

BETWEEN:

SOMERSET LIMITED,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on April 29, 2026, at Vancouver, British Columbia

Before: The Honourable Justice Ronald MacPhee

Appearances:

Counsel for the Appellant: Joel Nitikman
Harry Cho

Counsel for the Respondent: Laura Zumpano
Sara Fairbridge

JUDGMENT

In accordance with the attached Reasons for Judgment:

The Appeal with respect the Appellant’s 2019, 2020 and 2021 taxation years (the “taxation years”) is denied in full.

For further clarification, it is found that the Appellant remained a Canadian Controlled Private Corporation (a “CCPC”) after the Continuation, such that Somerset’s aggregate investment income in the taxation years is subject to 123.3 tax.

Furthermore, the Minister properly disallowed the general rate reduction under subparagraph 123.4(1)(b)(iii) in respect of the Taxation Years for the same reason.

The excessive eligible dividend designations by the Appellant are subject to tax under Part III.1 of the Act, but for the election by the Appellant in 2019 and 2020 to treat the excessive eligible dividends in those years as ordinary dividends.

Costs are payable by the Appellant to the Respondent. The parties shall have until September 15, 2026, to reach an agreement on costs, failing which the Respondent shall have until October 15, 2026, to serve and file written submissions on costs, and the Appellant shall have until November 15, 2026, to serve and file written response submissions on costs. Any submissions shall not exceed five pages. If the parties do not advise the Court that they have reached an agreement and no submissions are received, costs shall be awarded to the Respondent as set out in the Tariff.

Signed this 29th day of June 2026.

“R. MacPhee”

MacPhee J.

Citation: 2026 TCC 123

Date: 20260629

Docket: 2023-295(IT)G

BETWEEN:

SOMERSET LIMITED,

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and

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REASONS FOR JUDGMENT

MacPhee J.

I. Introduction

[1] In October 2018, Somerset Limited, a Canadian Controlled Private Corporation (a “CCPC”) entered into an agreement to sell its two Vancouver properties for just over \$34,000,000.

[2] The Appellant then undertook a series of transactions prior to closing to avoid specific tax payable by a CCPC pursuant to ss. 123.3 of the *Income Tax Act*, 2 RSC 1985, c 1 (5th Supp), as amended (the “Act”) and to obtain a general rate reduction under ss. 123.4 of the Act. The central transaction in the series was the Appellant’s Continuation¹ into the British Virgin Islands (the “BVI”) on December 19, 2018. The Appellant believed that because of the Continuation Somerset would lose its status as a “Canadian corporation” and more importantly would no longer be a CCPC. However, the Appellant also concedes that even after these transactions, it remained a resident in Canada.

¹ A Continuation is a statutory process by which a corporation operating under the corporate law statute of one jurisdiction becomes subject to the laws of another jurisdiction. A key element of this process is that the corporation is deemed to have been incorporated in the new jurisdiction.

[3] A very similar transaction was recently considered by the Federal Court of Appeal (the “FCA”), in *Canada v. DAC Investments*² (“DAC”) The parties have agreed that much of the general anti-avoidance rule (the “GAAR”) analysis undertaken by the FCA in *DAC* is applicable to this analysis.

[4] What is different in this matter is the Respondent has a preliminary argument, that GAAR need not be considered, because the series of transactions changed nothing for the Appellant from a tax perspective. This because, despite the Continuation of Somerset in BVI, the company continued to meet the definition of a “Canadian corporation” under 89(1) of the Act and therefore was a CCPC as defined pursuant to ss. 125(7) of the Act.

[5] Therefore, this appeal first focuses the statutory interpretation of the definition of a “Canadian corporation”.

[6] If it is necessary to consider GAAR, the Appellant argues that this matter is distinguishable from *DAC* because of the availability of an alternative transaction.³

II. The issues to be decided are:

1. Whether the Appellant remained a CCPC after the Continuation, such that section 123.3 tax applies to any of the 2019, 2020 and 2021 Investment Income of Taxable Capital Gains;
2. Whether the Minister properly disallowed the general rate reduction under subparagraph 123.4(1)(b)(iii) in respect of the Taxation Years for the same reason; and,
3. Alternatively, whether the GAAR applies such that the tax pursuant to s. 123.3 of the Act should be applied and the general tax rate reduction under s. 123.4 should be denied in respect of the Taxation Years.

² *Canada v. DAC Investment Holdings Inc.*, 2026 FCA 35 [*DAC Investment Holdings*], leave to appeal to the Supreme Court of Canada sought.

³ The Appellant proposes that had Somerset originally incorporated in BVI in 1943 (an impossibility) or in some other country other than Canada, than the same result would have been obtained.

[7] An agreed statement of facts was filed on this matter, which sets out the following⁴:

III. Analysis

A. Corporate details:

1. The Appellant (Somerset) is a corporation.
2. Somerset was incorporated in British Columbia (BC) under the *Companies Act* (BC).
3. Somerset was incorporated on May 26, 1943.
4. Somerset's business purpose was to make and hold long term investments, including rental property and shares of various companies listed on the TSX.
5. Somerset has been resident in Canada from the time it was incorporated to now, including throughout its taxation years from December 16, 2018, to December 15, 2019, December 16, 2019, to December 15, 2020, and December 16, 2020, to December 15, 2021.
6. As of December 10, 2018, each of the following persons had been a Canadian resident since at least 1987 and held 25% (11,345 shares) of Somerset's common voting shares (Common Shares):
 - a. Katherine Cairns (Katherine);
 - b. John Stekl (John);
 - c. Robert Stekl (Robert); and
 - d. Robyn Cairns (Robyn).
7. John and Robert are brothers of each other; Robyn and Katherine are sisters of each other and cousins of John and Robert.

⁴ Some formatting and typographic changes have been made.

8. Katherine was, at all material times, a director of Somerset.
9. John was, at all material times, a director and authorized representative of Somerset.

