

The Supreme Court of Canada and the General Anti-Avoidance Rule:
Tax Avoidance after *Canada Trustco* and *Mathew*

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THE MINISTER'S BURDEN UNDER GAAR

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The Supreme Court of Canada released its long-awaited decisions in the first two GAAR cases, *The Queen v. Canada Trustco Mortgage Company*¹ and *Mathew v. The Queen*,² on October 19, 2005. The results themselves were not surprising to most tax pundits: both appeals were dismissed. However, the guidelines that the Supreme Court laid down for applying GAAR (indeed, for interpreting any provision of the Income Tax Act) have done little to clarify when GAAR will apply. Indeed, in my view, the cases bring the law full circle to the judicial anti-avoidance principles laid down by the Supreme Court more than 20 years ago in *Stubart Investments Ltd. v. The Queen*,³ which is ironic given that GAAR was enacted because of the perceived shortcomings of that decision.⁴

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¹ [2005] SCC 54 (*Canada Trustco*).

² [2005] SCC 55 (*Mathew*).

³ [1984] CTC 294, 84 DTC 6305 (SCC) (*Stubart*).

⁴ In enacting GAAR, perhaps Parliament did not share Estey, J.'s view in *Stubart* that the "object and spirit test" would serve as an effective anti-avoidance doctrine. The approach of the Supreme Court of Canada to tax avoidance cases (in pre-GAAR fact situations) following *Stubart* justified Parliament's misgivings. Despite the consistent reference to Dreidger's principles of statutory interpretation in virtually every Supreme Court of Canada tax decision since *Stubart*, the court, particularly in the 1990s, indicated that the object and purpose of a provision was irrelevant where the meaning of the provision was "plain" or "clear and unambiguous": see, e.g., *Antosko et al. v. The Queen*, [1994] 2 CTC 25, 94 DTC 6314 (SCC); *Friesen*

The burdens of proof (theoretical or practical) imposed on the taxpayer and on the Minister under GAAR are particularly important given the Supreme Court’s views on appeals of GAAR decisions. According to the court:

Where the Tax Court judge has proceeded on a proper construction of the provisions of the *Income Tax Act* and on findings supported by the evidence, appellate tribunals should not interfere, absent a palpable and overriding error.⁵

Obviously, the Supreme Court is not prepared to entertain another GAAR case for some time. It further gives the impression that the Federal Court of Appeal should be loath to interfere with Tax Court decisions. However, as elaborated below, there are important questions of law that a Tax Court judge must answer when applying subsection 245(4) and these answers must always be open to reconsideration by the Federal Court of

v. The Queen, [1995] 2 CTC 369, 95 DTC 5551 (SCC). In *Canada Trustco* (para. 10), this determinative role of the text of provisions of the *Income Tax Act* is described as a “dominant role” in the interpretative process. Even so, the court later suggests (at para. 47):

Even where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities. ... In order to reveal and resolve any latent ambiguities in the meaning of provisions of the *Income Tax Act*, the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation.

This discussion of “latent ambiguities” is reminiscent of the Cory, J.’s comments on statutory interpretation in tax cases in *The Queen v. Alberta Treasuries Branches and T-D Bank*, [1996] 1 CTC 395, 96 DTC 6245, (SCC), para. 15. One is left wondering whether the “textual, contextual, purposive” approach is now relevant only in GAAR cases or whether it applies in all income tax cases.

⁵ *Canada Trustco*, paras. 46 and 66.

Appeal. An error of law need not be “palpable and overriding” in order for an appellate tribunal to interfere with a lower court decision and I cannot imagine that the Supreme Court was suggesting otherwise.

This paper considers precisely what burden of proof the Minister must satisfy in order to substantiate a reassessment under GAAR. As indicated by the Supreme Court in *Canada Trustco*, there are three requirements that must be met for GAAR to apply:

- (1) A *tax benefit resulting from a transaction* or part of a series of transactions (s. 245(1) and (2));
- (2) that the transaction is an *avoidance transaction* in the sense that it cannot be said to have been reasonably undertaken or arranged primarily for a *bona fide* purpose other than to obtain a tax benefit; and
- (3) that there was *abusive tax avoidance* in the sense that it cannot be reasonably concluded that a tax benefit would be consistent with the object, spirit or purpose of the provisions relied upon by the taxpayer.⁶

According to the court, “[t]he burden is on the taxpayer to refute (1) and (2), and on the Minister to establish (3).”⁷

⁶ *Canada Trustco*, para. 66.

