Our Response to the CRA's Position on Creditor-Proofing Reorganizations – Part 1

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Part II of this blog has been published here**.**

Background

Creditor proofing involves improving the ranking of a corporate shareholder ("**Holdco**") of an operating subsidiary corporation ("**Opco**") from ranking behind unsecured creditors of Opco to ranking ahead of them as a secured creditor. The benefit is that in the event of a future insolvency of Opco, Holdco will be entitled to recover on its investment in Opco in priority to any unsecured creditors of Opco.

Creditor-proofing reorganizations normally involve a subsidiary operating corporation paying a dividend to, or purchasing some of its outstanding common shares from, its parent holding corporation, in order for Holdco to then use the funds received to make a secured loan back to Opco.[1] This Blog specifically assumes that no sale of any shares of Opco to an unrelated party, or acquisition of any such shares by an unrelated party, is contemplated at the time of completing a creditor-proofing reorganization. In our view, in such circumstances subsection 55(2) of the *Income Tax Act* ("the **Act**") should not be able to be used by the CRA to recharacterize an otherwise deductible inter-corporate dividend as a taxable capital gain.

The CRA disagrees with our above view, and has published several times its position that subsection 55(2) can be applied by it even where creditor proofing constitutes the sole purpose of the dividend in question and there exists no plan to sell any shares of Opco.

Ordinarily, dividends move up a chain of corporations entirely free of tax, for the reason that the net income out of which such dividends are paid is presumed to have been subject to income tax in the hands of the bottom-tier corporation that earned the income (here, Opco). Subsection 112(1) of the Act provides that a Canadian-resident corporation (here, Holdco) is entitled to deduct the full amount of a taxable dividend that it receives from a taxable Canadian corporation (here, Opco).

Dividends fall into two distinct categories – ordinary dividends declared by the board of directors of a corporation in their sole discretion and dividends that for income tax purposes are deemed to be paid upon a purchase for cancellation or redemption of a share to the extent that the proceeds of such purchase or redemption exceed the paid-up capital of the shares that are purchased or redeemed.

Subsection 55(2) of the Act provides that where it is applicable, a taxable dividend received by a Canadian-resident corporation is deemed not to be a dividend (which means that it cannot be deducted by the recipient corporation under subsection 112(1) of the Act) but, instead, is deemed to be "proceeds of disposition" in circumstances where the dividend results from a purchase for cancellation or redemption of a share or, otherwise, to be a capital gain – in each case for the year in which the dividend is received. Subsection 55(2.1) of the Act sets forth the circumstances in which subsection 55(2) is to be applicable. Essentially, those circumstances are where:

- one of the purposes of an ordinary dividend is to effect (i) a significant reduction in either the fair market value ("**FMV**") of the share on which the dividend is paid or the portion of a capital gain that, but for the dividend, would have been realized on a disposition at FMV of that share or (ii) a significant increase in the cost of property held by the corporation receiving the dividend; or
- one of the results of a dividend deemed to be paid on a purchase for cancellation or redemption of a share is to effect a significant reduction in the portion of an accrued capital gain.

In either such case, subsection 55(2.1) provides that subsection 55(2) will apply only to the extent that the dividend exceeds the amount of "safe income" of the corporation that pays (or is deemed to pay) the dividend and is considered to contribute to the capital gain accrued on the shares to which the dividend relates.

An important provision in this context is paragraph 55(3)(a), often referred to as the "related party exception" to subsection 55(2). It provides that subsection 55(2) "does not apply" to "any" dividend received by a corporation on a purchase for cancellation or redemption of a share under subsection 84(3), provided that such purchase for cancellation or redemption is not part of a series of transactions or events that involves a disposition of property to an unrelated person or a significant increase in the interest of an unrelated person in any corporation. That exception does not extend to ordinary dividends passing between related corporations.

The CRA's Position

At the 2015 Canadian Tax Foundation's Annual Conference, when asked whether the purpose test in paragraph 55(2.1)(b) would be satisfied in respect of an ordinary dividend paid for creditor-proofing purposes that significantly reduces the value of the shares on which the dividend is paid, the CRA stated[2] (underlining added by us):

When Opco pays a "lumpy" dividend such as in this creditor-proofing transaction in order to significantly reduce the value on the Opco shares, the apparent purpose of the payment of the dividend for the application of subsection 55(2) is to reduce the value on the Opco shares. When such purpose is present, subsection 55(2) applies to the dividend. We would like to further elaborate on our response as follows:

- The deduction under subsection 112(1) on inter-corporate dividends has the purpose of avoiding double-taxation on income earned by a corporation that has already been subject to tax. In addition to other restrictions established elsewhere, subsection 55(2) essentially establishes limits to that deduction. Hence, one cannot presume that the scheme of the Act is to exempt all payments made between corporations that could be considered to be a dividend under corporate law.

