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Department of Finance Canada
Tax Policy Branch
90 Elgin Street
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**RE: General Anti-Avoidance Rule ("GAAR") Consultation**

## 1. Introduction

We provide these submissions in response to the "Modernizing and Strengthening the General Anti-Avoidance Rule" consultation paper released on August 9, 2022 (the "**Consultation Paper**").

After a careful review of the Explanatory Notes prepared by the Department of Finance upon the original enactment of the GAAR,[1] the Supreme Court of Canada ("**SCC**") confirmed in *Canada Trustco* that the GAAR is a provision of "last resort" that was "not intended to introduce uncertainty in tax planning".[2] Given the government's stated objective to protect legitimate commercial and family arrangements,[3] one of the primary goals of any proposed amendment to the GAAR should be to strike an appropriate balance between protecting the tax base on the one hand, and maintaining certainty, predictability, and fairness on the other.

The SCC has acknowledged that some level of uncertainty in relation to the application of the GAAR is "unavoidable".[4] In light of this, over the last 35 years, the courts, in relying on guidance from the SCC, have developed a rigorous framework to determine whether the GAAR should apply. The courts have done so with a view to balancing the desire for certainty and the facilitation of commercial and family transactions against the desire to combat abusive tax planning. The resulting framework, which is now well established, focuses on achieving that balance and on reducing uncertainty as to whether, or how, the GAAR should be applied.

[1] *Explanatory Notes to Legislation Relating to Income Tax* (June 1988) at pp 461, 464-65.

[2] *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 21; see also paras 15, 48 & 49.

[3] *Explanatory Notes to Legislation Relating to Income Tax* (June 1988) at p 461; Consultation Paper at p 4.

[4] *Copthorne Holdings v R*, 2011 SCC 63 at para 123.

Now, based on an examination of a limited number of cases that the Minister of National Revenue has lost, and seemingly little else, the Consultation Paper contains a myriad of proposals that, if adopted, would override the courts' rigorous approach and revive the uncertainty that they seek to reduce. This is particularly unjustified as the Consultation Paper recognizes that the GAAR has been an effective tool in countering abusive tax avoidance. It also accepts that, in the vast majority of instances, the Minister's application of the GAAR has been successful.

The Consultation Paper implies that anything less than universal success by the Minister in all cases in which she seeks to apply the GAAR is problematic. We disagree with this implicit assumption. Amendments to a provision such as the GAAR should not be driven by taxpayer success in a handful of cases. The Consultation Paper fails to explain why, as a matter of policy, the GAAR must be amended to broadly address potential unknown future disputes — rather than simply addressing specific issues to the extent necessary through targeted legislative amendments to particular provisions.

The Consultation Paper also notes that the proposed Mandatory Disclosure Rules ("**MDR**") are closely related to the GAAR consultation. The proposed MDR provide sweeping powers to the government to designate transactions of concern as notifiable transactions and to require taxpayers to report information on reportable transactions and uncertain tax treatments. However, the Consultation Paper does not acknowledge the significant deterrent effect the MDR are likely to have on tax planning that the government views as undesirable. As a result, the Consultation Paper does not adequately address whether significant amendments to the GAAR are warranted in the face of the MDR proposals.

There is still less consideration in the Consultation Paper of whether amendments to the GAAR would be appropriate, given the attendant erosion of certainty, predictability, and fairness, and the impact to the interpretive framework now well established in the case law. Moreover, it fails to grapple with the problem of the increased compliance, administration, and dispute toll that an expanded GAAR would take on taxpayers, the Canada Revenue Agency, the Department of Justice, and an already-overburdened Tax Court.

In our view, the lack of explanation in the Consultation Paper on these issues — why significant amendments are needed given the overwhelming application success rate of the GAAR; what purpose such amendments would serve given the impending MDR regime (and potential penalties thereunder); and, most importantly, whether any benefit to be gained from amending the GAAR outweighs the detrimental effects of an expanded GAAR — makes clear that any significant changes to the GAAR are unwarranted at this time.