B. Somerset's status as a CCPC

10. At all relevant times until at least December 10, 2018, Somerset met the conditions necessary to be a "Canadian-controlled private corporation" (CCPC) as defined by subsections 248(1) and 125(7).

C. The agreement to sell the Buildings

11. As of October 16, 2018, Somerset owned two apartment buildings (the Buildings) in Vancouver, BC, at 5450 University Boulevard(owned since 1973) and 5600 Dalhousie Road (owned since 1952).
12. On October 16, 2018, Somerset entered into an agreement to sell the Buildings to Starlight Acquisitions Ltd. (Starlight), an arm's length corporation, for a price of \$34,250,000.
13. After adjusting for credits to Starlight, the total purchase price for the Buildings was \$34,020,000, comprised of:

5600 Dalhousie Road - Land	\$12,965,671.50
5600 Dalhousie Road - Building	\$7,428,828.50
5450 University Boulevard - Land	\$8,369,239.56
5450 University Boulevard - Building	\$5,226,260.44
Equipment	\$30,000.00
Total	\$34,020,000.00

[8] In 2018, Somerset also held a stock portfolio.

D. Somerset's Continuation to the BVI

14. On October 30, 2018, by special resolution, Somerset's shareholders resolved to authorize Somerset to make an application to the proper authority in the BVI for an instrument of continuation continuing Somerset into the BVI.

15. On October 30, 2018, Somerset's directors resolved to authorize Somerset to make application to the proper authority in the BVI for an instrument of continuation continuing Somerset into the BVI.
16. On October 30, 2018, Somerset's directors applied to the BC Registry of Services for authorization to continue Somerset outside of BC.
17. On October 31, 2018, Somerset received approval from the BC Registrar of Companies to continue out of BC to the BVI.
18. On November 1, 2018, Somerset made an application to the Intertrust Group of the BVI to continue into the BVI.
19. On December 10, 2018, Somerset was continued out of BC and into the BVI (the Continuation).

E. The purpose of Somerset's Continuation

20. Somerset's primary purpose in undertaking the Continuation was to avoid the section 123.3 tax for which it was later reassessed as set out below.

F. Closing the Sale of the Buildings

21. In respect of the sale of the Buildings, Somerset and Starlight agreed initially to a closing date of December 10, 2018.
22. On November 15, 2018, Somerset and Starlight agreed to change the closing date to December 17, 2018.
23. On December 17, 2018, Somerset and Starlight completed the sale of the Buildings.

G. The Capital Gain

24. As a result of the sale of the Buildings, Somerset realized a capital gain of \$32,239,142 and a taxable capital gain of \$16,119,571 (the Taxable Capital Gain), calculated as follows:

Proceeds of Disposition		\$34,020,000
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Equipment		\$(30,000)
Adjustment		-\$48,062
Revised proceeds of Less: adjusted cost base		\$33,941,938

Land cost	\$372,619	
Building cost	\$915,652	
Outlays and expenses	<u>\$414,525</u>	
ACB		(\$1,750,858)
Capital Gain		\$32,239,142
Taxable Capital Gain		\$16,119,571

H. BC Registration

25. On January 10, 2019, Somerset registered as an extra-provincial company in BC with the BC Registry Services.

I. The incorporation of the Holding Companies

26. On December 4, 1989, Rubberman Holdings Ltd. (Rubberman) was incorporated in BC.
27. Robyn is the sole director of Rubberman.
28. Robyn holds 100 class A, non-voting, common shares and 100 class B, non-participating, voting-only, preferred shares of Rubberman.
29. On December 15, 2018, Windfall Ventures Inc. (Windfall) was incorporated in BC.
30. Katherine is the sole director and holds 100% of the common voting shares of Windfall.
31. On December 15, 2018, J Stekl Holdings Ltd. (JS Holdings) was incorporated in BC.
32. John is the sole director and holds 100% of the common voting shares of JS Holdings.

33. On December 15, 2018, RG Stekl Investments Ltd. (RGI and together with Rubberman, JS Holdings and Windfall, the Holding Companies, and individually, each a Holding Company) was incorporated in BC.
34. Robert is the sole shareholder and holds 100% of the common voting shares of RGI.

J. Resolutions to pay capital dividends

35. On December 17, 2018, Somerset's directors resolved to have Somerset pay a capital dividend of \$14,400,000 on its Common Shares pursuant to an election made under subsection 83(2).
36. On December 17, 2018, Somerset elected to pay a capital dividend of \$14,400,000 on its Common Shares pursuant to subsection 83(2).
37. On December 18, 2018, Somerset paid a capital dividend of \$14,400,000 on its Common Shares, all of which were held at that time by Katherine, John, Robert and Robyn.
38. On January 30, 2019, Somerset's directors resolved to have Somerset pay a capital dividend of \$1,600,000 on its Common Shares pursuant to an election made under subsection 83(2).
39. On January 30, 2019, Somerset elected to pay a capital dividend of \$1,600,000 on its Common Shares pursuant to subsection 83(2).
40. On January 30, 2019, Somerset paid a capital dividend of \$1,600,000 on its Common Shares, all of which were held at that time by Katherine, John, Robert and Robyn.

K. Reorganization of Somerset

41. On January 31, 2019, Somerset's directors resolved to approve Katherine, John, Robert and Robyn transferring their respective 11,345 Common Shares to Windfall, JS Holdings, RGI and Rubberman, respectively.
42. The Common Shares transferred by Katherine, John, Robert and Robyn to their Holding Companies represented all of their shares of Somerset.

43. As of January 31, 2019, the value of the 11,345 Common Shares held by each of Katherine, John, Robert and Robyn, was \$4 million with an ACB of \$111.91.
44. Pursuant to section 85, Katherine, John, Robert and Robyn and Windfall, JS Holdings, RGI and Rubberman, respectively, elected to transfer the Common Shares for proceeds of disposition equal to ACB in exchange for shares of the Holding Company (100 Class A common shares of Windfall, JS Holdings and RGI and 1,000 Class C preferred shares of Rubberman, respectively).