- The scheme of the Act restricts the increase in tax-free amounts that a shareholder may derive from a corporation without any payment of tax. For example, any exchange of shares of a corporation by a shareholder is subject to tax when non-share consideration is received in excess of the ACB of the shares disposed of on the exchange.

- The payment of a dividend that is in excess of the amount of the after-tax income of a corporation for the purpose of significantly reducing the value of the shares by essentially converting a significant amount of accrued value on a share of a corporation into full ACB debt that could be sold or repaid without any tax implication should be subject to tax under the scheme of the Act, as supported by proposed subsection 55(2).

- The fact that the purpose of the dividend is also to achieve creditor-proofing would not alter that conclusion.

The CRA also stated that it would consider the purpose test in subparagraph 55(2.1)(b)(ii) of the Act to be met in the context of a creditor-proofing transaction (meaning that a deductible ordinary inter-corporate dividend would be recharacterized as a taxable capital gain), despite the fact that in the query posed it was emphasized that the sole purpose of the dividend in question was creditor proofing and that there were no plans to sell the shares of the dividend payer.[3]

Similarly, at the CTF Technical Seminar held on June 8, 2018, the CRA noted that the purpose of creditor proofing is to reduce the fair market value of a share or to increase the cost base of property by the creation of a note, which fits squarely within the new purpose tests. In our view, that is an incorrect statement for two reasons. First, it equates a corporate shareholder's purpose in completing a creditor proofing transaction with the effect of such a transaction. Jurisprudence has established that a balanced subjective and objective determination of a taxpayer's purpose for completing a transaction should be used.[4] Moreover, as discussed in more detail below under "Support for our Perspective from Decided Cases", in circumstances where a taxpayer establishes that its sole purpose of a dividend payment was to effect creditor proofing, subsection 55(2) has been held not to apply (which provides an incentive for taxpayers effecting pure creditor-proofing reorganizations to prepare statutory declarations or other evidence supporting that this is their only purpose for the payment of dividend). Second, the new purpose test applicable to the payment of ordinary dividends differs from the test applicable to share purchases for cancellation and redemptions. The test set forth in subparagraph 55(2.1)(b)(ii) of the Act applicable to share purchases for cancellation and redemptions makes no reference whatever to an increase in the dividend recipient's cost of property (here, the issuance of a promissory note by Opco to Holdco). In a 2017 technical interpretation,[5]the CRA considered the application of paragraph 55(3)(a) of the Act in the context of a purchase for cancellation or redemption of shares of the capital stock of an operating corporation owned by its parent holding corporation. In that interpretation, the CRA stated that it "must examine the application of the general anti-avoidance rule provided in subsection 245(2) considering that the money remitted to Holdco does not come from the income that was already taxed in Opco and that the adjusted cost base of the participating shares of the capital stock of Opco is nominal". We have expressed our view that the GAAR should not be applicable to a pure creditor-proofing reorganization below under "The General Anti-Avoidance Rule (the "**GAAR**")". We should caution readers, however, that there always exists a risk that a court – given the particular circumstances of, and evidence provided in support of, a taxpayer's creditor-proofing purpose combined with the subjectivity of certain aspects of the GAAR itself – could reach the conclusion that the GAAR does apply.

Problems with the CRA's Position

The Payment of Ordinary Dividends

In our view, in making the preceding assertions, the CRA has failed to place sufficient emphasis on the actual purpose underlying pure creditor-proofing reorganizations that are completed by many taxpayers. Very often, the sole purpose of a Holdco completing such a reorganization is to improve its own credit position in relation to claims that may be asserted in the future by creditors of Opco, and neither Holdco nor its controlling shareholder has any contemplation of either selling any shares of Opco to any unrelated third party or permitting any such third party to subscribe for shares of Opco. The CRA's attitude, however, which can be gleaned from the passages quoted above, is to look only at the effect of the payment of an ordinary dividend or a purchase for cancellation or redemption of shares of Opco held by Holdco, followed by the making of a secured loan by Holdco to Opco. The effect of either such payment is to trigger a dividend from Opco to Holdco that is deductible by Holdco followed by the making of a loan by Holdco to Opco that results in Holdco having full cost basis in that loan receivable; however, the CRA's above-quoted statements seem to downplay the reality that (i) the sole purpose of those transactions is to achieve the legitimate non-tax purpose of creditor-proofing Holdco's investment in Opco, and (ii) Holdco has no contemplation of selling any shares of Opco at the time of undertaking this reorganization. Indeed, the CRA appears to have disregarded the following passage which the CRA itself authored in 2015[6] (underlining added by us):