The GAAR was not intended to transfer the role of developing and implementing tax policy and legislation from the executive and legislative branches to the courts. Care should be taken to ensure that any amendments not have such an effect.[5]

Our remaining comments on specific proposals in the Consultation Paper reflect our view that several of the proposals encroach heavily on taxpayers' ability to engage in legitimate commercial arrangements, undermine long-standing judicial principles, or create serious practical problems in the application of the GAAR.

## 2. Tax Benefit

The Consultation Paper solicits feedback on whether the definition of a "tax benefit" in subsection 245(1) of the *Income Tax Act* (the "**Act**") warrants further revision to apply appropriately.[6] Budget 2022 already expands the definition of a tax benefit to include tax attributes that could be used at a subsequent time (rather than requiring an actual reduction of tax, and a reassessment). This change was motivated by fact patterns such as the one at issue in the *Wild* case, where the Federal Court of Appeal determined that it was premature to raise an assessment under the GAAR where tax attributes had been created or preserved but not used.[7]

Having regard to this change, we would answer the question posed by the Consultation Paper in the negative. The changes in Budget 2022 address the practical difficulty of forcing the revenue authorities to wait until a positive tax attribute results in a reduction of tax or a refunded amount to raise a GAAR assessment. No further legislative amendment is needed to address the existence of a tax benefit.

## 3. Avoidance Transaction

For almost a century, it has been settled law in Canada that taxpayers are entitled to order their affairs to minimize tax payable.[8] The Consultation Paper correctly notes that the avoidance transaction test was designed to reflect this principle by performing a gatekeeper function, such that the GAAR would not apply to transactions primarily undertaken for legitimate commercial purposes, even where they result in a tax benefit. The high proportion of cases in which this element of the test is conceded by taxpayers, either at audit or before the courts, demonstrates that the test has been effective in its current form.

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[5] *Canada v Alta Energy Luxembourg SARL*, 2021 SCC 49 at para 96.

[6] *Income Tax Act*, RSC 1985, c 1 (5th Supp). All statutory references are to the Act unless otherwise stated.

[7] *1245989 Alberta Ltd v Canada (AG)*, 2018 FCA 114 (*sub nom Wild v Canada (AG)*).

[8] See e.g., *Canada v Loblaw Financial Holdings Inc*, 2021 SCC 51 at para 4; *Collins Family Trust*, 2022 SCC 26 at para 12.

The proposals in the Consultation Paper, on the other hand, would inappropriately reduce the avoidance transaction analysis to a formality.

Two cases are said to illustrate a "fundamental problem" with the current purpose-based avoidance transaction test. The first case, *Canadian Pacific Ltd*, was easily and more appropriately addressed through a specific legislative amendment.[9] The second case, *Spruce Credit*, stands for the proposition that a taxpayer faced with two equally commercial ways to achieve its business objective is entitled to choose the more tax effective option. That case involved a highly unusual fact pattern in which a provincial government assumed control of a credit union insurance fund. As noted by the Tax Court judge in that case, without tax planning, the tax result would have been "most unclear or unsatisfactory" and the Department of Finance did not provide a tax neutral option on a timely basis.[10] The Consultation Paper does not explain why the outcome of the case was inappropriate from a tax policy perspective, or why a case with such unique facts should drive a substantial amendment to the GAAR.

The proposals in the Consultation Paper contemplate potentially overruling the well-established case law on what constitutes an avoidance transaction through three measures, each of which is discussed below.

(a) *An interpretive rule specifying what is not a* bona fide *purpose*

The content of such an interpretative rule must be carefully assessed so that the substantive purpose of the avoidance transaction requirement is maintained. In particular, the Consultation Paper proposes that minimizing foreign taxes should not constitute a *bona fide* purpose. The Consultation Paper varies between discussing "foreign tax avoidance" and "foreign tax savings". These are two different concepts, and both are problematic.

