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GAAR in Action: An Empirical Exploration of Tax Court of Canada Cases (1997-2009) and Judicial Decision Making

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GAAR in Action: An Empirical Exploration of Tax Court of Canada Cases (1997-2009) and Judicial Decision Making

Jinyan Li and Thaddeus Hwong*

(with the Honourable Donald G.H. Bowman, Pablo Caballero, Lemuel Chan, Jennifer Pocock, Shimshon Posen, and Sarah Templeton)**

PRÉCIS

Cet article présente une modeste étude empirique exploratoire de l'application de la règle générale anti-évitement du Canada (RGAE). L'étude examine l'ensemble des causes relatives à la RGAE tranchées par la Cour canadienne de l'impôt au cours de la période de 1997 à 2009, ainsi que certains attributs personnels et sociétaux des juges qui ont rendu ces décisions. Les constatations permettent de formuler trois conclusions provisoires. Premièrement, la RGAE a contribué à faire changer la donne, quoique modestement, en ce qui a trait à l'approche des tribunaux dans les causes d'évitement fiscal. Deuxièmement, bien qu'un degré élevé d'incertitude demeure concernant l'application de la RGAE, il semble se dessiner une constance dans les décisions judiciaires. Troisièmement, tout porte à croire que certaines décisions sur la RGAE s'appuient sur des critères « au pifomètre »; en particulier, la prise de décisions judiciaires dans les affaires relatives à la RGAE semble avoir été influencée par les attributs des juges, notamment l'expérience à la Cour canadienne de l'impôt, le sexe, l'expérience avant la nomination et les liens régionaux. Puisque les ensembles de données examinés dans l'étude sont très petits, ces constatations ne sont nullement concluantes. Néanmoins, il est à espérer qu'elles aideront à faire progresser la compréhension empirique de l'application de la RGAE.

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ABSTRACT

This article presents a modest, exploratory empirical study of Canada's general anti-avoidance rule (GAAR) in action. The study examines the entire body of GAAR cases decided by the Tax Court of Canada in the period 1997-2009, as well as certain personal and societal attributes of the judges who decided these cases. The findings support three tentative conclusions. First, GAAR has been a game changer, albeit a modest one, with respect to the courts' approach to tax-avoidance cases. Second, while considerable uncertainty remains with respect to the application of GAAR, a pattern in judicial decisions appears to be emerging. Third, there are indications that a judicial smell test is at play in some GAAR decisions; in particular, judicial decision making in GAAR cases appears to have been influenced by the judge's attributes, including experience on the Tax Court, gender, preappointment experience, and regional ties. Because the data sets examined in the study are very small, these findings are by no means conclusive. Nevertheless, the hope is that they will help to advance empirical understanding of GAAR in action.

KEYWORDS: TAX AVOIDANCE ■ STATUTORY INTERPRETATION ■ GENERAL ANTI-AVOIDANCE RULE ■ GAAR ■ EMPIRICAL ■ RESEARCH

CONTENTS

INTRODUCTION—EXPLORING GAAR USING CASE AND JUDICIAL ATTRIBUTES

Canada enacted a general anti-avoidance rule (GAAR), as section 245 of the Income Tax Act,[1] in 1988. Since then, the courts have addressed on numerous occasions the interpretation of the GAAR provisions and the circumstances in which the rule may apply. This article presents a modest, exploratory empirical study of GAAR in action. We analyze the body of GAAR cases decided by the Tax Court of Canada in the years 1997-2009, as well as personal and societal attributes of the judges involved that may have influenced their decision making. We focus on three main research questions:

1. Has GAAR been a game changer in terms of how the courts approach tax-avoidance cases?
2. Notwithstanding the inherent uncertainty in the legislation, are any elements of certainty emerging in the courts' application of GAAR?
3. Is there a judicial smell test in GAAR cases?

The research was conducted by students enrolled in the tax law colloquium (winter 2011) in the JD program at Osgoode Hall Law School, York University, under the supervision of Jinyan Li, Thaddeus Hwong, and Donald G. Bowman, a former judge and chief justice of the Tax Court of Canada.

The study was motivated by several factors. We were intrigued by the intended role of GAAR and how it has played out in reality. If tax planning is analogized to a card game between taxpayers and the government, the government's cards are all on the table, face up, but one of those cards—GAAR—is a trump card. The rules for playing this card are not entirely clear; essentially, the government may use it at its discretion. The referee of the game (the court) has to make a call from time to time as to whether the use of the card is appropriate. This scenario prompts a number of questions. How have the courts made the calls? To what extent has the game been changed by GAAR? While these issues have been much debated in the literature from a normative perspective, we were curious about the usefulness of empirical research methodology in answering these questions. Finally, we wanted to extract whatever lessons can be learned from the experience of Donald Bowman, who played a pivotal role in developing the Canadian GAAR jurisprudence, and in particular to test his views about a judicial smell test in GAAR cases.

1 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the Act"). Unless otherwise stated, statutory references in this article are to the Act.

The scope of the research is modest, since the Tax Court decided only 37 GAAR cases during the study period. As the first of its kind, the study explores the possible connection between the personal and societal attributes of the judges and the case outcomes. The research methodology is exploratory, and the data set is small. Selected variables are applied in a statistical analysis of the data. Since the GAAR jurisprudence is evolving and only Tax Court cases are covered, the findings offer only an initial snapshot. They do, however, suggest that despite the inherent uncertainty of the GAAR provisions, elements of certainty are emerging in the jurisprudence. GAAR is a game changer in this context, especially when the effect of the Supreme Court of Canada's decision in *Canada Trustco*[2] is considered. The findings also seem to corroborate former justice Bowman's sense of a judicial smell test.

We hope to add to the literature on GAAR, which to date has been primarily doctrinal and normative. For that purpose, we hope that our statistical analysis of the jurisprudence and our main findings can advance understanding of GAAR in action. We also hope to offer some takeaway points that will be useful to lawyers who are involved in litigating GAAR cases and to tax advisers who are asked to give opinions on the potential application of GAAR.

Following this brief introduction, the second section of the article provides the context for the research project by reviewing the existing literature on GAAR and presenting an overview of empirical legal studies. The third section describes the research data sets and methodology, and explains the choice of cases and variables. The fourth section reports the findings and the conclusions on the three main research questions. The fifth section highlights the limitations of the research and suggests some implications of the findings for litigators and tax advisers, as well as for the judicial appointment process. The sixth and concluding section comments briefly on some of the lessons learned about GAAR and about empirical legal research as a scholarly endeavour.

CONTEXT—LITERATURE ON GAAR AND EMPIRICAL LEGAL STUDIES

The body of existing literature on the Canadian GAAR includes books[3] and articles in academic journals;[4] articles by legal scholars and practitioners published by the

2 *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54.

3 For example, David G. Duff and Harry Erlichman, eds., *Tax Avoidance in Canada After Canada Trustco and Mathew* (Toronto: Irwin Law, 2007); Nathalie Goyette, *Countering Tax Treaty Abuses: A Canadian Perspective on an International Issue* (Toronto: Canadian Tax Foundation, 1999); William I. Innes, Patrick J. Boyle, and Joel A. Nitikman, *The Essential GAAR Manual: Policies, Principles and Procedures* (Toronto: CCH, 2006); Gilles Larin and Robert Duong, *Effective Responses to Aggressive Tax Planning: What Canada Can Learn from Other Jurisdictions*, Canadian Tax Paper no. 112 (Toronto: Canadian Tax Foundation, 2009); Alan M. Schwartz, François Barette, Paul Cabana, Anna Dayan, Paul F. Monahan, Alain Ranger, Peter W. Vair, and Kevin Yip, *GAAR Interpreted: The General Anti-Avoidance Rule* (Toronto: Carswell, 2006);

(Footnotes 3 and 4 are continued on the next page.)

Canadian Tax Foundation, covering the history and application of GAAR;[5] annual reviews of GAAR cases;[6] and commentary on decisions in individual cases since *Canada*

Vern Krishna, *Tax Avoidance: The General Anti-Avoidance Rule* (Toronto: Carswell, 1990); David G. Duff, Benjamin Alarie, Kim Brooks, Geoffrey Loomer, and Lisa Philipps, *Canadian Income Tax Law*, 4th ed. (Markham, ON: LexisNexis Canada, 2012), chapter 3; Tim Edgar, Daniel Sandler, and Arthur Cockfield, eds., *Materials on Canadian Income Tax*, 14th ed. (Toronto: Carswell, 2010), chapter 10; and Peter W. Hogg, Joanne E. Magee, and Jinyan Li, *Principles of Canadian Income Tax*, 7th ed. (Toronto: Carswell, 2010), chapter 20.

4 For example, Tim Edgar, "Building a Better GAAR" (2008) 27:4 *Virginia Tax Review* 833-906.

5 For example, David Dodge, "A New and More Coherent Approach to Tax Avoidance" (1988) 36:1 *Canadian Tax Journal* 1-22; Brian J. Arnold and James R. Wilson, "The General Anti-Avoidance Rule—Part 1" (1988) 36:4 *Canadian Tax Journal* 829-87 and ". . . Part 2" (1988) 36:5 *Canadian Tax Journal* 1123-85; and John R. Owen, "Statutory Interpretation and the General Anti-Avoidance Rule: A Practitioner's Perspective" (1998) 46:2 *Canadian Tax Journal* 233-73.

6 An update on GAAR is a regular feature of conferences organized by the Canadian Tax Foundation. See, for example, Daryl P. Boychuk and Edward C. Rowe, "The General Anti-Avoidance Rule: Recent Developments and Some Practical Advice on Dealing with GAAR," in *1997 Prairie Provinces Tax Conference* (Toronto: Canadian Tax Foundation, 1997), 6:1-34; Sheldon Silver and Glenn Ernst, "Recent Cases on GAAR," in *2001 Ontario Tax Conference* (Toronto: Canadian Tax Foundation, 2001), 1B:1-35; Beatty F. Beaubier and Robert J.C. Stack, "The General Anti-Avoidance Rule: Recent Developments," in *2001 Prairie Provinces Tax Conference* (Toronto: Canadian Tax Foundation, 2001), 4:1-50; Warren J.A. Mitchell, "GAAR: A Snapshot," in *Report of Proceedings of the Fifty-Third Tax Conference*, 2001 Conference Report (Toronto: Canadian Tax Foundation, 2002), 2:1-6; Thomas M. Boddez, "Current Cases: GAAR, REOP, and Dispositions," in *2002 British Columbia Tax Conference* (Toronto: Canadian Tax Foundation, 2002), 5:1-31; Brian S. Nichols, "GAAR and More," in *2002 Ontario Tax Conference* (Toronto: Canadian Tax Foundation, 2002), 1:1-42; Patrick Boyle, Sharon Gulliver, Jerry Lalonde, Anne-Marie Lévesque, and Paul Lynch, "The GAAR Committee: Myth and Reality," in *Report of Proceedings of the Fifty-Fourth Tax Conference*, 2002 Conference Report (Toronto: Canadian Tax Foundation, 2003), 10:1-20; Mark Meredith, "GAAR in Quotes: Section 245 Cases from the Past 12 Months," in *Report of Proceedings of the Fifty-Fifth Tax Conference*, 2003 Conference Report (Toronto: Canadian Tax Foundation, 2004), 2:1-23; Ken S. Skingle, "The GAAR—Be Careful Out There!" in *2004 Prairie Provinces Tax Conference* (Toronto: Canadian Tax Foundation, 2004), 3:1-38; Brian Arnold, Judith Freedman, Al Meghji, Mark Meredith, and the Honourable Marshall Rothstein, "The Future of GAAR," in *Report of Proceedings of the Fifty-Seventh Tax Conference*, 2005 Conference Report (Toronto: Canadian Tax Foundation, 2006), 4:1-16; Jasmine Sidhu, "The Post-Supreme Court World of GAAR—Where Are We?" in *2006 British Columbia Tax Conference* (Toronto: Canadian Tax Foundation, 2006), 16:1-31; Joel Nitikman, "A Year's Worth of GAAR Cases," in *2008 British Columbia Tax Conference* (Toronto: Canadian Tax Foundation, 2008), 7:1-23; Ed Kroft and Deen Olsen, "GAAR: Recent Developments," in *Report of Proceedings of the Sixtieth Tax Conference*, 2008 Conference Report (Toronto: Canadian Tax Foundation, 2009), 1:1-24; the Honourable Donald G.H. Bowman, Deen Olsen, Wayne Adams, Al Meghji, and Wilfrid Lefebvre, "GAAR: Its Evolution and Application," in *Report of Proceedings of the Sixty-First Tax Conference*, 2009 Conference Report (Toronto: Canadian Tax Foundation, 2010), 2:1-23; Douglas J. Powrie, "GAAR: A Planner's Perspective," in *Report of Proceedings of the Sixty-Second Tax Conference*, 2010 Conference Report (Toronto: Canadian Tax Foundation, 2011), 8:1-32; and Marco Darmo and Olivier Fournier, "Recent Developments Regarding the Application of Subsection 245(4)," in *Report of Proceedings of the Sixty-Third Tax Conference*, 2011 Conference Report (Toronto: Canadian Tax Foundation, 2012), 37:1-33.

Trustco.[7] This literature provides inspiration and a rich context for the design of our research project.

We turn to the literature on empirical legal studies[8] for inspiration on research methodology and design. Empirical legal studies are now firmly entrenched as a distinct field of law.[9] Through quantitative research, empirical legal studies aim at generating "scholarship that helps inform litigants, policymakers, and society as a whole about how the legal system works."[10] They seek to explain rather than justify decisions made by judges. Explanatory factors examined in empirical analysis of judicial decision making include ideology, race, ethnicity, gender, and societal context. To date, most of the studies have focused on judicial decision making in the United States. The inherent judicial uncertainty in GAAR makes the GAAR jurisprudence an ideal subject for research.

GAAR as a Game Changer

GAAR was introduced as Parliament's response to the 1984 decision of the Supreme Court of Canada in *Stubart*.[11] This historical context clearly indicates that GAAR was intended to effect changes in the Canadian tax culture, ranging from the judicial approach to statutory interpretation to the acceptance of a degree of uncertainty in the applicability of tax provisions.[12]

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7 See, for example, Brian J. Arnold, "Policy Forum: Confusion Worse Confounded—The Supreme Court's GAAR Decisions" (2006) 54:1 *Canadian Tax Journal* 167-209; Brian Kearl and Bruce Lemons, "GAAR in the Tax Court After Canada Trustco: A Practitioner's Guide" (2007) 55:4 *Canadian Tax Journal* 745-76; Duff and Erlichman, supra note 3; and Manon Thivierge, "GAAR Redux: After Canada Trustco," in *Report of Proceedings of the Fifty-Eighth Tax Conference*, 2006 Conference Report (Toronto: Canadian Tax Foundation, 2007), 4:1-23.