L. 2019 Dividends

45. On February 25, 2019, Somerset paid dividends on its Common Shares to the Holding Companies and designated those dividends as “ordinary” and “eligible” as follows:

Shareholder	Ordinary Dividends	Eligible Dividends	Total Dividends
RGI	\$224,736	\$1,591,319	\$1,816,055
JS Holdings	\$224,736	\$1,591,319	\$1,816,055
Rubberman	\$224,736	\$1,591,319	\$1,816,055
Windfall	\$224,736	\$1,591,319	\$1,816,055
Total	\$898,944	\$6,365,276	\$7,264,220

46. If Somerset were a CCPC at this time, the balance of its general rate income pool (GRIP) for purposes of the Act at the end of the 2019 taxation year was \$670,967.
47. If Somerset were a CCPC at this time, the dividends of \$6,365,276 designated as “eligible dividends” and paid by Somerset on February 25, 2019 exceeded its GRIP by \$5,694,309.

M. 2020 Dividends

48. On November 16, 2020, Somerset paid dividends of \$500,000 on its Common Shares to each Holding Company for total dividends of \$2 million.
49. Somerset designated the dividends of \$2 million paid on November 16, 2020 as “eligible dividends”.

50. If Somerset were a CCPC at this time, the balance of its GRIP at the end of the 2020 taxation year was \$76,170.
51. If Somerset were a CCPC at this time, the dividends of \$2 million designated as “eligible dividends” and paid by Somerset on November 16, 2020 exceeded its GRIP by \$1,923,830.

N. Reporting the Taxable Capital Gains and other Investment Income

52. On February 11, 2019, Somerset filed a T2 income tax return for a taxation year running from January 1 to December 9, 2018.
53. On March 4, 2019, Somerset filed a T2 income tax return for a taxation year running from December 10 to December 15, 2018.
54. On April 9, 2020, Somerset filed a T2 income tax return (the 2019 Return) for a taxation year running from December 16, 2018 to December 15, 2019 (the 2019 Taxation Year).
55. Somerset subsequently filed T2 income tax returns (the 2020 Return and 2021 Return) for taxation years running from December 16, 2019 to December 15, 2020, (the 2020 Taxation Year) and December 16, 2020 to December 15, 2021 (the 2021 Taxation Year), respectively.
56. On June 6, 2022, Somerset requested that the Canada Revenue Agency (CRA) grant it a change in year-end to reflect the year-ends as filed so that Somerset would not have to redo its accounting and financial records.
57. Somerset’s request was granted and beginning in 2018, Somerset’s year-end for taxation purposes was December 15.
58. Prior to December 10, 2018, Somerset’s year-end for financial and income tax purposes was December 31.
59. In its 2019 Return, Somerset:
 - a. reported a capital gain of \$32,281,952 from the disposition of the Buildings;

- b. reported net investment income of \$166,050 (the 2019 Investment Income);
 - c. did not report any refundable tax payable under section 123.3; and
 - d. claimed a general tax reduction of \$2,208,335.
- 60. For its 2019 Taxation Year, Somerset paid Part I federal tax of \$2,584,074.
- 61. Somerset requested, and the CRA allowed an adjustment to reduce the 2019 capital gain from \$32,281,952, as reported, to \$32,239,142.
- 62. In its 2020 Return, Somerset:
 - a. reported a taxable capital gain of \$170,683 (the 2020 Taxable Capital Gain);
 - b. reported net investment income of \$180,375 (the 2020 Investment Income);
 - c. did not report any refundable tax payable under section 123.3; and
 - d. claimed a general tax reduction of \$45,638.
- 63. For its 2020 taxation year, Somerset paid Part I federal tax of \$52,658 and Part IV tax of \$29,199.
- 64. In its 2021 Return, Somerset:
 - a. reported no taxable capital gain;
 - b. reported net investment income of \$15,130 (the 2021 Investment Income);
 - c. did not report any refundable tax payable under section 123.3;
 - d. claimed the general tax reduction of \$1,967; and,
 - e. for its 2021 taxation year, Somerset paid Part I federal tax of \$2,269.

O. Reporting the Holding Companies' Dividends

65. Each of Windfall, RGI and IS Holdings, for its taxation years ending December 31, 2019 and 2020 and Rubberman, for its taxation years ending October 31, 2019 and 2021, reported taxable dividends from Somerset in the amounts of \$1,816,055 (\$1,591,319 of which was designated "eligible") and \$500,000 (all of which was designated "eligible"), respectively.
66. Each Holding Company deducted these dividends under subsection 112(1) and reported neither Part I nor Part IV tax thereon.

P. The Reassessments

67. On October 7, 2022, the Minister of National Revenue (the Minister) reassessed Somerset's 2019, 2020 and 2021 Taxation Years and issued notices of the reassessments on that date (individually, the 2019 Reassessment, 2020 Reassessment and 2021 Reassessment and together, the Reassessments).
68. By the 2019 Reassessment, the Minister:
 - a. accepted that Somerset's 2019 Taxation Year ended on December 15, 2019;
 - b. accepted that the Taxable Capital Gain should be taxable in Somerset's 2019 Taxation Year;
 - c. assumed, inter alia, that Somerset was a CCPC throughout its 2019 Taxation Year; and
 - d. imposed tax under section 123.3 on the Taxable Capital Gain and the 2019 Investment Income.
69. The Minister's acceptance that Somerset's 2019 Taxation Year ended on December 15, 2019 and that the Taxable Capital Gain should be taxable in the 2019 Taxation Year were the result of the Minister granting Somerset's request for a change in year-end.

70. By the 2020 and 2021 Reassessments, the Minister imposed tax under section 123.3 on Somerset's 2020 Taxable Capital Gain, 2020 Investment Income and 2021 Investment Income.
71. In addition, by the Reassessments the Minister:
- a. disallowed the general rate reduction in the amount of \$2,161,737 for the 2019, 2020 and 2021 Taxation Years;
 - b. allowed a dividend refund increase of \$2,412,002 and \$737,467 in the respective 2019 and 2020 Taxation Years;
 - c. accepted Somerset's subsection 185.1(2) election to treat the 2019 and 2020 excessive eligible dividend designations as ordinary dividends;
 - d. reduced the capital gain on the sale of the Buildings in 2018 from \$32,281,952 to \$32,239,142, per Somerset's request.

