cannot be the basis of a GAAR analysis. The purposes of a GAAR analysis is to discern the true meaning of the words of the relevant provision, not to determine the propriety of broad concepts divorced from those words.

91. "Treaty shopping" is not defined in the Act or in the Treaty. It is the pejorative label for *selecting* the most favourable available alternative in making an investment in a foreign jurisdiction. As a starting point, the selection of the most favourable way to conduct a transaction is not, of itself, abusive. As this Court made clear in *Canada Trustco*:

> Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.[97]

And in *Copthorne*:

> The terms "abuse" or "misuse" might be viewed as implying moral opprobrium regarding the actions of a taxpayer to minimize tax liability

---

United States, failed to satisfy the test to be a resident of either Contracting State as agreed upon by the treaty partners. In contrast, the Respondent was incorporated in Luxembourg and subject to full tax therein and, as admitted by the Appellant, is a resident of that Contracting State for the purposes of the Treaty.

[96] Appellant's factum, at 54.
[97] *Canada Trustco*, at para 11.

> utilizing the provisions of the Income Tax Act in a creative way. That would be inappropriate. Taxpayers are entitled to select courses of action or enter into transactions that will minimize their tax liability (see Duke of Westminster).[98] [emphasis added]

92. To find that the *selection* of a treaty regime in order to minimize taxes is itself abusive is to conflate the concept of "avoidance" with "abuse". The GAAR does not support such conflation. If an abuse is to be found, it must lie in the *use* of a treaty, not in its *selection*.

93. In any event, a broad assertion of "treaty shopping" does not conform to a proper GAAR analysis; it asks a court to opine on an overriding policy not based on a unified textual, contextual and purposive interpretation of the specific provisions in issue and to make a value judgement of what is right or wrong. Again, as instructed by this Court in *Canada Trustco*:

> The courts cannot search for an overriding policy of the Act that is not based on a unified textual, contextual and purposive interpretation of the specific provisions in issue. … Did Parliament intend judges to formulate taxation policies that are not grounded in the provisions of the Act and to apply them to override the specific provisions of the Act? Notwithstanding the interpretative challenges that the GAAR presents, we cannot find a basis for concluding that such a marked departure from judicial and interpretive norms was Parliament's intent.[99]

And in *Copthorne*:

> The search is for the rationale that underlies the words that may not be captured by the bare meaning of the words themselves. However, determining the rationale of the relevant provisions of the Act should not be conflated with a value judgment of what is right or wrong nor with theories about what tax law ought to be or ought to do.[100]

---

[98] *Copthorne*, at para 65. This principle, as applicable in the United States, was explained by Judge Learned Hand explained in *Commissioner of Internal Revenue v Newman*, 159 F 2d 848 (2d Cir 1947), at 850-851: "Over and over again the courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor, and all do right, for nobody owes any public duty to pay more tax than the law demands: taxes are enforced extractions, not voluntary contributions. To demand more in the name of morals is mere cant."

[99] *Canada Trustco*, at para 41.

[100] *Copthorne*, at para 70.

94. By Her repeated reference to "treaty shopping", the Appellant is inviting the Court to base a finding of abuse on some broad vision of policy that is not attached to the provisions of the Treaty. As repeatedly made clear by this Court, such an invitation must be rejected.[101]

95. Recent work undertaken as part of the OECD/G20 Base Erosion and Profit Shifting Project provides the path forward to address evolving concerns regarding the use of international tax treaties. That path is not to reinterpret existing treaties but to amend such treaties through the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the "MLI").[102]

96. Canada ratified the MLI and deposited its ratification instrument with the OECD on August 29, 2019. As a result, the MLI entered into force in Canada on December 1, 2019 and has amended many of Canada's tax treaties, including the Treaty with Luxembourg.[103] The amendments are not retroactive.

E. Conclusion

97. The Federal Court of Appeal did not err in its conclusions: the underlying rationale of the relevant provisions is no broader than the text itself and the transactions did not result in a misuse or abuse of those provisions.

98. In contrast, the effect of the Appellant's argument is to say either that the Respondent is not resident of Luxembourg for the purposes of the Treaty (despite a clear admission to the contrary) or that the Treaty must be applied on some basis other than the clearly-defined basis established in Articles 1 and 4.

99. In either instance, to accept the Appellant's argument would be to accept a radical re-working of Articles 1 and 4 of the Treaty which would have an impact not only on the business

---

[101] *Copthorne,* at para 118; and *Canada Trustco*, at para 41.
[102] Organisation for Economic Co-operation and Development, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Paris: OECD, 2016).
[103] Organisation for Economic Co-operation and Development, Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Status as of 15 January 2021 (Paris: OECD, 2021).

property exemption found in Article 13(4) of the Treaty but on the whole of the Treaty and all other treaties based on the OECD Model.

100. The Appellant is asking this Court to deviate from the text such that the Court effectively creates a new agreement. This the Court should not do.

101. This appeal should be dismissed.

PART IV – COSTS

102. There is no reason to depart from the general principle that costs should follow the cause. The Respondent requests its costs in this appeal.