8 For an overview, see Michael Heise, "The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism" [2002] no. 4 *University of Illinois Law Review* 819-50.

9 The recent focus in legal research on empirical studies is by no means new, in the sense of having no precedent; similar work was attempted before 1940, as evidenced in the use of judicial statistics and the interest of judges in past scholarship. See Herbert M. Kritzer, "Empirical Legal Studies Before 1940: A Bibliographic Essay" (2009) 6:4 *Journal of Empirical Legal Studies* 925-68. Still, 2004 was arguably the landmark year (to date) with respect to such studies, not only in the United States but also in general for the field, since it was in that year that the *Journal of Empirical Legal Studies* was launched. This is the flagship journal for the Society of Empirical Legal Studies (see www.lawschool.cornell.edu/sels/), which held its inaugural conference in 2006 (see www.utexas.edu/law/conferences/cels2006/). (The journal is available online at http://onlinelibrary.wiley.com/journal/10.1111/(ISSN)1740-1461/issues.) As the beachhead of empirical legal studies, the journal and the conference have led to the growth of such a mode of inquiry, of which judicial decision making is a prominent theme, as it was in earlier studies.

10 Theodore Eisenberg, "Why Do Empirical Legal Scholarship?" (2004) 41:4 *San Diego Law Review* 1741-46, at 1741.

11 *Stubart Investments Ltd. v. The Queen*, [1984] 1 SCR 536.

12 See Dodge, supra note 5; Arnold and Wilson, ibid.; the explanatory notes accompanying the original draft GAAR legislation (Canada, Department of Finance, *Explanatory Notes Relating to Income Tax* (Ottawa: Department of Finance, June 1988)); and Innes et al., supra note 3, at 7-62.

The *Stubart* case involved the use of a series of transactions to shift losses from one company to another in technical compliance with the wording of the provisions of the Act (as they then read), even though the Act explicitly treated each company as a separate entity and the transactions in issue served no business purpose other than tax avoidance through loss utilization. The Supreme Court rejected the adoption of a business purpose test as a judicial anti-avoidance doctrine. At the same time, the court held that the modern rule of statutory interpretation applied to taxing statutes just as it did to other statutes; that is, "[t]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[13] The court's decision in *Stubart* is consistent with the common-law principle that taxpayers are entitled to arrange their affairs in order to minimize their tax liability—a principle recognized since the 1935 decision in the English *Duke of Westminster* case.[14] This principle has been the cornerstone for tax planning. A corollary of the *Duke of Westminster* principle is that taxing statutes are to be interpreted literally, and are to be applied to a taxpayer's transactions in accordance with the legal form of those transactions as opposed to their substance.[15] The modern rule modifies this principle in respect of the construction of statutory provisions, but not the construction of facts. In the absence of a business purpose requirement, this approach to statutory interpretation did little to discourage aggressive tax planning.[16]

GAAR was enacted to give the government and the courts a statutory basis for combatting abusive tax avoidance. As remarked by Bowman CJ (as he then was),

> I think that GAAR stems from two factors. First, it stems from the fact that people who draft legislation have finally thrown up their hands and said that no matter how specific we get, we cannot plug every loophole, so we need this sort of general rule to fill in the gaps. Second, the attitude of the courts—*Stubart* being an example—is that we are going back to strict construction, and the *Duke of Westminster* is alive and well. Therefore, the government figures that many schemes will succeed unless we have some sort of general anti-avoidance rule.[17]

13 *Stubart*, supra note 11, at 578, quoting Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), at 87.

14 *Commissioners of Inland Revenue v. Westminster (Duke)*, [1936] AC 1 (HL).

15 Hogg et al., supra note 3, at 611.

16 Brian J. Arnold, "The Canadian General Anti-Avoidance Rule," in Graeme S. Cooper, ed., *Tax Avoidance and the Rule of Law* (Amsterdam: IBFD Publications, 1997), 221-45, at 224. Following *Stubart*, tax planning became increasingly aggressive; many transactions involved the utilization of losses, resulting in a serious shortfall in corporate income tax between 1985 and 1987.

17 The Honourable Donald G.H. Bowman with Al Meghji and J. Scott Wilkie, "A Fireside Chat with the Chief Justice of the Tax Court of Canada" (2010) 58, special supp. *Canadian Tax Journal* 29-40, at 35.

GAAR was meant to be a game changer in terms of how courts approach tax-avoidance cases.[18] As Rothstein J observed in *Copthorne*, "if the Court is confined to a consideration of the language of the provisions in question, without regard to their underlying rationale, it would seem inevitable that the GAAR would be rendered meaningless."[19] A court involved in a GAAR analysis has the "unusual duty" of going behind the words of the legislation to determine the object, spirit, or purpose of the provision or provisions relied on by the taxpayer.[20]

To what extent have the courts moved away from the *Duke of Westminster* principle? This is still an open question.[21] Our research was designed to answer this question by looking at how often the courts refer to the legislative context and purpose in interpreting the provisions of the Act. Furthermore, our hypothesis is that the Supreme Court's decision in *Canada Trustco* is a game changer in terms of GAAR analysis. Our research tracks GAAR cases decided by the Tax Court of Canada before and after that decision in order to establish whether there is a "*Canada Trustco* effect."

A fascinating dimension of the game-changer question is whether GAAR has led to any changes in how the courts deal with legislative gaps. In non-GAAR cases, legislative ambiguity is often interpreted in favour of the taxpayer. The literature and jurisprudence suggest that the extent of change is unclear. Many judges do not interpret GAAR in such a way as to fill in legislative gaps.[22] For example, Bowman ACJ (as he then was) wrote in *Geransky*:

> The *Income Tax Act* is a statute that is remarkable for its specificity and replete with anti-avoidance provisions designed to counteract specific perceived abuses. Where a taxpayer applies those provisions and manages to avoid the pitfalls the Minister cannot say: "Because you have avoided the shoals and traps of the Act and have not carried out your commercial transaction in a manner that maximizes your tax, I will use GAAR to fill in any gaps not covered by the multitude of specific anti-avoidance provisions."
>
> That is not what GAAR is all about.[23]

18 As the Supreme Court of Canada stated in *Canada Trustco*, supra note 2, at paragraph 13, "[t]o the extent that the GAAR constitutes a 'provision to the contrary' as discussed in *Shell* (at para. 45), the Duke of Westminster principle and the emphasis on textual interpretation may be attenuated." The court reiterated this point in *Lipson v. Canada*, 2009 SCC 1, at paragraph 54, and *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, at paragraph 70.

19 *Copthorne*, supra note 18, at paragraph 111.

20 Ibid., at paragraph 66.

21 Bowman J remarked in *Continental Bank of Canada et al. v. The Queen*, 94 DTC 1858, at 1872 (TCC), "What, then, is the 'object and spirit' of subsection 97(2)? I am not sure what its spirit, if any, is—spirits tend to be somewhat illusive [sic]—but its object seems rather straightforward."

22 In *Landrus v. The Queen*, 2008 TCC 274; aff'd. 2009 FCA 113, the court held that it is inappropriate to use GAAR to fill in gaps left by Parliament. Essentially, if there are specific anti-avoidance rules and the taxpayer has successfully navigated them, then the Canada Revenue Agency (CRA) should not have the power to undo the plan by applying GAAR.

23 *Geransky v. The Queen*, 2001 DTC 243, at paragraphs 42-43 (TCC).

In *Lehigh Cement*, the Federal Court of Appeal stated that even if a taxpayer relies on a provision in an unforeseen or novel manner, this will not necessarily mean that there has been a misuse of the provision: "[T]he Crown cannot discharge the burden of establishing that a transaction results in a misuse of [an exemption] merely by asserting that the transaction exploits a previously unnoticed legislative gap."[24] On the other hand, in the Tax Court decision in *Antle*, Miller J remarked that "[l]oopholes are not policy-makers."[25] Whether taking advantage of a loophole is abusive or acceptable depends on whether "there has been a frustration of the object, spirit and purpose of the provisions in play."[26] Because of the small number of cases involving this issue, our research does not capture this dimension of the game-changer question.

Inherent Uncertainty of GAAR

Section 245 is clearly "a different kettle of fish" compared to the other provisions of the Act, in terms of both its drafting style and its intended function.[27] As a "standard-based" provision, it is extraordinary because the Act is predominantly a "rule-based" statute. Other provisions of the statute tend to be technically complex, precisely worded, and drafted in an airtight manner to prevent loopholes. GAAR is drafted in broader, more open-ended language, incorporating undefined concepts such as "misuse" and "abuse."[28]

Earlier literature on GAAR discusses its inherent uncertainty, the issue of its constitutionality,[29] a preference for the words of the statute over unexpressed notions of policy (which was thought to be part of the abuse analysis),[30] and concerns about the subjectivity of GAAR.[31] As one practitioner recalled,

> [w]hen GAAR was first brought in, when you looked at the text about whether something was a misuse or abuse, as a lawyer you couldn't help but think that this open-ended

24 *Lehigh Cement Limited v. Canada*, 2010 FCA 124, at paragraph 37.

25 *Antle v. The Queen*, 2009 TCC 465, at paragraph 102.

26 Ibid.

27 *Canada Trustco Mortgage Company v. The Queen*, 2003 TCC 215, at paragraph 91.

28 Miller J remarked in *Canada Trustco*, ibid., "The success or failure of the application of GAAR left to the Court's finding of a clear and unambiguous policy inevitably invites uncertainty. That is simply the nature of the GAAR legislation in relying upon such terms as misuse and abuse."

29 For example, Joel Nitikman, "Is GAAR Void for Vagueness?" (1989) 37:6 *Canadian Tax Journal* 1409-47; and Howard J. Kellough, "A Review and Analysis of the Redrafted General Anti-Avoidance Rule" (1988) 36:1 *Canadian Tax Journal* 23-78, at 60-62. In *The Queen v. Gregory*, 2000 DTC 6563, at paragraph 2 (FCA), the taxpayer argued, without success, that section 245 is "not intelligible, incapable of rational application and as such, unconstitutionally vague."

30 See the comments by Brian Arnold in Arnold et al., supra note 6, at 4:5.

31 Al Meghji, "Pending GAAR Litigation and Other Anti-Avoidance Issues," in *1996 Prairie Provinces Tax Conference* (Toronto: Canadian Tax Foundation, 1996), 10:1-24.

> text, which invites a judge to answer the question as to whether something is a misuse or abuse, appeared to be an open invitation for judges to engage their own fiscal morality. The concern was whether we are really going to have this test apply as a legal standard, consistent from case to case, where similarly situated taxpayers are treated similarly. Could this standard be crafted by the courts into a legal standard rather than something perhaps far more subjective?[32]

GAAR was variously described as "the most ominous, and likely the most mysterious, weapon of the Canada Revenue Agency";[33] an "ill-considered provision" that will "haunt the Act for many years to come," and whose purpose is to "act as an intimidating factor";[34] a "fuzzy," "obscure," and "opaque" provision[35] "shrouded in uncertainty";[36] or a "beast [to be] tamed."[37]

The sense of uncertainty evident in the literature reflects the prevailing judicial uncertainty in the early years following the introduction of GAAR. Initially, some Tax Court judges reacted to GAAR with caution, describing it as an "extreme sanction" or a "blunt instrument,"[38] an "ultimate weapon," or a "heavy hammer."[39] Others worried about the health of the *Duke of Westminster* principle, and sought to limit the use of GAAR.[40] Other judges wondered what the real purpose of GAAR was and tried to give meaning to such purpose.[41] In the earlier GAAR cases, Tax Court judges generally approached GAAR with caution and embarked on a process of "reading

32 Al Meghji, in Bowman et al., supra note 6, at 2:14.

33 Skingle, supra note 6, at 3:1.

34 Howard J. Kellough, "The GAAR—Are There Circumstances When It Will Not Have Application?" in *1994 British Columbia Tax Conference* (Toronto: Canadian Tax Foundation, 1994), 5A:1-20, at 5A:17.

35 Marshall Rothstein, in Arnold et al., supra note 6, at 4:4.

36 Nichols, supra note 6, at 1:1.

37 Grace Chow, "GAAR—The Beast Finally Tamed" (2006) 6:2 *Tax Perspectives* 5-7 (www.taxspecialistgroup.ca/public/taxPerspectives.asp?art=84&site=tsg).

38 Bowman J in *Jabs Construction Limited v. The Queen*, 99 DTC 729, at paragraph 48 (TCC); and *CIT Financial Ltd. v. The Queen*, 2003 TCC 544, at paragraph 30.

39 Miller J in *Hill v. The Queen*, 2002 DTC 1749, at paragraph 63 (TCC); and *Canada Trustco*, supra note 27, at paragraph 58.

40 See, for example, *Lipson*, supra note 18, at paragraph 54, per Binnie J (Deschamps J concurring): "How healthy is the *Duke of Westminster*? There is cause for concern." According to Binnie J, "[t]he GAAR is a weapon that, unless contained by the jurisprudence, could have a widespread, serious and unpredictable effect on legitimate tax planning" (ibid., at paragraph 55). Many judges expressed similar views, regarding GAAR with a large degree of suspicion and seeing their role with respect to GAAR as fundamentally one of limiting its application. For further discussion, see Brian J. Arnold, "The Long, Slow, Steady Demise of the General Anti-Avoidance Rule" (2004) 52:2 *Canadian Tax Journal* 488-511.

41 For example, in *McNichol et al. v. The Queen*, 97 DTC 111, at 120 (TCC), Bonner J wrote, "The telos [object and purpose] of section 245 is the thwarting of abusive tax avoidance transactions."

down" the provision.[42] The Federal Court of Appeal, in its first GAAR decision (*OSFC Holdings*), imposed a "clear and unambiguous policy" test for finding abuse.[43] The general sense of uncertainty and confusion continued until 2005, when the Supreme Court of Canada provided some long-awaited guidance in the *Canada Trustco*[44] and *Mathew*[45] decisions.