Q. The Objection

72. On November 10, 2022, Somerset filed with the Minister a notice of objection by which it objected to the Reassessments.
73. As of the date of the Notice of Appeal, February 8, 2023, more than 90 days had elapsed since Somerset filed the objection and the Minister had neither confirmed, vacated nor varied the Reassessments in response to the objection⁵.

IV. Position of the Parties

[9] To be a CCPC, a corporation must be a "Canadian corporation". The Appellant attempted to change its status as a CCPC (through the series of transactions described below in the agreed facts at paragraph 76). Both parties agree that we must look to the words of the Act, specifically subsection 89(1), to determine whether Somerset remained a CCPC (because it remained a "Canadian corporation") despite the avoidance transactions undertaken.

⁵ Facts agreed to pertaining to GAAR are set out later in the decision.

Respondent's position

[10] The Respondent's main argument is that the definition of a "Canadian corporation" "is clear and unambiguous". On a plain reading of ss. 89(1)(b), Somerset meets (and has always met) the definition of a CCPC. The plain text reading of 89(1)(b) accords with the context and purpose of that paragraph. The words Parliament ultimately chose to effect that purpose should be respected, and no additional words should be read in to change what Parliament enacted. As such, the Appellant was still a CCPC after the Continuation.

[11] In support of the above paragraph the Minister makes two arguments concerning the status of the Appellant as a CCPC. First, they rely upon the fact that Somerset was incorporated in Canada in 1943 and remains a resident in Canada up until the present day.

[12] Following the Continuation, the Respondent acknowledges that Somerset was no longer a "Canadian Corporation" under 89(1)(a) because it was then deemed to have been incorporated in the BVI in 1943.

[13] Their position is that Somerset nonetheless remained a CCPC because it remained a "Canadian corporation" in accordance with the definition in subsection 89(1)(b). This because, as noted above, the corporation was incorporated pre 1971 and has remained a resident in Canada at all times until the present day. Prior to the Continuance, they argue that Somerset met the definition of a Canadian corporation under both 89(1)(a) and (b). After the Continuation, they argue that Somerset still meets the definition under 89(1)(b).

[14] Second, the Respondent argues that, because of Somerset's Continuation to the BVI, the deeming rule in ss. 250(5.1) is determinative. Somerset met the definition of a "Canadian corporation" after the Continuation. Subsection 250(5.1) deems Somerset to have been incorporated in the BVI in 1943 while always remaining resident in Canada. Somerset therefore meets the definition of a "Canadian corporation" in paragraph 89(1)(b).

[15] In the alternative, if the Court does not find that Somerset remained a CCPC, the Crown submits that the application of the GAAR would deny the Tax Benefits. This because Somerset's continuation to BVI frustrated Parliament's anti-deferral policy and was an abusive avoidance transaction.

The Appellant's Position

[16] The Appellant submits that by effecting a Continuation into the BVI, pursuant to ss. 250(5.1) of the Act, the Appellant was no longer a Canadian corporation, and thus no longer a CCPC subject to 123(3) taxes. Specifically, the Appellant contends that at the moment of the Continuation, Somerset ceased to be a CCPC because it was no longer a “Canadian corporation” as defined in subsections 248(1) and 89(1) of the Act.

[17] The Appellant argues that Somerset no longer comes within the definition of a “Canadian corporation” for one of two reasons. First, because it is no longer captured by the definition of “Canadian corporation” at paragraph 89(1)(a) of the Act. This because, after the Continuation, Somerset is deemed to have been incorporated in the BVI on May 26, 1943. The definition of Canadian Corporation in 89(1)(a) only applies to a corporation that was in fact incorporated in Canada.

[18] The Appellant further argues that it is not captured by paragraph 89(1)(b) of the definition of “Canadian corporation” because that provision only applies to corporations that were factually incorporated outside of Canada, which the Appellant was not.

[19] Concerning the application of GAAR, the Appellant submits that this matter should be distinguished from *DAC*, because of the availability of an alternative transaction. Specifically, the Appellant could have been incorporated in a country different from Canada in 1943.

V. Statutory Interpretation of 89(1)

[20] The relevant provision of subsection 125(7) provides:

1. Canadian-controlled private corporation means a private corporation that is a Canadian corporation other than a corporation controlled, directly or indirectly in any manner whatever, by one or more non-resident persons, by one or more public corporations (other than a prescribed venture capital corporation), by one or more corporations described in paragraph (c), or by any combination of them,
2. a corporation that would, if each share of the capital stock of a corporation that is owned by a non-resident person, by a public corporation (other than a prescribed venture capital corporation), or by a corporation described in paragraph (c) were owned by a particular person, be controlled by the particular person,
3. a corporation a class of the shares of the capital stock of which is listed on a designated stock exchange, or in applying subsection (1), paragraphs 87(2)(vv) and (ww) (including, for greater certainty, in applying those paragraphs as provided

under paragraph 88(1)(e.2)), the definitions excessive eligible dividend designation, general rate income pool and low rate income pool in subsection 89(1) and subsections 89(4) to (6), (8) to (10) and 249(3.1), a corporation that has made an election under subsection 89(11) and that has not revoked the election under subsection 89(12).

[21] Additionally, subsection 248(1) provides that “[CCPC] has the meaning assigned by subsection 125(7), and further states that a ‘Canadian corporation’ has the meaning assigned by subsection 89(1)”.

[22] I must therefore provide an analysis of the proper interpretation of 89(1) of the Act which defines a “Canadian corporation”.

