Toronto Law Journal

Revival of Dormant Law: Unconscionable Procurement

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Death can be an uncomfortable topic of conversation, but its inevitability necessitates prudent planning by way of a will. Even the best laid (estate) plans can go awry, especially when complex familial dynamics are exposed and accentuated in estate litigation.

Such was the case in a decision heard by the Court of Appeal for Ontario. In *Gefen Estate v Gefen* 2022 ONCA 174, the court noted that the family dynamics were discordant and characterized by conflict. Elias and Henia Gefen, were married spouses and Holocaust survivors who immigrated to Canada in the early 1950s. Over the course of their marriage, they accumulated a considerable real estate portfolio and amassed a sizable estate. The Gefens had three children: Harvey, Harry, and Yehuda (also known as Eddy). Elias and Henia had executed mirror wills (typical for spouses). On the passing of Elias, his estate passed to Henia, and she was named as the sole executor. Henia sought to convey almost all of the Gefens' real estate portfolio and assets to Harvey, thereby substantially excluding Harry and Eddy from sharing in the familial assets.

Harry and Eddy made three key claims, of which the third pertains to a previously dormant equitable doctrine:

1. In making their mirror wills, Elias and Henia Gefen had effectively made a mutual wills agreement, which prevented either surviving spouse from making changes to their will without the others' consent;
2. A secret trust was created by Elias two months prior to his passing wherein all assets received by Harvey from Henia were to be held in trust for the three brothers;
3. Henia's *inter vivos* transfers to Harvey were impermissible due to the application of the doctrine of unconscionable procurement.

The Court of Appeal for Ontario rejected all of the claims outlined above.

Application of Equitable Doctrines in Ontario

The move towards integration of equitable principles in Canadian law has perhaps been borne out of a recognition that the rigidity and inflexibility of a court of law alone would be insufficient in addressing case-specific challenges. In order to better achieve justice, each individual case needed to be addressed by an arbiter of facts. The very nature of legislative law-making makes it almost impossible to have case-specific judgments. Rather, the dual application of equity and law allows the courts to render decisions that are both legally precise, but also achieve justice.

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An unfortunate by-product of the fusion of the chancery court (English courts of equity) and the court of law is the dormancy of long developed equitable doctrines. A given doctrine that could have been well developed, has simply gone by the wayside. Such a dormancy would not render the doctrine invalid or inapplicable. An example of a dormant equitable doctrine is the doctrine of unconscionable procurement which was historically used by those contesting *inter vivos* transfers made by a testator. In both the lower trial decision and in the appeal in *Gefen Estate*, Harry relied on the doctrine to reverse portions of the *inter vivos* gift made by Henia to her son Harvey.

Unconscionable Procurement in Ontario

The doctrine of unconscionable procurement had long been dormant in Ontario, having last been referred to by the Court of Appeal for Ontario in decisions dating in 1880[2] and 1913[3].

If the doctrine of unconscionable procurement is applied, it has the effect of rendering a transfer of wealth as voidable. For the doctrine to apply, the objector has the onus of demonstrating two elements:

1. A significant benefit; and
2. The active involvement of the person receiving the benefit in the arrangement of the transfer.

If these two elements are set out, there is then a rebuttable presumption that the donor of the gift is not understanding the transaction. The recipient of the benefit must then establish that the donor bestowed the gift in a voluntary and deliberate manner.

In writing for a unanimous bench, Justice Peppall noted that the decision in *Gefen Estate* "in the absence of full legal argument on the existence and desirability of the doctrine of unconscionable procurement, […] this decision should not be taken as approval or rejection of unconscionable procurement being part of the law in Ontario." Justice Peppall noted that because the issue was claimed by Henry in his appeal, the doctrine would be analyzed within the context of the case before the bench. In her decision, Justice Peppall noted that the successful application of the doctrine would serve to benefit the transferor, who in this case, was Henia Gefen. The doctrine of unconscionable procurement could not be applied to retroactively divert the gift equally among the three brothers, which was the desired outcome of Henry and Eddy's appeal.

Although the application of the doctrine of unconscionable procurement was successful in part, it did not benefit the claimants. The key takeaway from the decision is that its use to reverse an *inter vivos* gift in the lower judgment is sufficient to render its effective revival as a part of the law in Ontario. Considering that the doctrine was last applied in a Court of Appeal for Ontario case in 1913 and has since, never been outright rejected or overturned, the doctrine is valid law in Ontario.