⁷ *Ibid.*

The Minister's Burden Regarding Tax Benefit and Avoidance Transaction

Little was said by the court about the first two requirements, perhaps because in both cases (at least according to the court), the first two requirements were conceded.⁸ In both cases, the court indicated that the requirements of tax benefit and avoidance transaction were questions of fact, and as noted above, the burden is on the taxpayer to refute the existence of these requirements.

I agree with the court that these two requirements are questions of fact (for the taxpayer to refute). However, the two requirements are inextricably linked and it is difficult to parse the two, particularly to look at the question of tax benefit on its own. According to the court, any deduction against taxable income is a tax benefit “since a deduction results in a reduction of tax.”⁹ In other cases (presumably where there is not a deduction against taxable income), the court indicates that a tax benefit can be established only by comparison “with an alternative arrangement.”¹⁰ No guidance is given as to what this alternative arrangement might be, other than two simple examples. The implication, though, is that if the taxpayer could have achieved the same end result but paid more tax along the way (or accelerated the tax payable), then there is a tax benefit.

⁸ In *Mathew*, the taxpayer conceded the first two requirements (Appellant's factum, para. 14). However, the taxpayer's factum in *Canada Trustco* suggested that all three points were in dispute (Respondent's factum, para. 23). In *Canada Trustco*, the Supreme Court stated (para. 67) that the Crown agreed with the finding of the Trial Judge that there was a tax benefit and avoidance transaction and therefore the only issue on appeal was whether there was abusive tax avoidance under subsection 245(4). Since the onus is on the taxpayer to refute the first two requirements, surely only the taxpayer can concede them.

⁹ *Canada Trustco* para. 20.

¹⁰ *Ibid.*

The court's approach, particularly to the issue of tax benefit, is too simplistic. Take the deduction in issue in *Canada Trustco* as an example: the ability to claim capital cost allowance (CCA) on an asset acquired for business purposes.¹¹ Consider the following scenarios:

1. the taxpayer buys the asset from savings;
2. the taxpayer fully finances the purchase of the asset, on a full-recourse basis;
3. the taxpayer fully finances the purchase of the asset, on a non-recourse basis (i.e., the only security provided by the taxpayer for the loan is the asset itself);
4. the taxpayer acquires the asset in a transaction similar to *Canada Trustco*.

According to the court, a tax benefit arises in all four situations simply because the taxpayer has been able to claim a deduction in computing income. In my view, there is no tax benefit in either of the first two scenarios. In the first scenario, the taxpayer is simply claiming CCA on the asset as permitted under paragraph 20(1)(a). The taxpayer is fully exposed to all business risks associated with the asset, particularly the possibility that it may decline in value at a greater rate than permitted as a deduction under the Act. The second scenario is a little more difficult because the taxpayer is effectively getting a double deduction—both CCA and an interest expense. Even here, it is difficult to conclude that there is a tax benefit because our tax system (indeed most income tax systems) clearly permits the double deduction. Although the taxpayer has not used its

¹¹ For the purposes of this example, I assume that the taxpayer is not subject to the leasing property rules in regulation 1100(15) or the specified leasing property rules in regulation 1100(1.1).

own resources to acquire the asset, it remains fully exposed under the loan. However, in my view, there is no question that there is a tax benefit in the third and fourth scenarios because the taxpayer's financial exposure in both cases disappears. The only difference between the third and fourth scenarios is the risk exposure to the lender; the risk exposure to the taxpayer in both cases is the same. Whether or not the third or fourth scenarios satisfy the second and third requirements for GAAR to apply is another matter.

As to the second requirement, the Minister's only obligation is to state his assumption that the primary purpose of the impugned transaction was not a *bona fide* purpose. It is then for the taxpayer to lead sufficient evidence to refute this assumption. This is made clear by the wording of subsection 245(3) itself. A transaction is an avoidance transaction unless it may reasonably be considered that the transaction was undertaken primarily for *bona fide* purposes other than to obtain a tax benefit. In *Canada Trustco*, the Tax Court's conclusion in this respect could not be upset absent a palpable and overriding error. Whether the transaction in that case met the third requirement—abusive tax avoidance—is another matter.¹²

¹² The Minister in *Canada Trustco* focused on the right issue under subsection 245(4): whether the Act permits the deduction of CCA where the taxpayer put no capital at risk in acquiring the trailers. The Minister might have had more success if it argued that there was a clear legislative scheme, highlighted by section 143.2, that the cost of property for CCA and other deduction purposes is limited to the taxpayer's at-risk amount. The Minister's factum in *Canada Trustco* did not refer to section 143.2, nor was it referred to in oral argument. The taxpayer's factum did, but in support of its argument that the "at-risk" rules in the Act were specific and limited and that GAAR could not be used to expand their ambit. This argument is similar to that unsuccessfully made by the taxpayer in *Mathew*, that the stop-loss rules are limited to specific situations covered by specific anti-avoidance rules.