The Relevant Law – Subsection 89(1)

[23] At issue is whether the Appellant is caught by the ss. 89(1)(b) definition of “Canadian corporation.” Thus, the question to be answered is whether a pre 1971 Canadian resident corporation that has continued into a jurisdiction but otherwise remains a resident in Canada is caught by paragraph (b) of the “Canadian corporation” definition.

[24] The relevant portion of the subsection 89(1) definition of “Canadian corporation” reads as follows:

Canadian corporation at any time means a corporation that is resident in Canada at that time and was

(a) incorporated in Canada, or

(b) resident in Canada throughout the period that began on June 18, 1971 and that ends at that time

...

Statutory Interpretation of 89(1)

[25] Recently, the FCA providing guidance in statutory interpretation, in *Hunt v. Canada*, 2026 FCA 88:

[11] Today, however, we have a great deal of stability. A recent series of consistent Supreme Court cases deserves the credit. In the process of analyzing text, context and purpose, the text is “the anchor of the interpretive exercise”: Québec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de

la protection de la jeunesse du CISSS A, 2024 SCC 43 at para. 24, citing M. Mancini, “The Purpose Error in the Modern Approach to Statutory Interpretation” (2022), 59 Alta. L. Rev. 919, at p. 927; see also the excellent analysis in M. Mancini, “‘Text as Anchor’ in Statutory Interpretation”, to be published in the Canadian Bar Review (online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6300919). Many Supreme Court cases just before and just after CISSS A have faithfully followed this methodology and are admirably consistent: see, e.g., TELUS Communications Inc. v. Wellman, 2019 SCC 19, [2019] 2 S.C.R. 144; R. v. Rafilovich, 2019 SCC 51, [2019] 3 S.C.R. 838; MediaQMI Inc. v. Kamel, 2021 SCC 23, [2021] 1 S.C.R. 899; Piekut v. Canada (National Revenue), 2025 SCC 13; R. v. Carignan, 2025 SCC 43; Kosicki v. Toronto (City), 2025 SCC 28; and many others.

...

[13] While the text is the anchor of the exercise, the context of the words in the legislation can shed light on the meaning of the text and sometimes can resolve ambiguities in the text. And the same is true for the legislative purpose. A court must consider the context and purpose of the provision “no matter how plain the disposition may seem upon initial reading”: Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 47; ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 48; Williams v. Canada (Public Safety and Emergency Preparedness), 2017 FCA 252, [2018] 4 F.C.R. 174 at para. 43. But where the language is clear and unambiguous and unaffected by considerations of context and purpose, it must be given its effect and the element of purpose “cannot be used to create an unexpressed exception to clear language” which was arguably the case in Wilson: see, e.g., Placer Dome Canada Ltd. v. Ontario (Minister of Finance), 2006 SCC 20, [2006] 1 S.C.R. 715 at para. 23. And policy considerations “cannot be permitted to distort the actual words of the statute, read harmoniously with the scheme of the statute, its object, and the intention of the legislature, so as to make the provision say something it does not”: TELUS Communications, above at para. 79.

[14] Courts must also consider both official language versions of legislation: Piekut, above; Schreiber v. Canada (Attorney General), 2002 SCC 62, [2002] 3 S.C.R. 269. In this case, there is no substantive difference between the English and French versions of sections 207.01, 207.05 and 207.06 of the Act.

[26] The Respondent argues that the words of ss. 89(1)(b) are “precise and unequivocal”. Looking at ss. 89(1)(b) in isolation, the Respondent is correct. A plain reading of this provision would mean that any corporation that was a resident in Canada pre-1971 would always remain a Canadian corporation, despite any deeming provision under subsection 250(5.1) of the Act. They argue that the legislation is not

concerned with the place of incorporation. Only that the corporation was a resident in Canada throughout the period that ended on June 18, 1971, up to the present time.⁶

[27] I disagree with their interpretation of ss. 89(1)(b). We must look at the entirety of ss. 89(1) in discerning the meaning of the legislation. Crucially, (in the English version) ss. 89(1)(a) and (b) are joined by “or”. Discerning whether the “or” is disjunctive or subjunctive’ is a necessary step in this analysis.

“Or”, disjunctive or conjunctive

[28] In *Hoch v The Queen*, 2019 TCC 99, I was called upon to do a similar analysis:

[13] The Oxford English Dictionary states that “or” is “used to coordinate two (or more) sentence elements between which there is an alternative.”[6]. In *Russell, Bowman* CJ (as he then was) analyzed whether “or” was disjunctive or conjunctive in the context of subsection 122.5(1) of the *Act*. Bowman CJ found that “or” in the ordinary sense is prima facie disjunctive [7] . Yet, “or” can also be conjunctive in limited circumstances. For example, the use of “or” between paragraphs 6(6)(a) and 6(6)(b) indicates that the tax free treatment of payment in respect of employment at special worksites or remote locations apply if one or both of the conditions under (a) and (b) are met [8] . However, this is not the case for the “or” in subparagraph 8(1)(c)(iii).

[14] The existence of the comma before “or” at the end of subparagraph 8(1)(c)(iii) is an important interpretative aid indicating that this “or” is disjunctive. In Matthew, Rip CJ (as he then was) examined paragraphs 90(1)(a) and 90(1)(b) of the *Act*, which are similarly drafted as subparagraphs 8(1)(c)(iii) and 8(1)(c)(iv). Rip CJ found:

The presence of a comma "opens the door to a disjunctive interpretation": *Canada v. Manitoba* (1985), 85 D.T.C. 5588 (Fed. T.D.) (per Joyal J.). The placement of a comma before the word "or" at the end of paragraph 90(1)(a) is clearly intended to create a disjunction between paragraphs 90(1)(a) and 90(1)(b) [9] .

[29] In this instance the “or” between 89(1)(a) and (b) is disjunctive. Paragraph 89(1) describes two different scenarios. Paragraph (a) of the definition of Canadian corporation refers to corporations incorporated (and resident) in Canada at any time. I accept the Appellant’s position that (b) applies only to corporations not incorporated in Canada.

