FILE NUMBER: _____

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

BETWEEN:

DEANS KNIGHT INCOME CORPORATION

Applicant (Respondent in Federal Court of Appeal)

and

HER MAJESTY THE QUEEN

Respondent (Appellant in the Federal Court of Appeal)

MEMORANDUM OF ARGUMENT

DEANS KNIGHT INCOME CORPORATION (APPLICANT)

Pursuant to S. 40 of the *Supreme Court of Canada Act,* R.S.C. 1985, c.5-26 and Rule 25 of the Rules of the Supreme Court of Canada

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PART I. OVERVIEW AND FACTS

A. Overview of Issues of Public Importance

1. Twenty-three years ago, this Court held in *Duha Printers (Western) Ltd. v. R.*[1] that control in the *Income Tax Act*,[2] if not otherwise legislatively defined, means *de jure* control, which the Court equated with effective control. *De jure* control refers to the ownership of sufficient shares to confer the right to elect a majority of the board of directors.[3] This Court's endorsement of *de jure* control as the "Canadian standard"[4] created a certain and predictable test for determining control of a corporation.

2. Now, the Federal Court of Appeal (the "**FCA**") has upended this certainty with one sentence: "I have replaced the term 'effective control' with 'actual control'."[5] This new "actual control" test is found nowhere in the *Act* or jurisprudence and throws into question transactions by taxpayers who have relied on this Court's decision in *Duha* to structure their affairs. The FCA arrived at this new test by applying the general anti-avoidance rule (the "**GAAR**").[6]

3. The FCA Decision raises the following issue of public importance: does the application of the GAAR permit it to depart from this Court's finding in *Duha* that Parliament intends "control" in the *Act* to mean *de jure* control?

4. Taxpayers may deduct business losses from their business income when computing their taxable income without restriction under s. 111(1) of the *Act*. However, under s. 111(5) of the *Act*[7], subject to specific exceptions, where a person or group of persons acquires control of a corporation,

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[1] *Duha Printers (Western) Ltd. v. R.*, [1998] SCJ No. 41 ("***Duha***").
[2] *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the "***Act***").
[3] *Duha*, *supra* note 1, at para. 36.
[4] *Duha*, *supra* note 1, at para. 36.
[5] *Canada v. Deans Knight Income Corporation*, 2021 FCA 160 ("**FCA Decision**"), at para. 73.
[6] Section 245 of the *Act*, *supra* note 2.
[7] Subsection 111(5) of the *Act* applies to non-capital losses, and s. 37(6.1) and s. 127(9.1) of the *Act* are similar rules with respect to input tax credits and scientific research and experimental development expenditures, respectively. In this Application, references to s. 111(5) will generally apply to all three applicable sections of the *Act*, unless otherwise stated.

losses that were incurred prior to that acquisition of control may not be deducted against income after the acquisition of control. *Duha* defined control in s. 111(5) as *de jure* control.

5. The meaning of "control" applies to sections throughout the *Act*. Parliament has used this term in more than 90 provisions. It appears in a wide range of areas such as scientific research and experimental development, resource and mining expenditures, amalgamations and windings-up of corporations, segregated funds, financial institutions, communal organizations, charitable foundations, trusts, and cross-border financing. The creation of this new judge-made test that ignores *Duha* and Parliament's intent creates uncertainty throughout the *Act*, well beyond s. 111(5).

6. In overturning the decision of the Tax Court of Canada (the "**Tax Court**"), and its careful analysis of whether the detailed rules in Parliament's control acquisition scheme had been misused or abused, the FCA failed to follow this Court's guidance in *Duha*. While *Duha* was not a GAAR case, this Court conducted an analysis of the object, spirit, and purpose of s. 111(5) in a manner equivalent to that required under the GAAR.[8] This Court found that Parliament intended "control" of a corporation to mean *de jure* rather than *de facto* control. In defining control as *de jure* control, this Court found that Parliament intended to provide certainty and predictability to taxpayers.[9] This same principle applies in regard to the GAAR:

> [d]espite Parliament's intention to address abusive tax avoidance by enacting the GAAR, Parliament nonetheless intended to preserve predictability, certainty and fairness in Canadian tax law.[10]

7. Moreover, contrary to this Court's admonition that, in interpreting a provision, courts cannot search for an overriding policy that is not based on a unified textual, contextual, and purposive interpretation of the specific provision at issue,[11] the FCA has done exactly that. It has relied on general statements of government officials from 1963 and 1988 (both of which predate *Duha*) to overrule the Tax Court. The FCA did not otherwise undertake its own analysis of s. 111(5) or have regard to why this Court held in *Duha* that control in s. 111(5) is *de jure* control.

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[8] The transactions in *Duha* occurred prior to the GAAR's enactment.

[9] *Duha*, *supra* note 1, at para. 58.

[10] *Canada Trustco*, 2005 SCC 54 ("***Canada Trustco***") at para. 31.

[11] *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63 ("***Copthorne***") at para. 118.

8. In *Duha*, this Court found that the simplicity of the *de jure* test was desirable and if the distinction between *de jure* and *de facto* control was to be eliminated, it should be left to Parliament.[12] Indeed in *Duha*, this Court noted that Parliament had distinguished between *de jure* and *de facto* control and had expressly adopted the *de facto* control test in other provisions of the *Act*. For over 23 years Parliament chose to maintain that distinction. Now the FCA has done what this Court said should be left to Parliament and used the GAAR to eliminate it, despite Parliament choosing not to.

9. When this Court has expressly said that the elimination of the distinction between the *de jure* and *de facto* tests for control of a corporation should be left to Parliament and Parliament has maintained that distinction, Parliament, by its inaction, has confirmed that it considers the object, spirit, and purpose of the control test under s. 111(5) to be *de jure* control. In creating a new test for control that eliminates that distinction and ignores Parliament's intent, the FCA has legislated. The GAAR is a powerful tool, but it does not give the courts the power to legislate.

B. Statement of Facts

10. The Applicant began as a publicly-listed company. In 2008 and 2009, while the world was experiencing a financial crisis, the Applicant recapitalized its share structure and restructured its business. At the end of the restructuring, the Applicant was a publicly-listed company, but was carrying on an entirely new business.[13]

11. In 2014, the Canada Revenue Agency (the "**CRA**") reassessed the Applicant to deny the deduction of business losses that had been deducted against post-2009 business income, but that were attributable to its pre-2009 business (the "**Reassessment**"). The basis of the Reassessment was that either: (a) one of the Applicant's shareholders, Matco Capital Ltd. ("**Matco**"), had acquired control of the Applicant in 2008, or (b) the GAAR should apply as if Matco had acquired control of the Applicant at that time.[14]

12. The Applicant appealed the Reassessment to the Tax Court, where the Trial Judge made extensive factual findings regarding control of the Applicant. The material facts are summarized

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[12] *Duha*, *supra* note 1, at para. 52.
[13] *Deans Knight Income Corporation v. R.*, 2019 TCC 75 ("**TCC Decision**") at paras 6 – 8.
[14] TCC Decision, *supra* note 13, at paras 3, 4, and 42 – 44.

below. It is important to appreciate the Trial Judge's factual findings, as the FCA Decision overlooks significant factual findings at trial. Most importantly, the FCA's statement that the "reins" of the Applicant were "turn[ed] over" to Matco is not an accurate characterization of the facts found by the Trial Judge.[15]

13. Prior to 2009, the Applicant was a corporation with a history of different businesses dating back to 1985 in mineral exploration, drug research, and nutritional food additives. While it was engaged in the drug research and food additive businesses, the Applicant raised over $100 million from investors and spent those funds conducting its business, incurring significant non-capital losses and other tax attributes (the **"Tax Attributes"**). The business, however, was not profitable and in 2007 it faced insolvency and delisting of its shares from the NASDAQ stock exchange.[16]

14. In late 2007, the Applicant found a new investor in Matco, who agreed to later provide a $3 million loan (the **"Loan"**).[17] The Loan was convertible into 35% of the Applicant's voting common shares as well as non-voting shares. These were not sufficient for *de jure*, or voting, control of the Applicant.[18]

15. Prior to Matco's advancing the Loan in early 2008, a new corporation (**"Newco"**) acquired all of the shares of the Applicant, becoming its parent company. Subsequently, Newco, the Applicant, and Matco agreed that the Applicant's failing business would be transferred to Newco, and pursuant to an Investment Agreement effective April 30, 2008 (the **"Investment Agreement"**),[19] Matco would help the Applicant search for new business opportunities (the **"Corporate Opportunity"**), and for an investor that would acquire Newco's shares of the Applicant, for which Newco would receive at least $800,000 (the **"Sale Opportunity"**). The Investment Agreement gave Matco one year to find a Corporate Opportunity and a Sale Opportunity. If Matco failed to find a Corporate Opportunity and a Sale Opportunity within one year (by April 2009), it would be obligated to make a guarantee payment of $800,000 to Newco.[20]

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[15] FCA Decision, *supra* note 5, para. 13.
[16] TCC Decision, *supra* note 13, at paras. 7 – 9.
17 The Loan was evidenced by a convertible debenture dated May 9, 2008 [Tab D-1].
[18] TCC Decision, *supra* note 13, at paras. 13, 36, and 38.
[19] Investment Agreement [**TAB D-2**].
[20] TCC Decision, *supra* note 13, at paras. 15 – 16 and 21 – 23.