Amending the GAAR to exclude "foreign tax avoidance" from constituting a *bona fide* purpose would place Canadian courts in the awkward position of having to determine whether a taxpayer engaged in tax avoidance under foreign tax laws, which themselves might encompass anti-avoidance provisions.

If the GAAR is instead amended to exclude any "foreign tax savings" from constituting a *bona fide* purpose, Canadian taxpayers might find themselves subject to the GAAR for transactions that are entirely unobjectionable, or even encouraged, as a matter of foreign tax law. For example, transactions that are designed to specifically comply with foreign tax laws could be interpreted by the Canada Revenue Agency ("**CRA**") as resulting in tax

[9] *Canada v Canadian Pacific Ltd*, 2001 FCA 398. See also the introduction of section 20.3 of the Act.

[10] *Spruce Credit Union v The Queen*, 2012 TCC 357 at paras 24-25.

savings, leaving the Canadian taxpayer potentially subject to the GAAR due to the desire to comply with foreign tax law. The inappropriateness of this outcome would be amplified if some of the proposed measures for amending the misuse or abuse test, including reversing the burden, are implemented.

(b) *Extending the definition of a "transaction" to include a choice*

Broadening the definition of "transaction" to include a choice would render the avoidance transaction test meaningless. All business decisions require a multitude of choices: the form of a transaction, the timing, the counterparty, and any number of other aspects. Treating a choice as a transaction implicitly requires consideration of a hypothetical alternative choice the taxpayer could have made, and whether that alternative would have resulted in more tax owing. Effectively requiring taxpayers to make the least tax-effective choice or face the scrutiny of the misuse or abuse test is antithetical to the principle that they are entitled to order their affairs so as to minimize tax payable.

Under the current framework established by the SCC, comparing the transactions at issue with a hypothetical alternative is only permissible for the tax benefit test. Including a comparative approach in the avoidance transaction test would be inappropriate. For any given transaction, no matter how innocuous, a hypothetical alternative to any choice that would result in greater taxes owing can almost always be identified.

Broadening the avoidance transaction test to include a choice is antithetical to the foundational principle of the Canadian tax system that taxpayers are entitled to achieve their commercial objectives in a manner that minimizes their tax burden.[11] An amendment of this nature would also give the CRA unfettered discretion over whether to embroil a taxpayer in an expensive and lengthy dispute process. Nothing in the case law to date supports such an outcome. This proposal ought to be abandoned.

(c) *Reducing the "primarily" threshold*

A similar problem arises with the proposal to lower the threshold of the purpose test from "primarily" to "one of the main purposes" or "one of the purposes". If the threshold is lowered in the manner proposed, the test will be watered down to universal application — it will always be the case that tax considerations motivate certain aspects of how a transaction or series of transactions are carried out.

Although "one of the main reasons" is presented as a middle ground, in practice, this test has proven ambiguous in its application. Appearing at least 79 times in the Act, the "one of the main reasons" test (or similarly worded tests) has left unsettled in the jurisprudence

[11] See for example the discussion of this point in the Tax Court decision in *Spruce Credit*.

how many main reasons can underlie an action. The word "main" means "chief" or "principal", but the context in which the phrase is used implies that there may be multiple such reasons.[12] It is inherently unclear how dominant a purpose must be to be a "main" purpose. Frustration over the interpretation of this phrase has been echoed in international commentary from the United Kingdom and United States.[13]

Adopting this standard to be consistent with certain other anti-avoidance rules neglects the ambiguity the standard has precipitated in the application of those rules. While such uncertainty may be manageable in certain provisions that use the "one of the main reasons" language, it would not be appropriate to extend that uncertainty in the GAAR, which effectively overlays all aspects of the tax system.

## 4. Misuse or Abuse

### (a) *Changing the burden under the misuse or abuse test*

We take particular issue with the suggestion that taxpayers ought to bear the burden of establishing the clear object, spirit, and purpose of the relevant provisions or the scheme of the Act as a whole, or the burden of establishing that there has been no misuse or abuse of those provisions or scheme.