Although a dividend on a share would normally result in a reduction of value of the share, it's not the result that determines the application of proposed subsection 55(2.1). It's the purpose and the motivation behind the purpose that could be established by finding the answer to questions such as "What does the taxpayer intend to accomplish with a reduction in value? How would such reduction in value be beneficial to the taxpayer? What actions did the taxpayer take in connection with the reduction in value?"

Deemed Dividends resulting from Share Purchases for Cancellation or Redemptions

Moreover, in the context of dividends resulting from share purchasers for cancellation or redemptions, in our view the CRA has not placed sufficient weight on the specific wording of paragraph 55(3)(a), which provides that subsection 55(2) "does not apply" to "any" dividend received by a corporation "on a redemption, acquisition or cancellation of a share" by the issuer corporation, so long as there exists as part of the series of transactions that includes that share purchase for cancellation or redemption no disposition of property to, or acquisition of propertyby, an unrelated person. The reality is that in many creditor-proofing reorganizations, no person unrelated to Holdco or Opco has any involvement whatever. We think that it is reasonably clear that paragraph 55(3)(a) is intended to preclude subsection 55(2) from applying to any share purchase for cancellation or redemption in circumstances where the parties have no contemplation whatever of disposing of any property to, or permitting an acquisition of any property by, an unrelated party.

Even though, as noted above, it is possible for a deemed dividend arising on a share purchase for cancellation or redemption not to be subject to the application of subsection 55(2) by falling within the related-party exception provided by paragraph 55(3)(a), in the CRA's view that is not the end of the matter. Rather, the CRA has cautioned taxpayers that it may consider transactions structured to "artificially" avoid the application of subsection 55(2) by utilizing the related-party exception to be abusive. For example, at the 2015 CTF Annual Conference, when asked whether one could "rely on the exemption under paragraph 55(3)(a) on a deemed dividend under subsection 84(3) to avoid the application of [subparagraph 55(2.1)(b)(ii)]", the CRA stated[7] (underlining added by us):

In addition to the prevention of (*sic*) capital gain strip, the scheme of proposed subsection 55(2) is to counter artificial generation or manipulation of cost, or reduction of FMV of a share as the reduction could potentially result in a fabricated loss on the share. The proposed introduction of subsection

55(2.2) to prevent the use of a high-low stock dividend to reduce the value of the shares on which the stock dividend is paid (unless the stock dividend is deemed to come from safe income under proposed subsection 55(2.3)) supports that scheme. So does the restriction of the application of proposed paragraph 55(3)(a) to dividends received on a redemption, acquisition or cancellation of shares since dividends in kind that have a purpose of increasing ACB or reducing FMV cannot be exempt simply on the basis that there is (*sic*) no unrelated persons involved. A redemption or cancellation of shares would normally result in the elimination of the ACB of the shares that have been redeemed or cancelled, and therefore, would not normally be helpful in achieving the ACB creation or FMV reduction objective. The technical notes to the July 31, 2015 legislative proposals stated the following:

The amended exception in paragraph 55(3)(a) for related-person dividends is intended to facilitate bona fide corporate reorganizations by related persons. It is not intended to be used to accommodate the payment or receipt of dividends or transactions or events that seek to increase, manipulate, manufacture or stream cost base.

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As such, an attempt to artificially create or unduly preserve ACB in a reorganization that would be exempt under either paragraph 55(3)(a) or 55(3)(b) would frustrate the object, spirit and purpose of the provision and the CRA would seek to apply GAAR to such situation. Examples of situations that are considered offensive include the following:

- A note or other property (other than assets owned by the dividend payer at the beginning of the series that includes the redemption) received by a dividend recipient as consideration for a redemption of shares in a reorganization that is exempt under paragraph 55(3)(a) is used by a person to generate ACB that is significantly greater than the ACB of the shares that were redeemed.

Further, at a CRA Roundtable in 2017,[8] the CRA stated (underlining added by us):

… the role of subsection 55(2) is to question whether one of the purposes of the payment or receipt of a dividend that is not derived from income that has been subject to tax is, amongst other objectives, to significantly increase the cost amount of property of the dividend recipient. If so, such dividend should not be tax free. Where a purpose to increase the cost amount of property of the dividend recipient

exists, subsection 245(2) would be triggered and it is irrelevant whether such cost amount has been used in the series of transactions that includes the dividend.

