Federal Court of Appeal | Cour d'appel fédérale

Date: 20191017

Docket: A-410-18

Citation: 2019 FCA 255

CORAM: **NADON J.A.**
DAWSON J.A.
MACTAVISH J.A.

BETWEEN:

VICTORIA Y. LOUIE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on September 17, 2019.

Judgment delivered at Ottawa, Ontario, on October 17, 2019.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NADON J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] Tax Free Savings Accounts were designed to allow Canadians to increase their savings by earning tax-free investment income. While contributions to a TFSA are not tax-deductible, gains earned within a TFSA are generally not taxed. There are exceptions to this general principle.

[2] One exception is found in subsection 207.05(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) which provides, among other things, that a tax is payable for a calendar year in connection with a TFSA if, in the year, "an advantage in relation to the TFSA is extended" to the holder of the TFSA.

[3] The term "advantage" in relation to a TFSA was, at the time relevant to this proceeding, defined in material part in paragraph 207.01(1)(*b*) of the Act to mean:

207.01(1) …	207.01(1) …
(*b*) a benefit that is an increase in the total fair market value of the property held in connection with the TFSA if it is reasonable to consider, having regard to all the circumstances, that the increase is attributable, directly or indirectly, to …	*b*) tout bénéfice qui représente une hausse de la juste valeur marchande totale des biens détenus dans le cadre du régime qu'il est raisonnable de considérer, compte tenu des circonstances, comme étant attribuable, directement ou indirectement : …
(i) a transaction or event or a series of transactions or events that	(i) soit à une opération ou à un événement, ou à une série d'opérations ou d'événements, qui, à la fois :
(A) would not have occurred in an open market in which parties deal with each other at arm's length and act prudently, knowledgeably and willingly, and	(A) ne se serait pas produit dans un contexte commercial ou financier normal où des parties sans lien de dépendance traitent librement, prudemment et en toute connaissance de cause,
(B) had as one of its main purposes to enable a person or a partnership to benefit from the exemption from tax under Part I of any amount in respect of the TFSA, or	(B) a pour objet principal notamment de permettre à une personne ou à une société de personnes de profiter de l'exemption d'impôt prévue à la partie I à l'égard d'une somme relative au compte,
…	[…]

[4] The amount of tax payable in respect of an "advantage" is, in the case of a benefit, "the fair market value of the benefit" (subsection 207.05(2)).

[5] These provisions are central to the appeal and cross appeal before the Court.

I. Factual background

[6] The appellant is a sophisticated investor with extensive knowledge of the stock market. Prior to the introduction of TFSAs, the appellant maintained two accounts with TD Waterhouse Discount Brokerage: a Canadian direct trading account and a self-directed Registered Retirement Savings Plan. In January 2009, when the TFSA Rules were implemented, the appellant opened a TFSA with TD Waterhouse.

[7] By May 2009, the appellant wanted to capture the gains she had earned on stocks held in her TFSA and RRSP accounts, and to shelter from tax the possible future gains to be made on stocks held in her trading account. TD Waterhouse, as trustee of the appellant's TFSA, confirmed to the appellant that it permitted holders of TFSAs to conduct asset swaps between their accounts. Accordingly, the appellant decided to move stocks from her Canadian trading account to her TFSA and RRSP accounts in order to eliminate or defer tax payable on possible future gains.

[8] The appellant conducted research to determine which stocks had the most upward price momentum going forward because these stocks would have the greatest probability of earning a gain in the future. Where a stock had upward price momentum, the appellant would benefit from

transferring the stock into and sheltering the stock in her TFSA. Similarly, the appellant conducted research to determine if there existed any downside risk in relation to stocks she held in her TFSA. If a risk existed that a stock might drop in value, the appellant's practice in 2009 was to capture the gain in the TFSA by either selling the stock or exchanging that stock for another existing stock in her RRSP or trading account.

[9] The appellant chose which stocks, and how many of them, she would transfer in and out of her TFSA. She also chose the values that would be used and recorded for each stock that was transferred, based on the daily range of their values on the market. For stocks being transferred into the TFSA the appellant chose, and instructed TD Waterhouse to use, the lowest market price that the stock had traded at on that day to the point in time when she gave her instructions to TD Waterhouse. For stocks being transferred out of the TFSA, the appellant chose, and instructed TD Waterhouse to use, the highest market price that the stock had traded at on that date to the point in time when she gave her instructions.

[10] In 2009 the appellant completed 71 swap transactions relating to her TFSA.