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[2] Lavin v. Lavin, 1880 CarswellOnt 52, 27 Gr. 567 (Ont. Ch.), affirmed (1882), 7 O.A.R. 197 (Ont.C.A.)
[3] Kinsella v. Pask 1913 CarswellOnt 781, 12 D.L.R. 522, 28 O.L.R. 393 (Ont. C.A.)

Moving forward, claimants seeking to contest *inter vivos* transfers of significance will be able to seek application of the doctrine.

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A Trademark Application *Per Se* Does Not Support an Infringement or Passing Off Action

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In *2788610 Ontario Inc. v. Bhagwani*, 2022 ONSC 6098 ("*Bhagwani*"), the Divisional Court vacated an order for an interlocutory injunction issued by a motion judge in February 2022 that prohibited the Defendants from using BOMBAY FRANKIE in connection with a restaurant business (*2788610 Ontario Inc. v. Bhagwani et al*., 2022 ONSC 905). The Plaintiff sought the injunction as part of an action for trademark infringement and passing off. At the time of the injunction motion, the Plaintiff had filed several trademark applications with the Canadian Intellectual Property Office for the trademark BOMBAY FRANKIES and had begun negotiations to franchise restaurants under that name. In allowing the appeal, the Divisional Court confirmed that trademark infringement actions must relate to a *registered* trademark; and that goodwill in an alleged mark must be established to support a passing off action.

The issuance of the February injunction, and the underlying decision, was the subject of criticism for essentially the reasons the Divisional Court identified in vacating the Order — i.e., that the *Trademarks Act* explicitly limits the availability of infringement proceedings to registered marks, and that, while owners of unregistered mark can sue for passing off, they must first establish the alleged mark has acquired some reputation, usually via use in commerce.

Moreover, the test for granting an interlocutory injunction is generally considered to have a high bar. To succeed, the moving party must satisfy all three elements of the *RJR-MacDonald Inc. v Canada (Attorney General)* test: (1) a serious issue to be tried; (2) irreparable harm; and (3) the balance of convenience favours granting the injunction. Interlocutory injunctions are extraordinary remedies, and historically, courts have been reluctant to grant them, particularly in trademark disputes, where such orders can be functionally dispositive.

Bhagwani highlights an inherent tension within the Canadian trademark regime — that common law trademark rights arise under the provincial power of "property and civil rights", while trademark registration rights arise under the Federal Government's "trade and commerce" power and cannot trench on matters of provincial jurisdiction without sufficient national justification.

The *Bhagwani* Decisions

Bhagwani involved a dispute between two parties in the restaurant business over the trademark and trade name BOMBAY FRANKIE / BOMBAY FRANKIES. The Plaintiff 2788610 Ontario Inc. incorporated in October 2020 and subsequently filed a Canadian trademark application for

BOMBAY FRANKIES the same month. By early 2022, it had retained a marketing firm, chefs, and franchise lawyers to help market and launch the business but had not yet opened any restaurants. The Defendant Bhagwani, meanwhile, registered the domain name www.bombay-frankie.com, and began using the mark on social media accounts in February 2021, and the next month, incorporated a business "Bombay Frankie Inc." and filed a trademark application for BOMBAY FRANKIE. Bhagwani's first BOMBAY FRANKIE restaurant opened in July 2021. Another opened in October 2021.

In September 2021, the Plaintiff commenced an action against the Defendants, claiming trademark infringement and passing off under sections 7(b), 7(c), 19 and 20 of the *Trademarks Act* and shortly thereafter moved for an interlocutory injunction in an attempt to prohibit use of BOMBAY FRANKIE by the Defendants.

On the motion, the Plaintiff argued they had priority to register BOMBAY FRANKIE over the Defendants as the first filer, and that the Defendants were aware of the senior BOMBAY FRANKIES application because it would have appeared on a trademark search. On the first element of the *RJR-MacDonald* test, the judge found: serious issues to be tried, including that the Plaintiff was the first to file an application for BOMBAY FRANKIES and the Defendant's use did not predate this filing date, and that there were novel claims about whether claims for infringement crystalize at the time of filing or the time of registration arising from changes to the *Trademarks Act* implemented in 2019; and that there are "arguable claims for trademark infringement and passing off raised in this action". On the second element, the judge accepted the Plaintiff's arguments that it was already suffering damage due to confusion among landlords about whether the Plaintiff and Defendants were related, and that until priority issues over the trademark were finally determined, the Plaintiffs would have a significant disadvantage in establishing their own name recognition and goodwill because the Defendant had already commenced use of BOMBAY FRANKIE. On the third element, the judge recognized that the Defendants would suffer some inconvenience if ordered to stop using BOMBAY FRANKIE with two restaurant locations, but that the Defendants also operated other restaurants under a different name and that "the majority of [the Defendants'] goodwill would be attached to those other restaurants".