16. Under the Investment Agreement the Applicant retained control of its affairs, as:

(a) Newco maintained control over its 100% interest in the Applicant and was free to sell its shares of the Applicant to any party at any time as it saw fit;[21] and

(b) the Applicant, as controlled by Newco, was free to accept or reject a Corporate Opportunity presented by Matco.[22]

17. Matco searched for new business opportunities and found a fund manager, Deans Knight Capital Management (the **"Fund Manager"**),[23] that was looking to sponsor a new fund by raising money from investors and starting a new high-yield bond business. Matco, the Applicant, and the Fund Manager were not related. The high-yield investment business was the Corporate Opportunity for the Applicant. The Sale Opportunity for Newco would be the public listing of the Applicant's shares (the **"IPO"**), such that Newco could sell the shares it held in the Applicant at any time in a public market.[24]

18. On the closing of the IPO on March 18, 2009, shares in the Applicant were issued to the public, raising $100 million from a broad and diverse group of new investors. Matco exercised its conversion rights under the Loan on the same day as the IPO thus becoming a shareholder of the Applicant. After the IPO closed, Matco owned less than 4% of the total equity of the Applicant, and Newco had less than 1%. Therefore, Matco had the potential to benefit from only 4% of the Applicant's Tax Attributes and 96% of the potential benefit belonged to the other shareholders. This benefit was indirect in that it could only be realized if the new business was profitable, resulting in increased dividends payable to the shareholders.[25]

19. In order to ensure market stability, Matco and Newco agreed not to sell any of their shares in the Applicant for six months after the IPO (the **"Lock-Up Period"**). During the Lock-Up Period,

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[21] TCC Decision, at paras. 157 – 160.

[22] TCC Decision, at paras. 23, 32, 64 and 162 – 165.

23 The name of the Fund Manager is similar to that of the Applicant, but they are independent of each other. The Applicant changed its name to Deans Knight Income Corporation when it commenced its new business, in order to brand itself to investors as being within the group of funds that employ the Fund Manager to manage their investments.

[24] TCC Decision, *supra* note 13, at paras. 28 - 34.

[25] TCC Decision, *supra* note 13, at paras. 36 – 38.

Matco offered to acquire Newco's shares in the Applicant, fulfilling its promise to provide a Sale Opportunity to Newco.[26] Newco independently considered whether to accept the offer, or hold the shares and sell them in the public market for potentially more money once the Lock-Up Period ended. Ultimately, Newco accepted the offer and sold its shares in the Applicant to Matco.[27]

20. The Applicant used the funds raised from the public to start its new business, earning profits for a few years, as well as losses in later years. In the profitable years, the Applicant deducted its Tax Attributes from the income from the high yield investment business. The Applicant paid dividends to its shareholders from the earnings of its new business for several years.[28]

C. The Tax Court of Canada decision

21. At trial, the Crown advanced two arguments. First the Crown argued that Matco was deemed to have acquired control of the Applicant by having a right to acquire all of the shares of the Applicant. In the alternative, the Crown argued that the GAAR should apply.[29]

22. The Trial Judge first concluded that the Investment Agreement did not give Matco control of the Applicant, as the only right Matco had was to acquire shares on a conversion of its Loan, which did not provide Matco with *de jure* control. He also concluded that Matco had no other right to acquire shares of the Applicant, whether under the Investment Agreement or otherwise.[30]

23. Next, in undertaking his abuse analysis under the GAAR, the Trial Judge applied the two-step approach from *Copthorne* and *Canada Trustco* and conducted a unified textual, contextual and purposive analysis of ss. 111(1)(a), s. 111(5) and s. 256(8) of the *Act*. As part of his analysis, the Trial Judge considered the history of the loss trading restrictions at issue, the surrounding

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[26] Prior to this, however, Matco was not obligated to acquire Newco's shares in the Applicant, nor was Newco obligated to sell them.

[27] TCC Decision, *supra* note 13, at paras 64 and 163 – 164.
[28] TCC Decision, *supra* note 13, at para. 41.
[29] TCC Decision, *supra* note 13, at paras. 3 – 4.
[30] TCC Decision, *supra* note 13, at paras. 57 and 66.

provisions in the *Act*[31], and this Court's decision in *Duha* with respect to Parliament's intent when using the term "control".

24. The Trial Judge concluded that Parliament chose the standard of *de jure* control to be "the means by which Parliament has determined that a loss has notionally been transferred to an unrelated party". He further concluded that "the notion of control is central" to the provision and to ignore it would amount to reading out the test created by Parliament.[32] Ultimately, he determined that the purpose of the acquisition of control test is to be "a reasonable marker between situations where the corporation is a free actor in a transaction and when it is only a passive participant whose actions can be manipulated by a new person or group of persons in order to utilize the losses or Tax Attributes of the corporation for their own benefit".[33] In other words, when a shareholder acquires *de jure* control of a corporation, the company ceases to be a free actor because the controlling shareholder has the legal power to elect a new board of directors.

25. In the end, the Trial Judge held that:

(a) Matco had no effective control over the Applicant,[34]

(b) Matco had no effective control over Newco's shares of the Applicant,[35]

(c) there was no attempt by Matco, Newco or the Applicant to disguise Matco's rights under the Investment Agreement, [36]

(d) Matco acted as a facilitator and did not use the tax attributes for itself; [37] and

(e) the Crown had improperly relied on the economics of the transaction in an attempt to recharacterize the legal relationships of the parties, especially with the

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[31] TCC Decision, *supra* note 13, at para. 106 considers ss. 111(4)-(5.3); at paras 113-114 considers ss. 256(8) and 251(5)(b); at para. 116 considers s. 256(5.1); at para. 125 considers s. 256(7); at para. 131 considers s. 256.1.

[32] TCC Decision, *supra* note 13, at para. 103.
[33] TCC Decision, *supra* note 13, at para. 134.
[34] TCC Decision, *supra* note 13, at para. 150.
[35] TCC Decision, *supra* note 13, at para. 157.
[36] TCC Decision, *supra* note 13, at para. 150.
[37] TCC Decision, *supra* note 13, at para. 152.

Investment Agreement, contrary to the principle set out by this Court in *Shell Canada Ltd. v. R.*[38]

26. Since the object of Parliament was to use the effective, or *de jure*, standard of control to determine when loss trading occurs, and Matco never had *de jure* or effective control over the Applicant, the Trial Judge concluded that the GAAR did not apply.[39]

D. The Federal Court of Appeal decision

27. The FCA overturned the Tax Court's decision by introducing and applying a new test for control under s. 111(5). In doing so, the FCA considered the issue before it to be a novel one that the FCA had not previously considered.

28. Despite stating that it agreed with the Tax Court's conclusion on the object, spirit and purpose of s. 111(5), the FCA went on to "rearticulate" the Tax Court's conclusions to arrive at a new test for control under the *Act*: "actual control".[40] In doing so, the FCA relied on the following indicators of government intent:

(a) a statement made in 1963 by the Minister of Finance, when introducing an acquisition of control rule for the first time, that it was aimed at trafficking in the shares of companies with loss carryovers; and

(b) an article written by a senior Department of Finance official in 1988 commenting that one of the objectives of the creation of the GAAR itself was to deal with the "unexpected" application of loss carryforwards.[41]

29. It also looked to a statement from this Court in *Mathew*[42] that the "the general policy of the *Income Tax Act* is to prohibit the transfer of losses between taxpayers, subject to specific exemptions".[43] Ultimately, this led the FCA to conclude that s. 111(5) contemplated a new test for

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[38] TCC Decision, *supra* note 13, at para. 63, and *Shell Canada Ltd v. Canada*, [1999] 3 S.C.R. 622 at para. 39.

[39] TCC Decision, *supra* note 13, at para. 166.

[40] FCA Decision, *supra* note 5, at paras. 71 – 73.

[41] FCA Decision, *supra* note 5, at paras. 79-80.

[42] *Mathew v. Canada,* 2005 SCC 55 ("***Mathew***") at para. 49.

[43] FCA Decision, *supra* note 5, at para. 81.