[11] In October 2009, TD Waterhouse advised the appellant that it would no longer permit swap transactions because of proposed amendments to subsection 207.01(1) of the Act. Subsequently, effective October 17, 2009, the definition of "advantage" was amended to include "swap transactions". This amendment does not apply to the present appeals because all of the swap transactions conducted by the appellant occurred before October 17, 2009.

[12] The swap transactions significantly increased the proportion of her capital stock held in her TFSA. The transactions also significantly increased the total fair market value of the appellant's TFSA in the 2009 taxation year. The appellant had made an initial contribution of $5,000 to the account in 2009 (the maximum contribution permitted for that year). The market value of her TFSA on December 31, 2009 was $206,615.09. The appellant made contributions of $5,000 to her TFSA in 2010, 2011 and 2012. As of December 31, 2010, the market value of her TFSA was $281,826.11. As of December 31, 2011 and December 31, 2012 the market value of the appellant's TFSA was, respectively, $186,267.56 and $220,485.00.

[13] After the appellant stopped conducting swap transactions in October 2009, she left the stocks held in her TFSA in that account. As a result, these stocks were subject to market forces for the remaining years at issue.

[14] The Minister reassessed the appellant in respect of the 2009, 2010 and 2012 taxation years to assess tax related to the appellant's TFSA. The Minister assessed the appellant on the basis that she had received an advantage within the meaning of that term as used in subsection 207.01(1) of the Act in each relevant taxation year. The advantage said to have been received in each year equalled the annual increase in the fair market value of the appellant's TFSA, minus her contribution of $5,000.

[15] The appellant appealed the reassessment to the Tax Court of Canada.

II. The judgment of the Tax Court

[16] For reasons cited 2018 TCC 225, the Tax Court dismissed the appeal for the 2009 taxation year, but allowed the appeals for the 2010 and 2012 taxation years.

[17] In dismissing the appeal for the 2009 taxation year, the Tax Court concluded that the appellant had received an "advantage" in relation to her TFSA in 2009. This conclusion flowed from the findings of the Tax Court that:

a) The swap transactions were part of a series of transactions. This was because all of the swap transactions were completed in contemplation of the series. It was not necessary for the appellant to know in advance which shares would be swapped. It was sufficient that the appellant "planned on doing swap transactions with the purpose of achieving the objectives of the series." (reasons, paragraphs 39 and 40).

b) The increase in the fair market value of the TFSA in 2009 was attributable to the series of swap transactions (reasons, paragraph 38).

c) The swap transactions would not have occurred in an open market in which parties deal with each other at arm's length and act prudently, knowledgeably and willingly. This was because of the appellant's ability to select the price at which shares would be swapped in and swapped out and because all of the swap transactions were carried out in a manner to favour the TFSA to the detriment of the RRSP and trading accounts (reasons, paragraphs 43 to 58).

d) One of the main purposes the appellant entered into the swap transactions was in order to benefit from the Part I tax exemption on the sale of the shares

subsequently held in the TFSA. Otherwise there was no advantage to transferring the shares between the accounts (reasons, paragraph 41).

[18] In allowing the appeal for the 2010 and 2012 taxation years, the Tax Court concluded that the appellant did not receive an "advantage" in relation to her TFSA in those years. This conclusion flowed from the findings of the Tax Court that:

a) When considering whether an increase in fair market value is attributable to impugned transactions, the phrase "directly or indirectly" used in paragraph 207.01(1)(*b*) should be narrowly interpreted (reasons, paragraphs 78, 81 and 82).

b) The increase in the fair market value of the TFSA in 2010 and in 2012 was not attributable to the swap transactions. Rather, the increase was attributable to the post-2008 financial recovery and market conditions (reasons, paragraphs 80 and 83).

[19] The appellant appeals from the judgment of the Tax Court that dismissed the appeal in respect of the 2009 taxation year. The Crown cross appeals from the judgment that allowed the appeal for the 2010 and 2012 taxation years.

III. The issues

[20] The issues to be determined on the appeal are whether the Tax Court erred in finding that:

a) The swap transactions were part of a series of transactions.

b) The parties to the series of transactions were not dealing at arm's length.

c) One of the main purposes of the series of transactions was so that the appellant could benefit from the TFSA's tax exemption.

[21] A single issue is raised on the cross appeal: did the Tax Court err when interpreting the phrase "directly or indirectly" contained in the definition of "advantage" found in paragraph 207.01(1)(*b*) of the Act?

IV. Consideration of the issues raised on the appeal

Did the Tax Court err in finding that the swap transactions were part of a series of transactions?