On appeal, the three-judge panel of the Ontario Superior Court of Justice, Divisional Court, led by Justice Nishikawa, determined the motion judge erred in the assessment of the *RJR-MacDonald* factors.

On the "serious issue" element, the court found several "errors in principle". On infringement, to determine there was a "serious issue" the motions judge must have first concluded that the Plaintiff either "had a right to the BOMBAY FRANKIES trademark merely by virtue of its application" or that application would be registered — both errors of law. First, the Court observed that trademark infringement, which is a statutory cause of action (sections 19 and 20 of the *Trademarks Act*), explicitly requires the claimant "have a ***registered trademark*** that is alleged to have been infringed". Here, the Plaintiff did not have a registration. Second, "registration is not a foregone conclusion". An application may be refused for numerous reasons. It is “an error to presume that a trademark for which an application has been filed will be registered”. Consequently, there was thus “no right that could ultimately be vindicated at trial”: “a mere application to register a trademark is insufficient to support a cause of action for trademark infringement under the *Act*”.

On passing off, the motions judge also erred because the Plaintiff’s start-up activities did not create actionable goodwill in BOMBAY FRANKIES. While unregistered trademark owners can sue for passing off without a registration, they must nevertheless prove that the mark in question has a reputation. Justice Nishikawa noted that goodwill attaches to “a name or mark as it relates to the reputation or association with the goods or services provided by the owner of the mark”. Here, the Plaintiff’s steps to develop a franchise by speaking with lawyers, marketers , landlords, and food suppliers, were “start-up activities” that did not constitute goodwill as recognized in the case law. While the Court recognized that goodwill in BOMBAY FRANKIES could exist from the perspective of potential franchisees of that business, there was no evidence on record speaking to such perspective.

On the “irreparable harm” element, the Court found the motions judge committed a “palpable and overriding error” by attributing irreparable harm to concerns expressed by the Plaintiff’s prospective landlords about confusion between the Plaintiff’s and Defendants’ businesses, and a resulting hesistancy to lease space to the Plaintiff. The Court found harm flowing from an inability to rent a particular space was quantifiable and reparable; that confusion among landlords “does not constitute confusion among customers or the public resulting in a loss of goodwill”; and that, in any event, any loss to the Plaintiff’s goodwill in BOMBAY FRANKIES would be to “prospective goodwill”, which is not cognizable — “the cause of action for passing-off protects existing goodwill”. “In order to demonstrate irreparable harm, the [Plaintiff] had to show that it had goodwill in the Bombay Frankie name and that it would lose its goodwill because of the [Defendants’] confusing use”. Moreover, absent a registered trademark or trademark use, the Court found “no basis” to find the Plaintiff was entitled to a “first mover” advantage.

Having found errors on the first two factors, the Court did not substantively engage with the “balance of convenience” element, except to comment that it may have actually favoured the Defendants, who would have been required to remove their business signage, and change their websites and social media.

Conclusion

While Canada may have a trademark registration regime that does not oblige an applicant to prove use to obtain a filing date or a registration, the Divisional Court decision in *Bhagwani* highlights the importance of coupling trademark applications with actual use to ground enforceable trademark rights.

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Closing Address Gone Wrong

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Braks v. Dundeal Canada (GP) Inc.[1] was a case that involved a slip and fall injury claim. The plaintiff, Alison Braks, was exiting an elevator when she fell on the defendants' premises. This claim progressed through a 4-week jury trial up until the end of the defendants' closing submission when the jury was ultimately discharged as a result of the prejudicial impact of the defendants' closing submission.

Following the closing submission, the plaintiff brought a motion to strike the jury on the basis that "inflammatory, emotional, irrelevant and hearsay comments expressed in the defendants' closing submissions and repeated throughout the trial were egregious and incapable of repair."[2] The Honourable Justice Ramsay agreed and held that "the defendants' closing address made a fair trial all but impossible."[3] Her Honour held that defence counsel made too many "transgressions" to cure through a jury instruction.[4] As a result, the jury had to be struck to guarantee the plaintiff a fair trial.[5]

The transgressions identified by the plaintiff included improper comments by counsel, misstatements of evidence and law, an invitation to the jury to accept unproven hearsay evidence which did not comply with the rule in *Browne v. Dunn*[6], and the suggestion that a determination on the evidence could be supplanted by one's personal experiences and common sense.