"actual control", which includes "forms of *de jure* and *de facto* control", but "is different than the statutory *de facto* control test".[44] Under this test of "actual control" the FCA found that the Tax Court had erred in concluding that the transaction was not abusive, found that Matco had achieved actual control of the Applicant under the Investment Agreement,[45] and allowed the appeal.

PART II. QUESTION IN ISSUE

30. Does the application of the GAAR permit a departure from this Court's finding in *Duha* that Parliament intends "control" to mean *de jure* control?

PART III. STATEMENT OF ARGUMENT

A. The FCA Decision directly impacts taxpayers across Canada

31. The precedential effects of the FCA Decision are not limited to the Applicant and raise issues of public importance for taxpayers across Canada. The FCA's change in the meaning of control in s. 111(5) will have far-reaching effects on taxpayers across all types of businesses. Moreover, the undefined test for "actual control" creates significant uncertainty for taxpayers seeking to rely on s. 111(5) of the *Act* to structure their affairs.

32. There are over 90 provisions throughout the *Act* that employ the term "control". Until now, based on this Court's decision in *Duha*, taxpayers understood that these provisions contemplated *de jure* control. The FCA Decision jettisons this certainty in favour of an amorphous "actual control" test.

33. The broad impact of the FCA Decision is described in a support letter from the Canadian Income Tax Committee of the Tax Executives Institute, a long-standing institution with 57 chapters across North and South America, Europe and Asia representing over 7,000 members.[46] The support letter asserts that the FCA Decision "...creates significant uncertainty that will negatively impact many businesses across Canada..." and that "...it's possible to envision similar applications of the New Actual Control Standard to other provisions in the *Act* with *de jure* control

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[44] FCA Decision, *supra* note 5, at para. 83.
[45] FCA Decision, *supra* note 5, at paras. 98 and 112.
[46] Letter from Mitchell S. Trager, International President of the Tax Executives Institute, dated October 1, 2021 at Exhibit A to the Affidavit of Sheena Criece sworn October 4, 2021.

standards." The support letter describes several examples of the "far-reaching uncertainty caused by the FCA Decision and the New Actual Control Test".

34. In the seven weeks since the FCA Decision was released, significant concerns about the uncertainty introduced by this decision have been identified throughout the Canadian tax community:

(a) As Suarez set out in *Tax Notes International*: "It would be extremely helpful to hear from the SCC: whether the FCA has correctly identified the object, spirit, and purpose of s. 111(5); how the courts should determine the object, spirit, and purpose of [the *Act's*] provisions in general; and what forms of extrinsic evidence taxpayers and courts may rely on in determining what the object, spirit, and purpose of any particular provision (or group of provisions) is".[47]

(b) As Nitikman Q.C. and Jadd noted in *Tax Interpretations*: "if ever there were a tax case that calls out for the Supreme Court's review, we think that this one is it. By developing a new, undefined, test of "actual control", by reading into the Act and non-governmental statements a policy that is not reflected in the Act itself, by ignoring its own decision on the relevance of alternative arrangements, the FCA has really stood tax law on its head."[48]

(c) As Lanthier notes in *Finances of the Nation:* certain transfers of the family business from parents to children or grandchildren: "... may now involve a risk under GAAR... ".[49]

(d) As a recent article in The Lawyer's Daily noted, the FCA Decision "introduces quite a bit of uncertainty" for tax professionals and taxpayers.[50]

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[47] Steve Suarez, "Taxpayer Seeks to Appeal Anti-avoidance Case to Supreme Court of Canada", *Tax Notes International* (**"Suarez Article"**) [**TAB 1 Book of Authorities (BOA)**].

[48] Mark Jadd and Joel Nitikman, Q.C., "The GAAR Analysis in *Deans Knight*: Apparently a cigar is not always just a cigar." Tax Litigation, *Federated Press*, Volume XXIV, No.2, 2021 [**TAB 2 BOA**].

[49] Alan Lanthier, "Update: Surplus stripping and the new, costly tax loophole for intergenerational transfers", *FON Commentaries* Vol. 2, No.3 [**TAB 3 BOA**].

[50] "Legal expert says appeal decision 'introduces quite a bit of uncertainty' for tax professionals", *The Lawyer's Daily*, August 16, 2021 [**TAB 5 BOA**].

35. The public importance of this case is further demonstrated by the number of cases that are currently before the Tax Court, under appeal to the FCA, or are at varying stages of appeal with the CRA, in which the Crown has similarly reassessed taxpayers by applying the GAAR on the basis that there has been an abuse of s. 111(5) or other provisions of the *Act* that rely on the *de jure* standard of control.[51]

36. Without a clear understanding of what Parliament means when it chooses a particular standard of control, business transactions now hang under a cloud of uncertainty. This departure from Supreme Court precedent is unwarranted and it is an issue of public importance for this Court to either confirm that its reasoning in *Duha* remains good law or modify the *de jure* test in response to Parliament's enactment of the GAAR.

B. There is an "epidemic"[52] of uncertainty as between the Tax Court and FCA in applying the GAAR

37. This Court has provided an analytical framework for courts to follow that requires a unified textual, contextual and purposive analysis of the provisions of the *Act* that give rise to a tax benefit in order to determine why they were put in place and why the benefit was conferred.[53] This framework gives effect to the GAAR while also recognizing consistency, predictability, and fairness in tax law. Abusive tax avoidance occurs only when such analysis reveals that the object, spirit and purpose of the provisions relied upon by a taxpayer have been frustrated. The burden is on the Minister to clearly demonstrate misuse or abuse of the *Act* or its provisions, and the benefit of any doubt is given to the taxpayer.[54]

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[51] Under appeal to the FCA: *MMV Capital Partners Inc. v. R.*, 2020 TCC 82; Under appeal to the Tax Court: *MP Western Properties v. R.*, 2013-3885(IT)G; *1073774 Properties Inc. v. R.*, 2013-3888(IT)G; *Madison Pacific Properties Inc. v. R.*, 2014-3959(IT)G; *Metro Vancouver Properties Corp v. R.*, 2018-540(IT)G; *Total Energy Services Inc. v. R.*, 2016-367(IT)G; *4499034 Canada Inc. v. R.*, 2018-785(IT)G; *Consortium Capital Projects (Amalco) Ltd. v. R.*; 2018-3968(IT)G, 2018-3971(IT)G and 2018-3986(IT)G; *CHR Investment Corporation v. R.*, 2017-4745(IT)G; *Realex Properties Corp. v. R.*, 2018-3417(IT)G.

[52] Justice Sopinka, "The Supreme Court of Canada", Toronto, April 10, 1997 as reproduced in Watt, Beedell, Regimbald, Ragan, and Eastbrook, Supreme Court of Canada Practice 2017, (Toronto: Thomson Reuters, 2017) at p. 479 [**TAB 6 BOA**].

[53] *Canada Trustco*, *supra* note 10, at para. 66, point 4.

[54] *Copthorne*, *supra* note 11, at para. 72.

38. This Court has stated that where a Tax Court judge has proceeded on a proper construction of the provisions of the *Act* and on findings supported by the evidence, appellate courts should not interfere.[55] Despite this, the FCA Decision is the fourth case in four years where the FCA has overturned a Tax Court decision in respect of abusive tax avoidance.[56] This suggests a significant split in how the Tax Court, a highly specialized court dedicated solely to interpreting and applying the *Act* and Parliament's policies, and the Federal Court of Appeal are interpreting this Court's instructions on misuse and abuse under the GAAR. When the Tax Court concludes that a taxpayer has, or has not, engaged in abusive tax avoidance following the analytical framework provided by this Court, the FCA should rarely overturn that decision.

39. This Court should address such disagreement over a powerful provision like the GAAR. The GAAR grants the CRA significant powers to "negate arrangements" of individuals and corporations on the basis that they constitute abusive tax avoidance.[57] Because of the breadth of this power, this Court has stated that the GAAR is a measure of last resort and may only be applied when the misuse or abuse of the *Act* is clear.[58] This case is an opportunity for this Court to direct that GAAR decisions be made in the rigorous and principled way set out in *Canada Trustco* and *Copthorne*.[59]

C. The FCA introduces a new test for control that conflicts with Parliament's intent

40. In *Duha*, this Court found that Parliament had provided clear guidance to taxpayers by creating two distinct and well-understood control tests that are used throughout the *Act*. When Parliament wants to apply consequences based on the effective legal control of a company, it uses the *de jure* standard. When it wishes to apply consequences based on factual control over the affairs of a company, it employs the *de facto* standard.[60]

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[55] *Canada Trustco*, *supra* note 10, at para. 66, point 7.
[56] *Canada v. 594710 British Columbia Ltd.*, 2018 FCA 166; *Canada v. Oxford Properties Group Inc.*, 2018 FCA 30; and *Univar Holdco Canada ULC v. R.*, 2017 FCA 207.
[57] *Canada Trustco*, *supra* note 10, at para. 13.
[58] *Copthorne, supra* note 11, at para. 68; *Canada Trustco*, *supra* note 10, at para. 50.
[59] *Canada Trustco*, *supra* note 10, at para. 66. *Copthorne*, *supra* note 10, at paras. 68 – 72.
[60] *Duha*, *supra* note 1, at para. 58.