[22] At trial the appellant, relying upon the common law meaning of a "series of transactions" as stated by Justice Rothstein in *OSFC Holdings Ltd. v. Canada*, 2001 FCA 260, [2002] 2 F.C. 288 at paragraph 24, argued that all of the relevant transactions had to be preordained in order to qualify as a series of transactions. Because the appellant's decision to carry out future swaps depended upon future market prices, the specific transactions could not be planned in advance. It followed, the appellant argued, that the transactions were not preordained and did not constitute a series of transactions.

[23] The Tax Court rejected this submission noting that "Justice Rothstein recognized in *OSFC*, at paragraphs 29, 34 and 35 and later in *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R. 721, that subsection 248(10) of the Act broadens" the common law meaning of "series of transactions" (reasons, paragraph 39).

[24] I agree. Subsection 248(10) provides:

248(10) For the purposes of this Act, where there is a reference to a series of transactions or events, the series shall be deemed to include any related transactions or events completed in contemplation of the series.	248(10) Pour l'application de la présente loi, la mention d'une série d'opérations ou d'événements vaut mention des opérations et événements liés terminés en vue de réaliser la série.
(underlining added)	(soulignement ajouté)

[25] Thus, in *Copthorne* Justice Rothstein, witing for the Court, concluded that the common law meaning of series "is expanded by s. 248(10) of the Act which deems any 'related transactio[n]' which is completed 'in contemplation of' a series to be part of that series." (at paragraph 43). He went on to explain at paragraph 54:

> The text and context of s. 248(10) leave open when the contemplation of the series must take place. Nothing in the text specifies when the related transaction must be completed in relation to the series. Specifically, nothing suggests that the related transaction must be completed in contemplation of a subsequent series. The context of the provision is to expand the definition of a series which is an indication against a narrow interpretation.
>
> (underlining added)

[26] As the Tax Court observed, in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 the Supreme Court elaborated that the phrase "in contemplation" is not to be read "in the sense of actual knowledge but in the broader sense of 'because of' or 'in relation to' the series." The Supreme Court went on to confirm in *Copthorne* that "the language of subsection 248(10) allows either prospective or retrospective connection of a related transaction to a common law series".

[27] It follows that the Tax Court made no error in concluding, at paragraph 39, that "[a]ll that was necessary was that the Appellant have planned on doing swap transactions with the purpose of achieving the objectives of the series." It further follows that the Tax Court did not err in

concluding, at paragraph 40, that "[w]hile the series of transactions never had a predetermined end point, all the transactions were completed in contemplation of the series." The appellant has not demonstrated any extricable error of law or any palpable and overriding error of fact that would justify intervention by this Court.

Did the Tax Court err in finding that the parties to the series of transactions were not dealing at arm's length?

[28] At trial the appellant argued that:

- TD Waterhouse acting as the trustee of the TFSA and the trustee of the RRSP were unrelated parties in relation to the 14 swap transactions between the appellant's TFSA and RRSP.
- TD Waterhouse acting as the trustee of the TFSA and the appellant as the holder of the Canadian trading account were unrelated parties in relation to the 57 transactions between the appellant's TFSA and her Canadian trading account.

[29] It followed, the appellant argued, that the parties to the swap transactions were dealing at arm's length.

[30] The Tax Court rejected this argument, noting that the legal status of parties as unrelated persons pursuant to subsection 251(2) of the Act is not determinative when considering whether parties in fact act at arm's length (reasons, paragraph 53).

[31] The Court therefore considered the three factors articulated by the majority of the Supreme Court in *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79, at paragraph 62 as

being relevant to the determination of whether parties to a transaction are dealing at arm's length. The Tax Court applied two of the three factors (and noted that not all of the criteria need to be satisfied in every case, citing *Canada v. Remai Estate*, 2009 FCA 340, 396 N.R. 351). This analysis led the Tax Court to find as a fact that the appellant was the single mind that directed all of the swap transactions and that the parties in control of the RRSP and Canadian trading accounts acted in concert without separate interests. The latter conclusion flowed from the evidence that swaps into the RRSP and Canadian trading account were always at the highest price and swaps out of these accounts were always at the lowest price, so that the RRSP and Canadian trading accounts "were consistently on the bad end of the deal." (reasons, paragraphs 55 and 56).