In our view, in both of the above-quoted passages, the CRA once again confused the meanings of "purpose" and "effect". It is clear that in order to implement a creditor-proofing purpose, it is necessary for Holdco (or some other related entity) to become a secured creditor of Opco. Consequently, the issuance by Opco to Holdco (or such other related entity) of a secured debt obligation forms a necessary component of the series of transactions that includes either the payment of an ordinary dividend or the purchase for cancellation or redemption of shares of Opco. Accordingly, provided that no disposition of property to, or acquisition of property by, an unrelated party forms part of the series of transactions that includes the payment of an ordinary dividend or the purchase for cancellation or redemption of shares, in our view the GAAR should not apply to override the related party exception to subsection 55(2) applying, which is set forth in paragraph 55(3)(a) of the Act.[9]

Department of Finance Technical Notes, such as those referenced in the above-quoted CRA position, have been accepted by the courts as constituting aids to the interpretation of the provisions of the *Income Tax Act* which such Technical Notes address. However, in our view, a creditor-proofing reorganization does constitute a bona fide corporate reorganization completed exclusively by related persons, and therefore complies with the circumstances envisaged by those Technical Notes.

Support for our Perspective from Decided Cases

C.P.L. Holdings Ltd. v. Canada[10]

In this case, subsection 55(2) was an issue; however, paragraph 55(3)(a) was not. The reason is that the series of transactions included the payment of an ordinary dividend and an arm's length sale of shares. The transactions included the following:

- on March 17, 1986, the principal of an operating corporation formed a new holding corporation and, with effect on March 18, 1986, transferred all of the outstanding shares in the capital of the operating corporation to the holding corporation in consideration of the issuance by the holding corporation of preferred shares having an aggregate redemption price equal to the FMV of the shares of the operating corporation that were transferred;

- on April 2, 1986, the operating corporation declared an ordinary dividend (rather than effecting a purchase for cancellation or redemption of shares) that was payable to the taxpayer holding corporation nine months later – namely on January 1 1987 – because that was the date on which the Government of Canada's previously released Budget had announced that the repeal of the 12-1/2% dividend distributions tax would take effect;

- also on April 2, 1986, resolutions were passed and other documents were executed for the making of a secured loan by the holding corporation to the operating corporation, because the principal of the holding corporation (which shortly before had been sued by a customer) desired to make a loan on January 1 1987 to the operating corporation that would be secured with the assets of the operating corporation, so as to cause the holding corporation to rank ahead of any future unsecured creditors of the operating corporation;

- on January 12, 1987 an agreement was entered into providing for the sale by the holding corporation to an arm's length employee of the operating corporation of 49% of the outstanding shares in the capital of the operating corporation, such sale to be effective January 30, 1987; and

- on January 13, 1987, three transactions were completed: (i) the holding corporation borrowed from Alberta Treasury Branches the amount to be advanced as a secured loan by the holding corporation to the operating corporation; (ii) the funds so borrowed from ATB were advanced by the holding corporation to the operating corporation in order to make the secured loan (following which the debenture executed by the operating corporation on April 2, 1986 was registered with the Alberta Corporate Registry); and (iii) the dividend declared on April 2, 1986 was paid by the operating corporation to the holding corporation.

The CRA denied the holding corporation a deduction under subsection 112(1) for the dividend received by it from the operating corporation, and sought to apply subsection 55(2) so as to result in the holding corporation having realized a capital gain, contending that the dividend had formed part of a series of transactions that resulted in a disposition of the shares of the operating corporation to the arm's length employee.

After having summarized the evidence provided by the witnesses who testified on behalf of the holding corporation and the CRA's tax avoidance officer called on behalf of the Crown, the Federal Court-Trial Division concluded as follows (underlining added by us):

23 The [holding corporation's] witnesses were unanimously agreed that the purpose behind the declaration of the dividend and the loan of the proceeds of the dividend was to secure the position of the [holding corporation] as a creditor to the [operating corporation]. There was no intention to avoid taxation. …..