41. There is no doubt that Parliament understands the distinction between the *de jure* and *de facto* control tests.[61] When Parliament chooses to use the term "control" in an unqualified manner, it means effective, or *de jure* control, which is the ability to elect the majority of the board of directors of a corporation through the ownership of shares. In contrast, when Parliament uses the phrase: "controlled, directly or indirectly, in any manner whatever", this includes factual, or *de facto* control, and does not necessarily depend on a shareholder's voting rights. Parliament chooses its intended test by choosing its words.

42. Despite not being a GAAR case, the Supreme Court of Canada spent considerable time in *Duha* conducting what was tantamount to an object, spirit and purpose analysis of s. 111(5). In that case, Iacobucci J. conducted a textual analysis of s. 111(5), finding that where another person acquires "control" of a corporation, that corporation's losses could become restricted.[62] He found that the meaning of the word "control" refers to *de jure* control and not *de facto* control.[63] The *de jure* test seeks to ascertain who is in effective control of the affairs and fortunes of the corporation. This test for control came from the applicable corporate law which gives the majority shareholder the indirect exercise of control through his or her ability to elect the board of directors.[64]

43. In his contextual review, Iacobucci J. contrasted *de jure* control with *de facto* control finding that Parliament "has now recognized the distinction between *de jure* and *de facto* control, adopting the latter as the new standard for the associated corporation rules"[65] and further finding that Parliament had rejected the *de facto* standard in s. 111(5) because it involves ascertaining control in fact which can lead to a myriad of indicators that exist apart from the corporation's governing statute and its constitutional documents.[66]

44. This finding was not just about the meaning of the word "control", but was a finding of Parliament's purpose underlying s. 111(5). This is evident from Iacobucci J.'s statement that to apply the test formalistically, "without paying appropriate heed to the reason for the test, can lead

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[61] *Duha*, *supra* note 1, at para. 52.
[62] *Duha*, *supra* note 1, at para. 14.
[63] *Duha, supra* note 1, at para. 35.
[64] *Duha, supra* note 1, at para. 36.
[65] *Duha, supra* note 1, at para. 52.
[66] *Duha, supra* note 1, at para. 58.

to an unfortunately artificial result".[67] Thus, Iacobucci J. concluded that Parliament chose the *de jure* standard "because" it is a relatively certain and predictable concept for determining control.[68]

45. In *Canada Trustco,* this Court found that statutory language must be respected and interpreted according to its well-established meaning and that a contextual and purposive interpretation may only add nuance to that well-established meaning.[69] The GAAR "does not rewrite the provisions of the *Income Tax Act;* it only requires that a tax benefit be consistent with the object, spirit and purpose of the provisions that are relied upon".[70] Despite this, the FCA decision has rewritten the well-established meaning of control identified in *Duha* and "supplemented"[71] it with actual control in contravention of this Court's directions in *Canada Trustco*.

46. Parliament has had twenty-three years since *Duha* to alter the meaning of control under the *Act*. It has chosen not to do so. As Rothstein J. found in *Gifford v. R*, Parliament often amends the *Act* in response to decisions of the Supreme Court.[72] As such, it is reasonable to conclude that when Parliament has had a real opportunity to amend the *Act* in response to a Supreme Court decision and has not done so, that Parliament's intention is consistent with the Supreme Court jurisprudence. In this case, Parliament by its inaction has confirmed that it considers the object, spirit, and purpose of the control test in s. 111(5) to be *de jure* control.

47. The FCA added to the uncertainty and confusion it created in eliminating the distinction between the *de jure* and *de facto* control tests with its suggestion that the GAAR, enacted in 1988, was Parliament's "response" to the statement ten years later in *Duha* that any such change should be left to Parliament.[73] The FCA Decision did not answer the question of whether the GAAR changes the *Duha* principle that the *de jure* test remains as Parliament's choice of a test for the determination of an acquisition of control.

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[67] *Duha, supra* note 1, at para. 37.
[68] *Duha, supra* note 1, at para. 58.
[69] *Canada Trustco, supra* note 10, at para. 54.
[70] *Canada Trustco, supra* note 10, at para. 54.
[71] FCA Decision, *supra* note 5, at para. 83.
[72] *Gifford v. R.*, 2002 FCA 301 at para. 52.
[73] FCA Decision, *supra* note 5, at paras. 84 – 85.

48. In *Duha*, this Court said: if the distinction between *de jure* and *de facto* control is to be eliminated or altered, it should be left to Parliament, not to the courts.[74] In fashioning the new test for control, the FCA has eliminated that distinction. It is a matter of public importance for this Court to confirm that its findings in regard to Parliament's intent remain good law and binding and that the creation of new tests or the merger of the *de jure* and *de facto* control tests should be left to Parliament.

D. The "actual control" test is undefined and unclear

49. As the commentary on the FCA Decision reflects, there is confusion as to what the FCA means by "actual control". As one commentator has put it: "[i]t is by no means clear what the FCA meant by "actual control" or how it is determined."[75]

50. In regard to what "actual control" means, the FCA Decision provides no guidance or criteria to determine the scope of this new test, other than to state that it contains forms of both *de jure* and *de facto* control, but is different than the statutory *de facto* control test. However, in doing so, it ignores that this Court in *Duha* had equated actual control with *de facto* control.[76] In paragraph 83 of the FCA Decision, the FCA makes a number of seemingly conflicting statements without proper explanation or analysis:

(a) that s. 111 (5) includes forms of *de jure* and *de facto* control (contrary to *Duha*);

(b) that the actual control test is "different" than the statutory *de facto* control test in s. 256(5.1);

(c) the GAAR is intended to "supplement" the *Act* in determining abusive tax avoidance;

(d) the text under s. 111 (5) is limited to *de jure* control; and

(e) the object, spirit and purpose of s. 111(5) takes into account different forms of control.

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[74] *Duha*, *supra* note 1, at para. 52.
[75] Suarez Article, *supra* note 47 at p. 18 [**TAB 1 BOA**].
[76] *Duha*, *supra* note 1, at para. 49.

51. Without explaining what aspects of *de jure* and *de facto* control are included in this new test and how it differs from the existing tests, taxpayers will be unable to apply this new standard with any certainty.

52. Second, the question of how one might determine whether a party has actual control is similarly unclear. The "actual control" test, in contrast to the *de jure* test, seemingly requires a court to consider numerous extrinsic factors from different sources when attempting to determine "actual control". This Court specifically found in *Duha* that a test that required a court to consider "a myriad of indicators" was not appropriate in the context of s. 111(5), as it removes the certainty that the *Act* must provide for taxpayers.[77]

53. The lack of clarity in the "actual control" test means that Canadian taxpayers who engage in everyday transactions are now unsure as to whether the Government will recharacterize their transactions under the GAAR. This is contrary to this Court's statement in *Canada Trustco* that Parliament must also be taken to seek consistency, predictability and fairness in tax law.[78]

54. Without clarification from this Court taxpayers are now unable to determine what level of influence a person may have over a corporation without triggering the restrictions under s. 111(5). For example, in each of the following cases, a taxpayer no longer has certainty whether its carry-forward tax attributes become restricted under the actual control test:

(a) Where a company borrows money from a financial institution, and the lending agreement contains restrictions over the taxpayer's business and share structure, could the lending institution be found to have acquired actual control?

(b) Where an investor acquires 20% or more of the shares of a publicly-listed company through a stock exchange, such that it is deemed to be a "control person" under securities legislation,[79] could that investor be found to have acquired actual control?

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[77] *Duha*, *supra* note 1, at para. 58.
[78] *Canada Trustco*, *supra* note 10, at para. 42.
[79] See for example the definition of "control person" in each of: *Securities Act* (B.C.) RSBC 1996, c. 418, s. 1; *Securities Act* (Ontario) RSO 1990, c. S-5, s. 1; and *Securities Act* (Alberta) RSA 2000, c. S-4, s. 1(l).

(c) Where a family member has a close relationship with the owner or owners of a company, and exerts influence over the business through that relationship, could they be found to have acquired actual control?

(d) Where the supplier of a business (such as a franchise or a dealership) has significant economic influence over a company, could that supplier be found to have acquired actual control?

(e) Where a shareholder acquires 25% or more of the shares of a corporation, such that it is deemed to be an "individual with significant control" for purposes of the *Canada Business Corporations Act*,[80] could that shareholder be found to have acquired actual control?