[32] The appellant now argues that the Tax Court committed a palpable and overriding error by finding that the parties to the swap transactions "acted in concert without separate interests as directed 'single-mindedly' by the Appellant." (memorandum of fact and law, paragraph 105). Again, the appellant argues that if there was a single mind directing all of the swap transactions it would be TD Waterhouse as trustee of the TFSA trust which imposed the technical requirements upon the swap transactions that it would permit. The appellant also argues that the parties to the swap transactions were able to maintain their separate interests because each party to the swap transaction received an asset of equal fair market value for the swapped asset (memorandum of fact and law, paragraphs 120 and 121).

[33] In the present case, subparagraph 251(1)(*c*) of the Act is applicable. Therefore, it is a question of fact whether persons not related to each other are at a particular time dealing with each other at arm's length. The appellant admitted the following facts at trial (Exhibit R1):

- At all material times, the appellant "directed all of her investments and trades". She relied on her own research without the advice or the services of a broker (paragraph 29).
- The appellant chose the stocks and how many she would transfer in and out of her TFSA (paragraph 49).
- The appellant directed TD Waterhouse as to which shares, and how many shares, she wanted to exchange between her TFSA and either her RRSP or her Canadian trading account (paragraph 56).
- The appellant also directed TD Waterhouse as to the value to be ascribed to the stocks that were being transferred in and out of her TFSA (paragraph 57).

[34] The Tax Court did not err in finding that the appellant was the single mind directing all of the swap transactions.

[35] As to the requirement that the assets swapped be of the same fair market value, when the appellant chose which shares to swap she had the benefit of knowing the daily price fluctuations of the shares (reasons, paragraph 45). Shares swapped into the TFSA were always valued at their lowest trading value, while shares swapped out were always valued at their highest trading value. The result was that, notwithstanding the apparent fair market value equivalency, "the RRSP and

[Canadian trading account] were consistently on the bad end of the deal." (reasons, paragraph 56).

[36] The appellant has not demonstrated any palpable and overriding error in the conclusion of the Tax Court that the parties to the series of transactions were not dealing at arm's length.

Did the Tax Court err in finding that one of the main purposes of the series of transactions was so that the appellant could benefit from the TFSA's tax exemption?

[37] The reasons of the Tax Court on this point are found at paragraph 41:

> The Appellant completed this series of transactions with the goal of transferring shares traded on the TSX held in her RRSP and her [Canadian trading account] into her TFSA. The Appellant argues that benefiting from the exemption from tax was not one of the main purposes of the transactions because taxable income was not shifted between her accounts (Appellant's Memorandum of Argument, paragraph 275). There were indeed almost no sales of shares. However, the Appellant's suggested approach defeats the very definition of the term "purpose", which is "the reason for which something is done". The purpose of an action thus necessarily precedes its realization. Whether or not the end goal is realized does not alter the original purpose that led to the act. Identifying the purpose of a transaction is done by objectively considering the facts: (*Trustco*, paragraph 29). It is a fact that the Appellant incurred transaction costs of $3,195 (71 transactions times $45 per transaction) to complete the swap transactions. That fact combined with the Appellant's strategy of identifying the downward and upward price momentum of the shares swapped (as explained in paragraph 18 of these reasons) creates a strong inference that she entered into those transactions to benefit from the Part I tax exemption on the sale of the shares subsequently held in the TFSA. The taxpayer must have intended to benefit from a tax-free distribution from her TFSA as opposed to a taxable withdrawal from her RRSP or a taxable gain within her [Canadian trading account]. Otherwise, I cannot see any advantage to transferring the shares between those accounts. Consequently, I conclude that benefiting from the exemption from tax under Part I was one of the Appellant's main purposes in completing the series of transactions. The requirement set out in clause (*b*)(i)(B) of the definition of "advantage" in subsection 207.01(1) is thus met.
>
> (underlining added)

[38] The appellant argues that the Tax Court's reasoning "would mean that the purpose test can simply be met by determining that the series of transactions involved a TFSA which would render that provision meaningless as it would always be met." (memorandum of fact and law, paragraph 136).

[39] I disagree. The Tax Court made no error of fact (let alone a palpable and overriding error of fact) in finding that one of the main purposes of the series of transactions was so that the appellant could benefit from the tax exempt status of the TFSA.

[40] Determining the main purposes of a non-commercial transaction is a factual inquiry. In the present case the relevant facts included:

- The appellant was aware of the tax exempt status of the TFSA.
- The appellant implemented a strategy using non-market transactions to shift significant amounts of value into the TFSA.
- The appellant's selection of share price artificially increased the number of shares moved into the TFSA with each swap (by using the lowest value of the shares swapped in) and artificially increased the gains in the TFSA when the shares were swapped out (by using the highest value of the share on that day).