Canada Trustco is a landmark decision in many respects.[46] The tax bar expressed a collective sigh of relief. "[T]he result in *Canada Trustco* was essentially what the tax community had expected it would be."[47] However, while the decision did provide some clarity with respect to the interpretive framework and the relationship between GAAR and the *Duke of Westminster* principle, much uncertainty remains. The Supreme Court allows judges of the Tax Court a great degree of latitude in GAAR cases,[48] and it has clearly expressed its reluctance to hear appeals of future GAAR decisions.[49] Applying the interpretation guidelines and principles pronounced in *Canada Trustco* does not guarantee consistency in the application of GAAR. In *Canada Trustco*, the court confirmed that the line between legitimate tax minimization and abusive tax avoidance is "far from bright."[50] In fact, it is difficult to reconcile the decision in *Mathew* with that in *Canada Trustco* on any principled basis.[51] For example, in *Canada Trustco* the court applied a largely textual interpretation and did not give much consideration to the context for the capital cost allowance provision relied on by the taxpayer in obtaining the tax benefit, whereas in *Mathew* the court adopted a contextual and purposive interpretation of the provision relied on in that case. Also, reliance on the economic substance of the transactions was rejected in *Canada Trustco*[52] but not in *Mathew*, where the court stated that "[t]he abusive nature

42 See Mitchell, supra note 6.

43 *OSFC Holdings Ltd. v. Canada*, 2001 FCA 260, at paragraph 69.

44 *Canada Trustco*, supra note 2.

45 *Mathew v. Canada*, 2005 SCC 55 (sometimes cited sub nom. *Kaulius v. The Queen*, 2005 DTC 5538 (SCC)).

46 For further discussion of the case, see Arnold, supra note 7; Innes et al., supra note 3; and Duff and Erlichman, supra note 3.

47 Innes et al., supra note 3, at 77.

48 The Supreme Court emphasized that other than the textual, contextual, and purposive interpretation of the provisions of the Act, it is a question of fact whether a transaction is an avoidance transaction and, if so, whether it frustrates the purpose of the provisions of the Act. Accordingly, the trial judge's decision is not to be interfered with save for "palpable and overriding error": *Canada Trustco*, supra note 2, at paragraph 46.

49 Ibid.

50 Ibid., at paragraph 16. See David G. Duff, "Lipson v Canada—Whither the Canadian GAAR?" [2009] no. 2 *British Tax Review* 161-69; and Vern Krishna, "GAAR Versus the Westminster Principle: Which Trumps?" (2008) 28:1 *Lawyers Weekly*.

51 See generally Arnold, supra note 7, and in particular the discussion at 197-205.

52 *Canada Trustco*, supra note 2, at paragraphs 75-76.

of the transactions is confirmed by the vacuity and artificiality of the non-arm's length aspect of the initial relationship between Partnership A and STC."[53]

The literature has pointed to numerous inconsistencies in GAAR decisions rendered by the Tax Court since *Canada Trustco*.[54] These include

- the treatment of surplus stripping in *Evans*[55] (GAAR was not applied) and *Desmarais*[56] (GAAR was applied);
- spousal rollovers and the borrowing of funds in *Overs*[57] (GAAR was not applied) and *Lipson*[58] (GAAR was applied);
- the preservation of paid-up capital in *Collins & Aikman*[59] (GAAR was not applied) and *Copthorne*[60] (GAAR was applied); and
- interprovincial tax arbitrage transactions in *Canada Safeway*[61] and *Husky Energy*[62] (GAAR was not applied) and *OGT Holdings*[63] (GAAR was applied).

The sense of uncertainty was not eased by the Supreme Court's three-way split decision in *Lipson*.[64] The majority decision can be reconciled with *Mathew* in that in both cases the taxpayer relied on a specific anti-avoidance rule to achieve tax avoidance; that is, in the words of Bowman CJ at the Tax Court in *Lipson*, anti-avoidance provisions were "turned on their heads."[65] Unfortunately, the majority's process for finding the object, spirit, and purpose of the attribution rules in *Lipson* is less than clear. The minority decision by Binnie J largely renders GAAR ineffective and cannot be reconciled with *Mathew*. Rothstein J also dissented, on a rather technical ground.

Subsequent to *Lipson*, and in contrast to that decision, the Supreme Court's unanimous decision in *Copthorne*[66] reinforces and consolidates principles enunciated

53 *Mathew*, supra note 45, at paragraph 62.

54 For comments, see Sidhu, supra note 6; Kearl and Lemons, supra note 7; and Thivierge, supra note 7.

55 *Evans v. The Queen*, 2005 TCC 684.

56 *Desmarais v. The Queen*, 2006 TCC 44.

57 *Overs v. The Queen*, 2006 TCC 26.

58 *Lipson v. The Queen*, 2006 TCC 148.

59 *Collins & Aikman Products Co. v. The Queen*, 2009 TCC 299.

60 *Copthorne Holdings Ltd v. The Queen*, 2007 TCC 481.

61 *Canada Safeway Limited v. Alberta*, 2012 ABCA 232; aff'g. 2011 ABQB 329.

62 *Husky Energy Inc. v. Alberta*, 2012 ABCA 231; aff'g. 2011 ABQB 268.

63 *OGT Holdings Ltd. c. Québec (Sous-ministre du Revenu)*, 2009 QCCA 191. For comment, see Sidhu, supra note 6, at 16:31.

64 *Lipson*, supra note 18.

65 *Lipson*, supra note 58, at paragraph 32.

66 *Copthorne*, supra note 18.

in earlier cases,[67] while providing additional guidance on the meaning of "series," and on the methodology for determining the object, spirit, and purpose of statutory provisions and for finding abuse. More recently, the Supreme Court had an opportunity to opine on the relationship between GAAR and treaty shopping in *Garron Family Trust*,[68] but it declined to do so on the basis that such comment would be obiter.

After more than two decades of experience with the application of GAAR, there seems to be an emerging recognition in the literature that the initial pessimistic view about the provision may not be justified, given that the courts have provided some guiding principles.[69] One commentator has remarked that GAAR is capable of performing the role of a safety valve that "relieves the pressure arising from the conflict between the government's need for certainty of revenue and a system that requires clear rules and predictability."[70] While the worry about uncertainty continues after the Supreme Court's decisions in *Canada Trustco* and *Mathew*,[71] some commentators have been pleasantly surprised by the level of success enjoyed by taxpayers in subsequent GAAR cases.[72] It is not clear whether that level of success will be sustainable, since the Supreme Court in *Copthorne* "appears to have moved its goalposts in the Crown's favour."[73]

Drawing on the existing literature, our research investigates the degree of inconsistency in case outcomes and any discernible trends or patterns that may provide some sense of certainty with respect to the future application of GAAR.

Judicial Smell Test

The judicial uncertainty in GAAR cases makes one wonder if the application of GAAR involves a smell test[74] and if a judge's "fiscal morality" matters.[75] Donald Bowman,

67 In *Copthorne*, ibid., at paragraph 57, the Supreme Court made it very clear that *Canada Trustco* is a recent decision and there must be "substantial reasons to believe the precedent was wrongly decided" in order for it to be revisited. To the extent that any points about the interpretation of GAAR issues are not addressed in *Copthorne*, one should presume that any applicable comments by the court in *Canada Trustco* and *Mathew*, and in the majority decision in *Lipson*, will govern.

68 *Garron Family Trust v. The Queen*, 2009 TCC 450; aff'd. 2010 FCA 309 (sub nom. *St. Michael Trust Corp. v. Canada*); aff'd. 2012 SCC 14 (sub nom. *Fundy Settlement v. Canada*).

69 See, for example, Meghji's comments in Bowman et al., supra note 6, at 2:14. Meghji also thought that the courts have done a far better job than one could have ever imagined.

70 Powrie, supra note 6, at 8:2.

71 Jack Bernstein, Barbara Worndl, and Kay Leung, "Canadian Supreme Court's Pronouncement on GAAR: A Return to Uncertainty" (2005) 40:5 *Tax Notes International* 437-47.

72 Kearl and Lemons, supra note 7.

73 Darmo and Fournier, supra note 6, at 37:26.

74 At a tax conference prior to the Supreme Court's decision in *Lipson*, Deen Olsen raised this open question: see Kroft and Olsen, supra note 6, at 1:9. It was argued that some of the post-*Canada Trustco* cases, such as *OGT Holdings Ltd.* (supra note 63), were decided using the smell test: see Nitikman, supra note 6, at 7:1.

75 Meghji, in Bowman et al., supra note 6, at 2:14.

who is known as one of the best tax judges in Canada[76] and (until his retirement in 2008) decided most of the Tax Court's GAAR cases, acknowledges the existence of the smell test:

> The first thing that is absolutely certain, in my view, is that whether you win or lose a GAAR case depends on the judge you get in the first instance. . . . I think that there continues to be a certain visceral element—people inelegantly call it the smell test, the olfactory factor, the gut reaction.[77]

The literature provides anecdotal evidence supporting the existence of judicial smell tests. As mentioned earlier, seemingly similar transactions are treated differently under GAAR. The divergent approaches taken by the same judge in different cases cannot be easily reconciled. For example, when asked how he can possibly reconcile his decision in *Lipson* with his decision in *Evans*, Bowman confesses, "Well, just one got past my nose in a slightly different way than the other one."[78] It is also not hard to imagine a different outcome in some cases if the case had been decided by a different judge. At the Tax Court, for example, Bell J did not apply GAAR in any of the cases that he heard. What might have been the outcome in *Univar*[79] or *MIL Investments*[80] (both decided by Bell J) if they had been decided by Bowie J, who applied GAAR in both of his cases? At the Supreme Court, if Abella and LeBel JJ had been replaced by Iacobucci and Major JJ on the bench in *Lipson*, how would that case have been decided?

Is the smell test an unruly sort of test? Bowman has acknowledged that

> sometimes the reasons for a decision might not reflect the full step-by-step thinking leading to an outcome. But judges have a sense that is informed by their experience with the law, within the framework that counsel set out to argue a case, and just because the reasons for a decision might appear results-based doesn't mean that they are. By the same token, human nature plays a role in everything, and inevitably there will be cases that provoke one or another kind of initial reaction—though good judges get beyond that in their application of the law, with the benefit of their experience.[81]

In *Copthorne*, the Supreme Court warned against the use of a smell test: "[D]etermining the rationale of the relevant provisions of the Act should not be conflated

76 See the special supplement to the *Canadian Tax Journal* published in 2010 by the Canadian Tax Foundation to mark the retirement of Donald Bowman as chief justice of the Tax Court of Canada, cited above at note 17.

77 Bowman, in Bowman et al., supra note 6, at 2:16.

78 Ibid., at 2:17.

79 *Univar Canada Ltd. v. The Queen*, 2005 TCC 723.

80 *MIL (Investments) SA v. The Queen*, 2006 TCC 460.

81 Bowman et al., supra note 17, at 34.

with a value judgment of what is right or wrong nor with theories about what tax law ought to be or ought to do."[82] Arguably, the approach articulated by the court does not amount to a smell test because it is anchored in the interpretation of the relevant provisions to determine their purpose.

As an empirical question, though, how can the existence of a judicial smell test be confirmed? One possible approach is to look for traces of it in the judicial decision making in specific cases. Our research links the attributes of Tax Court judges to the outcomes in their GAAR decisions. If who the judge is affects how the case is decided, the finding could lend credence to the existence of a judicial smell test.

Factors Influencing Judicial Decision Making

The literature on empirical legal studies identifies certain factors that help to explain rather than justify judicial decision making. As noted above, these explanatory factors include ideology, race, ethnicity, gender, and societal context. At present, most of the studies are on judicial decision making in general and are limited to the United States. However, there is an emerging body of work on the topic in Canada, and there are some studies in the tax area.

Judicial Decision Making in General

Ideology has been found to influence judicial decision making by some US judges; specifically, ideological preferences have been detected in the published opinions of US appellate court judges, but not in those of US district court judges.[83] The influences are more notable when the complexity of the cases increases: conservative judges are found to be more likely to make ideologically consistent decisions in complex cases than are liberal judges.[84] Strategic analysis of US judicial behaviour has revealed that in order to avoid reversal of their decisions by higher courts, judges seem to dampen expression of their ideological leanings. In addition, to create enduring law and policy, judges appear to take into account the views of other relevant actors, such as the legislative branch, in order to minimize the risk that their decisions may be overturned by subsequent legislation.[85] It has been suggested that,

82 *Copthorne*, supra note 18, at paragraph 70.

83 Denise M. Keele, Robert W. Malmsheimer, Donald W. Floyd, and Lianjun Zhang, "An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions" (2009) 6:1 *Journal of Empirical Legal Studies* 213-39.

84 Laura P. Moyer, "The Role of Case Complexity in Judicial Decision-Making" (2012) 34:3 *Law & Policy* 291-312.

85 Lee Epstein and Tonja Jacobi, "The Strategic Analysis of Judicial Decisions" (2010) 6:1 *Annual Review of Law and Social Science* 341-58; and Tonja Jacobi and Matthew Sag, "Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases" (2009) 98:1 *Georgetown Law Journal* 1-75.

in addition to the ideology of judges, the ideological character of the cases being decided should be factored into empirical legal studies.[86]

Another area related to ideology in judicial decision making is the judicial appointment process. In the US judicial nomination process, ideological divergence between the voting senator and the nominee coupled with questionable qualifications of the nominee would likely lead the senator to vote against the nominee, while ideological convergence and exemplary qualifications would likely lead the senator to vote for the nominee.[87]

Researchers have also considered the role of race, ethnicity, and gender, factors that have been found to affect judicial decision making not only in the United States but elsewhere.[88] With respect to gender, inspired by the controversy over comments by a female US judge suggesting that female judges outperform their male counterparts, one study tested whether in the United States female judges who have weaker credentials and less experience underperform by comparison with male judges.[89] The study found that despite differences in background, female judges perform at least as well as their male counterparts.