⁶ Crown’s Written Submissions at paragraph 44.

[30] Notably, the French version of the “Canadian corporation” definition included in subsection 89(1) does not include the word “ou” (i.e., “or”). Rather, the relevant portion of the definition of “société canadienne” in paragraph 89(1) of the French version of the *Income Tax Act* reads as follows:

société canadienne À un moment donné, société qui réside au Canada et qui:

soit a été constituée au Canada;

soit a résidé au Canada tout au long de la période qui a commencé le 18 juin 1971 et se termine à ce moment.

...

[31] The French version of the legislation could possibly be interpreted as broader than the English version. In dealing with this possible contradiction, I rely upon the guidance provided by the Supreme Court, which has found that where one version of the legislation is broader than the other, the narrower version (“shared meaning”) is usually preferred⁷.

[32] Therefore, I take into account the disjunctive nature of paragraphs (a) and (b) found in the English version of the “Canadian corporation” definition. Paragraph (b) is meant to capture any corporation resident in Canada before June 1971, if they were not incorporated in Canada, while paragraph (a) is meant to capture all corporations that were incorporated in Canada – before and after June 1971.

[33] While the text is the anchor in this exercise, we must also consider the legislative purpose of subsection 89(1).

[34] The applicable Technical Notes from the 1971 Tax Reform concerning 89(1)(b) stated that:

“Corporations now resident in Canada but not incorporated in Canada will be considered ‘Canadian corporations’ for all intents and purposes as long as they remain resident...The provision applies only to foreign corporations resident in Canada on budget day, 1971. In future, a corporation must be incorporated in

⁷ *Piekut v. Canada*, 2025 SCC 13. As cited by Professor Geoffrey Loomer in his recent paper *Statutory Interpretation in Tax Law*.

Canada to be classified as a ‘Canadian corporation’ and to obtain certain benefits of the new system...”⁸

[35] In its submissions, the Appellant has provided various commentary in support of their interpretation of 89(1)(b), which I have found helpful and accept. For example, see Canada Tax Service (Taxnetpro) subsection 89(1) “Canadian corporation”:

Subsection 89(1) defines the term “Canadian corporation” for the purposes of subdivision h. Pursuant to subsection 248(1), the meaning given to “Canadian corporation” when used elsewhere in the Act is the same as that set out in subsection 89(1). A Canadian corporation is one which is resident in Canada and either was incorporated in Canada or, if not incorporated in Canada, has been resident in Canada continuously from June 18, 1971. See the commentary to subsection 2(1) regarding the determination of corporate residence,

[emphasis added]

[36] Finally, I further rely upon the analysis provided by the Tax Court in *Saipem UK Ltd. v. The Queen*:

7. Subsection 89(1) therefore sets out two ways in which a corporation can be a “Canadian corporation”. It provides that a corporation must be resident in Canada and have been incorporated in Canada, or that a corporation not incorporated in Canada must have been resident in Canada since at least June 18, 1971 to be considered a “Canadian corporation”.⁹

[37] I therefore find that that the Appellant’s initial interpretation of 89(1)(b) is correct. Prior to the Continuation, Somerset meets the definition of a “Canadian corporation” under 89(1)(a), but not (b) (because it was incorporated in Canada). Yet that is not the end of the analysis. As set out below, after the Continuation, Somerset meets the definition of a “Canadian corporation” under 89(1)(b), but not (a).

Effect of deeming provision in Paragraph 250(5.1)(a)

[38] The legislation, which deems the Appellant to have been incorporated in the BVI reads as follows:

⁸ Technical Notes, 89(1) “Canadian Corporation”

⁹ *Saipem UK Ltd. V. R.*, 2011 TCC 25 at para 7 and also at para 50 in which the same conclusion is reached.

Continued corporation

(5.1) Where a corporation is at any time (in this subsection referred to as the “time of continuation”) granted articles of continuance (or similar constitutional documents) in a particular jurisdiction, the corporation shall

(a) for the purposes of applying this Act (other than subsection 250(4)) in respect of all times from the time of continuation until the time, if any, of continuation in a different jurisdiction, be deemed to have been incorporated in the particular jurisdiction and not to have been incorporated in any other jurisdiction;

[39] The Appellant wishes to rely only upon the part of this provision which provides an advantage. That is, because of the deeming provision, the Appellant rightfully claims that Somerset no longer meets the definition of a “Canadian corporation” under 89(1)(a) (since Somerset is deemed to be incorporated outside of Canada). Yet the Appellant further argues that the deemed incorporation in the BVI should not be interpreted so that Somerset becomes a foreign incorporated entity with residence in Canada prior to 1971, and therefore a “Canadian corporation” pursuant to the definition of a “Canadian corporation” under 89(1)(b).

[40] The Appellant argues that Somerset must factually have been incorporated outside of Canada to meet the parameters of 89(1)(b). The Appellant further argues that to be deemed to have done so is not sufficient.

[41] Of assistance in determining the consequences of a deeming provision is *Sullivan and Driedger on the Construction of Statutes*, Fourth Edition, by Ruth Sullivan in which, at page 69 Driedger wrote:

When “deems” is used to create a legal fiction, the fiction cannot be rebutted. The facts as declared by the legislature govern even in the face of irrefutable evidence to the contrary. The difficulty that arises in interpreting legal fictions is determining the scope of the fiction.

[42] In this instance, the scope of the fiction is not difficult to determine. Paragraph 250(5.1)(a), reads: **for the purposes of applying this Act** (other than subsection 250(4)) in respect of all times from the time of continuation until the time, if any, of continuation in a different jurisdiction, be deemed to have been incorporated in the particular jurisdiction and not to have been incorporated in any other jurisdiction.

[43] The wording makes it clear, the deeming rule applies to all provisions of the Act, except for subsection 250(4). Indeed, although paragraph 250(5.1)(a) applies to

deem the Appellant to have been incorporated in the BVI, the consequence of this is that the Continuation applies from the original incorporation date. Thus, the Appellant is deemed to have been incorporated in the BVI from May 26, 1943.