[41] While it is correct that almost none of the shares were sold, so that taxable income was not shifted between trading accounts, the result of the appellant's strategy was to inflate the value of the TFSA so as to benefit from a tax-free distribution from her TFSA (as opposed to a taxable withdrawal from her RRSP or a taxable gain within her Canadian trading account).

[42] The Tax Court did not err with respect to this issue.

Conclusion on the appeal

[43] No error has been demonstrated on the part of the Tax Court for the 2009 taxation year. It follows that I would dismiss the appeal.

V. Consideration of the issue raised on the cross appeal

Did the Tax Court err when interpreting the phrase "directly or indirectly" contained in the definition of "advantage" found in paragraph 207.01(1)(b) of the Act?

[44] On the cross appeal, the Crown argues that the Tax Court erred in interpreting the statutory definition of "advantage" by construing too narrowly the phrase "if it is reasonable to consider, having regard to all the circumstances, that the increase is attributable, directly or indirectly, to …".

[45] The Crown argues that the Tax Court's interpretation improperly excludes from the scope of an "advantage" any increase in value in a TFSA in subsequent years that is attributable to amounts previously inappropriately shifted into the TFSA due to improper transactions. Thus, in the present case, the Crown asserts that but for the swap transactions, after October 16, 2009 the appellant would not have had the necessary capital to engage in the volume and dollar amounts of the share transactions that she did which gave rise to the fair market increases in the TFSA in 2010 and 2012.

[46] The interpretation of the statutory definition of "advantage" is a question of law, reviewable on the standard of correctness.

[47] As the Tax Court correctly stated at paragraph 62 of its reasons, the interpretation of a statutory provision must be based on an analysis of the text, context and purpose of the impugned provision.

[48] For ease of reference I repeat the relevant portion of the statutory definition: "advantage", in relation to a TFSA, means "a benefit that is an increase in the total fair market value of the property held in connection with the TFSA if it is reasonable to consider, having regard to all the circumstances, that the increase is attributable, directly or indirectly, to" "a transaction or event or a series of transactions or events that" meet specified criteria (underlining added).

[49] I now turn to consider the text used in the definition of "advantage", mindful that "[w]hen the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role." (*Canada Trustco*, paragraph 10).

[50] As the Tax Court correctly noted at paragraph 68, the use of the phrase "directly or indirectly" evidences Parliament's intent "to capture any and all methods through which a transaction could increase" the fair market value of a TFSA.

[51] However, the Tax Court went on to conclude that the presence of the phrase "reasonable to consider, having regard to all the circumstances" "acts as a constraint on the potential for 'directly or indirectly' to operate over-inclusively and requires an analysis of other" relevant

circumstances (reasons, paragraph 69). The Tax Court found support for this view in *Canada Trustco* where the Supreme Court noted that the presence of the word "reasonably" in subsection 245(4) of the Act "tempered" the interpretation of the provision "suggesting some ministerial and judicial leeway in determining abuse." (reasons, paragraph 69).

[52] The Tax Court distinguished cases such as *Medland v. Canada*, [1999] 4 C.T.C. 293, 1998 CanLII 7895 (F.C.A.) and *Canada v. Kieboom*, [1992] 3 F.C. 488, [1992] 2 C.T.C. 59 (F.C.A.) that interpreted the phrase "directly or indirectly" in cases that concern the transfer of property (reasons, paragraphs 70 to 72). This said, the Court noted that the decision of the Tax Court in *Garron Family Trust v. The Queen*, 2009 TCC 450, [2010] 2 C.T.C. 2346, provided "an interesting counterpoint to the above cases." There, in the context of considering whether a trust "acquired property, directly or indirectly in any manner whatever" the trial Judge "expressed concern about the scope of that phrase" (reasons, paragraph 73).

[53] The Tax Court then concluded its textual analysis as follows at paragraph 76:

> Although the sum of the above case law might be interpreted as favouring a broad reading of the phrase "directly or indirectly" in paragraph (*b*) of the definition of "advantage" in subsection 207.01(1), the absence of a reasonability factor and the inclusion of expressions such as "by any other means" or "in any manner whatever" in the provisions at issue in all the above cases are two powerful distinguishing factors between those cases and the Appellant's case. As will be seen below in my analysis, Justice Woods' concerns about the ambiguity of the phrase "directly or indirectly" may be more appropriately applied to a provision like paragraph (*b*), at issue here, that lacks a defined analytical beginning and end point.
>
> (underlining added)

[54] I respectfully disagree that the requirement to base a determination about the source of an increase in the value of a TFSA upon what "it is reasonable to consider, having regard to all the

circumstances" constrains the broad, textual meaning of the phrase "directly or indirectly". I reach this conclusion for the following reasons.