55. This Court has warned that courts should be mindful of how GAAR decisions may have implications for innumerable "everyday" transactions of taxpayers.[81] The lack of clarity on how to apply the actual control test requires this Court's intervention to resolve the uncertainty that now affects everyday business and investing transactions.

E. The FCA has effectively amended legislation that Parliament has chosen not to change

56. Instead of examining the historical evolution of Parliament's rules against loss trading under a unified textual, contextual and purposive analysis, the FCA went on a search for an overarching policy and then relied on such policy to "supplement" the legislation, ignoring the admonition of this Court in *Canada Trustco* that:

> 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. First, such a search is incompatible with the roles of reviewing judges. The *Income Tax Act* is a compendium of highly detailed and often complex provisions. To send the courts on the search for some overarching policy and then to use such a policy to override the wording of the provisions of the *Income Tax Act* would inappropriately place the formulation of taxation policy in the hands of the judiciary, requiring judges

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[80] See *Canada Business Corporations Act*, RSC 1985, c. C-44, s. 2.1.
[81] *Copthorne*, *supra* note 11, at para. 67.

> to perform a task to which they are unaccustomed and for which they are not equipped. [emphasis added][82]

57. Despite this warning, the FCA overrode the result that the Tax Court had reached based on a textual, contextual and purposive analysis (after purportedly adopting the Tax Court's analysis in this regard),[83] and instead found an object, spirit, and purpose based on the broadest of statements not tied to the actual provisions at hand. Specifically, the FCA relied on: (1) a statement made in 1963 by the Minister of Finance about the first iteration of an acquisition of control rule in the *Act*, and (2) an article written by a Department of Finance official in 1988 about the creation of the GAAR.[84]

58. As one commentator has noted, the FCA's reliance on these policy statements instead of the provisions of the *Act* weakens the role of Parliament in the interpretation of the *Act*: "What matters is not so much what Parliament actually said, but what the 'government' or even officials may have had in mind."[85] This Court also recognized the danger of such an approach in *Canada Trustco* warning that the object, spirit and purpose of legislative provisions should not be ascertained by relying on a generalized statement of policy.[86] The FCA's use in this case of decades-old policy statements to determine the purpose of a provision in the *Act* is antithetical to precedents from this Court.

59. There is no dispute that the *Act* contains a general policy against loss trading between taxpayers who deal with each other at arm's length. The historical development of the provisions at issue make this clear. This Court recognized this general policy in *Mathew*.[87] The scope of this policy, however, must be discovered from the provisions of the *Act*, as the abuse analysis under the GAAR cannot be divorced from the legislation.[88]

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[82] *Canada Trustco*, *supra* note 10, at para. 41.
[83] FCA Decision, *supra* note 5, at paras. 71 – 73.
[84] FCA Decision, *supra* note 5, at paras. 79 – 80.
[85] Richard W. Pound, Pound's Tax Case Notes, Thomson Reuters, September 24, 2021 [**TAB 7 BOA**].
[86] *Canada Trustco*, *supra* note 10, at para. 42.
[87] *Mathew*, *supra* note 41, at para. 49.
[88] *Canada Trustco*, *supra* note 10, at paras 41-42.

60. Parliament has maintained its general policy against loss trading for over sixty years, modifying it through incremental changes to the legislation over time. The evolution of s. 111(5), the applicable "loss-trading" rule in this case and its companion provisions over the decades, demonstrates Parliament's careful crafting of the loss trading rule.[89] As noted by the Tax Court, since 1972 Parliament has always chosen an acquisition of *de jure* control as the standard to identify loss trading between arm's length parties.[90]

61. When this Court released its decision in *Duha* in 1998, Parliament was put on notice (if it did not already know) that the Supreme Court had interpreted Parliament's intention as being that its loss trading rule contemplated only *de jure* or effective control, and not *de facto* control. Since that time, Parliament has only made two targeted changes to the *de jure* and *de facto* control tests within the *Act*:

(a) the enactment of s. 256.1 in 2013; and

(b) the enactment of 256(5.11) in 2017, in response to a lower court decision with respect to the ambit of *de facto* control.[91]

62. Despite the fact that s. 256.1 was enacted after the Applicant's years under reassessment, it is particularly revealing of Parliament's policy. Section 256.1 was created by Parliament to address transactions whereby new investors avoided acquisitions of *de jure* control through the use of non-voting equity. Notably, to address this type of tax planning Parliament did not change the *de jure* control test, nor did it adopt a *de facto* control test. Instead, it created a new bright-line test that deems *de jure* control to have been acquired where a new shareholder acquires more than 75% of the equity of a corporation, without acquiring *de jure* control, and where one of the main reasons of avoiding the acquisition of control was to avoid the restrictions on the corporation's tax attributes.

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[89] TCC Decision, *supra* note 13, at paras. 107 – 131.

[90] TCC Decision, *supra* note 13, at para. 131.

[91] Subsection 256(5.11) expands the definition of *de facto* control to require courts to consider a wide range of factors. It was enacted in response to a court case which restricted its application to factual control over the directors of a corporation. This is a clear demonstration of Parliament reacting when it disagrees with a court's interpretation of a control test.

63. This history led Paris J. in the TCC Decision to conclude that loss trading occurs when a new person acquires control such that he or she can use a corporation's losses to his or her sole advantage.[92] The FCA Decision ignored this conclusion and instead chose to "supplement" the provisions of the *Act* in order to deal with abusive tax avoidance.[93] To supplement the provisions of the *Act* with extrinsic aids in support of an overriding policy that is not demonstrated in the provisions of the *Act* further demonstrates the FCA's failure to follow this Court's admonition:

> … to 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. Although Parliament's general purpose in enacting the GAAR was to preserve legitimate tax minimization schemes while prohibiting abusive tax avoidance, Parliament must also be taken to seek consistency, predictability and fairness in tax law. These three latter purposes would be frustrated if the Minister and/or the courts overrode the provisions of the *Income Tax Act* without any basis in a textual, contextual and purposive interpretation of those provisions.[94]

64. The FCA has acted where Parliament has chosen not to. Under the GAAR, the courts are to ascertain the object, spirit and purpose of legislation, not supplement or change the meaning of statutory provisions.

PART IV. COSTS AND ORDER SOUGHT

65. The Applicant respectfully requests leave to appeal from the decision of the Federal Court of Appeal, dated August 4, 2021, with costs in the cause.

All of which is respectfully submitted this 4th day of October, 2021

Barry Crump /Heather DiGregorio / Robert Martz
Burnet, Duckworth & Palmer LLP
Counsel for the Applicants

[92] TCC Decision, *supra* note 13, at para. 134.
[93] FCA Decision, *supra* note 5, at para. 83.
[94] *Canada Trustco*, *supra* note 10, at para. 42.

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		immediately before that time exceeds (b) the total of (i) where the business to which the amounts described in clause (a)(i)(A), (B) or (C) may reasonably be considered to have been related was carried on by the corporation for profit or with a reasonable expectation of profit throughout the year, the total of (A) the corporation's income for the year from the business before making any deduction under subsection (1), and (B) where properties were sold, leased, rented or developed, or services were rendered, in the course of carrying on the business before that time, the corporation's income for the year, before making any deduction under subsection (1), from any other business substantially all the income of which, was derived from the sale, leasing, rental or development, as the case may be, of similar properties or the .rendering of similar services, and (ii) the total of all amounts each of which is an amount determined in respect of a preceding taxation year of the corporation that ended after that time equal to the lesser of (A) the amount determined under subparagraph (i) with respect to the corporation in respect of the business for that preceding year, and (B) the amount in respect of the business deducted by virtue	

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		of subsection (1) in computing .the corporation's income for that preceding year.	
		111(1) (1) Losses deductible - For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted such portion as the taxpayer may claim of the taxpayer's (a) non-capital losses - non-capital losses for the 20 taxation years immediately preceding and the 3 taxation years immediately following the year; (b) net capital losses - net capital losses for taxation years preceding and the three taxation years immediately following the year; (c) restricted farm losses - restricted farm losses for the 20 taxation years immediately preceding and the 3 taxation years immediately following the year, but no amount is deductible for the year in respect of restricted farm losses except to the extent of the taxpayer's incomes for the year from all farming businesses carried on by the taxpayer; (d) farm losses - farm losses for the 20 taxation years immediately preceding and the 3 taxation years immediately following the year; and (e) limited partnership losses - limited partnership losses	4, 23

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		in respect of a partnership for taxation years preceding the year, but no amount is deductible for the year in respect of a limited partnership loss except to the extent of the amount by which (i) the taxpayer's at-risk amount in respect of the partnership (within the meaning assigned by subsection 96(2.2)) at the end of the last fiscal period of the partnership ending in the taxation year exceeds (ii) the total of all amounts each of which. is (A) the amount required by subsection 127(8) in respect of the partnership to be added in computing the investment tax credit of the taxpayer for the taxation year;, (B) the taxpayer's share of any losses of the partnership for that fiscal period from a business or property, or (C) the taxpayer's share of (I) the foreign resource pool expenses, if any, incurred by the partnership in that fiscal period, (II) the Canadian exploration expense, if any, incurred by the partnership in that fiscal period, (III) the Canadian development expense, if any, in-curred by the partnership in that fiscal period, and (IV) the Canadian oil and gas property expense, if any, incurred by the partnership in that fiscal period.	