As members of society, judges are bound to be affected by the societal context. A number of studies have found that the preappointment careers of judges, such as practising or teaching law, may influence their judicial decision making.[90] One study found broad support for the proposition that in an economic downturn, US judges tend to be less likely to vote for the government as a way to punish the government for the economic decline.[91] Another study found that when their country is at war, judges tend to be more conservative and more intolerant of criminal deviance than

86 Carolyn Shapiro, "The Context of Ideology: Law, Politics, and Empirical Legal Scholarship" (2010) 75:1 *Missouri Law Review* 79-142. As Shapiro notes, because the ideological character of cases is likely to be rooted in the legal issues of the case, a judicial decision-making database that includes information on legal issues would be a useful step forward. See also Carolyn Shapiro, "Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court" (2008) 60:3 *Hastings Law Journal* 477-540.

87 Charles R. Shipan, "Partisanship, Ideology, and Senate Voting on Supreme Court Nominees" (2008) 5:1 *Journal of Empirical Legal Studies* 55-76.

88 Oren Gazal-Ayal and Raanan Sulitzeanu-Kenan, "Let My People Go: Ethnic In-Group Bias in Judicial Decisions—Evidence from a Randomized Natural Experiment" (2010) 7:3 *Journal of Empirical Legal Studies* 403-28.

89 Stephen J. Choi, Mitu Gulati, Mirya Holman, and Eric A. Posner, "Judging Women" (2011) 8:3 *Journal of Empirical Legal Studies* 504-32. As readers may recall, the judge who originally made the controversial comments, Sonia Sotomayor, was subsequently appointed as a justice of the US Supreme Court, though she had to answer to accusations of gender bias in the course of her nomination process.

90 Lee Epstein, Jack Knight, and Andrew D. Martin, "The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court" (2003) 91:4 *California Law Review* 903-65.

91 Thomas Brennan, Lee Epstein, and Nancy Staudt, "Economic Trends and Judicial Outcomes: A Macrotheory of the Court" (2009) 58:7 *Duke Law Journal* 1191-1230.

in peacetime.[92] It has also been suggested that the public mood on issues relevant to specific cases at the time those cases are heard has some influence on the decisions of judges at the US Supreme Court.[93] Public sentiment affects not only how cases are decided but also how those decisions are perceived: citizens are more likely to accept judicial decisions as legitimate when they agree with the reasons for those decisions.[94]

The incorporation of the societal environment in the analysis of judicial decision making is relatively new, but it is not the only analytical advancement in the past decade. New approaches have been field-tested, including the following:

- the use of an automated learning approach to classify the text of legal briefs in the search for the deeper meaning of the language used in those documents;[95]
- the use of classification trees to map case facts to case outcomes, in order to enhance understanding of the application of legal rules in judicial decision making;[96] and
- the further development of analysis of random assignment of cases to judges in evaluating the influence of partisanship in judicial decision making.[97]

In Canada, both the governing political party at the time of appointment and the gender of Ontario appellate court judges have been found to be explanatory variables in judicial decision making.[98] However, the political party at the time of appointment may not be a reliable predictor of voting outcomes for Supreme Court of Canada judges, since the policy preferences of the prime minister of the day and those of individual judges have been found not to be strongly associated; in particular, the policy preferences of judges seemingly changed over time.[99] In Supreme Court of Canada cases concerning government regulation of the economy and private economic

92 Tom S. Clark, "Judicial Decision Making During Wartime" (2006) 3:3 *Journal of Empirical Legal Studies* 397-419.

93 Lee Epstein and Andrew D. Martin, "Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)" (2010) 13:2 *University of Pennsylvania Journal of Constitutional Law* 263-81.

94 Dan Simon and Nicholas Scurich, "Lay Judgments of Judicial Decision Making" (2011) 8:4 *Journal of Empirical Legal Studies* 709-27.

95 Michael Evans, Wayne McIntosh, Jimmy Lin, and Cynthia Cates, "Recounting the Courts? Applying Automated Content Analysis To Enhance Empirical Legal Research" (2007) 4:4 *Journal of Empirical Legal Studies* 1007-39.

96 Jonathan P. Kastellec, "The Statistical Analysis of Judicial Decisions and Legal Rules with Classification Trees" (2010) 7:2 *Journal of Empirical Legal Studies* 202-30.

97 Matthew Hall, "Randomness Reconsidered: Modeling Random Judicial Assignment in the U.S. Courts of Appeals" (2010) 7:3 *Journal of Empirical Legal Studies* 574-89.

98 James Stribopoulos and Moin A. Yahya, "Does a Judge's Party of Appointment or Gender Matter to Case Outcomes? An Empirical Study of the Court of Appeal for Ontario" (2007) 45:2 *Osgoode Hall Law Journal* 315-63.

99 Benjamin Alarie and Andrew Green, "Policy Preference Change and Appointments to the Supreme Court of Canada" (2009) 47:1 *Osgoode Hall Law Journal* 1-46.

disputes, the influence of the political party as a variable seems to interact with the variable of regional ties. Supreme Court of Canada judges from Quebec who were appointed by the Liberal Party were found to be less liberal than those appointed by the Conservative Party, and thus less likely to decide in favour of the government, because the policies of the Liberal Party in Quebec tended to be more conservative than those of the Conservative Party; however, the reverse was found to be the case for judges with ties to other regions of Canada.[100]

Judicial Decision Making in Tax Cases

Empirical legal studies of judicial decision making in tax cases remain the next frontier in both the United States and Canada, even as the body of knowledge has been taking shape. One study has found that the ideology of US Supreme Court judges is an ineffective predictor of voting outcomes in tax cases;[101] however, another study suggests that when the US Supreme Court has a majority of Republican judges, it is more likely to rule in favour of the government.[102] The ideology of US judges was found to affect the outcomes in corporate tax cases, but not in cases involving individual taxpayers.[103] In corporate tax cases, liberal judges are more likely than conservative judges to find for the government.

In the United States, one study has found gender and race to be influential in explaining judicial decision making, with female trial court judges and black appellate court judges tending to decide for taxpayers.[104] Increases in government spending, such as defence or war efforts, have been found to lead to an expected increase in government wins; also, in times of war and foreign policy crises, there is a notable increase in the government's chances of winning.[105] When the government is the petitioner for review at the US Supreme Court, the likelihood of a pro-government outcome increases.[106] When the economy is booming, the government is less likely

100 Donald R. Songer and Susan W. Johnson, "Judicial Decision Making in the Supreme Court of Canada: Updating the Personal Attribute Model" (2007) 40:4 *Canadian Journal of Political Science* 911-34.

101 Charles M. Cameron and Jee-Kwang Park, "How Will They Vote? Predicting the Future Behavior of Supreme Court Nominees, 1937-2006" (2009) 6:3 *Journal of Empirical Legal Studies* 485-511. Scalia J was known for favouring the plain meaning approach to statutory interpretation. His participation in tax abuse cases was found to have an effect on the government's win rate, but the results did not achieve statistical significance. See Joshua D. Blank and Nancy Staudt, "Corporate Shams" (2012) 87:6 *New York University Law Review* 1641-1712, at 1677.

102 Blank and Staudt, supra note 101, at 1674.

103 Nancy Staudt, Lee Epstein, and Peter Wiedenbeck, "The Ideological Component of Judging in the Taxation Context" (2006) 84:7 *Washington University Law Review* 1797-1821.

104 Daniel M. Schneider, "Using the Social Background Model To Explain Who Wins Federal Appellate Tax Decisions: Do Less Traditional Judges Favor the Taxpayer?" (2005) 25:1 *Virginia Tax Review* 201-49.

105 Blank and Staudt, supra note 101, at 1674.

106 Ibid.

to win.[107] In US tax cases, the use of judicial tax doctrines and the case outcomes were found to be associated, with taxpayers obtaining favourable outcomes with the use of the business purpose and sham transaction doctrines and the government obtaining favourable outcomes with the use of the step transaction doctrine.[108]

For Canadian tax cases, the investigation of the influence of ideology, gender, and race is at an early stage. An exploratory study of Supreme Court decision making in the period 1920-2003 tested the sociodemographic characteristics of judges as explanatory variables of case outcomes.[109] The importance of this factor was flagged, but more research is needed to understand the relationships between the sociodemographic background of judges and their judicial decision making. A recent study of appeals of tax assessments to the Tax Court of Canada and the Federal Court of Appeal found that "policy preferences of judges matter, but not that much."[110]

Value and Limitations of Empirical Legal Studies

Despite the increase in the number of empirical legal studies papers published in the past decade, opinion as to whether such studies can provide a legitimate analysis of the evolution of the law remains inconclusive, owing to inherent constraints in statistical analysis and the limited data available.[111] Empirical legal studies face uncertainty as a recognized discipline within the field of law.[112] Major challenges arise

107 Ibid., at 1674-75.

108 Daniel M. Schneider, "Use of Judicial Doctrines in Federal Tax Cases Decided by Trial Courts, 1993-2006: A Quantitative Assessment" (2009) 57:1 *Cleveland State Law Review* 35-75.

109 Thaddeus Hwong, "An Exploration of Influences of Sociodemographic Characteristics of Supreme Court Justices in Judicial Decision-Making in Income Tax Cases, 1920-2003" (2009) 33:1 *Manitoba Law Journal* 151-96.

110 Benjamin Alarie and Andrew Green, "Policy Preferences and Expertise in Canadian Tax Adjudication" (University of Toronto, Faculty of Law, August 27, 2012) (http://ssrn.com/abstract=2105785).

111 Michael Heise, "An Empirical Analysis of Empirical Legal Scholarship Production, 1990-2009" [2011] no. 5 *University of Illinois Law Review* 1739-52. In the past decade, the debates have been informative, with the value of empirical legal studies in judicial decision making being both challenged and defended. See, for example, the Honorable Harry T. Edwards and Michael A. Livermore, "Pitfalls of Empirical Studies That Attempt To Understand the Factors Affecting Appellate Decisionmaking" (2009) 58:8 *Duke Law Journal* 1895-1989; and Richard A. Posner, "Some Realism About Judges: A Reply to Edwards and Livermore" (2010) 59:6 *Duke Law Journal* 1177-86. Since the defence of the challenge was also challenged (Michael A. Livermore, "Realist Lawyers and Realistic Legalists: A Brief Rebuttal to Judge Posner" (2010) 59:6 *Duke Law Journal* 1187-93), the debate will likely continue.

112 Marin Roger Scordato, "Reflections on the Nature of Legal Scholarship in the Post-Realist Era" (2008) 48:2 *Santa Clara Law Review* 353-440. As a branch of legal inquiry, empirical legal studies can be cast as social science in law. Whether they will flourish front and centre, like social science in business, or linger along the sidelines, like social science in medicine, is unclear. Mark C. Suchman and Elizabeth Mertz, "Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism" (2010) 6:1 *Annual Review of Law and Social Science* 555-79.

from the fact that empirical analytical expertise and data sets suitable for analysis are not readily available.[113]

On the other hand, empirical legal research is useful in raising questions that may not be asked in other forms of inquiry in legal scholarship.[114] It also offers some explanation of certain "big picture" questions. The body of Canadian GAAR jurisprudence is a good candidate for such an empirical project because of judicial uncertainty in the application of section 245, the evolution of the jurisprudence, the potential influence of a smell test, and the importance of the jurisprudence in this area of the tax law.

RESEARCH METHODOLOGY

Data Sets

As described earlier, the goal of our study was to see whether patterns in GAAR cases and attributes of Tax Court judges could help to answer the three research questions. We used two data sets, one consisting of case attributes of the 37 GAAR decisions at the Tax Court of Canada over the period 1997-2009, and the other consisting of personal and societal attributes of the 19 Tax Court judges who decided those cases.

To identify the cases for the study, we searched the databases published by Taxnet Pro® and CCH and collected a set of cases published after 1988 and before the end of 2010 that included one or more references to "GAAR" or "general anti-avoidance rule" or "section 245." This initial search included cases decided by the Tax Court of Canada, the Federal Court Trial Division, the Federal Court of Appeal, the Supreme Court of Canada, and provincial courts. Among the set of cases, 17 merely referred to section 245 without providing any analysis,[115] and thus were

113 Thaddeus Hwong, "A Review of Quantitative Studies of Decision Making in the Supreme Court of Canada" (2003) 30:3 *Manitoba Law Journal* 353-82.

114 Whether empirical legal studies can raise important questions is a legitimate query: see Jack Knight, "Are Empiricists Asking the Right Questions About Judicial Decisionmaking?" (2009) 58:7 *Duke Law Journal* 1531-56. One way to make empirical legal studies indispensable to the field of law is to nurture a symbiosis in division of labour—empirical legal studies can be helpful in asking tough questions, while other forms of legal analysis can be helpful in finding elusive answers. On the mixed approach, see Hwong, supra note 109. See also Gregory C. Sisk, "The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making" (2008) 93:4 *Cornell Law Review* 873-900.

115 These cases include *Adams et al. v. The Queen*, 96 DTC 1145 (TCC); *Aventis Pharma Inc. v. The Queen*, 2007 TCC 629; *Blackburn Radio Inc. v. The Queen*, 2009 TCC 155; *DeGeer v. The Queen*, 2000 DTC 1749 (TCC); *Fording Coal Limited v. The Queen*, 95 DTC 571 (TCC); *Gestion B. Dufresne Ltée v. The Queen*, 98 DTC 2078 (TCC); *Gregory v. The Queen*, 2000 DTC 2027 (TCC); *Gregory et al. v. The Queen*, 2001 DTC 163 (TCC); *Harris v. The Queen*, 99 DTC 5018 (FCTD); *Interior Savings Credit Union v. The Queen*, 2006 TCC 411; *Kossow v. The Queen*, 2006 TCC 151; *Large v. The Queen*, 2006 TCC 509; *Makuz v. The Queen*, 2006 TCC 263; *Sherle v. The Queen*, 2009 TCC 377; *Silicate Holdings Limited v. The Queen*, 2001 DTC 299 (TCC); *Standard Mortgage Investment Corporation et al. v. The Queen*, 2000 DTC 1451 (TCC); and *Webster et al. v. The Queen*, 2001 DTC 738 (TCC).

excluded from our data set. We also excluded from the final data set decisions on the goods and services tax, such as *Michelin Tires*[116] and *Ventes D'Auto Giordano*,[117] and decisions of provincial courts,[118] the Federal Court, and the Supreme Court of Canada (these being too few to allow any meaningful comparison). We decided to analyze the Federal Court of Appeal and the Supreme Court of Canada cases on their own instead of including them in the data set.

Since 2010, there have been at least seven more Tax Court decisions involving GAAR.[119] We considered adding these to our data set but decided not to do so because, on reviewing the decisions, we concluded that they would not alter our findings. Accordingly, we capture these cases through discussion of the answers to our research questions, rather than through statistical analysis.