It was the cumulation of these transgressions that resulted in the plaintiff establishing that justice to the parties was better served by discharging the jury. Justice Ramsay held that "…the fairness of the trial was put in jeopardy from the defendants' opening submissions to the jury, events that occurred during the trial, and culminating in numerous transgressions, which cumulatively were not capable of being cured without distracting the jury from its primary task."[7]

The purpose of a closing address is to persuade the trier of fact of the merits of one's case and "to present each party's case clearly and in a way that is of help to the Court in the performance of its duty to decide the issues before it."[8] There is a great deal of latitude for counsel to advance the client's cause fearlessly and with vigour in a closing address but this is not without

[1] 2022 ONSC 4015 [*Braks*].
[2] *Ibid* at para 8.
[3] *Ibid* at para 5.
[4] *Ibid* at para 27.
[5] *Ibid* at paras 6, 16, 27 and 127.
[6] *Browne v Dunn*, [1893] J.C.J. No. 5, (1894) 6 R. 67 [*Browne*].
[7] *Braks, supra* note 1 at para 27.
[8] *Ibid* at para 30.

limit and the jury must not be distracted from its task of deciding the case on the evidence and to ensure that neither the appearance nor the reality of trial fairness is undermined.

Before analysing where the defendants erred, Justice Ramsay reviewed what a closing address should not contain:

> …it is generally accepted that in a closing address, counsel may not give their personal opinion of the case, misstate the evidence, make remarks that appeal to the jurors' emotions, rather than their reason, or which impede the jury from an objective consideration of the evidence, and which encourage assessment based on emotion or irrelevant considerations…Remarks made to the jury must be supported by the evidence. Counsel may not misstate the evidence at trial.[9]

In the following sections, we will review some of the errors in the defendants' closing submission which resulted in the jury being discharged.

I) Misstating the Law and Evidence and Relying on Unproven Hearsay

The Court found that defence counsel misstated the law regarding contributory negligence. Counsel must always be cautious when addressing the jury regarding the principles of law, which is the Judge's responsibility. In a closing address, if counsel refers to the law it should advise the jury that they are to follow the law provided by the trial judge in the charge. Justice Ramsay held that, on its own, this error likely could have been addressed through the charge but it was compounded by many errors regarding the evidence.[10]

Counsel must properly state the evidence and only refer to admissible evidence. In *Braks*, counsel relied on an incident report, which contained hearsay statements from the plaintiff that were never put to the plaintiff during cross examination[11], thereby breaching the rule in *Browne v. Dunn*. The rule in *Browne v. Dunn* requires that if counsel is going to challenge the credibility of a witness by calling contradictory evidence, the witness must be given a chance to address that evidence.[12] Yet "in her closing address, counsel for the defendant challenged the credibility of the plaintiff and invited the jury to believe the unproven hearsay evidence over that of the plaintiff's."[13]

Justice Ramsay also highlighted the fact that the defendant was advised by the Court on the "limitation on the incident report" and throughout the trial was "cautioned about the restriction of otherwise inadmissible evidence/hearsay, being admitted for the truth of the content."[14]

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[9] *Ibid* at para 36.
[10] *Ibid* at para 46.
[11] *Ibid* at paras 4 and 48.
[12] *Ibid.* at para 64.
[13] *Ibid* at para 63.
[14] *Ibid* at para 71.

While this was only one of many errors, Justice Ramsay held that it would be "all but impossible" to correct this particular error through the charge.[15]

II) Misstating Evidence and Expressing Personal Opinion

Defence counsel also made suggestions, based on personal views, regarding the nature of the plaintiff's injuries and whether they should be believed by the jury.