[55] First, I accept the Crown's submission that the term "reasonable to consider" simply requires an objective consideration of all of the relevant circumstances when determining whether an increase in the fair market value of a TFSA is directly or indirectly attributable to a transaction or event or a series of transactions or events. The need to consider objectively all relevant circumstances does not constrain or restrict the broad meaning conveyed by the phrase "directly or indirectly".

[56] The passage from *Canada Trustco* relied upon by the Tax Court, read as a whole, does not dictate that the concept of reasonableness constrains the meaning of "directly or indirectly". Paragraph 37 of *Canada Trustco* is as follows:

> It is this requirement that has given rise to the most difficulty in the interpretation and application of the GAAR. A number of features have provoked judicial debate. The section is cast in terms of a double negative, stating that the GAAR does "not apply to a transaction where it may reasonably be considered that the transaction would not result directly or indirectly in a misuse . . . or an abuse". It is tempered by the word "reasonably", suggesting some ministerial and judicial leeway in determining abuse. It does not precisely define abuse or misuse. To further complicate matters, the English and French versions of s. 245(4) differ. Overarching these particular difficulties is the central issue of the relationship between the GAAR and more specific provisions of the Act.

[57] The Supreme Court, at this point in its reasons, is speaking of the difficulty posed when interpreting the general anti-avoidance rule. The Court was not, at this point, interpreting the provision. Ultimately, the Court simply concluded that the general anti-avoidance rule does not "apply to deny a tax benefit where it may reasonably be considered that the transactions were

carried out in a manner consistent with the object, spirit or purpose of the provisions of the Act, as interpreted textually, contextually and purposively." (reasons, paragraph 62).

[58] Later, in *Lipson v. Canada*, 2009 SCC 1, [2009] 1 S.C.R. 3, the Court considered in greater detail the phrase "directly or indirectly", as used in subsection 254(4) of the Act. At paragraph 37, the majority wrote:

> … Further, s. 245(4) states that a tax benefit may be denied if a transaction would result "directly or indirectly" in a misuse of the provisions of the Act or in an abuse having regard to those provisions read as a whole. The use of the words "directly or indirectly" indicates that Parliament intended the GAAR to apply even where abuse is an indirect result of a transaction. It follows logically that regard may be had to the series of transactions when determining whether a transaction within the series is abusive; otherwise, the GAAR would apply only to transactions that directly result in abuse and misuse. Finally, this Court agreed in *Kaulius* that the s. 245(4) analysis may be conducted "in light of the series of transactions" (para. 46; see also para. 56).
>
> (underlining added)

[59] The presence of the phrase "reasonably be considered" did not constrain the textual meaning of "directly or indirectly".

[60] Second, I do not see support for the Tax Court's restrictive interpretation in the decision of the Tax Court in *Garron Family Trust*. As the Tax Court correctly observed in the present case, the interpretation of "directly or indirectly" in property transfer cases (cases such as *Garron Family Trust*) is less appropriate in the context of paragraph (*b*) of the definition of "advantage".

[61] In any event, the concerns of the Tax Court as articulated in *Garron Family Trust* were rejected by this Court in *Fundy Settlement v. Canada*, 2010 FCA 309, [2012] 2 F.C.R. 374, at paragraphs 78 to 80 (affirmed but not on this point in *Fundy Settlement v. Canada*, 2012 SCC 14,

[2012] 1 S.C.R. 520). While the Supreme Court did not consider the arguments before it on this issue, and expressed the caveat that it should not be seen as endorsing the conclusions of this Court on an issue the Supreme Court did not consider, this Court's judgment remains valid and binding.

[62] Moreover, in the present case the requirement in the definition of "advantage" to reasonably consider all relevant circumstances, led the Tax Court to apply a narrow reading of "directly or indirectly". However, no similar provision was present in the legislation before the Tax Court in *Garron Family Trust*. Accordingly, the Court's concern in that case about the breadth of the phrase "directly or indirectly" was not based upon the language which the Tax Court relied upon in the present case to narrow the interpretation of the statutory definition of "advantage".

[63] Finally, as seen in paragraph 76 of the reasons of the Tax Court, the Tax Court also relied upon the absence of expressions such as "by any other means" or "in any manner whatsoever" in the definition of "advantage" to favour a narrow reading of the phrase "directly or indirectly". Phrases to this effect are found in provisions dealing with property transfers.