The final case data set, shown in table 1, contains 37 cases decided at the Tax Court of Canada by a total of 19 judges[120] in the period 1997-2009. (The Tax Court of Canada did not rule on any GAAR case in 2010.) In this and subsequent tables listing cases in chronological order, the cases are divided into two groups—cases decided before the Supreme Court of Canada's decisions in *Canada Trustco* and *Mathew*, and cases decided after those decisions. (The line of demarcation is indicated by a space.)

The data on the personal and societal attributes of the 19 Tax Court judges are based on publicly available sources, including biographical information on the websites of the Tax Court of Canada and the Canadian government[121] as well as *Canadian Who's Who*.[122]

Variables

The choice of variables is dictated by the three research questions as well as the pedagogical purpose of the project. Initially, a large number of variables was chosen; however, after two rounds of coding of the cases, some of those variables were dropped since they shed no light on the research questions. The case attributes collected from the 37 cases include the characteristics of the taxpayers, the types of

116 *Michelin Tires (Canada) Ltd. v. MNR* (1995), 3 GTC 4040 (CITT).

117 *Ventes D'Auto Giordano Inc. v. The Queen*, 2001 GTC 358 (TCC).

118 For example, *OGT Holdings*, supra note 63; *Husky Energy*, supra note 62; and *Canada Safeway*, supra note 61.

119 *Global Equity Fund Ltd. v. The Queen*, 2011 TCC 507; *1207192 Ontario Limited v. The Queen*, 2011 TCC 383; *Triad Gestco Ltd. v. The Queen*, 2011 TCC 259; *Brent Kern Family Trust v. The Queen*, 2012 TCC 358; *McClarty Family Trust v. The Queen*, 2012 TCC 80; *MacDonald v. The Queen*, 2012 TCC 123; and *Spruce Credit Union v. The Queen*, 2012 TCC 357.

120 All references to "Miller" are to Campbell J. Miller (not Valerie Miller, who also currently serves on the Tax Court).

121 Tax Court of Canada: www.tcc-cci.gc.ca. For recent judicial appointments, see www.justice.gc.ca/eng/news-nouv/index.asp?tid=4. For archived judicial appointments, see www.collectionscanada.gc.ca/webarchives/20071116175956 or http://canada.justice.gc.ca/en/news/index.asp?tid=4.

122 See http://canadianwhoswho.ca/AboutPage.aspx.

TABLE 1 GAAR Cases Decided at the Tax Court of Canada, 1997-2009

Case	Year	GAAR applied	Judge (years on Tax Court)[a]
McNichol et al. v. The Queen 97 DTC 111	1997	Yes	Bonner (14)
RMM Canadian Enterprises Inc. et al. v. The Queen 97 DTC 302	1997	Yes	Bowman (6)
Husky Oil Limited v. The Queen 99 DTC 308	1998	No	Beaubier (8)
Jabs Construction Limited v. The Queen 99 DTC 729	1999	No	Bowman (8)
Nadeau v. The Queen 99 DTC 324	1999	Yes	Tardif (5)
OSFC Holdings Ltd. v. The Queen 99 DTC 1044	1999	Yes	Bowie (4)
Canadian Pacific Limited v. The Queen 2000 DTC 2428	2000	No	Bonner (17)
Donohue Forest Products Inc. v. The Queen 2001 DTC 823	2001	No	Archambault (9)
Duncan et al. v. The Queen 2001 DTC 96	2001	Yes	Bowie (6)
Fredette v. The Queen 2001 DTC 621	2001	Yes	Archambault (9)
Geransky v. The Queen 2001 DTC 243	2001	No	Bowman (10)
Jabin Investments Ltd. v. The Queen 2001 DTC 1002	2001	No	Hamlyn (11)
Rousseau-Houle v. The Queen 2001 DTC 250	2001	No	Archambault (9)
Hill v. The Queen 2002 DTC 1749	2002	No	Miller (1)
Imperial Oil Limited v. The Queen 2002 DTC 1954	2002	No	Mogan (14)
Mathew et al. v. The Queen 2002 DTC 1637	2002	Yes	Dussault (12)
Canada Trustco Mortgage Company v. The Queen 2003 TCC 215	2003	No	Miller (2)
CIT Financial Ltd. v. The Queen 2003 TCC 544	2003	No	Bowman (12)
Loyens v. The Queen 2003 TCC 214	2003	No	Campbell (3)
Howe v. The Queen 2004 TCC 719	2004	No	Bell (13)
Brouillette c. La Reine 2005 TCC 203	2005	No	Lamarre Proulx (17)
Evans v. The Queen 2005 TCC 684	2005	No	Bowman (14)
Univar Canada Ltd. v. The Queen 2005 TCC 723	2005	No	Bell (14)

(Table 1 is concluded on the next page.)

TABLE 1 Concluded

Case	Year	GAAR applied	Judge (years on Tax Court)[a]
Ceco Operations Ltd. v. The Queen 2006 TCC 256	2006	Yes	Bonner (23)
Desmarais v. The Queen 2006 TCC 44	2006	Yes	Archambault (14)
Lipson v. The Queen 2006 TCC 148	2006	Yes	Bowman (15)
MIL (Investments) SA v. The Queen 2006 TCC 460	2006	No	Bell (15)
Overs v. The Queen 2006 TCC 26	2006	No	Little (4)
Copthorne Holdings Ltd. v. The Queen 2007 TCC 481	2007	Yes	Campbell (7)
MacKay v. The Queen 2007 TCC 94	2007	No	Campbell (7)
McMullen v. The Queen 2007 TCC 16	2007	No	Lamarre (14)
Landrus v. The Queen 2008 TCC 274	2008	No	Paris (6)
Remai v. The Queen 2008 TCC 344	2008	No	Rossiter (2)
Antle v. The Queen 2009 TCC 465	2009	Yes	Miller (8)
Collins & Aikman Products Co. v. The Queen 2009 TCC 299	2009	No	Boyle (2)
Garron Family Trust v. The Queen 2009 TCC 450	2009	No	Woods (6)
Lehigh Cement Limited v. The Queen 2009 TCC 237	2009	Yes	Mogan (21)

[a] Years on the court as at the time the case was decided.

transactions, the kinds of tax benefits and avoidance transactions, and some aspects of the decision-making approaches used by Tax Court judges. Table 2 shows the variables in the case attributes data set.

The attributes of judges used in the analysis are as follows:

- gender,
- prior graduate studies,
- a proxy for prior professional experience (whether the judge was a founder of a law firm),
- a proxy for academic interests (prior teaching experience in law),
- a proxy for political leanings (the political party of the prime minister who appointed the judge), and
- a proxy for regional influences (work experience in Ontario, Quebec, or elsewhere in Canada).

TABLE 2 Selected Case Attributes, GAAR Cases Decided at the Tax Court of Canada, 1997-2009

Category	Variables
General information	Year of decision
	Name of the judge
Taxpayer	Individual
	Corporation
	Non-resident
	Trust
Amount of reassessment	Above or below a threshold amount of $1 million
Taxpayer's characterization of transaction(s)	Transfer or sale of shares
	Property transfer to partnership
	Loss utilization
	Acquisition of property
	Interest expense deduction
	Surplus stripping
	Paid-up capital adjustment
Tax benefit	Conceded by the taxpayer
	Found by the court
	Tax credits and exemptions
	Tax deductions
	Tax deferral
Avoidance transaction	Conceded by the taxpayer
	Found by the court
	Series not in controversy
	Series found under subsection 248(10)
	Attention to time between transactions
Misuse or abuse	Misuse and abuse tests applied
	Only abuse test applied
	Contextual and purposive interpretation applied
	Extrinsic evidence considered
	Scheme of the Act considered
	Legal history considered
	Explanatory notes considered

Coding the Databases

The data collection for the first data set and the coding of the variables were conducted by the student authors of this article. Students worked in teams. Each GAAR case was independently coded by two students, and Jinyan Li checked the coding of all cases. The preliminary findings were presented to a group of invited tax practitioners in the private and public sectors.

The research on the second data set was conducted by research assistants during the summer of 2011 under the supervision of Thaddeus Hwong. The second data set was added in response to suggestions made by invited participants at the above-mentioned presentation.

RESEARCH FINDINGS

Exploration of Case Attributes—The Canada Trustco Effect

The exploration of the case attributes focuses on key aspects of the cases and the interaction between the kind of attributes in the GAAR-applied cases and the length of tenure of the Tax Court judges who decided these cases. The exploration pays special attention to the GAAR-applied cases in the post-*Canada Trustco* period because the findings with respect to these cases will be more relevant to the current legal environment.

To test the effect of *Canada Trustco* on the Tax Court's decisions, we separated the cases decided before *Canada Trustco* (cases listed above *Evans* in table 1) and those decided after that decision. At first glance, the propensity for the Tax Court to apply GAAR seems to rise in the period after *Canada Trustco*, compared to the period before that decision. Before *Canada Trustco*, the court decided 21 GAAR cases and held that GAAR applied in 7 (33 percent) of those cases. After *Canada Trustco*, the court decided 16 GAAR cases and applied GAAR in 6 (38 percent) of those cases.

In addition, it appears that judges who had served on the Tax Court for a decade or more at the time of the decision were more likely to find in favour of GAAR after *Canada Trustco*. Before *Canada Trustco*, these more experienced judges held that GAAR applied in 2 out of 9 cases (22 percent), compared to 4 out of 8 cases (50 percent) after *Canada Trustco*. Judges who had served on the Tax Court for less than a decade at the time of the decision applied GAAR in 5 out of 12 cases (42 percent) before *Canada Trustco*, compared to 2 out of 8 cases (25 percent) after *Canada Trustco*. All 3 GAAR-applied cases with a reassessed amount of $1 million or more in the post-*Canada Trustco* period also happened to have corporate taxpayers, as shown in table 3. Two of the 3 cases were decided by judges with more than two decades of experience on the Tax Court.

Amount of Reassessment

As shown in table 3, the GAAR-applied cases are divided roughly equally between cases with a reassessed amount of $1 million or more and those with a lower amount before and after *Canada Trustco*. Before *Canada Trustco*, the Tax Court decided 11 GAAR cases with a reassessed amount of $1 million or more, finding that GAAR applied in 3 of them (27 percent). After *Canada Trustco*, the court decided 9 GAAR cases in this higher reassessment category, finding that GAAR applied in 3 of them (33 percent). Among GAAR cases with a reassessed amount of less than $1 million, the court held that GAAR applied in 4 cases out of 10 (40 percent) before *Canada Trustco* and 3 cases out of 7 (43 percent) after *Canada Trustco*.

Characteristics of Taxpayers

Most GAAR-applied cases have resident corporations or individuals. Before *Canada Trustco*, the Tax Court decided 13 GAAR cases with corporate taxpayers, finding that GAAR applied in 4 of them (31 percent). After *Canada Trustco*, the court decided 7 GAAR cases with corporate taxpayers, finding that GAAR applied in 3 of them (43 percent). For cases with individual taxpayers, before *Canada Trustco* the court decided 10 GAAR

TABLE 3 Reassessment Amount and Taxpayers in GAAR-Applied Cases, Tax Court of Canada, 1997-2009

Case	Year	Judge (years on Tax Court)[a]	Reassessed amount of $1 million or more	Taxpayer			
				Corporate	Individual	Non-resident	Trust
McNichol	1997	Bonner (14)			Yes		
RMM	1997	Bowman (6)		Yes			
Nadeau	1999	Tardif (5)			Yes		
OSFC Holdings	1999	Bowie (4)	Yes	Yes			
Duncan	2001	Bowie (6)	Yes	Yes	Yes		
Fredette	2001	Archambault (9)			Yes		
Mathew	2002	Dussault (12)	Yes	Yes	Yes		
Ceco	2006	Bonner (23)	Yes	Yes			
Desmarais	2006	Archambault (14)			Yes		
Lipson	2006	Bowman (15)			Yes		
Copthorne	2007	Campbell (7)	Yes	Yes		Yes	
Antle	2009	Miller (8)			Yes	Yes	Yes
Lehigh Cement	2009	Mogan (21)	Yes	Yes			

[a] Years on the court as at the time the case was decided.

cases involving such taxpayers, finding that GAAR applied in 5 of them (50 percent). After *Canada Trustco*, the court decided 10 GAAR cases with individual taxpayers, finding that GAAR applied in 3 of them (30 percent).

With respect to other types of taxpayers, before *Canada Trustco*, the Tax Court decided no GAAR cases in which the taxpayer was a non-resident or a trust. After *Canada Trustco*, the court decided 5 GAAR cases with a non-resident taxpayer and 2 GAAR cases with a trust as the taxpayer, finding that GAAR applied in 2 (40 percent) and 1 (50 percent) of those cases respectively.

Types of Transactions

Given that the data set includes only a small number of cases and a relatively wide variety of transactions, and that some cases may involve more than one type of transaction, it is difficult to offer a conjecture on the relationship between the types of transactions and the application of GAAR, or on any link between judicial experience on the Tax Court and transaction types. As shown in table 4, a transfer or sale of shares might be a candidate for a type of transaction that links to GAAR-applied cases, but if such a link exists, it has been weakened since *Canada Trustco*. Before *Canada Trustco*, the Tax Court decided 6 GAAR cases involving a transfer or sale of shares, finding that GAAR applied in 3 of them (50 percent). After *Canada Trustco*, the court decided 9 GAAR cases involving a transfer or sale of shares, finding that GAAR applied in 3 of them (33 percent). Similarly, for a property transfer to a partnership, before *Canada Trustco*, the court decided 7 GAAR cases, finding that GAAR applied in 4 of them (57 percent); after *Canada Trustco*, the court decided 4 GAAR cases, finding that GAAR applied in 1 of them (25 percent).

Loss utilization seems to hold steady before and after *Canada Trustco*, but the number of cases decided in the latter period is too small to suggest any relationship. Before *Canada Trustco*, the court decided 9 GAAR cases involving loss utilization, finding that GAAR applied in 3 of them (33 percent). After *Canada Trustco*, the court decided 3 such cases, finding that GAAR applied in 1 of them (33 percent).