In my view, it would be preferable for courts (and the Minister) to recognize the inherent characteristics of tax avoidance transactions. Basically, there are three fact patterns that all tax avoidance transactions fit within and all three should clearly satisfy the first two requirements of GAAR.¹³ The first is exemplified by cases such as *Shell Canada Ltd. v. The Queen*¹⁴ and the legendary *I.R.C. v. Duke of Westminster*.¹⁵ These cases are characterized by “substitutability”—where more than one method exists to achieve the same non-tax driven result, the taxpayer uses the method that gives the lower tax result (whether a reduction, deferral or avoidance of tax). The better tax result is obviously a tax benefit and the arrangement chosen by the taxpayer should be considered an avoidance transaction because the taxpayer chose the particular arrangement (over its alternatives) for tax reasons. The more difficult issue in these cases—and where courts should focus their attention—is whether there has been “abusive” tax avoidance.

The second type of tax avoidance is exemplified by cases such as *Duha Printers (Western) Ltd. v. The Queen*,¹⁶ *Canada Trustco* and *Mathew*. In these cases, a taxpayer “trades” tax attributes that it cannot benefit from to an arm’s length taxpayer (usually for a price equal to a small fraction of the tax attributes). These tax attributes might be losses or deductions, such as CCA, which the taxpayer cannot use but have value (in terms of a tax benefit) to someone else. In these cases, again, there is no question that there is a tax benefit and an avoidance transaction. Furthermore, in many of these cases, there should be no question that the transactions constitute “abusive” tax avoidance.

¹³ I am indebted to my colleague, Tim Edgar, for these observations.

¹⁴ [1999] 4 C.T.C. 313, 99 D.T.C. 5669 (SCC).

¹⁵ [1936] AC 1 (HL).

¹⁶ [1998] 3 CTC 30398 DTC 6334, (SCC).

The third type of tax avoidance—and clearly the most abusive—is where the taxpayer “fabricates” tax attributes out of thin air. The “buy low, donate high” charitable tax credit schemes—such as that illustrated by *Klotz v. The Queen*¹⁷—is a good example. Here, there is clearly both a tax benefit and an avoidance transaction. And furthermore, it should be clear that the transactions constitute abusive tax avoidance.

The point to be made is that in virtually all GAAR cases, the court should concentrate on subsection 245(4) because the first two requirements should be “no-brainers.” If it is difficult to conclude that there has been both a tax benefit and an avoidance transaction, the Minister should not be litigating the case under GAAR. That, in my view, is the Minister’s burden with regard to the first two requirements: choosing the appropriate cases to litigate under GAAR.

The Minister’s Burden Regarding Abusive Tax Avoidance

Even if it is determined that there is an avoidance transaction that gives rise to a tax benefit, subsection 245(4) provides that GAAR applies “only if it may reasonably be considered” that the transaction results in a misuse of any provision of the Act (or the Regulations, a tax treaty, the Income Tax Application Rules, or other relevant enactment) or an abuse of having regard to those provisions read as a whole. I have paraphrased subsection 245(4) as amended by the 2004 budget.¹⁸ Although not specifically discussed in *Canada Trustco*, this amendment removes the double negative previously found in subsection 245(4):

¹⁷ [2005] 3 CTC 78, 2005 DTC 5279 (FCA).

¹⁸ Applicable retroactively from September 12, 1988 (the original application date for GAAR).

For greater certainty, [GAAR] *does not apply* to a transaction where it may reasonably be considered that the transaction *would not result* directly or indirectly in a misuse of the provisions of this Act or an abuse having regard to the provisions of this Act, other than this section, read as a whole.

While the Supreme Court indicated that the amendments to subsection 245(4) “would not warrant a different approach to the issues on appeal,”¹⁹ it later stated that

[t]he negative language in which s. 245(4) is cast indicates that the starting point for the analysis is the assumption that a tax benefit that would be conferred by the plain words is not abusive. This means that a finding of abuse is warranted where the opposite conclusion—that the avoidance transaction was consistent with the object, spirit or purpose of the provisions of the provisions of the Act that are relied on by the taxpayer—cannot be entertained. In other words, the abusive nature of the transaction must be clear.²⁰

I do not think that the change in wording affects on whom the burden lies under subsection 245(4), although it may affect the standard of proof. Prior to the amendments to subsection 245(4), David Duff suggested that subsection 245(4) should be amended so that the burden is explicitly shifted to the tax authorities by stating that “GAAR does not

¹⁹ *Canada Trustco*, para. 7.