Significantly, counsel misdirected the jury by suggesting that the plaintiff did not report hitting her head and as a result, did not suffer a head injury, even though all of the experts, including the defendants' experts, agreed that the plaintiff had suffered a concussion and that direct impact to the head is not necessary for a person to suffer a concussion.[16] Justice Ramsay held that counsel's personal opinion was both "improper and not supported by the evidence."[17]

Counsel also misstated evidence or expressed a personal opinion on other occasions, including the following examples: providing personal opinion on the timing of the commencement of certain medical symptoms; providing personal opinion on the cause of medical symptoms; misstating the evidence of the treating neurologist; misstating that certain medical records contained no complaints from the plaintiff relating to the fall when they actually did; misstating that the plaintiff received a work promotion even though this evidence was never elicited; misstating the plaintiff's income amounts; misstating that one doctor wrote that the plaintiff's "chronic neck pain settled" despite writing "chronic neck pain settling"; misstating that the family doctor wrote that the plaintiff's concussion symptoms have resolved when instead she wrote that the plaintiff "reports" her concussion symptoms have resolved; misstating that the family doctor wrote that the plaintiff returned to work, when her notes read that there was a telephone call with the patient "regarding" returning to work; misstating that the family doctor had no specific concern from the plaintiff's visit to the neurologist, when the family doctor's evidence was that she had no specific "new" concern; and, referring to "other records" which were not in the evidence, leaving the jury to speculate.[18]

This lengthy list of remarks made by defence counsel that did not align with the evidence appears to have played a significant role in the Court's decision to discharge the jury.

III) Reliance on Inadmissible Opinion Evidence

Finally, defence counsel attempted to admit the inadmissible opinion evidence of a neurologist, Dr. Giles.[19] This was apparently an ongoing issue from the opening statement and required a ruling during the trial. The opinion evidence of Dr. Giles, who did not testify, "should not have made its way, even indirectly, into any party's opening address or the closing address."[20]

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[15] *Ibid* at para 77.
[16] *Ibid* at para 84.
[17] *Ibid* at para 83.
[18] *Ibid* at paras 83, 87-89, 93, 96, 97-100, 102-103, 110-111, 113 and 122-123.
[19] *Ibid* at para 105-107.
[20] *Ibid* at para 108.

In general, Courts are guided by the principle that clear improprieties in an opening or closing address are to be identified for the jury and coupled with an unambiguous direction to the jury that they are to be disregarded as irrelevant.[21] However, there are circumstances where the breaches are so significant that no corrective instruction to the jury can repair the damage that has been done to trial fairness. Ultimately, the Court must decide whether justice to the parties would be better served by discharging or retaining the jury.[22]

Justice Ramsay held that the cumulative effect of the offending statements in the defendants' closing address were such that a fair trial could not be had and discharged the jury as a result. There was simply no instruction that could cure the prejudice to the plaintiff. This is not surprising given the litany of errors addressed by the Court, many of which were raised during the trial and repeated in the closing address. The outcome is unfortunate for everyone involved, including the jurors who dedicated weeks of their lives to this matter, only to be discharged without reaching a verdict.

The decision serves as a reminder of what to avoid in a closing submission. Best practices for a closing submission, include preparation of the closing submission as far in advance as possible. This must include a meticulous review of transcripts (if available) and notes for accuracy to ensure the evidence is never misstated.

From there, Counsel can focus on effective advocacy with the goal of being as persuasive as possible in tying the evidence to the themes that the party has identified throughout the trial. There is nothing improper with personalizing your client (in the right type of case) or speaking with emotion to the jury as long as it is based on, and fair to, the evidence. The goal is always to be persuasive, and the delivery of counsel and language used are critical in that regard. However, the argument should never be based on the opinion of counsel or in any way unfaithful to the trial evidence.

Some practical tips for the preparation and delivery of a closing submission before a jury based on *Braks* and the author's recent trial experience are as follows:

- Begin drafting the closing submission as early as possible so you can focus on establishing the evidence required to make your argument.
- Know what the witnesses have said by taking detailed notes throughout trial.
- Be persuasive and use appropriate rhetoric, language and analogies to keep the jurors engaged. Make it clear to the jurors why the case is important to your client.
- Do not summarize all of the evidence. Focus the jurors on what is important to your client's case and highlight the witnesses and evidence that they should focus upon in their deliberations.

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[21] *Landolfi v. Fargione* (2006), 79 O.R. (3d) 767 (C.A.) at para 106.
[22] *Braks, supra* note 1 at paras 23 and 130.

- Address and contextualize the other side's arguments and explain to the jurors what the other side is not seeing or understanding. Where the other side has focused on evidence of marginal relevance it is helpful to remind the jurors what the case is and is not about.
- Consider what exhibits or other demonstrative evidence should be shown to the jury during the address or should be highlighted for the jury to focus on during their deliberations. There may be many trial exhibits and it is best to focus the jurors on those that are important.
- Address the law, where necessary, but defer to the trial Judge and the charge on all issues of law; and,
- Make it clear what the case is about what you are asking the jury to decide and take the jury through the jury questions and the desired answers so there is no confusion during their deliberations.