[64] Again, I respectfully disagree. Such additional wording, helpful in situations involving transfers of property and the mechanisms by which property is transferred, is unnecessary in the definition of "advantage" which looks to see whether an increase is directly or indirectly attributable to a transaction or event, or a series thereof.

[65] To conclude on this point, the requirement to consider objectively all relevant circumstances and the absence of any further modifiers do not warrant a narrow reading of the text “directly or indirectly”.

[66] I now turn to consider the statutory context.

[67] The Tax Court reviewed the legislative context at paragraphs 29 to 34 of its reasons. As the Court correctly observed, section 146.2 of the Act allows for the creation of TFSAs. Subsection 146.2(5) prescribes the rules related to the creation of TFSAs and subsection 146.2(6) contains the general rule that a TFSA allows tax-free compounding of investment returns and tax-free distributions of accrued gains. These provisions are all found in Part I of the Act which sets out the general taxation regime.

[68] Sections 207.01 and 207.05 are found in Part XI.01 of the Act. In 2009 and 2010 this part of the Act was entitled “Taxes in Respect of TFSAs”. Later, as of March 2011, this part was entitled “Taxes in Respect of RRIFs, RRSPs and TFSAs”. Part XI.01 may be described as an anti-avoidance scheme intended to deter abuse of the provisions in Part I of the Act that give rise to certain tax benefits, including the benefit provided by TFSAs as specified in subsection 146.2(6) of the Act.

[69] I see nothing in this context that requires or favours a narrow, restricted definition of “advantage”.

[70] I now turn to the purpose of the phrase “directly or indirectly” as found in paragraph (*b*) of the definition of “advantage”.

[71] The Tax Court dealt with the purpose of the provision at paragraphs 64 to 66 of its reasons, correctly stating that it is an anti-avoidance rule. Paragraph (*b*), operating in combination with subsection 207.05(1), taxes 100% of the increase in the fair market value of a TFSA that is attributable to a transaction or event (or a series thereof) that would not occur in an open market between arm’s length parties. As explained by the Tax Court, the purpose of the provision was stated in the Explanatory Notes to the 2009 Budget as follows: paragraph (*b*) of the definition “is intended to guard against transactions designed to artificially shift taxable income away from the holder and into the shelter of a TFSA or to circumvent the TFSA contribution limits.” (reasons, paragraph 64).

[72] The Court went on to caution that while “paragraph (b) is itself an anti-avoidance provision, it pertains to a legislative scheme whose very purpose is to encourage a tax-free increase in savings. There is therefore an inherent tension between the purpose of the provision and the scheme as a whole.” (reasons, paragraph 65).

[73] Finally, the Court observed that while the Explanatory Notes to the Budget “describe the type of transactions considered offensive” they “add no additional information regarding when or how far into the future an advantage (i.e., an increase in value) will be considered as attributable to such transactions.” (reasons, paragraph 66).

[74] Respectfully, I do not see a tension in the legislative scheme between the benefit provided in Part I of the Act and the anti-avoidance provision found in Part XI.01 that justifies a restricted interpretation of the anti-avoidance provision. Rather, the provisions of Part XI.01 are provisions intended to specifically target and deter specific abuses of the general benefit provisions conferred in Part I. The fact Parliament intended to confer specific tax benefits is not by itself relevant to the proper interpretation of provisions intended to target specific abuses, such as transactions that artificially shift taxable income into the shelter of a TFSA.

[75] Similarly, the Tax Court's concern about "when or how far into the future an advantage … will be considered as attributable to" abusive transactions did not justify a restrictive interpretation of the definition of advantage. Such concern is intended to be addressed by other legislative provisions, including the Minister's ability to waive or cancel advantage taxes (subsection 207.06(2) of the Act) and to determine the unused TFSA contribution room (subsection 207.01(1) of the Act and more particularly the definition of "unused TFSA contribution room" as enacted in S.C., 2010, c. 25, subsections 57(5) and 57(8). See, as well, Department of Finance Technical Notes with respect to subsection 207.01(1) "unused TFSA contribution room"). The ability to waive an advantage tax and reset an individual's unused TFSA contribution room are the mechanisms intended to address the future impact of abusive transactions.

[76] As well, concerns about how far into the future impugned transactions continue to impact the TFSA are in every case questions of fact. For each taxation year under consideration the

question is how much of the fair market value increase in the TFSA is attributable directly or indirectly to impugned transactions.