[44] As the Appellant's deemed incorporation date in the BVI is May 26, 1943, the Appellant is captured by paragraph 89(1)(b) of the "Canadian corporation" definition in subsection 89(1). As such, from the time of the Continuation, the Appellant did not cease to be a CCPC because it did not cease to be a "Canadian corporation." It simply went from being a "Canadian corporation" under 89(1)(a) of the Act to a "Canadian corporation" as defined under 89(1)(b) of the Act.

[45] The Appellant also is not eligible for the general rate reduction because aggregate investment income is excluded from the full rate taxable income under subparagraph 123.4(1)(b)(iii). Ultimately, whether the Appellant is eligible for the general rate reduction depends on whether the Appellant is a CCPC during the Taxation Years. As I have already concluded that the Appellant never lost its status as a CCPC despite the Continuation, its ineligibility for the general rate reduction is unchanged.

Alternative General Anti-Avoidance Argument

[46] Based on my finding above, specifically that the Appellant always remained a CCPC, no further analysis is required.

[47] If I am wrong in concluding the Somerset remained a CCPC, as set out below I find that the application of the GAAR in section 245 of the Act would deny the previously defined Tax Benefits.

Consideration of the Appellant's GAAR Position (paragraphs 74-76 are from the Agreed Statement of Facts)

74. If Somerset ceased to be a CCPC after the Continuation, the Appellant concedes that it obtained a tax benefit by continuing into the BVI.
75. If Somerset ceased to be a CCPC after the Continuation, its taxable income would, but for GAAR in subsection 245(2), not be subject to tax under section 123.3 and it could avail itself of the general rate reduction in section 123.4 (collectively the Tax Benefits).

76. The only purpose of the following transactions was to obtain the Tax Benefits and they were “avoidance transactions” as defined in subsection 245(3):

- a. the Continuation on December 10, 2018;
- b. the incorporation of the Holding Companies, namely, Windfall, JS Holdings and RGI on December 15, 2018;
- c. the directors’ resolution of January 31, 2019, resolving that Somerset approve Katherine, John, Robert and Robyn transferring their respective 11,345 Common Shares to Windfall, JS Holdings, RGI and Rubberman; and,
- d. Somerset’s February 25, 2019 payment of dividends on the Common Shares totaling \$7,264,220.

[48] In addition, the Appellant, in its written submissions, has provided a helpful summary describing the tax being avoided:

3.2 To understand the issue in DAC, note that CCPCs and private non-CCPCs are subject to different income tax regimes. The details are set out in DAC TCC at paragraphs 76-81, Tab 3. It is not necessary to repeat them here. Private non-CCPCs are taxed on investment income (e.g., rental income from the Buildings) at 15% (38% under subsection 123(1) minus 10% under subsection 124(1), minus 13% under section 123.4). CCPCs are taxed on “aggregate investment income” (“All”) at 28% plus an additional refundable tax under section 123.3, which was 6 2/3% when section 123.3 was added in 1996 and increased to 10 2/3% after 2015. This resulted in a CCPC paying tax at 38.66% on All in 2018 and 2019.

[49] Regarding the GAAR analysis, much of the heavy lifting has already been done by the FCA in *DAC*.

[50] The parties agree that the facts in this case are sufficiently similar to *DAC* such that the analysis undertaken by the FCA is applicable.

[51] It was therefore admitted at trial that:

- i. there was a tax benefit, specifically, if Somerset was able to cease to be a CCPC after Continuation, its taxable income would not be subject to tax under

123.3 of the Act, plus it could take advantage of the general rate reduction in section 123.4;

- ii. there was avoidance transactions. Somerset has agreed that the Continuation on December 10, 2018, as well as the incorporation of Windfall Ventures Inc., J Stekl Holdings Ltd, and RG Stekl Investments Ltd. on December 15, 2018, the directors' resolutions on January 31, 2019, and the February 25, 2019, payment of dividends were all avoidance transactions giving rise to the Tax Benefits.

[52] The only remaining issue for the application of the GAAR is whether the avoidance transactions were abusive.

Review of *DAC Investments*

[53] In considering this, I am bound by the findings in *DAC* which were nicely summarized in paragraph 77 of that decision:

77. In summary, the Tax Court erred in finding that the GAAR did not apply. I find that the GAAR does apply. The continuance of DAC to the BVI was used as a means to circumvent the relevant anti-deferral measures. The transaction fell outside and frustrated the rationale of subsection 250(5.1). The anti-deferral measures in sections 123.3 and 123.4 of the ITA were also abused because the transactions defeated the anti-deferral rationale of these provisions.

[54] The Appellant admits that the Continuance of Somerset to the BVI was used as a means to circumvent the relevant anti-deferral measures. Yet the Appellant argues that the transaction does not fall outside and frustrate the rationale of subsection 250(5.1). This because the anti-deferral measures in sections 123.3 and 123.4 of the ITA were not abused. They claim that Somerset had the opportunity to undertake an “alternative transaction”.

[55] The Appellant therefore argues that what was an abusive transaction in *DAC* is not in this present case. This because the Appellant, through a different transaction, could have achieved the same commercial result and an equal or better tax result.