A consistent theme in Canadian tax jurisprudence is that the party with better knowledge of the matter in issue should bear a greater burden of proof. Since a taxpayer is assumed to be more familiar with its affairs than the Minister, it bears the burden of demolishing the Minister's assumptions, except where a fact is exclusively or peculiarly within the Minister's knowledge.[14] With its ready access to the Department of Finance and the drafting history of legislative provisions, the Minister is in a better position to present the case on what is alleged to constitute the object of the provisions or schemes of the Act than any individual taxpayer.

Based on arguments made, and any admissible evidence presented, a court will make a finding on the purpose of a provision which, in turn, will inform the court's conclusion as to its meaning. The court's determination of the meaning or rationale of a provision is a legal conclusion that might be challenged on appeal or in a later case. However, as the SCC

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[12] Nat Boidman, "One of the Main Purposes Test" (May 2014) 22:5 *Canadian Tax Highlights* 9, online: ctf.ca.

[13] See Angelo Nikolakakis, "Purpose," in Report of Proceedings of the Seventy-first Tax Conference, 2019 Conference Report (Toronto: Canadian Tax Foundation, 2019), 21:1-33.

[14] *Hickman Motors v R*, [1997] 2 SCR 336 at paras 92-94; *Canada v Anchor Pointe Energy Ltd*, 2007 FCA 188 at para 36.

expressly acknowledged in *Loblaw Financial Holdings Inc.*,[15] evidence concerning the purpose of a provision (*i.e.*, Parliament's intent at the time of enactment) is necessary to enable the court to determine as a matter of fact what Parliament was trying to achieve.

Consistent with the decision in *Canada Trustco*, it is the Minister, forming part of the *corpus* of the state with ready access to the relevant materials, who has markedly greater constructive knowledge of the statutory scheme and legislative intent. It is also the Minister who must specify the provisions that have been abused and the basis on which they have been abused. It is inappropriate to require a taxpayer to proactively identify and analyse every provision or scheme to demonstrate that none of them was misused or abused.

Taxpayers are tasked with familiarizing themselves with the detailed rules in the Act and filing a return on a basis that complies with those rules. In a GAAR case, the Minister's task is to explain why, and how, compliance with the provisions of the Act is insufficient to allow the tax consequences mandated by the provisions. To put the taxpayer to the task of both making the Minister's case, and defending against it, would be antithetical to the rule of law, the self-reporting nature of the tax regime, and the adversarial system. Placing the burden on the taxpayer to establish that no provision has been abused would inevitably result in cases where the GAAR applies to situations where it is not clear that a misuse or abuse has occurred.

The proposal to change the burden would be particularly inappropriate and onerous if certain other proposals in the Consultation Paper are ultimately adopted. Most notably, the proposal that lowers the threshold of the avoidance transaction test makes the protection offered by the current burden of proof even more crucial. Without such a guardrail, taxpayers who have undertaken innocuous and widely accepted transactions may face significant costs in complex GAAR litigation. The proposal materially increases the risk of inconsistent outcomes depending on the resources of the taxpayer, and of the uneven application of statutory schemes across taxpayers.

(b) *Additional Extrinsic Aids*

Throughout the history of the GAAR, the determination of legislative policy has occupied a considerable amount of judicial time and attention. The courts have relied on external sources, such as Hansard records, to discern Parliament's purpose in implementing a particular set of provisions. Legislative endorsement of the use of extrinsic aids may therefore be acceptable, subject to the following safeguards:

- Any extrinsic commentary relied upon for the purposes of the GAAR should be prepared and released contemporaneously with the legislation, and only applicable

[15] *Canada v Loblaw Financial Holdings Inc*, 2021 SCC 51 at para 54.

on a prospective basis. Later statements of the purpose of previously enacted provisions are potentially self-serving and tainted by hindsight;[16] and

- Extrinsic commentary should be specific to, and reflective of, the substance of the relevant provision. High level and general statements of purpose that are not specific to a particular provision should not be made or given any weight.