²⁰ *Canada Trustco*, para. 62.

apply unless it may reasonably be considered that the transaction results in a misuse or abuse.”²¹ Although the amendments do not satisfy Duff’s proposal, there should be no doubt that the burden is (and should be) on the Minister in this respect. The replacement of the double negative with “only if” in subsection 245(4) accomplishes the same result as that recommended by Duff. The question remains precisely what the Minister’s burden entails.

Most commentators agreed that the Federal Court of Appeal decision in *OSFC Holdings Ltd. v. The Queen*²² imposed a high threshold before GAAR would apply. According to the oft-quoted passage, “to deny a tax benefit where there has been strict compliance with the Act, on the grounds that the avoidance transaction constitutes a misuse or abuse, requires that the relevant policy be clear and unambiguous.”²³ To what extent, if any, has this approach been modified by the Supreme Court’s decision in *Canada Trustco*?

First of all, the Supreme Court clarified that the reference to “misuse” or “abuse” in subsection 245(4) does not dictate two separate inquiries. In this respect, the court clearly disagreed with the approach of the Federal Court of Appeal in *OSFC*.²⁴ Rather, according to the court in *Canada Trustco*, subsection 245(4)

²¹ David Duff, “Judicial Application of the General Anti-Avoidance Rule in Canada: *OSFC Holdings Ltd. v. The Queen*” (2003), vol. 31, no. 3 *Bulletin for International Fiscal Documentation* 278-288 at 288.

²² 2001 D.T.C. 5471, [2001] 4 C.T.C. 82 (*OSFC*).

²³ *OSFC*, para. 69.

²⁴ *OSFC*, para. 59.

requires a single, unified approach to the textual, contextual and purposive interpretation of the specific provisions of the *Income Tax Act* that are relied upon by the taxpayer in order to determine whether there was abusive tax avoidance.²⁵

A few paragraphs later, this “single, unified approach” to subsection 245(4) is described as “a two-part inquiry”:

The first step is to determine the object, spirit or purpose of the provisions of the *Income Tax Act* that are relied on for the tax benefit, having regard to the scheme of the Act, the relevant provisions and permissible extrinsic aids. The second step is to examine the factual context of a case in order to determine whether the avoidance transaction defeated or frustrated the object, spirit or purpose of the provisions in issue.²⁶

Indeed, this inquiry appears to be virtually identical to Rothstein, JA’s comments in *OSFC*:

The approach to determine misuse or abuse has been variously described as purposive, object and spirit, scheme or policy. I will refer to these terms collectively as policy of the provisions in question or of the Act read as a whole.

²⁵ *Canada Trustco*, para. 43.

²⁶ *Canada Trustco*, para. 55.

Determining whether there has been misuse or abuse is a two-stage analytical process. The first stage involves identifying the relevant policy of the provisions or the Act as a whole. The second is the assessment of the facts to determine whether the avoidance transaction constituted a misuse or abuse having regard to the identified policy.²⁷

And going back 20 years earlier, it is difficult to see any distinction between the Supreme Court's approach to subsection 245(4) and the judicial anti-avoidance doctrine espoused by Estey, J. in *Stuart*:

the formal validity of the transaction may also be insufficient where ... “the object and spirit” of the allowance or benefit provision is defeated by the procedures blatantly adopted by the taxpayer to synthesize a loss, delay or other tax saving device This may be illustrated where the taxpayer, in order to qualify for an “allowance” or a “benefit”, takes steps which the terms of the allowance provisions of the Act may, when taken in isolation and read narrowly, be stretched to support. However, when the allowance provision is read in the context of the whole statute, and with the “object and spirit” and purpose of the

²⁷ *OSFC*, paras. 66-67. It is unfortunate that Rothstein, JA chose “policy” as the collective term for “purposive, object and spirit, scheme or policy.” Most subsequent GAAR decisions ignored his reference to all of the terms, thus leading to much confusion about the court's role in determining the legislative intent of the statutory provisions in issue.

allowance provision in mind, the accounting result produced by the taxpayer's actions would not, by itself, avail him of the benefit of the allowance.²⁸

So here we are, more than 20 years later, with the Supreme Court now (finally) adopting Estey, J's approach to statutory interpretation, although perhaps limited only to tax avoidance transactions challenged under GAAR.