Acquisition of property seems to appear more often in GAAR-applied cases, but the post-*Canada Trustco* case number is again too small for us to infer any relationship. Before *Canada Trustco*, the court decided 7 GAAR cases involving an acquisition of property, finding that GAAR applied in 2 of them (29 percent). After *Canada Trustco*, the court decided 3 such cases, finding that GAAR applied in 2 of them (67 percent).

The post-*Canada Trustco* case numbers are also small for each of the remaining transaction types. The Tax Court held that GAAR applied in

- 1 out of 4 cases (25 percent) involving the deduction of interest expense before *Canada Trustco*, and 1 out of 2 cases (50 percent) after *Canada Trustco*;
- 3 out of 5 cases involving surplus stripping before *Canada Trustco*, and 1 out of 3 cases (33 percent) after *Canada Trustco*; and
- 1 case (100 percent) involving a paid-up capital adjustment before *Canada Trustco*, and 1 out of 2 cases (50 percent) after *Canada Trustco*.

Finally, as noted in table 4, one case (*Lehigh Cement*) fell into a separate category, being the only GAAR-applied case in the study period involving part XIII withholding tax on interest. That case was decided after *Canada Trustco*.

As mandated by the Supreme Court in *Canada Trustco*, the first step in the GAAR analysis is to determine whether there is a tax benefit arising from a transaction or a series of transactions of which the transaction is a part. Once it is determined that there is a tax benefit from a transaction or series of transactions, the second step in the GAAR analysis is to determine whether the transaction is an "avoidance transaction" within the meaning of subsection 245(3).[123]

Tax Benefits

According to the Supreme Court in *Canada Trustco*, the determination of whether there is a tax benefit is a factual matter, and the burden of proof is on the taxpayer.[124] A "tax benefit" is defined in subsection 245(1) to include not only the avoidance or reduction of tax, but also the deferral of tax. In most cases, the existence of a tax benefit is obvious. Of the 37 cases in the study, 35 had tax benefits (22 conceded by the taxpayer; 13 not conceded by the taxpayer but found by the Tax Court). The two exceptions are *Brouillette* and *Univar*. In *Brouillette*, where GAAR was not the main argument, the court held that section 245 did not apply, without analyzing the issue of a tax benefit. *Univar* is the only case that found no tax benefit.

Taxpayers appear to be more likely to concede the existence of a tax benefit since *Canada Trustco*. They did so in 11 out of 21 cases (52 percent) before *Canada Trustco*, compared to 11 out of 16 cases (69 percent) after *Canada Trustco*. Among the cases in which the taxpayer did not concede a tax benefit, a tax benefit was found in 9 out of 10 cases (90 percent) before *Canada Trustco*, with GAAR applying in 2 of the 9 (22 percent), and in 4 out of 5 cases (80 percent) after *Canada Trustco*, with GAAR applying in 2 of the 4 (50 percent).

The GAAR application rate seems to rise in cases where taxpayers did not concede a tax benefit in the post-*Canada Trustco* period. Where the taxpayer conceded a tax benefit, GAAR was applied in 5 out of 11 cases (46 percent) before *Canada Trustco* and 4 out of 11 cases (37 percent) after *Canada Trustco*. Where the taxpayer did not concede a tax benefit, GAAR was applied in 2 out of 10 cases (20 percent) before *Canada Trustco* and 2 out of 5 cases (40 percent) after *Canada Trustco*.

As shown in table 5, most of the GAAR-applied cases involved tax credits and exemptions and tax deductions. The Tax Court applied GAAR in 3 out of 4 cases involving tax credits and exemptions (75 percent) before *Canada Trustco*, and 4 out of 10 cases (40 percent) after *Canada Trustco*. The GAAR application rate held roughly steady after *Canada Trustco* in cases involving tax deductions and deferrals: for tax deductions, section 245 applied in 4 out of 17 cases (24 percent) before *Canada Trustco* and 1 out of 5 cases (20 percent) after *Canada Trustco*; for tax deferrals,

123 See *Canada Trustco*, supra note 2, at paragraphs 18-22.

124 Ibid., at paragraph 63.

TABLE 4 Transactions in GAAR-Applied Cases, Tax Court of Canada, 1997-2009

Case	Year	Judge (years on Tax Court)[a]	Type of transaction							
			Transfer or sale of shares	Property transfer to partnership	Loss utilization	Acquisition of property	Interest expense deduction	Surplus stripping	Paid-up capital adjustment	Other
McNichol	1997	Bonner (14)	Yes					Yes		
RMM	1997	Bowman (6)	Yes	Yes				Yes		
Nadeau	1999	Tardif (5)	Yes						Yes	
OSFC Holdings[b]	1999	Bowie (4)		Yes	Yes					
Duncan	2001	Bowie (6)			Yes	Yes				
Fredette	2001	Archambault (9)		Yes		Yes	Yes			
Mathew[b]	2002	Dussault (12)		Yes	Yes					
Ceco	2006	Bonner (23)		Yes						
Desmarais	2006	Archambault (14)	Yes					Yes		
Lipson	2006	Bowman (15)				Yes	Yes			
Copthorne	2007	Campbell (7)	Yes		Yes	Yes			Yes	
Antle	2009	Miller (8)	Yes							
Lehigh Cement	2009	Mogan (21)								Yes[c]

[a] Years on the court as at the time the case was decided.
[b] *OSFC Holdings* and *Mathew* involved the same transactions.
[c] This case involved the withholding requirement under part XIII of the Act in respect of interest paid to a non-resident.

TABLE 5 Tax Benefits in GAAR-Applied Cases, Tax Court of Canada, 1997-2009

Case	Year	Judge (years on Tax Court)[a]	Tax benefit conceded	Tax benefit found	Type of tax benefits		
					Tax credits and exemptions	Tax deductions	Tax deferrals
McNichol	1997	Bonner (14)	Yes		Yes		Yes
RMM	1997	Bowman (6)		Yes	Yes		
Nadeau	1999	Tardif (5)	Yes		Yes		
OSFC Holdings	1999	Bowie (4)	Yes			Yes	
Duncan	2001	Bowie (6)	Yes			Yes	
Fredette	2001	Archambault (9)		Yes		Yes	Yes
Mathew	2002	Dussault (12)	Yes			Yes	
Ceco	2006	Bonner (23)	Yes				Yes
Desmarais	2006	Archambault (14)		Yes	Yes		Yes
Lipson	2006	Bowman (15)	Yes			Yes	
Coptborne	2007	Campbell (7)		Yes	Yes		
Antle	2009	Miller (8)	Yes		Yes		
Lehigh Cement	2009	Mogan (21)	Yes		Yes		

[a] Years on the court as at the time the case was decided.

section 245 applied in 2 out of 4 cases (50 percent) before *Canada Trustco* and 2 out of 3 cases (67 percent) after *Canada Trustco*.

Avoidance Transactions

Subsection 245(3) defines "avoidance transaction" to mean a transaction that results in a tax benefit, either alone or as part of a series of transactions, "unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit." As the Supreme Court stated in *Canada Trustco*, "[t]he function of this requirement is to remove from the ambit of the GAAR transactions or series of transactions that may reasonably be considered to have been undertaken or arranged primarily for a non-tax purpose."[125] In the case of a series of transactions, if a single transaction in the series lacks a primary non-tax purpose, it is an avoidance transaction. The question of what constitutes a "series" is important, since many tax-planning strategies involve a carefully structured sequence of transactions. Even if the primary purpose of the series is not tax avoidance, a particular transaction in the series may still constitute an avoidance transaction. GAAR may apply to deny the tax benefit if the transaction is found to constitute abusive tax avoidance under subsection 245(4). There is no need for every transaction in the series to be an avoidance transaction. Similar to the determination of a tax benefit, whether or not a transaction is an avoidance transaction is a question of fact, and the taxpayer bears the burden of proof.[126]

125 Ibid., at paragraph 21.

126 Ibid., at paragraph 63.

In contrast to the concession of tax benefits, not many taxpayers readily admitted that the impugned transactions were avoidance transactions. Of the 35 cases with tax benefits, the taxpayer conceded the existence of an avoidance transaction in 9 cases; of the remaining 26 cases, the Tax Court found the transaction to be an avoidance transaction in 17 cases.

Taxpayers seem to be more willing to concede an avoidance transactions since *Canada Trustco*. They did so in 4 out of 20 cases with tax benefits (20 percent) before *Canada Trustco*, with GAAR applying in none of the 4, and in 5 out of 15 cases with tax benefits (33 percent) after *Canada Trustco*, with GAAR applying in 3 of the 5 (60 percent). Among the cases in which taxpayers did not concede an avoidance transaction, such a transaction was found in 11 out of 17 cases with tax benefits (65 percent) before *Canada Trustco*, with GAAR applying in 7 of the 11 (64 percent), and in 6 out of 11 cases with tax benefits (55 percent) after *Canada Trustco*, with GAAR applying in 3 of the 6 (50 percent).

The question of a series of transactions was not a controversy in most GAAR cases: 13 out of 20 cases with tax benefits (65 percent) before *Canada Trustco* and 11 out of 15 cases with tax benefits (73 percent) after *Canada Trustco*. Among the cases in which GAAR applied, as shown in table 6, 3 were concerned with the question of a series.

Misuse or Abuse

The final step in the GAAR analysis is the two-stage misuse and abuse analysis: a textual, contextual, and purposive interpretation of the provisions that were relied upon by the taxpayer in obtaining the tax benefit; and a determination as to whether the avoidance transaction frustrates the purpose of those provisions.[127]

Of the 26 cases with avoidance transactions, misuse and/or abuse was found in 13 (50 percent): 7 out of 15 cases (47 percent) before *Canada Trustco*, and 6 out of 11 cases (55 percent) after *Canada Trustco*. The Tax Court applied both abuse and misuse tests in 8 out of 15 cases with avoidance transactions (53 percent) before *Canada Trustco*, with GAAR applying in 3 of the 8 (38 percent), and 7 out of 11 such cases (64 percent) after *Canada Trustco*, with GAAR applying in 3 of the 7 (43 percent). Of the remaining 11 cases with avoidance transactions, the court applied only the abuse test in 4 out of 6 cases (67 percent) before *Canada Trustco*, with GAAR applying in all 4 (100 percent), and in 4 out of 4 cases (100 percent) after *Canada Trustco*, with GAAR applying in 3 of the 4 (75 percent). (See table 7.) The court applied the misuse test only in *Donohue*,[128] a decision that preceded *Canada Trustco* and in which GAAR was not applied.

Of the 26 cases with avoidance transactions, the Tax Court adopted a contextual and purposive interpretation of statutory provisions in 5 out of 15 cases (33 percent) before *Canada Trustco*, with GAAR applying in 1 of the 5 (20 percent), and in 7 out of 11 cases (64 percent) after *Canada Trustco*, with GAAR applying in 4 of the 7 (57 percent).

127 Ibid., at paragraphs 36-43 et seq.

128 *Donohue Forest Products Inc. v. The Queen*, 2001 DTC 823; aff'd. 2002 FCA 422.

TABLE 6 Avoidance Transactions in GAAR-Applied Cases, Tax Court of Canada, 1997-2009

Case	Year	Judge (years on Tax Court)[a]	Avoidance transaction conceded	Avoidance transaction found	Series of transactions		
					No controversy on this issue	Series found under subsection 248(10)	Attention to time between transactions
McNichol	1997	Bonner (14)		Yes			
RMM	1997	Bowman (6)		Yes			
Nadeau	1999	Tardif (5)		Yes	Yes		
OSFC Holdings[b]	1999	Bowie (4)		Yes		Yes	
Duncan	2001	Bowie (6)		Yes	Yes		
Fredette	2001	Archambault (9)		Yes	Yes		
Mathew[b]	2002	Dussault (12)		Yes		Yes	
Ceco	2006	Bonner (23)		Yes	Yes		
Desmarais	2006	Archambault (14)		Yes	Yes		Yes
Lipson	2006	Bowman (15)	Yes		Yes		Yes
Copthorne	2007	Campbell (7)		Yes		Yes	
Antle	2009	Miller (8)	Yes	Yes	Yes		
Lehigh Cement	2009	Mogan (21)	Yes		Yes		

[a] Years on the court as at the time the case was decided.
[b] *OSFC Holdings* and *Mathew* involved the same transactions.

With respect to materials considered by the Tax Court, both extrinsic evidence and the scheme of the Act were considered in 7 out of 15 cases with avoidance transactions (47 percent) before *Canada Trustco* and 7 out of 11 cases (64 percent) after *Canada Trustco*. As shown in table 7, in cases where extrinsic evidence was considered, GAAR was applied in 3 of the 7 cases (43 percent) before *Canada Trustco* and 5 of the 7 cases (71 percent) after *Canada Trustco*. In cases where the scheme of the Act was considered, GAAR was applied in 4 of the 7 cases (57 percent) before *Canada Trustco* and 3 of the 7 cases (43 percent) after *Canada Trustco*.

The Tax Court considered legal history in 4 out of 15 cases with avoidance transactions (27 percent) before *Canada Trustco*, with GAAR applying in 1 of the 4 (25 percent), and in 4 out of 11 cases (36 percent) after *Canada Trustco*, with GAAR applying in 2 of the 4 (50 percent). The court did not consider explanatory notes in many cases: 2 out of 15 cases with avoidance transactions (13 percent) before *Canada Trustco*, with GAAR applying in neither of those cases, and 3 out of 11 cases (27 percent) after *Canada Trustco*, with GAAR applying in all 3 (100 percent).

Exploration of Judicial Attributes

As described above, the 37 GAAR cases in this study were decided by 19 Tax Court judges. Among the judges, 6 decided only cases in the pre-*Canada Trustco* era, while 6 decided only cases in the post-*Canada Trustco* era. The 7 judges who decided cases in both periods are Archambault J (3 pre-*Canada Trustco*; 1 post-*Canada Trustco*), Bell J (1; 2), Bonner J (2; 1), Bowman J (4; 2), Campbell J (1; 2), Miller J (2; 1), and Mogan J (1; 1).

Voting Record

As shown in table 8, Bowman J decided the most GAAR cases—a total of 6. Most of the judges decided only one GAAR case—11 of 19 belong to this group. No judge ruled that GAAR applied in more than two cases. Bowman J is in this group (applying GAAR in 2 of his 6 cases) along with Archambault J (2 out of 4), Bonner J (2 out of 3), and Bowie J (2 out of 2). Bowman J had the most cases in which GAAR was not applied (4 out of 6), while Bell J held that GAAR did not apply in any of his three cases.