(c) *Greater emphasis on abuse of the Act read as a whole*

The Consultation Paper expresses concern that a single, unified approach to misuse and abuse has diluted the emphasis on abuse of the Act read as a whole. Cited in support of this proposition are the comments in *Alta Energy*, citing *Canada Trustco*, that misuse or abuse is properly based on a unified textual, contextual, and purposive interpretation of the specific provisions in issue.[17]

It is important to consider these comments in context; the Court simply made note that generic policy concerns, such as "avoiding double taxation" and "encouraging trade and investment" cannot override the text of particular provisions or the policy choices reflected in the text.[18] This judicial guidance is an important guardrail as it requires an alleged abuse of the scheme of the Act to be grounded in its provisions and not a speculative policy debate with respect to what the tax system might be designed to achieve.

This guidance is an essential component of the rigorous framework developed by the SCC to the application of the GAAR and should remain part of that framework. Nothing in the Act or the jurisprudence bars the advancement of an argument based on a wider scheme of the Act as reflected in its various provisions. Caution should be exercised with respect to requiring a court to materially change the role it plays in determining tax policy for purposes of the GAAR.

(d) *Interpretive rule for assessing certainty, predictability, and fairness*

The Consultation Paper takes issue with the focus in *Alta Energy* on certainty, predictability, fairness, and the right of a taxpayer to structure its affairs to minimize tax. It is suggested that an interpretive rule could be added to encourage courts to consider

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[16] Note that the Department of Finance has exhibited a tendence to confirm existing policy in technical notes to new provisions.

[17] *Alta Energy* at para 49; *Canada Trustco* at para 41.

[18] *Alta Energy* at para 49.

fairness to other taxpayers and the tax system as a whole. It is unclear what type of rule is being contemplated, and so we reserve comment at this time.

However, restraint should be exercised lest the GAAR devolve into a social fairness analysis that is neither rigorous nor principled, and injects more uncertainty than needed into the application of the GAAR.[19]

## 5. Economic Substance

The Consultation Paper indicates that the government is contemplating adding an explicit rule to the GAAR integrating economic substance into the GAAR analysis. Setting aside a lack of clarity as to precisely what such a rule would entail, it appears to mark a potentially fundamental shift in tax policy. Canadian tax jurisprudence has explicitly and continuously held that absent a specific rule to the contrary, taxpayers should be taxed based on what they actually did, and the legal and contractual relationships actually established — and not what they could have done.[20]

The Consultation Paper is light in providing reasons why it would be sound tax policy to abandon the legal substance approach established in the jurisprudence. The case for such a marked shift appears to be that generic allegations by the Minister that a taxpayer's transaction or series lacks economic substance have not found favour with the courts. Consideration of a lack of proper business purpose is already a fundamental part of the avoidance transaction test. The Consultation Paper provides no reason for the proposed expanded role of economic substance in this context.

The Department of Finance appears to recognize that an economic substance test engages a number of broad, open-ended questions, many of which lead to issues in implementation. The Consultation Paper itself describes several of these issues in detail, one of which is the fact that economic substance has no commonly understood definition in Canadian law. Moreover, there are obvious circumstances in which a focus on economic substance would be problematic: it is often difficult to establish within related groups, accounting standards are not regulated by Parliament, and many sound business decisions do not immediately result in profit. In addition, many completely legitimate corporate objectives from a tax policy perspective — such as tax deferred divisive corporate reorganizations and intra-group corporate loss consolidation — necessarily involve transactional steps that do not have independent economic substance. In fact, the Act often requires such steps to accomplish what would otherwise be a straight-forward business transaction.

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[19] *Copthorne Holdings* at para 65.

[20] *Shell Canada v R*, [1999] 3 SCR 622 at para 45.

The other approaches to economic substance suffer from similar deficiencies. A deeming rule would inappropriately capture transactions within related groups, such as accepted loss consolidation arrangements.