[56] Avoidance transactions will be abusive where the outcome or result of those transactions (a) is an outcome that the provisions relied on seek to prevent; (b) defeats the underlying rationale of the provisions relied on; or (c) circumvents

certain provisions in a manner that frustrates the object, spirit and purpose of those provisions.¹⁰

[57] The object, spirit and purpose (the “OSP”) of sections of the Act do not change depending on the facts of the particular case.¹¹

[58] In *DAC*, the FCA described the OSP for 123.3 of the Act as follows:

the object, spirit and purpose of section 123.3 is to reduce income tax deferral opportunities that individuals earning investment income directly might otherwise obtain by earning such income through a CCPC.¹²

[59] For section 123.4 *DAC* determined that the OSP for excluding investment income of a CCPC from the section 123.4 tax rate reduction is two-fold: (1) the investment income already has a preferential tax rate; and (2) the exclusion preserves the fundamental principle that investment income should be taxed the same whether it is received directly or through a private corporation.¹³

[60] The FCA held that the OSP of subsection 250(5.1) is to make tax provisions fairer for corporations moving into or leaving Canada by way of Continuance.¹⁴

[61] Finally, (as already noted at paragraph 53 above) in *DAC*, the FCA concluded that the Continuance transaction was used as a means to circumvent the anti-deferral measures. The continuance transaction fell outside and frustrated the rationale of subsection 250(5.1). The anti-deferral measures in sections 123.3 and 123.4 were also abused because the transactions defeated the anti-deferral rationale of these provisions.¹⁵

Alternative transactions

[62] The Appellant argues that what was abusive in *DAC* is not abusive in this instance. This because of the availability of an alternative set of transactions.

¹⁰ *Deans Knight Income Corp v Canada*, 2023 SCC 16 at para 69.

¹¹ *Total Energy Services v Canada*, 2025 FCA 77 at par. 4.

¹² *DAC Investment Holdings* at para 38, citing Canada, Department of Finance, Explanatory Notes Relating to the *Income Tax Act* (Ottawa: December 2015) at 6.

¹³ Respondent’s Written Submissions at para 101 citing *DAC* at para. 46.

¹⁴ Respondent’s Written Submissions at para 104 citing *DAC* at paras. 48 and 52.

¹⁵ *DAC Investment Holdings* at par 77.

[63] Alternative transactions that a taxpayer might have carried out may be considered in the course of GAAR analyses.¹⁶

[64] If the taxpayer can illustrate that there are other transactions that could have achieved the same result without triggering any tax, this is a relevant consideration in determining whether or not the avoidance transaction is abusive.¹⁷

[65] The FCA has stated that alternative transactions are “helpful in determining the object, spirit and purpose of the relevant provisions” when considering the GAAR¹⁸.

[66] Put more simply, the object, spirit purpose of the legislation is not ever changing, from one taxpayer to the next. Yet, the existence of an alternative transaction may mean that a transaction is not abusive when the court considers the overall result of the series.

[67] In any case, even in applying the alternative transaction analysis as proposed, I do not find this helpful for the Appellant.

[68] Alternative transactions should be considered by the Court in a GAAR analysis if they meet a five-part test. The onus is upon the Appellant to show that the five conditions were met:¹⁹

- a) They are available under the Act....;
- b) They are not so remote as to be practically infeasible....;
- c) They have a high degree of commercial and economic similarity to the series at issue....;
- d) They generate tax consequences approximately as favourable as the series at issue....; and,
- e) They are not abusive of the GAAR.²⁰

¹⁶ 3295940 *Canada Inc. v. Canada*, 2024 FCA 42 at pars 55-58.

¹⁷ *Ibid.*

¹⁸ 3295940 *Canada Inc* at par.58

¹⁹ *Wuswig Inc v The King*, 2025 TCC 147 at para 292.

²⁰ 3295940 *Canada Inc. at para. 61.*

Proposed Alternative Transaction

[69] The alternative transaction suggested by the Appellant is that Somerset could have been incorporated in the BVI in 1943²¹ (or in a country other than Canada).

[70] Accordingly, Somerset could have been a BVI corporation all along. It still would have owned the buildings in Vancouver, still would have been taxable on the capital gains from the Starlight Sale, still would have paid the general tax rate on its taxable capital gains, but would not have been subject to the section 123.3 tax on that income.

[71] In this scenario, I do not accept that this is a reasonable alternative transaction. In applying the guidance given by the FCA, this transaction is clearly too remote to be feasible. The proposal by the Appellant is that Somerset could have incorporated in a different country 83 years before the matter came to trial. Stating the obvious, that is not something that the Appellant could have made occur in any recent timeframe.

[72] To that end I agree with the submission of the Respondent “Moreover, alternative transactions do not provide a time-machine allowing a taxpayer to go back in time to create an entirely new set of factual circumstances, the alternative transaction must be one that is contemporaneous with the transaction actually undertaken.”²²

[73] It also runs afoul of paragraph (d) of the five-part FCA test. The suggested alternative transaction must generate tax consequences approximately as favourable as the series at issue. Yet, if the Appellant were incorporated outside of Canada in 1943, and remained a Canadian resident, as suggested in this scenario, then Somerset would still be a Canadian resident since 1971, continuing to the relevant time. In such a scenario the Appellant would still meet the definition of a Canadian corporation and would be taxed as a CCPC.

[74] It is my conclusion that the proposed alternative transaction, as suggested by the Appellant, does not assist in its argument.

²¹ As was noted at trial, the BVI did not exist in 1943. In any case the Appellant made clear that its alternative transaction was an incorporation in another country in 1943.

²² Respondent’s Written Submissions at paragraph 122.

[75] I am bound by the reasoning and application of the GAAR by the FCA in *DAC*. If Somerset was found to not be a “Canadian corporation” as a result of the Continuation, the GAAR would still apply.

[76] As agreed by the parties, in the application of the GAAR, the reasonable tax consequences would be the denial of the tax benefits resulting from the avoidance transaction. The denied Tax Benefits are derived from section 123.3 not being applicable and from section 123.4 being applicable to Somerset following its continuation into the BVI.

VI. Conclusion

[77] The Appeal is denied. The Appellant remained a CCPC after the Continuation, such that section 123.3 tax applies to all of the 2019, 2020 and 2021 Investment Income of Taxable Capital Gains;

[78] Furthermore, the Minister properly disallowed the general rate reduction under subparagraph 123.4(1)(b)(iii) in respect of the Taxation Years for the same reason; and,

[79] Costs are payable by the Appellant to the Respondent

Signed this 29th day of June 2026.

“R. MacPhee”

MacPhee J.

CITATION: 2026 TCC 123

COURT FILE NO.: 2023-295(IT)G

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MAJESTY THE KING

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