Personal and Societal Attributes of Judges

Data on the attributes of the individual judges are set out in table 9 and discussed further below.

Gender

Fifteen of the 19 judges are men, and most of the GAAR-applied cases were decided by male judges: all 7 of the cases before *Canada Trustco*, and 5 out of 6 of the cases after *Canada Trustco*. Before *Canada Trustco*, 19 of the 21 GAAR cases were decided by male judges, and, as noted, GAAR was applied in 7 of those cases. Thus, it follows that the remaining 2 cases were decided by female judges, who held that GAAR did not apply in either case. Twelve of the 16 cases decided after *Canada Trustco* were

TABLE 7 Judicial Decision Making on Misuse and Abuse in GAAR-Applied Cases, Tax Court of Canada, 1997-2009

			GAAR applied			Materials considered			
Case	Year	Judge (years on Tax Court)[a]	Abuse and misuse tests	Only abuse test	Contextual and purposive interpretation	Extrinsic evidence	Scheme of the Act	Legal history	Explanatory notes
McNichol	1997	Bonner (14)	Yes			Yes	Yes	Yes	
RMM	1997	Bowman (6)		Yes		Yes	Yes		
Nadeau	1999	Tardif (5)		Yes					
OSFC Holdings	1999	Bowie (4)	Yes				Yes		
Duncan	2001	Bowie (6)		Yes	Yes		Yes		
Fredette	2001	Archambault (9)		Yes					
Mathew	2002	Dussault (12)	Yes			Yes			
Ceco	2006	Bonner (23)		Yes		Yes			
Desmarais	2006	Archambault (14)		Yes	Yes	Yes	Yes		
Lipson	2006	Bowman (15)	Yes		Yes				
Copthorne	2007	Campbell (7)	Yes		Yes	Yes	Yes	Yes	Yes
Antle	2009	Miller (8)		Yes		Yes	Yes	Yes	Yes
Lehigh Cement	2009	Mogan (21)	Yes		Yes	Yes			Yes

[a] Years on the court as at the time the case was decided.

TABLE 8 Decision Record for Tax Court of Canada Judges in GAAR Cases, 1997-2009

		GAAR cases					
				Pre-*Canada Trustco*		Post-*Canada Trustco*	
Judge[a]	Year appointed (retired)	Total	GAAR applied	Total	GAAR applied	Total	GAAR applied
Bowman	1991 (2008)	6	2	4	1	2	1
Archambault	1992	4	2	3	1	1	1
Bonner	1983 (2006)	3	2	2	1	1	1
Miller	2001	3	1	2	0	1	1
Campbell	2000	3	1	1	0	2	1
Bowie	1995	2	2	2	2	0	0
Mogan	1988 (2004)	2	1	1	0	1	1
Dussault	1990 (2006)	1	1	1	1	0	0
Tardif	1994	1	1	1	1	0	0
Bell	1991 (2006)	3	0	1	0	2	0
Beaubier	1990 (2007)	1	0	1	0	0	0
Hamlyn	1990 (2002)	1	0	1	0	0	0
Lamarre Proulx	1988 (2008)	1	0	1	0	0	0
Lamarre	1993	1	0	0	0	1	0
Little	2002	1	0	0	0	1	0
Paris	2002	1	0	0	0	1	0
Woods	2003	1	0	0	0	1	0
Rossiter	2006	1	0	0	0	1	0
Boyle	2007	1	0	0	0	1	0

[a] Judges are separated into two groups: the first group includes those who applied GAAR in one or more cases; the second group includes judges who applied GAAR in none of their cases.

decided by male judges, with GAAR applying in 5 of those cases. Of the 4 remaining cases decided by female judges, GAAR was applied in 1 case.

Graduate Studies

Twelve of the 19 judges did not go to graduate school, and most of the GAAR-applied cases were decided by such judges. Before *Canada Trustco*, 15 of the 21 cases were decided by judges with no background in graduate studies, and GAAR was applied in 6 of those cases. Of the remaining 6 cases, decided by judges with such background, GAAR was applied in 1 case. After *Canada Trustco*, 11 of the 16 cases were decided by judges with no graduate studies background, and GAAR was applied in 4 of those cases. Of the remaining 5 cases, decided by judges with such background, GAAR was applied in 2 of those cases.

Prior Professional Experience

Thirteen of the 19 judges had not founded a law firm before being appointed to the court, and most of the GAAR-applied cases were decided by judges in this group: 6 out of 7 cases before *Canada Trustco*, and 4 out of 6 cases after *Canada Trustco*. Before

TABLE 9 Personal and Societal Attributes of Tax Court of Canada Judges, GAAR Cases, 1997-2009

		GAAR applied		Attributes					
Judge[a]	GAAR cases, total	Pre-*Canada Trustco*	Post-*Canada Trustco*	Gender	Graduate studies	Founder of law firm	Taught law	Appointed by a Liberal prime minister	Regional ties
Bowman	6	1	1	Male	No	Yes	Yes	No	Ontario
Archambault	4	1	1	Male	No	No	Yes	No	Quebec
Bonner	3	1	1	Male	No	No	No	Yes	Ontario
Campbell	3	0	1	Female	Yes	Yes	No	Yes	Others
Miller	3	0	1	Male	Yes	No	Yes	Yes	Others
Bowie	2	2	0	Male	No	No	No	Yes	Ontario
Mogan	2	0	1	Male	No	No	Yes	No	Ontario
Dussault	1	1	0	Male	Yes	No	Yes	No	Quebec
Tardif	1	1	0	Male	No	No	No	Yes	Quebec
Bell	3	0	0	Male	No	Yes	Yes	No	Other
Beaubier	1	0	0	Male	Yes	Yes	Yes	No	Other
Boyle	1	0	0	Male	No	No	Yes	No	Ontario
Hamlyn	1	0	0	Male	No	Yes	No	No	Ontario
Lamarre	1	0	0	Female	Yes	No	No	No	Quebec
Lamarre Proulx	1	0	0	Female	Yes	No	No	No	Quebec
Little	1	0	0	Male	No	Yes	No	Yes	Other
Paris	1	0	0	Male	No	No	No	Yes	Other
Rossiter	1	0	0	Male	No	No	No	No	Other
Woods	1	0	0	Female	Yes	No	No	Yes	Ontario

[a] Judges are separated into two groups: the first group includes those who applied GAAR in one or more cases; the second group includes judges who applied GAAR in none of their cases.

Canada Trustco, 13 of the 21 cases were decided by judges who had not founded a law firm, and, as noted, GAAR was applied in 6 of those cases. Of the remaining 8 cases decided by judges who had founded a law firm, GAAR was applied in 1 case. After *Canada Trustco*, 9 of the 16 cases were decided by judges who had not founded a law firm, with GAAR applying in 4 of those cases. Of the remaining 7 cases decided by judges who had founded their own law firm, GAAR was applied in 2 of those cases.

Law Teaching Experience

Eight of the 19 judges had prior experience teaching law on a full-time or part-time basis. More GAAR-applied cases were decided by judges with law teaching experience after *Canada Trustco* than before *Canada Trustco*: 4 out of 6 cases after *Canada Trustco*, and 3 out of 7 cases before *Canada Trustco*. Before *Canada Trustco*, 13 of the 21 cases were decided by judges with law teaching experience, and GAAR was applied in 3 of those cases. Of the remaining 8 cases decided by judges without law teaching experience, GAAR was applied in 4 of those cases. After *Canada Trustco*, 8 of the 16 cases were decided by judges with law teaching experience, and GAAR was applied in 4 of those cases. Of the remaining 8 cases decided by judges without law teaching experience, GAAR was applied in 2 of those cases.

Political Ties

Eight of the 19 judges were appointed by a Liberal prime minister, and about half of the GAAR-applied cases were decided by judges in this group: 4 out of 7 cases before *Canada Trustco*, and 3 out of 6 cases after *Canada Trustco*. Before *Canada Trustco*, 8 of the 21 cases were decided by judges appointed by a Liberal prime minister, and, as noted, GAAR was applied in 4 of those cases. Of the remaining 13 cases decided by judges appointed by a Progressive Conservative/Conservative prime minister, GAAR was applied in 3 of those cases. After *Canada Trustco*, 7 of the 16 cases were decided by judges appointed by a Liberal prime minister, with GAAR applying in 3 of those cases. Of the remaining 9 cases decided by judges appointed by a Progressive Conservative/Conservative prime minister, GAAR was applied in 3 of those cases.

Regional Ties

Seven of the 19 judges had ties to Ontario and 5 had ties to Quebec, with the remaining 7 having ties to other provinces or regions of Canada; yet at least half of the GAAR-applied cases were decided by judges with regional ties to Ontario: before *Canada Trustco*, 4 out of 7 cases, and after *Canada Trustco*, 3 out of 6 cases. Most of the pre-*Canada Trustco* cases were decided by judges with ties to Ontario: 10 out of 21 cases, with GAAR applying in 4 of those cases. Of the remaining 11 cases, 6 were decided by judges with ties to Quebec, with GAAR applying in 3 of those cases, and 5 by judges with ties to other parts of Canada, with GAAR applying in none of those cases. Eight of the 16 post-*Canada Trustco* cases were decided by judges with regional ties outside Ontario and Quebec, with GAAR applying in 2 of those cases. Of the remaining 8 post-*Canada Trustco* cases, 6 were decided by judges with ties to Ontario,

with GAAR applying in 3 of those cases, and 2 were decided by judges with ties to Quebec, with GAAR applying in 1 case.

Linking Case Outcomes and the Attributes of Judges

To explore possible linkages between the attributes of judges and the case outcomes, cumulative averages of the application of GAAR by the Tax Court and by judges who have particular personal and societal attributes are presented side by side, as shown in table 10. All attributes selected on the basis of the exploratory analysis above fit the ebb and flow of the Tax Court's GAAR application rate before and after the release of *Canada Trustco* in 2005—a dip, followed by a bounce. All except one of the selected attributes—law teaching experience—end the study period with cumulative averages of GAAR application rates higher than that of the Tax Court, and hence they could be considered dominant attributes at this point in the evolution of the jurisprudence. Law teaching experience is currently on the margin, on the basis of the very small set of GAAR cases available for this study, but as more cases are decided, the attribute profile may change in the future.

In addition to trying to ascertain the dominance of selected attributes, our exploratory analysis opens the door to further conjecture and paves the way for future research when more GAAR cases become available. Several judges in our study who possess certain attributes are not among the majority in this respect but have more than their proportionate share of cases in which GAAR has been applied. From this vantage point, a number of attributes—in particular, law teaching experience, political ties, and regional ties—appear to be prime targets for future research on sources of minority influence on judicial decision making in GAAR cases. More specifically, judges who have law teaching experience, were appointed by a Liberal prime minister, and have ties to Ontario seem to be candidates for a higher propensity to find that GAAR applies.

Combining the observations from the exploration of the case attributes and the judicial attributes, a back test using the existing post-*Canada Trustco* data can be performed. Of cases with at least one of the following three case attributes—a reassessment amount of $1 million or more, a corporate taxpayer, or a tax benefit involving tax credits and/or exemptions—there is a 50:50 split on GAAR decisions between judges with either Liberal or Ontario ties. Bonner, Miller, and Mogan JJ applied GAAR in such cases, while Bowman, Boyle, and Woods JJ did not apply GAAR, and Campbell J had a 1:1 record.

Answering the Research Questions

The above data analysis provides some, albeit not definitive, evidence to answer the three research questions.

To what extent has GAAR been a game changer in terms of how courts approach tax-avoidance cases?

TABLE 10 Analysis of Judicial Attributes in Light of GAAR Case Outcomes, Tax Court of Canada, 1997-2009

Year	Total number of cases decided	GAAR-applied cases	Cumulative percentage of GAAR-applied cases	Cumulative percentage of GAAR-applied cases, by attributes of deciding judges					
				Appointed by a Liberal prime minister	Did not found a law firm	Ties to Ontario	Male	Did not attend graduate school	Taught law
1997	2	2	100	100	100	100	100	100	100
1998	1	0	67	100	100	100	67	100	50
1999	3	2	67	100	100	75	67	80	33
2000	1	0	57	75	75	60	57	67	33
2001	6	2	46	80	63	50	46	50	29
2002	3	1	44	67	55	44	44	46	30
2003	3	0	37	50	50	40	39	43	25
2004	1	0	35	50	50	40	37	40	23
2005	3	0	30	50	46	36	33	35	20
2006	5	3	36	50	53	46	38	41	28
2007	3	1	35	50	50	46	38	41	28
2008	2	0	33	46	44	46	36	38	28
2009	4	2	35	47	45	44	39	38	33

There is some statistical evidence that supports the conclusion that GAAR has been a game changer to some extent. In post-2005 cases that held that GAAR applied, the Tax Court more frequently turned to contextual and purposive interpretation, and the consideration of legislative history and explanatory notes (see table 7). This coincides with the *Canada Trustco* effect. Post-2010 Tax Court cases appear to confirm the trend of moving away from literal interpretation. For example, the legislative scheme and history were considered in *Triad Gestco*, *1207192 Ontario Limited*, and *Global Equity Fund Ltd.*[129] Furthermore, judges who had served on the Tax Court for a decade or more at the time of the decision seemed more likely to rule in favour of GAAR after *Canada Trustco* (see table 9).

Are elements of certainty emerging in the application of GAAR?

The statistical results of case attributes indicate that

- GAAR has been fairly consistently applied to loss utilization but not to other types of transactions;
- the existence of a tax benefit is admitted by the taxpayer in most cases;
- when the taxpayer does not concede the existence of a tax benefit, the GAAR application rate tends to rise;
- taxpayers seem to be more willing to concede the existence of an avoidance transaction since *Canada Trustco*; and
- the existence of a series of transactions is generally not a controversial issue.

The research findings confirm that the only certainty is the unpredictability of the case outcome at the Tax Court. This is what we would expect, since neither the taxpayer nor the Crown would waste time and money going to court if the outcome were clearly predictable.

Is there a smell test?