In brief, while the government's stated objective is to introduce an economic substance test, the Consultation Paper illustrates that the options under consideration invoke significant unresolved issues. The case for incorporating economic substance into subsection 245(4) has not been made.

## 6. Penalties and Other Deterrents

The Consultation Paper suggests that a taxpayer undertaking a transaction found to be abusive under the GAAR is often placed back in the position that they would have been in absent the planning. The lack of further downside associated with abusive tax planning is the justification provided for considering measures intended to deter such behaviour. Accordingly, the Consultation Paper considers the introduction of a penalty proportional to the tax benefit, an increased interest rate on taxes in dispute, or an extension of the reassessment period for GAAR assessments by an additional three years.

The Consultation Paper is silent on important considerations relevant to such measures:

- it does not take into account the deterrent effect of the MDR proposals;
- it does not address the inappropriateness of a penalty given that taxpayers cannot self-assess under the GAAR;
- it does not address concerns that the CRA might aggressively seek to assess or threaten to assess taxpayers under the GAAR in order to gain leverage in audits;
- it does not recognize that imposing an absolute liability penalty in cases where the GAAR applies is unreasonable, given that a taxpayer to whom the GAAR applies has, necessarily, complied with the text of the Act; and
- it does not recognize that the GAAR is intended to be a safety net for the Minister where Parliament failed to specifically address a specific transaction or set of transactions. Penalties are inappropriate when the GAAR is used because Parliament was not sufficiently precise in its legislative role.

Specific additional concerns are addressed below.

(b) *Expansion of Penalties is Disproportionate*

Subsection 163(2) already addresses taxpayers whose non-compliance is wilful or grossly negligent. In any tax planning arrangement, gross negligence penalties are a powerful deterrent to taxpayers who might otherwise "roll the dice" on a reckless arrangement.

The Consultation Paper cites *Copthorne Holdings* in support of the proposition that there is judicial reticence to impose penalties in the context of a rule that only the Minister can apply.[21] The penalties in that case were reversed in a vastly different context from that implied by the Consultation Paper. The Minister sought to impose penalties in reliance on a penalty provision that, on its face, only applied where there was non-compliance with the technical requirements (which were admitted by the Crown to have been satisfied as a prerequisite condition to any consideration of the GAAR). To conclude that the Court's rejection of the Minister's position in that case signifies a sweeping judicial reticence to apply penalties is an overreach.

The expansions under consideration are disproportionate. It should not be lost that the GAAR inherently creates uncertainty for taxpayers and deprives them of the foresight available when applying established statutory provisions. As Justice Hogan noted in *Mady*, "[t]hose types of provisions are by their nature difficult to interpret. Skilled tax advisors and the CRA have difficulty identifying where the boundaries of anti-avoidance provisions lie."[22]

For a taxpayer to have been incorrect in reaching a determination that the CRA and courts struggle to make is not sufficiently culpable conduct to warrant an independent penalty. The imposition of a significant penalty based on a determination only the Minister can make is unfair, and cuts away at the legitimate commercial and family planning arrangements the Consultation Paper indicates that the government intends to protect.

(a) *Sufficient Deterrents Exist*

The animating concern behind these proposals is not borne out in taxpayer behaviour. The impact of non-deductible interest at an already punitive rate should not be minimized. The potential for prolonged audit activity is itself a considerable deterrent. Often invisible to the Minister is the substantial internal and external cost a taxpayer incurs to filter through historical documentation, respond to audit requests, and compile submissions on the issues under review. This cost is not recoverable if the GAAR adjustment is ultimately abandoned by the Minister or found to be indefensible by a court. The process of moving through the

[21] *Copthorne Holdings v R*, 2007 TCC 481, aff'd 2011 SCC 63.

[22] *Mady v The Queen*, 2017 TCC 112 at para 146.

administrative appeal process or litigation is also costly and time-consuming, and a taxpayer experiences considerable financial uncertainty throughout (particularly for large corporations that are pre-emptively required — unlike in other OECD countries — to pay 50% before any liability has been finally established in a court of law).