Similar considerations and tips apply to a closing submission before a Judge alone, however in that scenario there is typically a greater focus on reviewing the law and addressing the Judge's questions and areas of concern. Counsel must still aim to be persuasive and to thoroughly review the facts and requested findings but should anticipate the concerns the Judge may have about the evidence or the law.

Whether before a jury or a Judge, Counsel should close strong. By then you and your client will have hopefully made a connection with the jurors. During those last few moments, remind the jury why the case is important to your client and why, based on the evidence, they should find for your client.

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Tax Avoidance and the Meaning of Control

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The Canadian *Income Tax Act* (Tax Act) contains a general anti-avoidance rule (GAAR) which can negate tax benefits arising from "abusive" tax avoidance transactions. These are transactions that satisfy the requirements of the law, but are found to be contrary to the spirit or underlying policy of the legislation or its specific provisions.

On November 2, 2022, the Supreme Court of Canada heard an appeal from the decision of the Federal Court of Appeal in *Canada v. Deans Knight Income Corporation* (2021 FCA 160). This case concerned the application of the GAAR to a recapitalization arrangement. Specifically, the question to be decided was whether the taxpayer had abused, among other provisions, the loss restriction rules in subsection 111(5) of the Tax Act. Under the rule in subsection 111(5), if a person or group of persons acquires *de jure* control of a corporation, there are restrictions placed on the use that the corporation can make of losses incurred before that time.

Canadian courts have confirmed that *de jure* control, which is also known as effective control, means the acquisition of a majority of voting shares by persons in a position to vote them in common. At the Federal Court of Appeal, the Crown persuaded the Court to depart from this established legal standard for corporate control (being *de jure* or voting control) and use a novel standard of "actual control" to decide that the arrangement in issue had abused the tax rules governing the availability and use of losses. The case was appealed by the taxpayer to the Supreme Court of Canada.

The taxpayer was a Canadian public corporation with tax attributes comprising unused non-capital losses and other deductions. The taxpayer sought to monetize these tax attributes. To do so, it underwent a reorganization that, according to the Federal Court of Appeal, "turned the reins" over to a venture capital company, Matco Capital Ltd. (Matco). However, Matco did not acquire *de jure* control of the taxpayer. Matco arranged for the taxpayer to complete an initial public offering (IPO), with the taxpayer using the funds raised from the IPO to commence a new business that generated profits against which the losses were claimed. As a result of the IPO, the taxpayer became widely held and no specific person or group of persons acquired voting control of the taxpayer.

The Minister of National Revenue assessed the taxpayer to deny the pre-IPO losses on the basis that they had been lost as a result of an acquisition of control of the taxpayer or, alternatively, that the GAAR applied to prevent the taxpayer from claiming them. The Tax Court of Canada disagreed with this assessing position. It determined that the policy of subsection 111(5) is "to target manipulation of losses of a corporation by a new person or group of persons, through effective control over the corporation's actions," and that Matco did not have effective control.

The Federal Court of Appeal allowed the Crown's appeal and overturned the Tax Court's decision. Despite acknowledging that the term "acquisition of control" in subsection 111(5) had been judicially determined to mean *de jure* control, the Court concluded that the policy of the provision required it also to apply where there has been an acquisition of "actual control." The Federal Court of Appeal thus rearticulated the policy of subsection 111(5) as restricting "the use of specified losses, including non-capital losses, if a person or group of persons has acquired actual control over the corporation's actions, whether by way of *de jure* control or otherwise." Having made this determination, the Court concluded that Matco had "actual control" of the taxpayer and, as a result, the GAAR applied.

On appeal to the Supreme Court, the taxpayer argued that the Court should not depart from the *de jure* control test and that the GAAR should not be found to apply.

Among others, the Tax Executives Institute intervened to make submissions to the Supreme Court regarding the scope of the GAAR. It argued that the proper function of the GAAR is to determine whether transactions are abusive based on the legislative scheme set out in the statute. It is not to rewrite legislative schemes that rely on established legal concepts and allow for predictable tax outcomes simply because a taxpayer has undertaken a primarily tax motivated transaction.

As was argued before the Supreme Court, the approach advocated by the Crown in this case is not workable as many ordinary commercial transactions are structured to minimize taxes. It is hoped that the Supreme Court will provide further direction on whether the application of the GAAR effectively enables the Minister and the courts to interpret and apply generally understood legal concepts differently based on tax motivation.