[77] To conclude on the purpose of the provision, the Tax Court's concerns about legislative tension and the future, ongoing impact of impugned transactions did not diminish the clear purpose of the provision. The anti-avoidance purpose of sections 207.01 and 207.05 supports a broad interpretation of the definition of "advantage".

[78] I now turn to apply this textual, contextual and purposive analysis to the facts of this case.

[79] I have concluded that:

- On a textual analysis, the requirement to base a determination about the source of an increase in the value of a TFSA upon what "it is reasonable to consider, having regard to all the circumstances" does not constrain the broad, textual meaning of the phrase "directly or indirectly".
- Nothing in the statutory context requires or favours a narrow, restrictive definition of "advantage".
- The anti-avoidance purpose of sections 207.01 and 207.05 supports a broad interpretation of "advantage".

[80] It follows, in my respectful view, that the Tax Court erred in applying a restrictive interpretation of paragraph (*b*) of the definition of advantage (reasons, paragraph 82). The Tax Court relied on this interpretation to conclude, at paragraph 83, that:

> … the increase in the value of the shares in 2010 and 2012 is not attributable to the swap transactions. The increase is attributable to what happened in the market and, in my view, is neither a direct nor an indirect consequence of the swap transactions.

[81] The swap transactions conducted in 2009 were non-market transactions. The method used by the appellant, which allowed the appellant to select the values that would be used and recorded for each stock that was transferred, permitted the appellant to move shares in and out of her TFSA at non-market prices so as to crystallize larger non-market gains in the TFSA. The method also allowed the appellant to move more shares into her TFSA.

[82] The effect of the swap transactions was to inappropriately increase the number of shares held in the TFSA and the value of the TFSA in 2009. But for this, the increase in value in the TFSA in 2010 and 2012 would not have been as significant as it was. Put another way, while the increase in value in the TFSA in 2010 and 2012 was directly attributable to the performance of the shares held in the TFSA each year, it was indirectly attributable to the swap transactions which increased the number of shares held in the TFSA and their value.

[83] With respect to the conclusion of the Tax Court that the increase in the value of the shares held in the TFSA was "attributable to what happened in the market", at trial the appellant admitted the following facts (Exhibit R1):

> 118. The Minister assessed the Appellant on the basis that she had received advantages within the meaning of that term in subparagraph 207.01(1) of the Act in each of those years, <u>being the yearly increases in the total fair market value of the property held in connection with her TFSA account minus the yearly $5,000 contributions</u>.
>
> 119. The Minister's assessing position was based on the <u>Appellant having received benefits that were increases in the total fair market value of the properties held in the TFSA account, minus the yearly $5,000 contributions, that,</u>

> having regard to all of the circumstances, were reasonably attributable to transactions that:
>
> a) would not have occurred in an open market in which parties deal with each other at arm's length and act prudently, knowledgeably and willingly; and
>
> b) had as one of their main purposes the enabling of the Appellant to benefit from the exemption from tax of any amounts in respect of the TFSA account, as they gave rise to large tax-free gains in the TFSA which could be withdrawn by her.
>
> (underlining added)

[84] The appellant did not call any evidence at trial to rebut or demolish the Minister's assumptions attributing the increases in value in the appellant's TFSA in 2010 and 2012 to the impugned swap transactions (less the appellant's annual contribution to the account).

[85] In this circumstance, it was not open to the Tax Court to find the increases to be attributable to "what happened in the market".

Conclusion on the cross appeal

[86] The Tax Court erred in its interpretation of the definition of "advantage" found in paragraph 207.01(1)(*b*) of the Act and erred in failing to find that the increase in the fair market value of the TFSA in 2010 and 2012 was indirectly attributable to the swap transactions undertaken in 2009 so as to fall within the definition of "advantage" in subsection 207.01(1).

VI. Conclusion

[87] For the above reasons, I would dismiss the appeal with respect to the 2009 taxation year and allow the cross appeal with respect to the 2010 and 2012 taxation years. I would order the appellant to pay the costs in this Court to the respondent Crown.

[88] Pronouncing the judgment that ought to have been pronounced, I would vary the judgment of the Tax Court so as to dismiss the appeals for the 2010 and 2012 taxation years and order the appellant to pay the costs in the Tax Court to the respondent Crown.

"Eleanor R. Dawson"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-410-18
STYLE OF CAUSE:	VICTORIA Y. LOUIE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	SEPTEMBER 17, 2019
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	NADON J.A. MACTAVISH J.A.
DATED:	OCTOBER 17, 2019

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