The empirical findings support a qualified "yes" in answer to this question. An abuse analysis was required in 26 out of the 37 cases. Not many of these cases considered legislative history, extrinsic materials, the scheme of the Act, or explanatory notes. Many of the cases, especially those that predate *Canada Trustco*, reached a conclusion without careful deliberation on the purpose of the provisions of the Act or the Act read as a whole, and without a reasoned discussion of why the impugned avoidance transaction was considered to be abusive or not. Moreover, in some cases, it seems that the particular judge who hears the appeal may affect the outcome. For example, as noted earlier, Bell J never ruled in favour of applying GAAR, and Bowie J never ruled against it. This intuitively confirms that some sort of smell test is at play.

129 See supra note 119.

On the basis of an exploratory analysis of the data on judges' attributes, a judge's sense of "fiscal morality" appears to be influenced by his or her experience on the Tax Court, gender, prior graduate studies, law teaching experience, experience of founding a law firm, regional ties, and/or the political party making the appointment. Our analysis suggests that a judge with any combination of the following attributes—male, with no background in graduate studies, who previously taught law, who was not a founder of a law firm, who has Ontario ties, and who was appointed by a Liberal prime minister—may be more likely to apply GAAR since the decision in *Canada Trustco*. We believe it will be worthwhile to examine these attributes further when more cases become available.

LIMITATIONS AND IMPLICATIONS

Limitations

Our study provides a statistical overview of the GAAR decisions by the Tax Court from 1997 through 2009 and the background of judges who made those decisions. Our findings may confirm certain conclusions that others had already drawn regarding GAAR cases at the Tax Court, but may also provide some new insights. Before discussing the potential implications of our study, we would like to point out some limitations of those findings.

First, the number of cases—37—provides a very small data set for empirical analysis of this kind. Because the cases were decided by 19 different judges, we can only speculate about the factors that influenced their decisions, and the extent to which individual judges may apply a smell test in their decision making in GAAR cases.

Second, each case is different, and that makes the challenge of drawing generalized conclusions even more difficult.

Third, the research is limited to the published decisions. The data set does not include the materials filed with the court by the parties or transcripts of the court hearings. In addition, the overview based on the quantitative data was not further explored by qualitative analysis. In particular, no formal interviews were conducted with any of the judges, including Donald Bowman (although he did share his insights about GAAR with the study group).

However, the study offers hope for the future: as the body of case law grows, more data will become available for further analysis. Building on this initial experience in conducting an empirical analysis of GAAR cases, a combination of quantitative and qualitative methods can be used to analyze future data in a more nuanced way. With better analyses in the future, the tax community and the judiciary will be better informed.

Smell Tests and Statutory Interpretation

The research findings confirm that judicial uncertainty is a reality. At the same time, GAAR is increasingly grounded in statutory interpretation. It is true that facts matter in GAAR cases. The existence of a tax benefit and an avoidance transaction are questions of fact, and the taxpayer bears the burden of proof. Less than a third of the

GAAR cases were resolved when the taxpayer successfully refuted these questions. However, 26 of 37 cases moved on to the misuse or abuse stage, which is primarily an exercise in statutory interpretation. After the Supreme Court of Canada's decision in *Canada Trustco*, Tax Court judges paid more attention to a contextual and purposive interpretation of the relevant provisions of the Act. With the additional guidance provided by the Supreme Court in *Copthorne*, this trend is expected to continue.

Red Flags for GAAR

Our quantitative research does not focus on identifying red flags for GAAR. However, after studying the 37 Tax Court decisions up to 2010, post-2010 Tax Court decisions, and GAAR decisions at the Federal Court of Appeal and the Supreme Court of Canada, it is possible to observe some trends or patterns emerging.

With respect to types of transactions,[130] GAAR has been found to apply to

- loss transfers (*Mathew*, *MacKay*[131]);
- synthetic losses (*Triad Gestco*, *1207192 Ontario Limited*);
- "naked surplus strip" transactions[132] (*McNichol*, *Desmarais*);
- Quebec shuffle or interprovincial tax arbitrage (*OGT Holdings*) (but not the "Ontario shuffles" in *Husky Energy* and *Canada Safeway*);
- duplication of paid-up capital (*Copthorne*);[133] and
- spousal rollover and mortgage transactions (*Lipson*).

GAAR has been found not to apply to transactions known as

- sale-leaseback (*Canada Trustco*);
- surplus strip plus income splitting (*Evans*);
- treaty shopping (*MIL Investments*);[134]

130 For further discussion of the grouping of GAAR cases, see Powrie, supra note 6; Bowman et al., ibid.; and Kroft and Olsen, ibid.

131 *MacKay v. The Queen*, 2007 TCC 94; rev'd. 2008 FCA 105.

132 Powrie, supra note 6.

133 GAAR was found not to apply in *Collins & Aikman*, supra note 59.

134 *Canada v. MIL (Investments) SA*, 2007 FCA 236; aff'g. *MIL (Investments) SA*, supra note 80. In *Garron*, supra note 68, GAAR was an alternative argument. The Federal Court of Appeal held that GAAR would not apply if the trust were found to be resident in Barbados. The Supreme Court of Canada did not consider this argument after finding that the trusts were resident in Canada, not Barbados, under common-law principles. But the Supreme Court made it clear that it should not be understood as endorsing the reasons of the Federal Court of Appeal on those matters. It should be noted that GAAR was not argued in two recent treaty-shopping cases—*Canada v. Prévost Car Inc.*, 2009 FCA 57; aff'g. 2008 TCC 231; and *Velcro Canada Inc. v. The Queen*, 2012 TCC 57—where the arguments were centred on the meaning of "beneficial ownership." For further discussion on GAAR and treaty shopping, see Kimberly Brown, "Tax

- tiered financing (*Univar*);
- interest-coupon stripping (*Lehigh Cement*);
- capital gain strip or hybrid asset and share sales (*Geransky*, *Donohue*, *McMullen*);[135] and
- recognition of a terminal loss (*Landrus*).

With respect to tax attributes, GAAR has been found to apply to transactions that involve

- tax attribute trading (*Mathew*, *MacKay*);
- tax attribute importation (*Duncan*);[136]
- tax attribute exportation (*OGT Holdings*, *Antle*); and
- double-counting of tax attributes (*Copthorne*).

GAAR has been found not to apply to

- transactions that created tax attributes (*Canada Trustco*, *Lehigh Cement*); and
- transactions that resulted in the realization of a tax attribute (terminal loss recognition in *Landrus*).

Some factors that are alleged by the government to be indicators of abusive tax avoidance have been rejected as being not significant or not relevant. For example, *Canada Trustco* establishes that the complexity of transactions and the involvement of indifferent third parties should not, in themselves, "tweak the nose upward" on the smell test.[137] Similarly, the fact that the transactions were designed to operate like clockwork has been found to be irrelevant. Bowman CJ stated in *Evans*:

> I do not think that it can be said that there is an abuse of the provisions of the *Act* where each section operates exactly the way it is supposed to. The Crown's position seems to be predicated on the view that since everything worked like clockwork there

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Treaty Shopping and the GAAR: MIL (Investments) S.A. v. The Queen" (2008) 66:1 *University of Toronto Faculty of Law Review* 33-63; Nathalie Goyette, "Tax Treaty Abuse: A Second Look" (2003) 51:2 *Canadian Tax Journal* 764-805; and Matias Milet and Peter Repetto, "Canada-U.S. Tax Treaty Issues: Anti-Hybrid Rules, the GAAR, and the U.S. Dual Consolidated Loss Rules" (2011) 63:12 *Tax Notes International* 889-901.

135 *McMullen v. The Queen*, 2007 TCC 16.

136 *Duncan et al. v. The Queen*, 2001 DTC 96 (TCC); aff'd. 2002 DTC 7172 (FCA) (sub nom. *Water's Edge Village Estates (Phase II) Ltd. v. The Queen*).

137 Miller J stated in *Canada Trustco*, supra note 27, at paragraph 93, "This is one of those paradoxes where the sheer complexity of the series of transactions involving many players tweaks the nose upward on that least scientific of analysis known, in tax vernacular, as the smell test, yet legislation and case precedent guide analysis down a more structured and deliberate path past the olfactory sense and into the more certain realm of reason, though less precise purview of policy, where the GAAR debate, in this case, rages."

> must have been an abuse. The answer to this position is, of course, that if everything had not worked like clockwork we would not be here.[138]

Similarly, a taxpayer's motivation to minimize tax is irrelevant. For example, LeBel J stated in *Lipson* that an avoidance purpose is needed to establish a violation of GAAR when subsection 245(3) is in issue, but is not determinative in the subsection 245(4) analysis.[139] The lack of economic substance is not, on its own, sufficient basis for finding abuse.[140] The potential loss of tax revenue is not a factor in GAAR decisions. However, the concern with the relative ease of duplicating avoidance transactions in the current business environment presumably underlies the decisions in *Mathew*, *Lipson*, and *Copthorne*.

Appeals of Tax Court Decisions

Our findings confirm that the Tax Court of Canada plays an important role in interpreting GAAR. As shown in table 11, only two GAAR decisions of the Tax Court have been overturned by the Federal Court of Appeal (by Sharlow J in both cases) and none have been overturned by the Supreme Court of Canada. Of the 37 Tax Court decisions, 18 were appealed to the Federal Court of Appeal. Among the 18 appealed decisions, GAAR was applied in 6 cases, and the decisions were appealed by the taxpayer. Of the 9 pre-*Canada Trustco* cases, 6 were decided by judges with at least a decade on the Tax Court at the time of the decision. Of the 9 post-*Canada Trustco* cases, only 3 were decided by judges with such experience.

Our findings also indicate that the preappointment experience of the judges matters, gender matters, and expertise matters. One implication of these findings is that the Tax Court may consider strengthening the development of expertise in GAAR through assigning cases or training. Another implication is to appoint judges with more diverse backgrounds, including gender.

In addition, we wish to note that some judges stand out in their influence on the development of GAAR jurisprudence. Bowman J decided the largest number of GAAR cases and was never overturned by an appellate court. As noted above, Sharlow J wrote the only two Federal Court of Appeal decisions that overturned Tax Court decisions, and both were written after the Supreme Court had signalled in *Canada Trustco* that appellate tribunals should not interfere with a decision of that court—absent a palpable and overriding error—provided that the Tax Court judge has proceeded on a proper construction of the provisions of the Act and on findings supported by the evidence.[141] Rothstein J wrote the first Federal Court of Appeal decision on GAAR in *OSFC Holdings*, setting the standard for analyzing GAAR until

138 *Evans*, supra note 55, at paragraph 29.

139 *Lipson*, supra note 18, at paragraph 38.

140 *Canada Trustco*, supra note 2, at paragraph 60.

141 Ibid., at paragraph 46.

TABLE 11 Appeals of Tax Court of Canada Decisions in GAAR Cases, 1997-2009

Case	Year	Judge (years on Tax Court)[a]	GAAR applied in Tax Court of Canada decision?	Tax Court decision overturned by Federal Court of Appeal?	Federal Court of Appeal decision overturned by Supreme Court of Canada?
OSFC Holdings	1999	Bowie (4)	Yes	No	
Canadian Pacific	2000	Bonner (17)	No	No	
Duncan	2001	Bowie (6)	Yes	No	
Donohue	2001	Archambault (9)	No	No	
Jabin Investments	2001	Hamlyn (11)	No	No	
Imperial Oil	2002	Mogan (14)	No	No	
Mathew	2002	Dussault (12)	Yes	No	No
Canada Trustco	2003	Miller (2)	No	No	No
CIT Financial	2003	Bowman (12)	No	No	
MIL	2006	Bell (15)	No	No	
Lipson	2006	Bowman (15)	Yes	No	No
Copthorne	2007	Campbell (7)	Yes	No	No
MacKay	2007	Campbell (7)	No	Yes	
Landrus	2008	Paris (6)	No	No	
Remai	2008	Rossiter (2)	No	No	
Collins & Aikman	2009	Boyle (2)	No	No	
Garron	2009	Woods (6)	No	No	No[b]
Lehigh Cement	2009	Mogan (21)	Yes	Yes	

[a] Years on the court as at the time the case was decided.
[b] GAAR was not a main issue in the appeal, and the Supreme Court declined to address it.

the Supreme Court's decision in *Canada Trustco* and its most recent decision in *Copthorne*.

SKETCHING THE BIG PICTURE WHILE LOOKING FORWARD

Our exploratory study is, we hope, a small step on the long road to a full understanding of the scope of GAAR in action, and the relationship between judges' attributes and their judicial decisions on GAAR. The study confirms that GAAR is indeed a game changer, but a modest one. Between 1988 and 2010, there were only 37 Tax Court decisions on GAAR, fewer than two per year. The initial anxiety about the uncertainty of GAAR was not translated into a large number of court challenges over the use of GAAR by the government. The GAAR-mandated shift toward purposive characterization of transactions and statutory interpretation is steady and slow. Even after the Supreme Court's decision in *Canada Trustco*, Tax Court judges did not carefully follow the textual, contextual, and purposive interpretation approach in about one-third of the cases. The economic substance of transactions was ruled out by the Supreme Court as a relevant factor in general and was not carefully considered as a basis for finding abuse in any GAAR cases. The fact that the Supreme Court

was asked to pronounce on whether or not GAAR applies to the highly synthetic transactions in *Copthorne* means that the game of tax planning is affected (though not changed) by the GAAR trump card. The influence of judicial experience with GAAR is limited, since many Tax Court judges decided only one GAAR case. Judicial uncertainty remains. There is no reason to doubt that judicial decision making will continue to evolve and shape the scope of GAAR in action.

Our experience with this modest, exploratory empirical study shows that such a line of inquiry requires a combination of technical knowledge about the targeted area of law and creativity in empirical research design. The relationship between the two is symbiotic yet synergistic, and the execution is more art than science. Although our study provides some conjectures on some of the "big picture" questions, the implications of our findings should not be exaggerated, owing to the small data set. On the basis of the exploration of case attributes, interesting questions emerge for future research when more cases become available for analysis. The GAAR application rate appears to rise more for cases with a reassessment amount of $1 million or more in the post-*Canada Trustco* period, and to increase for cases with corporate taxpayers in the period. Also, the jury is still out on whether the Tax Court may be more or less inclined to hold that GAAR applies in cases involving tax credits and exemptions after *Canada Trustco* (with a lower GAAR application rate of 40 percent compared to 75 percent before *Canada Trustco*, but as a feature of 67 percent [4 out of 6] post-*Canada Trustco* cases in which GAAR applied). These notions are good candidates to be tested with more case data in future empirical studies. We are hopeful that future research will bear more fruit as the number of cases grows with the passage of time.