Plus ça change, plus c'est la même chose

Where are we in terms of the burden of proof under subsection 245(4)? Specifically, does the Minister bear the burden of establishing clear abuse under a "single, unified" inquiry that is a mixture of law and fact, or is the Minister's burden limited to the factual burden in the second step of a two-step analysis *after* the court has answered the purely legal question of determining the object, spirit or purpose of the provisions in issue (which I'll refer to as "legislative intent")?

The contrast between these two approaches is highlighted by considering yet one more variation on the burden theme from *Canada Trustco*:

... the practical burden of showing that there was abusive tax avoidance lies on the Minister. The abuse of the Act must be clear, with the result that doubts must be resolved in favour of the taxpayer. The analysis focuses on the purpose of the

²⁸ *Stuart*, para. 65.

particular provisions that on their face give rise to the benefit, and on whether the transaction frustrates or defeats the object, spirit or purpose of those provisions.²⁹

Let me rephrase the burden issue: is it only the factual question of “abuse”³⁰ that the Minister must establish to be “clear;” or can the abuse only be clear if the legislative intent of the provisions in issue is also clear? If the latter, then the Supreme Court has simply restated the test from *OSFC*, unless “clear” means something different from “clear and unambiguous.” If the former—that the court must first determine the legislative intent of the provisions in issue and then consider abuse—then it should be relatively easy to decide whether or not the taxpayer’s transactions frustrate (even *clearly* frustrate) that legislative intent and there should be few cases in which there is a doubt that must be resolved in favour of the taxpayer.

The contrast between these two approaches is best illustrated by considering the differing results that a court might reach under each. On a single, unified approach, a court might conclude that it cannot determine the clear legislative intent of particular provisions—or, that the Minister has not “proven” what the clear legislative intent is—and therefore GAAR cannot apply because a taxpayer cannot frustrate something that is not known. *Hill v. The Queen*³¹ provides a good example. *Hill* concerned a series of transactions designed to convert unpaid (and therefore non-deductible) compound interest

²⁹ *Canada Trustco*, para. 69.

³⁰ Even under the two-step approach, the second step is not purely a factual question. Once the court has interpreted the provisions to determine legislative intent, the question of “abuse” is surely a mixed question of fact and law.

³¹ 2002 DTC 1749, [2003] 4 CTC 2548 (*Hill*).

into unpaid (but accrued and therefore deductible) simple interest (an example of the first type of avoidance transaction discussed above: substitutability). The Minister challenged the transactions on a number of grounds, including GAAR. Miller, J. concluded that GAAR did not apply:

I was not referred by the Respondent to any materials that would assist me in understanding why the government permitted the deduction of simple interest on a payable basis and only permits the deduction of compound interest on a paid basis. What is the policy? It is not my role to speculate; it is the Respondent's role to explain to me the clear and unambiguous policy. He has not done so. I am therefore unable to find that there has been a misuse or abuse as contemplated by subsection 245(4) of the Act. Consequently, subsection 245(2) does not apply to the Appellant's avoidance transactions.³²

Under a two-step approach, it would be first incumbent upon the court to determine the legislative intent of paragraphs 20(1)(c) (regarding simple interest) and 20(1)(d) (regarding compound interest) before turning to the question of abuse. As Brian Arnold notes in his criticism of the *Hill* decision:

It is no concern of the courts why Parliament chose to distinguish between the timing of the deduction of simple interest and that of compound interest. The role of the courts is to interpret legislation in accordance with the intention of

³² *Hill*, para. 62.

Parliament. Where the intention of Parliament is clear, as it is in the case of the timing of the deduction of compound interest, it is not the courts' role to inquire into the justification for Parliament's actions.³³

In both *Canada Trustco* and in *Mathew*, the Supreme Court applied a two-step approach to subsection 245(4). First, they determined the legislative intent of the statutory provisions in issue in the particular cases (the CCA provisions in *Canada Trustco* and subsection 18(13) and section 96 in *Mathew*).³⁴ Then, they considered the taxpayer's transactions in each case in light of that determination. Thus, the court seems to favour an approach that involves two distinct steps.

But even at the first step, which is purely a legal question of statutory interpretation, the Court appears to impose a burden on the Minister.