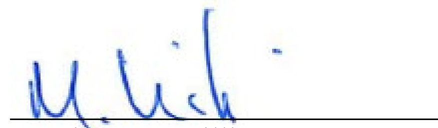
PART V – ORDER SOUGHT

103. The Respondent respectfully requests that this appeal be dismissed with costs.

PART VI – SUBMISSIONS ON CONFIDENTIALITY

104. Not Applicable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day February, 2021.



Matthew G. Williams
E. Rebecca Potter

Counsel for the Respondent

PART VII – TABLE OF AUTHORITIES (WITH HYPERLINKS)

	Cited at Paragraph
Legislation	
Income Tax Act, RSC 1985, c 1 (5th Supp), as amended (English).	
s. 2(3)	38, 39
s. 115(1)	38, 39
s. 245	5, 33, 34, 35, 36, 37, 86, 87, 90, 92, 93
s. 248: "treaty-protected property"	38, 39
s. 250(4)(a)	46, 58
Income Tax Act, RSC 1985, c 1 (5th Supp), as amended (French).	
s. 2(3)	38, 39
s. 115(1)	38, 39
s. 245	5, 33, 34, 35, 36, 37, 86, 87, 90, 92, 93
s. 248: "propriété protégée par traité"	38, 39
s. 250(4)(a)	46, 58
Case Law	
Canada v MIL (Investments) SA, 2007 FCA 236.	76
Canada Trustco Mortgage Co v Canada, 2005 SCC 54.	34, 35, 36, 37, 86, 91, 93, 94
Copthorne Holdings Ltd v Canada, 2011 SCC 63.	24, 33, 34, 35, 36, 85, 91, 93, 94
Crown Forest Industries v Canada, [1995] 2 SCR 802.	33, 45, 88
Prévost Car Inc. v Canada, 2009 FCA 57.	79
R v Hauser, [1979] 1 SCR 984.	44
Sattva Capital Corp v Creston Moly Corp, 2014 SCC 53.	64, 71

International Materials	
Agreement Between the Government of Canada and the Government of the Federal Republic of Nigeria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, 4 August 1992.	72
Bruins, Gijsbert W.J., Luigi Einaudi, Edwin R.A. Seligman, and Sir Josiah Stamp. *Report on Double Taxation Submitted to the Financial Committee Economic and Financial Commission.* League of Nations documents no. E.F.S.73.F.19 (Geneva: League of Nations, April 5, 1923).	53
Commissioner of Internal Revenue v Newman, 159 F 2d 848 (2d Cir 1947).	91
Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital, 21 September 2007.	74
Convention between the Government of Canada and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital, 10 September 1999.	1, 2, 3, 5, 6, 7, 31, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 61, 71, 75, 77, 78, 83, 84, 98, 99
Convention Between the Government of Canada and the Government of the Republic of Kazakhstan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, 25 September 1996.	72, 73
Convention Between the Government of Canada and the Government of the Republic of Peru for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, 20 July 2001.	72, 73
Convention Between the Government of Canada and the Government of the Republic of Uzbekistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, 17 June 1999.	72
Convention between the Government of Canada and the Government of the State of Israel for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, 21 September 2016.	74
Convention Between the Government of Canada and the Government of Ukraine for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, 4 March 1996.	72

Organisation for Economic Co-operation and Development, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Paris: OECD, 2016).	95
Organisation for Economic Co-operation and Development, Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Status as of 15 January 2021 (Paris: OECD, 2021).	96

PART VII – TABLE OF AUTHORITIES (WITHOUT HYPERLINKS)

	Cited at Paragraph
International Materials	
Organisation for Economic Co-operation and Development, *Double Taxation Conventions and the Use of Conduit Companies* (Paris: OECD, 1986).	67
Organisation for Economic Co-operation and Development, Committee on Fiscal Affairs, 1977 Model Tax Convention on Income and on Capital, (Paris: OECD, 1977).	66
Organisation for Economic Co-operation and Development, Committee on Fiscal Affairs, 1998 Model Tax Convention on Income and on Capital, (Paris: OECD, 1998).	57, 58, 59, 68, 69, 70
Organisation for European Economic Co-operation, *The Elimination of Double Taxation: Report of the Fiscal Committee of the OEEC* (Paris: OEEC, 1958).	55
Secondary Materials	
Arnold, Brian J, *Reforming Canada's International Tax System: Toward Coherence and Simplicity*, (Toronto: Canadian Tax Foundation, 2009).	74
Arnold, Brian J, "Tax Treaties and Tax Avoidance: The 2003 Revisions to the Commentary to the OECD Model" *Bulletin – Tax Treaty Monitor*, June 2004, 244.	79
Kandev, Michael N and Wiener, Brandon, "Some Thoughts on the Use of Later OECD Commentaries After Prévost Car", (2009) 54:8 Tax Notes International 667.	79
Ken Snider, "Policy Forum: Canada's Anti-Treaty-Shopping Proposals and International Treaty Obligations" (2014) 62:3 Can Tax J 705.	79

Suarez, Steve, "How the MLI Will Change Capital Gains Taxation in Canada", (2020) 98:6 Tax Notes International 657. 3