Conversely, there is no deterrent for the Minister to take baseless GAAR positions. If anything, the 50% payment requirement for large corporations, the significant difference between the arrears interest and refund interest rates, and the non-deductibility of arrears interest compared to the income inclusion of refund interest provides a positive incentive for the Minister to do so.

In addition, accounting principles frequently require taxpayers challenging an assessment to record contingent liabilities in relation to reassessed amounts – impairing their financial standing in the eyes of investors and lenders. Reputational considerations compound these effects. In brief, taxpayers already have a significant amount to lose in being assessed under the GAAR. The reality is that taxpayers expend significant resources to ensure their affairs are structured in a manner consistent with the law and its underlying policy to minimize the possibility of such an assessment.

Further deterrents exist as a consequence of the MDR amendments. The expanded regime for reportable transactions is proposed to be engaged where only one of the generic hallmarks set out in the old regime (contingent fee arrangement, confidentiality protection or contractual protection) is present. Substantial penalties apply in the case of non-compliance, and advisors and promoters can be subject to a separate and independent penalty. Further, the regime incorporates transactions where only one of the taxpayer's main purposes was to obtain a tax benefit. These expansions, together with the new notifiable transactions and reportable uncertain tax treatment rules, provide enormous scope for the CRA to detect and audit aggressive tax avoidance at early stages and seriously deter aggressive tax planning.

If the Department of Finance does proceed with any penalty proposal, it is submitted that penalties must be restricted to "notifiable transactions". This would ensure that transactions are subject to a penalty only where notice has been given that the Minister considers the transactions to constitute abusive (or potentially abusive) tax avoidance.

(b) *Normal Reassessment Period is Adequate*

The Consultation Paper proposes to extend the normal reassessment period for a GAAR assessment by three years to provide the CRA with "sufficient" time to review a GAAR assessment.

The normal reassessment period represents a carefully considered policy choice that strikes a balance between a taxpayer's legitimate need for finality and the Minister's duty to ensure equitable application and enforcement of the taxpayer's obligations under the Act.

An extended reassessment period is properly the exception and not the rule. Potential complexity alone has never warranted an extension of the normal reassessment period. It is particularly unwarranted in light of the significant additional investment made in successive recent Budgets to the funding of the Minister's audit division.

The policy rationale for extending the period in the context of cross-border related party transactions is the time required to collect materials not located in Canada — and not mere complexity. Our experience is that, even for international related-party transactions, the extended reassessment period in practice often results in the Minister delaying the commencement of its audit of such transactions until after the end of the normal reassessment period. Canada is already an outlier in the length of time expended on audit activity relative to other OECD countries and the international community — a fact underscored by the 6-year limitation for related-party adjustments under OECD treaties.

It is important to counterbalance the Minister's desire for more time to raise GAAR assessments with the policy reasons underlying reasonable service standards in the audit function. While a taxpayer is under audit or pursuing a tax dispute, it remains in a state of considerable financial and corporate uncertainty, with limited avenues to accelerate the process. An incentive for the CRA to render timely determinations is a required feature of the tax administration system so that necessary audit activity does not unduly burden individual businesses or the economy at large.

## 7. Concluding Comments

The Consultation Paper reflects the government's desire to put a chilling effect on abusive tax planning. The proposed measures, cumulatively and independently, are disproportionate to the concerns and issues identified by the Department of Finance.

The government's objective can be achieved with more modest measures. In this regard, while there are problematic elements within the MDR proposals, that regime will operate as a significant deterrent and result in the collection of significant volumes of additional information.

We note that an inordinate amount of time is currently spent on tax disputes in Canada (including at audit, appeals, and at all levels of Court). Many of the proposals in the Consultation Paper augment the already significant burdens on Canadian taxpayers in the form of compliance and dispute costs that have the potential to harm Canada's competitiveness in an increasingly global economy.

We would be happy to discuss any aspect of this submission further, or to comment on any draft legislation under consideration.

Yours very truly,

**Osler, Hoskin & Harcourt LLP**