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		111(5) (5) Idem [business or property losses after change in control] - Where, at any time, control of a corporation has been acquired by a person or group of persons, no amount in respect of its non-capital loss or farm loss for a taxation year ending before that time is deductible by the corporation for a taxation year ending after that time and no amount in respect of its non-capital loss or farm loss for a taxation year ending after that time is deductible by the corporation for a taxation year ending before that time except that (a) such portion of the corporation's non-capital loss or farm loss, as the case may be, for a taxation year ending before that time as may reasonably be regarded as its loss from carrying on a business and, where a business was carried on by the corporation in that year, such portion of the non-capital loss as may reasonably be regarded as being in respect of an amount deductible under paragraph ll0(l)(k) in. computing its taxable income for the year is deductible by the corporation for a particular taxation year ending after that time (i) only if that business was carried on by the corporation for profit or with a reasonable expectation of profit throughout the particular year, and	4, 5, 6, 7, 9, 23, 27, 28, 29, 31, 34, 35, 42, 43, 44, 46, 50, 52, 54, 60

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		(ii) only to the extent of the total of the corporation's income for the particular year from that business and, where properties were sold, leased, rented or developed or services rendered in the course of carrying on that business before that time, from any other business substantially all the income of which was derived from the sale, leasing, rental or development, as the case may be, of similar properties or the rendering of similar services; and (b) such portion of the corporation's non-capital loss or farm loss, as the case may be, for a taxation year ending after that time as may reasonably be regarded as its loss from carrying on a business and, where a business was carried on by the corporation in that year, such portion of the non-capital loss as may reasonably be regarded as being in respect of an amount deductible under paragraph ll0(l)(k) in computing its taxable income for the year is deductible by the corporation. for a particular year ending before that time (i) only if throughout the taxation year and in the particular year that business was carried on by the corporation for profit or with a reasonable expectation of profit, and (ii) only to the extent of the corporation's income for the particular year from that business and, where properties were	

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		sold, leased, rented or developed or services rendered in the course of carrying on that business before that time, from any other business substantially all the income of which was derived from the sale, leasing, rental or development, as the case may be, of similar properties or the rendering of similar services.	
		127(9.1) (9.1) Control acquired before the end of the year - Where a taxpayer is a corporation the control of which has been acquired by a person or group of persons (each of whom is in this subsection referred to as the "purchaser") at any time (in this subsection referred to as "that time") before the end of a taxation year of the corporation, the amount determined for the purposes of paragraph (j) of the definition "investment tax credit" in subsection (9) is the amount, if any, by which (a) the amount, if any, by which (i) the total of all amounts added in computing its investment tax credit at the end of the year in respect of a property acquired, or an expenditure made, before that time exceeds (ii) the total .of all amounts each of which is an amount (A) deducted in computing its investment tax credit at the	4

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		end of the year under paragraph (f) or (g) of the definition "investment tax credit" in subsection (9), or (B) deducted in computing its investment tax credit at the end of the taxation year immediately preceding the year under paragraph (i) of that definition, to the extent that the amount may reasonably be considered to have been so deducted in respect of a property or expenditure in respect of which an amount is included in subparagraph (i) exceeds the total of (b) [Repealed under former Act] (c) the amount, if any, by which its refundable Part VII tax on hand at the end of the year exceeds the total of all amounts each of which is an amount designated under subsection 192(4) in respect of a share issued by it (i) in the period commencing one month before that time and ending at that time, or (ii)·after that time, and before the end of the year, and (d) that proportion of the amount that, but for subsections (3) and (5) and sections 126, 127.2 and 127.3, would be its tax payable under this Part for the year that, (i) where throughout the year the corporation carried on a particular business in the course of which a property was acquired, or an expenditure was made, before that time.in respect	

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		of which an amount is included in computing its investment tax credit at the end of the year, the amount, if any, by which the total of all amounts each of which is (A) its income for the year from. the particular business, or (B) its income for the year from any other business substantially all the income of which was derived from the sale, leasing, rental or development of properties or the rendering of services similar to the properties sold, leased, rented or developed, or the services rendered, as the case may be, by the corporation in carrying on the particular business before that time exceeds (C) the total of all amounts each of which is an amount deducted under paragraph 111(1)(a) or (d) for the year by the corporation in respect of a non-capital loss or a farm loss, as the case may be, for a taxation year in respect of the particular business or the other business, is of the greater of (ii) the amount determined under subparagraph (i), and (iii) its taxable income for the year.	
		245 (1) (1) Definitions	2

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		"tax benefit" means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act, and includes a reduction, avoid-ance or deferral of tax or other amount that would be payable under this Act but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty; "tax consequences" to a person means the amount of income, taxa-ble income, or taxable income earned in Canada of, tax or other amount payable by or refundable to the person under this Act, or any other amount that is relevant for the purposes of computing that amount; (2) General anti-avoidance provision [GAAR] - Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of trans-actions that includes that transaction. (3) Avoidance transaction - An avoidance transaction. means any transaction (a) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered	

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		to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit; or (b) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit. (4) Application of subsec. (2)- Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction (a) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of (i) this Act, (ii). the *Income Tax Regulations,* (iii) the *Income Tax Application Rules,* (iv) a tax treaty, or (v) any other enactment that is relevant in computing tax or any other amount payable by or refundable to a person under this Act or in determining any amount that is relevant for the purposes of that computation; or (b) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.	

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		(5) Determination of tax consequences - Without restricting the generality of subsection (2), and notwithstanding any other enactment, (a) any deduction, exemption or exclusion in computing income, taxable income, taxable income earned in Canada or tax payable or any part thereof may be allowed or disallowed in whole or in part, (b) any such deduction, exemption or exclusion, any income, loss or other amount or part thereof may be allocated to any person, (c) the nature of any payment or other amount may be recharacterized, and (d) the tax effects that would otherwise result from the application of other provisions of this Act may be ignored, in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction. (6) Request for adjustments - Where with respect to a transaction (a) a notice of assessment, reassessment or additional assessment involving the application of subsection (2) with respect to the transaction has been sent to a person, or (b) a notice of determination pursuant to subsection 152(1.11)	

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		has been sent to a person with respect to the transaction, any person (other than a person referred to in paragraph (a) or (b)) shall be entitled, within 180 days after the day of sending of the notice, to request in writing that the Minister make an assessment, reassessment or additional assessment applying subsection (2) or make a determination applying subsection 152(1.11) with respect to that transaction. (7) Exception - Notwithstanding any other provision of this Act, the tax consequences to any person, following the application of this section, shall only be determined through a notice of assessment, reassessment, additional assessment or determination pursuant to subsection 152(1.11) · involving the application of this section (8) Duties of Minister - On receipt of a request by a person under subsection (6), the Minister shall, with all due dispatch, con-sider the request and, notwithstanding subsection 152(4), assess, re- assess or make an additional assessment or determination pursuant to subsection 152(1.11) with respect to that person, except that an assessment, reassessment, additional assessment or determination may be made under this subsection only to the extent that it may	

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		reasonably be regarded as relating to the transaction referred to in subsection (6).	
		256(5.1) (5.1) Control in fact - For the. purposes of this Act, where the expression "controlled, directly or indirectly in any manner whatever," is used, a corporation shall be considered. to be so con-trolled by another corporation, person or group of persons (in this subsection referred to as the "controller") at any time where, at that time, the controller .has any direct or indirect influence that, if exer-cised, would result in control in fact of the corporation, except that, where .the corporation and the controller are dealing with each other at arm's length and the influence is derived from a franchise, licence, lease, distribution, supply or management agreement or other similar agreement or arrangement, the main purpose of which is to govern the relationship between the corporation and the controller regarding the manner in which a business carried on by the corpora-tion is to be conducted, the corporation shall not be considered to be controlled, directly or indirectly in any manner whatever, by the controller by reason only of that agreement or arrangement.	50
		256(5.11) (5.11) For the purposes of the Act, the determination of whether a taxpayer has, in respect of a corporation,	61