The taxpayer, once he or she has shown compliance with the wording of a provision, should not be required to disprove that he or she has thereby violated

³³ Brian Arnold, "The Long, Slow, Steady Demise of the General Anti-Avoidance Rule" (2004), vol. 52, no. 2 *Canadian Tax Journal* 488-511 at 501. Arnold argues that Miller, J. misapplied the test from *OSFC* by confusing "policy," as the Federal Court of Appeal in *OSFC* used the term—to encompass "purposive, object and spirit, scheme or policy"—with the notion of Parliamentary policy. See *supra* note 27, and corresponding text.

³⁴ In *Mathew*, the court came to some surprising conclusions in this respect: specifically, the suggestion (in para. 51 and repeated elsewhere) that the partnership rules in section 96 "are predicated on the requirement that partners in a partnership pursue a common interest in the business activities of the partnership, *in a non-arm's length relationship*." [emphasis added]

the object, spirit or purpose of the provision. 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.³⁵

I fail to see how the Minister is in a *better position* than the taxpayer to make submissions on legislative intent, unless the court is inferring that the Minister has access to information about legislative intent to which taxpayers do not have access—and even if it did, I doubt such information would be considered a “permissible extrinsic aid” by the court. Perhaps the court is concerned that economically disadvantaged taxpayers cannot afford access to the same information as the Minister. But I doubt many economically disadvantaged taxpayers will face a GAAR reassessment.

The preferable view is that the court is simply stating that the Minister must make some argument (relying on text, context and “permissible extrinsic aids”) about legislative intent, although the Minister does not have any burden of proof in this respect.³⁶ Both the Minister and the taxpayer can make arguments about legislative

³⁵ *Canada Trustco*, para. 65.

³⁶ *Black’s Law Dictionary*, 8th edition defines “burden of proof” as “A party’s duty to prove a disputed assertion or charge. The burden of proof includes both the burden of persuasion and the burden of production.” The former is defined as the party’s duty “to convince the fact-finder to view the facts in a way that favors the party” while the latter refers to the party’s “duty to introduce enough evidence on an

intent—that is, they may both argue about the correct textual, contextual and purposive interpretation of provisions and both may refer to permissible extrinsic aids—but ultimately it is for the court to interpret the provisions.³⁷ And in doing so, the court should find the most reasonable legislative intent; it should not be only a “clear and unambiguous” legislative intent that a taxpayer can abuse.

In this respect, I suggest that the Supreme Court’s guidelines in *Canada Trustco* reflect a lower standard of proof for legislative intent than that espoused in *OSFC*. The necessary consequence of the higher *OSFC* standard is best illustrated by the Federal Court of Appeal’s conclusion in *The Queen v. Imperial Oil Limited*:

issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict.” Thus, the burden of proof is normally understood to be a factual burden, not a burden of establishing the correct interpretation of the law. That is for the court to discern and then apply that interpretation to the facts.

³⁷ In this respect, the Rothstein, JA’s remarks in *OSFC* (para. 68) of the judge’s role and the obligation of the Minister are more appropriate:

Ascertaining the relevant policy is a question of interpretation. As such it is ultimately the duty of the Court to make this determination. There is no onus to be satisfied by either party at this stage of the analysis. However, from a practical perspective, the Minister should do more than simply recite the words of subsection 245(4), and allege that there has been misuse or abuse. The Minister should set out the policy with reference to the provisions of the Act or extrinsic aids upon which he relies. Otherwise he places the taxpayer and the Court in the difficult position of trying to guess the relevant policy at issue.

The “policy” Rothstein, JA refers to is, of course, “purposive, object and spirit, scheme or policy” (*supra*, note 27 and corresponding text).

for GAAR to apply it must be clear that the provisions of the Act are being misused or the Act as a whole is being abused. *It is not enough that a court might reasonably consider them to be misused or abused.*³⁸

Of course, this conclusion was based on the (then) negative language in subsection 245(4).

It remains to be seen how trial courts and appellate courts will apply the Supreme Court's new GAAR guidelines, particularly whether the standard of proof for legislative intent has been altered in any way. In this respect, it is always open to an appellate court to overturn a lower-court decision on the basis that the trial judge made an error in law. If subsection 245(4) does require two distinct steps, the first of which requires the trial judge to determine legislative intent, then surely a trial judge who fails to do so has made an error in law in much the same way as a trial judge who makes an erroneous determination of legislative intent. In either case, the trial judge has *clearly not* proceeded on a proper construction of the provisions of the Income Tax Act and an appellate tribunal should interfere.

³⁸ [2004] 2 CTC 190, 2004 DTC 6044 (FCA), para. 40. [emphasis added]