25 … Regarding the lawsuit, [counsel to the holding corporation] testified that [the principal of the operating corporation] attended at his office in 1986 and was very concerned about a potential lawsuit and wished to place himself in a preferred position (transcript, page 26). [Counsel to the holding corporation] further testified about the purpose behind the transactions (transcript, page 11):

- The purpose as indicated by the file and according to my recollection was to secure [the holding corporation's] interest in [the operating corporation]. At that time his only interest was a shareholder. He had certain shareholder loans and other matters, but he was not in any type of a secured position in the company *vis-à-vis* unsecured creditors.

- So he had a concern about unsecured creditors, did he?

- Yes, that was brought up very clearly as being the reason why he wished to undergo these transactions was to put himself in a position of security *vis-a-vis*the company such that he would ostensibly rank ahead of any unsecured creditors that may arise in the future. …..

28 The taxpayer has provided convincing evidence that the purpose of the rollover was to make [the holding corporation] a secured creditor of the [operating] corporation. I do not find that the purpose of the transaction was to reduce the fair market value of the shares, although I agree that it was one of the effects of the transaction. …..

This case focused on the distinction between the purpose and effect of the dividend payment and loan transactions completed by the taxpayer, and is important in that it demonstrates that it is possible for a taxpayer to complete a creditor-proofing reorganization without the CRA succeeding in attempting to invoke subsection 55(2). The Crown did not seek to apply the GAAR in this case.

*Placer Dome Inc. v. R***[11]**

Moreover, in *Placer Dome Inc. v. R*., the Federal Court of Appeal held that the Crown's argument "that the term 'purposes', as utilized in subsection 55(2) of our Act, must be interpreted in an objective manner cannot succeed".[12] That Court also expressed agreement with the above-quoted comment in paragraph 28 of the reasons for judgment in *C.P.L. Holdings*, finding that it does not follow from the fact that an inter-corporate dividend payment was made in order to achieve creditor proofing that the purpose of that dividend payment must have been to reduce the fair market value of the shares on which that dividend was paid, for purposes of subsection 55(2).[13]

The General Anti-Avoidance Rule (the "**GAAR**")

An in-depth analysis of the GAAR is beyond the scope of this Blog; however, here are a few relevant comments:

1. In *Canada Trustco Mortgage Co. V. R*[14], the Supreme Court of Canada made the following important points pertaining to the application of the GAAR (underlining added by us):

- Subsection 245(3) provides that the GAAR does not apply to a transaction that "may reasonably be considered to have been undertaken or arranged primarily for *bona fide*purposes other than to obtain the tax benefit."[15] Such a transaction does not constitute an "avoidance transaction". If it is reasonable to conclude that a non-tax purpose to a transaction is its primary purpose, the GAAR cannot be applied to deny the tax benefit. [**Comment: In our view, for most reorganizations undertaken solely to achieve creditor proofing, with no contemplated**

arm's length sale or acquisition of any shares on the horizon, it should be reasonable to conclude that the primary purpose is a non-tax one, meaning that it will not constitute an avoidance transaction and therefore will not be subject to the application of the GAAR]

- If, on the other hand, a transaction's primary purpose is to obtain a tax benefit, although the transaction will constitute an avoidance transaction, the GAAR still will not apply unless the transaction can be shown by the Crown to be either a *misuse* of a provision of the Act or an *abuse*of the provisions of the Act read as a whole.

- In delivering its reasons for judgment, the Court held that in making a determination of misuse or abuse, a court must first ascertain the object, spirit and purpose of the provision(s) in issue, and the Crown must establish that such object, spirit and purpose has been frustrated by the taxpayer's impugned transaction. In delivering its reasons for judgment, the Court held that "[T]here is but one principle of interpretation: to determine the intent of the legislator having regard to the text, its context, and other indicators of legislative purpose." [**Comment: The latter reference is to such aids to interpretation as the Department of Finance Technical Notes, including those referenced above. In our view it is reasonably clear that the text of paragraph 55(3)(a) demonstrates that its legislative purpose is to facilitate share purchases for cancellation and redemptions completed for a bona fide corporate reorganization completed exclusively by related parties**][16]

- The Court went on the elaborate as follows:

41 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 to perform a task to which they are unaccustomed and for which they are not equipped. Did Parliament intend judges to formulate taxation policies that are not grounded in the provisions of the Act and to apply them to override the specific provisions of the Act? Notwithstanding the interpretative challenges that the GAAR presents, we cannot find a basis for concluding that such a marked departure from judicial and interpretative norms was Parliament's intent.

…..