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		any direct or indirect influence that, if exercised, would result in control in fact of the corporation, shall (a) take into consideration all factors that are relevant in the circumstances; and (b) not be limited to, and the relevant factors need not include, whether the taxpayer has a legally enforceable right or ability to effect a change in the board of directors of the corporation, or its powers, or to exercise influence over the shareholder or shareholders who have that right or ability.	
		256(7) and (8) (7) Acquiring control - For the purposes of this subsection, of subsections 10(10), 13(21.2) and (24), 14(12) and 18(15), sections 18.1 and 37, subsection 40(3.4), the definition "superficial loss" in section 54, section 55, subsections 66(11), (11.4) and (11.5), 66.5(3) and 66.7(10) and (11), section 80, paragraph 80.04(4)(h), subsections 85(1.2), 88(1.1) and (1.2) and 110.1(1.2), sections 111 and 127 and subsection 249(4) and of subsection 5905(5.2) of the *Income Tax Regulations*, (a) control of a particular corporation shall be deemed not to have been acquired solely because of (i) the acquisition at any time of shares of any corporation by (A) a particular person who acquired the shares from a person to whom the particular person was related (otherwise than because of a right referred to in paragraph	23

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		251(5)(b)) immediately before that time, (B) a particular person who was related to the particular corporation (otherwise than because of a right referred to in paragraph 251(5)(b)) immediately before that time, (C) an estate that acquired the shares because of the death of a person, (D) a particular person who acquired the shares from an estate that arose on the death of another person to whom the particular person was related, or (E) a corporation on a distribution (within the meaning assigned by subsection 55(1)) by a specified corporation (within the meaning assigned by that subsection) if a dividend, to which subsection 55(2) does not apply because of paragraph 55(3)(b), is received in the course of the reorganization in which the distribution occurs, (ii) the redemption or cancellation at any particular time of, or a change at any particular time in the rights, privileges, restrictions or conditions attaching to, shares of the particular corporation or of a corporation controlling the particular corporation, where each person and each member of each group of persons that controls the particular corporation immediately after the particular time was related (otherwise than because of a right referred to in paragraph 251 (5)(b)) to the	

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		corporation (A) immediately before the particular time, or (B) immediately before the death of a person, where the shares were held immediately before the particular time by an estate that acquired the shares because of the person's death; or (iii) the acquisition at any time of shares of the particular corporation if (A) the acquisition of those shares would otherwise result in the acquisition of control of the particular corporation at that time by a related group of persons, and (B) each member of each group of persons that controls the particular corporation at that time was related (otherwise than because of a right referred to in paragraph 251(5)(b)) to the particular corporation immediately before that time; (b)where at any time 2 or more corporations (each of which is referred to in this paragraph as a "predecessor corporation") have amalgamated to form one corporate entity (in this paragraph referred to as the "new corporation"), (i) control of a corporation is deemed not to have been acquired by any person or group of persons solely because of the amalgamation unless it is deemed by subparagraph (ii) or (iii) to have been so acquired, (ii) a. person or group of persons that controls the new corporation	

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		immediately after the amalgamation and did not control a predecessor corporation immediately before the amalgamation is deemed to have acquired immediately before the amalgamation control of the predecessor corporation and of each corporation it controlled immediately before the amal- gamation (unless the person or group of persons would not have acquired control of the predecessor corporation if the person or group of persons had acquired all the shares of the predecessor corporation immediately before the amalgamation), and (iii) control of a predecessor corporation and of each corporation it controlled immediately before the amalgamation is deemed to have been acquired immediately before the amalgamation by a person or group of persons (A) unless the predecessor corporation was related (otherwise than because of a right referred to in paragraph 251(5)(b)) immediately before the amalgamation to each other predecessor corporation, (B) unless, if one person had immediately after the amalgamation acquired all the shares of the new corporation's capital stock that the shareholders of the predecessor corporation, or of another predecessor corporation that controlled the predecessor corporation, acquired on the amalgamation in consideration for their shares of the	

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		predecessor corporation or of the other predecessor corporation, as the case may be, the person would have acquired control of the new corporation as a result of the acquisition of those shares, or (C) unless this subparagraph would, but for this clause, deem control of each predecessor corporation to have been acquired on the amalgamation where the amalgamation is an amalgamation of (I) two corporations, or (II) two corporations (in this subclause referred to as the "parents") and one or more other corporations (each of which is in this subclause referred to as a "subsidiary") that would, if all the shares of each subsidiary's capital stock that were held immediately before the amalgamation by the parents had been held by one person, have been controlled by that person; (c) subject to paragraph (a), where 2 or more persons (in this paragraph referred to as the "transferors") dispose of shares of the capital stock of a particular corporation in exchange for shares of the capital stock of another corporation (in this paragraph referred to as the "acquiring corporation"), control of the acquiring corporation and of each corporation controlled by it immediately before the exchange is deemed to have been acquired at the time of the exchange by a person or group of persons unless	

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		(i) the particular corporation and the acquiring corporation were related (otherwise than because of a right referred to in paragraph 251(5)(b)) to each other immediately before the exchange, or (ii) if all the shares of the acquiring corporation's capital stock that were acquired by the transferors on the exchange were acquired at the time of the exchange by one person, the person would not control the acquiring corporation; a series of transactions or events, two or more persons acquire shares of a corporation (in this paragraph referred to as the "acquiring corporation") in exchange for or upon a redemption or surrender of interests in, or as a consequence of a distribution from, a SIFT trust (determined without reference to subsection 122.1(2)), SIFT partnership (determined without reference to subsection 197(8)) or real estate investment trust (as defined in subsection 122.1(1)), control of the acquiring corporation and of each corporation controlled by it immediately before the particular time is deemed to have been acquired by a person or group of persons at the particular time unless (i) in respect of each of the corporations, a person (in this subparagraph referred to as a "relevant person") affiliated	

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		(within the meaning assigned by section 251.1 read without reference to the definition "controlled" in subsection 251.1(3)) with the SIFT trust, SIFT partnership or real estate investment trust owned shares of the particular corporation having a total fair market value of more than 50% of the fair market value of all the issued and outstanding shares of the particular corporation at all times during the period that (A) begins on the latest of July 14, 2008, the date the particular corporation came into existence and the time of the last acquisition of control, if any, of the particular corporation by a relevant person, and (B) ends immediately before the particular time, (ii) if all the securities (in this subparagraph as defined in subsection 122.1(1)) of the acquiring corporation that were acquired as part of the series of transactions or events at or before the particular time were acquired by one person, the person would (A) not at the particular time control the acquiring corporation, and (B) have at the particular time acquired securities of the acquiring corporation having a fair market value of not more than 50% of the fair market value of all the issued	

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		and outstanding shares of the acquiring corporation, or (iii) this paragraph previously applied to deem an acquisition of control of the acquiring corporation upon an acquisition of shares that was part of the same series of transactions or events; (d) where at any time shares of the capital stock of a particular corporation are disposed of to another corporation (in this paragraph referred to as the "acquiring corporation") for consideration that includes shares of the acquiring corporation's capital stock and, immediately after that time, the acquiring corporation and the particular corporation are controlled by a person or group of persons who (i) controlled the particular corporation immediately before that time, and (ii) did not, as part of the series of transactions or events that includes the disposition, cease to control the acquiring corporation, control of the particular corporation and of each corporation controlled by it immediately before that time is deemed not to have been acquired by the acquiring corporation solely because of the disposition; (e) control of a particular corporation and of each corporation	

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		controlled by it immediately before a particular time is deemed not to have been acquired at the particular time by a corporation (in this paragraph referred to as the "acquiring corporation") if at the particular time, the acquiring corporation acquires shares of the particular corporation's capital stock for consideration that consists solely of shares of the acquiring corporation's capital stock, and if (i) immediately after the particular time (A) the acquiring corporation owns all the shares of each class of the particular corporation's capital stock (determined without reference to shares of a specified class, within the meaning assigned by paragraph 88(1)(c.8)), (B) the acquiring corporation is not controlled by any person or group of persons, and (C) the fair market value of the shares of the particular corporation's capital stock that are owned by the acquiring corporation is not less than 95% of the fair market value of all of the assets of the acquiring corporation, or (ii) any of clauses (i)(A) to (C) do not apply and the acquisition occurs as part of a plan of arrangement that, on completion, results in (A) the acquiring corporation (or a new corporation that is	