45 This analysis will lead to a finding of abusive tax avoidance when a taxpayer relies on specific provisions of the *Income Tax Act* in order to achieve an outcome that those provisions seek to prevent. As well, abusive tax avoidance will occur when a transaction defeats the underlying rationale of the provisions that are relied upon. An abuse may also result from an arrangement that circumvents the application of certain provisions, such as specific anti-avoidance rules, in a manner that frustrates or

defeats the object, spirit or purpose of those provisions. By contrast, abuse is not established where it is reasonable to conclude that an avoidance transaction under s. 245(3) was within the object, spirit or purpose of the provisions that confer the tax benefit. [**Comment: In our view, a purchase for cancellation of shares that forms part of a reorganization undertaken to achieve creditor proofing should fall within the object, spirit and purpose of paragraph 55(3)(a) of the Act**]

2. In *Copthorne Holdings Ltd. v. The Queen*,[17] the Supreme Court of Canada based its decision on a nine-word parenthetical phrase in paragraph 87(3)(a) of the Act, which created an exception to a general provision that governs the computation of the "paid-up capital" of an amalgamated corporation. That decision underscores the importance of the text of a statutory provision in arriving at Parliament's intention behind that provision and the statutory scheme of which it forms a part. [**Comment: In our view, the same may be said of paragraph 55(3)(a) of the Act, which very explicitly provides that subsection 55(2) "does not apply" to "any" dividend received by a corporation on a purchase for cancellation or redemption of a share. That specifically amended wording was added by Parliament applicable to dividends received after April 20, 2015**[18]]

In our view, if the CRA were to seek to use the GAAR in the context of the type of pure creditor-proofing reorganization that is discussed herein, that would be unreasonable and unlikely to succeed in court.

Conclusion

We disagree with the CRA's published position that the payment of a dividend or the purchase for cancellation or redemption of a share completed in a reorganization the sole purpose of which is to achieve a corporate shareholder's creditor-proofing objective should be subject to the provisions of subsection 55(2) of the Act. Instead, we believe that (i) in the case of an ordinary dividend payment, the corporate shareholder's sole purpose should prevail and (ii) in the case of a share purchase for cancellation or redemption, the clear provisions of paragraph 55(3)(a) should apply to negate the application of subsection 55(2), provided that in both those circumstances the creditor-proofing reorganization is not part of a series of transactions in which a sale of any share to, or acquisition of any share by, an unrelated party is contemplated.

We will be publishing a subsequent Blog – Part 2 – on this topic, which will outline a specific example of a creditor-proofing transaction.

[1] Alternatively, a dividend in kind consisting of the issuance and delivery of a secured debenture by Opco to Holdco, or a share purchase for cancellation or redemption in consideration of the issuance and delivery of a secured debenture by Opco to Holdco, could be utilized.

[2] Views Doc No. 2015-0623551C6.

[3] Views Doc No. 2015-0617731E5. In CRA Views 2017-0683511E5-T, however, the CRA does comment that "we have to see the reason why a building is purchased by Holdco, using a dividend" that was paid to Holdco on the shares of Opco held by Holdco (underlining added by us). This causes us to be somewhat optimistic that the CRA recognizes that there is a difference between the purpose of a dividend and its effect.

[4] See paragraph 54 of the reasons for judgment of the Supreme Court of Canada in *Ludmer et al v. The Queen*, 2001 D.T.C. 5505 (SCC), in which the Court held that "where purpose or intention behind actions is to be ascertained, courts should objectively determine the nature of the purpose, guided by both subjective and objective manifestations of purpose".

[5] See CRA Views 2017-0683511E5-T.

[6] 2015-0610651C6.

[7] Views Doc No. 2015-0610681C6.

[8] See CRA doc #2017-0693411C6.

[9] We reiterate our caution above that there always exists a risk that a court – given the particular circumstances of, and evidence provided in support of, a taxpayer's creditor-proofing purpose combined with the subjectivity of certain aspects of the GAAR itself – could reach the conclusion that the GAAR does apply.

[10] 95 D.T.C. 5253 (FCTD).

[11] 96 D.T.C. 6562 (FCA).

[12] Paragraph 32 of the reasons for judgment in the *Placer Dome* case.

[13] Paragraph 33 of the reasons for judgment in the *Placer Dome* case.

[14] 2005 D.T.C. 5523 (SCC).

[15] The onus is on the taxpayer to establish that the share purchase for cancellation was arranged primarily for a bona fide purpose other than to obtain a tax benefit.

[16] The onus is on the Crown to establish that a creditor-proofing reorganization amounts to abusive tax avoidance.

[17] 2012 D.T.C. 5007 (SCC).

[18] See 2016, c. 7, subsection 5(2).