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		formed on an amalgamation of the acquiring corporation and a subsidiary wholly-owned corporation of the acquir- ing corporation) owning all the shares of each class of the particular corporation's capital stock (determined without reference to shares of a specified class, within the meaning assigned by paragraph 88(l)(c.8)), (B) the acquiring corporation (or the new corporation) not being controlled by any person or group of persons, and (C) the fair market value of the shares of the particular corporation's capital stock that are owned by .the acquiring corporation (or. the new corporation) being not less than 95% of the fair market value of all of the assets of the acquiring corporation (or the new corporation); (f) if a particular trust is the only beneficiary of another trust, the particular trust is described in paragraph (c) of the definition "SIFT trust wind-up event", the particular trust would, in the absence of this paragraph, acquire control of a corporation solely because of a SIFT trust wind-up event that is a distribution of shares of the capital stock of the corporation by the other trust, and the other trust controlled the corporation immediately before the distribution, the particular trust is deemed not to acquire control	

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		of the corporation because of the distribution; and (g) a corporation (in this paragraph referred to as the "acquiring corporation") that acquires shares of another corporation on a distribution that is a SIFT trust wind-up event of a SIFT wind-up entity is deemed not to acquire control of the other corporation because of that acquisition if the following conditions are met: (i) the SIFT wind-up entity is a trust whose only beneficiary immediately before the distribution is the acquiring corporation, (ii) the SIFT wind-up entity controlled the other corporation immediately before the distribution, (iii) as part of a series of transactions or events under which the acquiring corporation became the only beneficiary under the trust, two or more persons acquired shares in the acquiring corporation in exchange for their interests as beneficiaries under the trust, and (iv) if all the shares described in subparagraph (iii) had been acquired· by one person, the person would (A) control the acquiring corporation, and (B) have acquired shares of the acquiring corporation having a fair market value of more than 50% of the fair market value of all the issued and outstanding shares of the acquiring corporation.	

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		(8) Deemed exercise of right - Where at any time a taxpayer acquires a right referred to in paragraph 251 (5)(b) in respect of a share and it can reasonably be concluded that one of the main pur-poses of the acquisition is (a) to avoid any limitation on the deductibility of any non-capital loss, net capital loss, farm loss or any expense or other amount referred to in subsection 66(11), 66.5(3) or 66.7(10) or (11), (b) to avoid the application of subsection 10(10) or 13(24), paragraph 37(l)(h) or subsection 55(2) or 66(11.4) or (11.5), paragraph 88(l)(c.3) or subsection 111(4), (5.1), (5.2) or (5.3), 181.1(7) or 190.1(6), (c) to avoid the application of paragraph (j) or (k) of the definition "investment tax credit" in subsection 127(9), (d) to avoid the application of section 251.1, or (e) to affect the application of section 80, the taxpayer is deemed to be in the same position in relation to the control of the corporation as if the right were immediate and absolute and as if the taxpayer had exercised the right at that time for the purpose of determining whether control of a corporation has been acquired for the purposes of subsections 10(10) and 13(24), section 37, subsections 55(2), 66(11), (11.4) and (11.5), 66.5(3), 66.7(10) and (11), section 80, paragraph 80.04(4)(h), subparagraph	

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		88(l)(c)(vi), paragraph 88(l)(c.3), sections 111 and 127 and sub-sections 181.1(7), 190.1(6) and 249(4), and in determining for the purpose of section 251. l whether a corporation is controlled by any person or group of persons.	
		256.1 (1) The following definitions apply in this section. **attribute trading restriction** means a restriction on the use of a tax attribute arising on the application, either alone or in combination with other provisions, of any of this section, subsections 10(10) and 13(24), section 37, subsections 66(11.4) and (11.5), 66.7(10) and (11), 69(11) and 8 8(1.1) and (1.2), sections 111 and 127 and subsections 181.1(7), 190.1(6), 249(4) and 256(7). **person** includes a partnership. **specified provision** means any of subsections 10(10) and 13(24), paragraph 37(1)(h), subsections 66(11.4) and (11.5), 66.7(10) and (11), 69(11) and 1 11(4), (5), (5.1) and (5.3), paragraphs (j) and (k) of the definition **investment tax credit** in subsection 127(9), subsections 181.1(7) and 190.1(6) and any provision of similar effect. **(2)** Subsection (3) applies at a particular time in respect of a corporation if **(a)** shares of the capital stock of the corporation held by a person, or the total of all shares of the capital stock of the corporation held by members of a group of persons, as the case may be, have at the particular time a fair market value that exceeds 75% of the fair market value of all the shares of the capital stock of the corporation;	61, 62

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		(b) shares, if any, of the capital stock of the corporation held by the person, or the total of all shares, if any, of the capital stock of the corporation held by members of the group, have immediately before the particular time a fair market value that does not exceed 75% of the fair market value of all the shares of the capital stock of the corporation; **(c)** the person or group does not control the corporation at the particular time; and **(d)** it is reasonable to conclude that one of the main reasons that the person or group does not control the corporation is to avoid the application of one or more specified provisions. **(3)** If this subsection applies at a particular time in respect of a corporation, then for the purposes of the attribute trading restrictions, **(a)** the person or group referred to in subsection (2) **(i)** is deemed to acquire control of the corporation, and each corporation controlled by the corporation, at the particular time, and **(ii)** is not deemed to have control of the corporation, and each corporation controlled by the corporation, at any time after the particular time solely because this paragraph applied at the particular time; and **(b)** during the period that the condition in paragraph (2)(a) is satisfied, each corporation referred to in paragraph (a) — and any corporation incorporated or otherwise formed subsequent to that time and controlled by that corporation — is deemed not to be related to, or affiliated with, any person to which it was related to, or affiliated with, immediately before paragraph (a) applies. **(4)** For the purpose of applying paragraph (2)(a) in respect of a person or group of persons,	

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		(a) if it is reasonable to conclude that one of the reasons that one or more transactions or events occur is to cause a person or group of persons not to hold shares having a fair market value that exceeds 75% of the fair market value of all the shares of the capital stock of a corporation, the paragraph is to be applied without reference to those transactions or events; and **(b)** the person, or each member of the group, is deemed to have exercised each right that is held by the person or a member of the group and that is referred to in paragraph 251(5)(b) in respect of a share of the corporation referred to in paragraph (2)(a). **(5)** For the purposes of subsections (2) to (4), if the fair market value of the shares of the capital stock of a corporation is nil at any time, then for the purpose of determining the fair market value of those shares, the corporation is deemed, at that time, to have assets net of liabilities equal to $100,000 and to have $100,000 of income for the taxation year that includes that time. **(6)** If, at any time as part of a transaction or event or series of transactions or events, control of a particular corporation is acquired by a person or group of persons and it can reasonably be concluded that one of the main reasons for the acquisition of control is so that a specified provision does not apply to one or more corporations, the attribute trading restrictions are deemed to apply to each of those corporations as if control of each of those corporations were acquired at that time.	
British Columbia	*Securities Act*, RSBC 1996, c. 418	**1(1)** In this Act: **"control person"** means	54

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		(a) a person who holds a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, or (b) each person in a combination of persons, acting in concert by virtue of an agreement, arrangement, commitment or understanding, which holds in total a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, and, if a person or combination of persons holds more than 20% of the voting rights attached to all outstanding voting securities of an issuer, the person or combination of persons is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer;	
Ontario	*Securities Act*, RSO 1990, c S.5	**1(1)** In this Act, "control person" means, (a) a person or company who holds a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, and, if a person or company holds more than 20 per cent of the voting rights attached to all outstanding voting securities of an issuer, the person or company is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer, or (b) each person or company in a combination of persons or companies, acting in concert by virtue of an agreement, arrangement, commitment or understanding, which holds in total a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect	54

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		materially the control of the issuer, and, if a combination of persons or companies holds more than 20 per cent of the voting rights attached to all outstanding voting securities of an issuer, the combination of persons or companies is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer; (“personne qui a le contrôle”)	
Alberta	*Securities Act* (Alberta) RSA 2000, c. S-4	**1(l)** In this Act, (l) "control person" means (i) a person or company who holds a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, and if a person or company holds more than 20% of the voting rights attached to all outstanding voting securities of an issuer, the person or company is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer, or (ii) each person or company in a combination of persons or companies acting in concert by virtue of an agreement, arrangement, commitment or understanding, who holds in total a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, and if a combination of persons or companies holds more than 20% of the voting rights attached to all outstanding voting securities of an issuer, the combination of persons or companies is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer;	54

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Federal (Canada)	*Canada Business Corporations Act*, RSC 1985, c. C-44	**Individual with significant control** **2.1 (1)** For the purposes of this Act, any of the following individuals is an individual with significant control over a corporation: **(a)** an individual who has any of the following interests or rights, or any combination of them, in respect of a significant number of shares of the corporation: **(i)** the individual is the registered holder of them, **(ii)** the individual is the beneficial owner of them, or **(iii)** the individual has direct or indirect control or direction over them; **(b)** an individual who has any direct or indirect influence that, if exercised, would result in control in fact of the corporation; or **(c)** an individual to whom prescribed circumstances apply.	54