Federal Court of Appeal Cour d'appel fédérale

Date: 20200914

Docket: A-138-19

Citation: 2020 FCA 142

CORAM: **NOËL C.J.**
DE MONTIGNY J.A.
LEBLANC J.A.

BETWEEN:

THE GLADWIN REALTY CORPORATION

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on June 8, 2020.

Judgment delivered at Ottawa, Ontario, on September 14, 2020.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: DE MONTIGNY J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal brought by The Gladwin Realty Corporation Inc. (Gladwin or the appellant) from a decision of the Tax Court of Canada (2019 TCC 62) wherein Hogan J. (the Tax Court judge) dismissed the appellant's appeal from a Notice of determination issued by the Minister of National Revenue (the Minister) with respect to its 2008 taxation year. The Notice of determination was issued pursuant to subsection 152(1.11) and the General Anti-Avoidance Rule (GAAR) found in section 245 of the *Income Tax Act*, R.C.S. 1985, c. 1 (5th Supp.) (the Act).

[2] The Tax Court judge held that the avoidance transactions undertaken by Gladwin, which involved rolling real estate assets into a partnership, disposing of these assets, distributing the proceeds to the limited partner, triggering the application of subsection 40(3.1) and making the election under subsection 40(3.12), to be abusive. The order and timing of the series of transactions allowed the appellant to distribute the entire capital gain realized from the sale to its corporate shareholder as a tax-free capital dividend.

[3] The appellant contends that the avoidance transactions are not abusive because they produce results mandated under the Act. It argues that the deemed capital gain arising from the application of subsection 40(3.1) is not artificial and that the Capital Dividend Account (CDA) mechanism allows taxpayers to benefit from the timing of the realization of capital gains and losses.

[4] The Crown argues that the appellant deliberately triggered the deemed capital gain provided for under subsection 40(3.1), thereby artificially inflating the appellant's CDA so that the entire capital gain realized for the sale of the property could be paid out tax-free in the form of a capital dividend. This artificial inflation led to the abuse of the CDA regime as well as the negative adjusted cost base (ACB) rules set out in the Act.

[5] For the reasons which follow, I propose that the appeal be dismissed.

[6] The provisions of the Act that are relevant to the analysis appear at the end of the reasons.

FACTS

[7] The factual background is set out in a Partial Agreed Statement of Facts (Appeal Book, Vol. 1, pp. 98-109). Of significance for present purposes is the following series of transactions which were found to have been entered into "with clockwork precision" with the view of paying no tax on a capital gain of $23,346,822 resulting from the sale of the real estate assets acquired six years earlier (Reasons, para. 23). This objective was achieved by the planned inflation of the appellant's CDA.

[8] The first step of the plan was the incorporation of Gladwin GP Inc. (Gladwin GP) on February 6, 2007, and its utilization as the general partner of the partnership which, in turn, was created on March 1, 2007. The appellant was a limited partner holding a 99% interest in the partnership, and Gladwin GP held the remaining 1% as general partner. The Tax Court judge's finding that the partnership was created for the purpose of securing the tax benefit and that its role was transitory in nature is uncontested (Reasons, para. 25).

[9] On April 10, 2007, the real estate assets were transferred to the newly formed partnership on a tax-free basis by way of a rollover pursuant to subsection 97(2) of the Act, thereby ensuring that the gain embedded in the real estate assets would be realized by the partnership, rather than by the appellant directly. The partnership sold the real estate assets to an arm's length party on August 8, 2007, thereby realizing a capital gain of $23,346,822.

[10] On that same day, the partnership lent an amount of $24,463,142 to Shabholdings Inc. (Shabholdings), the appellant's direct shareholder, in return for a promissory note.

[11] On September 26, 2007, the appellant was continued under the British Virgin Island legislation and, as a result, gave up its Canadian-controlled private corporation status. In so doing, the appellant avoided the additional tax on investment income (including taxable capital gains) under section 123.3 of the Act.

[12] On September 28, 2007—during its first fiscal period—the partnership distributed $24,647,031 to the appellant. This distribution, which was partially satisfied by the assignment of the promissory note issued by Shabholdings, caused the ACB of the appellant's interest in the partnership to become negative by an amount of $24,311,654, pursuant to paragraph 53(2)(*c*) of the Act.

[13] As a result on October 1, 2007, the date that coincides with the end of the partnership's first fiscal period, the appellant realized a deemed capital gain in the amount equal to the negative ACB of its interest in the partnership pursuant to subsection 40(3.1). Half of this amount (i.e. $12,155,827) was added to the appellant's CDA in conformity with subsection 89(1).

[14] On the same day, the partnership allocated the capital gain of $23,346,822 realized earlier on the disposition of the real estate assets to the appellant. Here again, half of the gain was added to the appellant's CDA (i.e. $11,673,410), thereby increasing its CDA balance to $23,829,237.

[15] On May 30, 2008, the appellant paid a capital dividend to Shabholdings equal to its CDA balance thereby reducing its CDA to nil. Payment was effected by distributing a portion of the promissory note. On the same day, Shabholdings elected that capital dividends in the same amount be paid to its shareholders—all corporations.

[16] For its taxation year ending on September 30, 2008—during the partnership's second fiscal period—the appellant elected to realize a capital loss in the amount of $24,311,653, pursuant to subsection 40(3.12), an amount equal to the capital gain it triggered pursuant to subsection 40(3.1) earlier in that taxation year. As a result, the ACB of the appellant's interest was decreased by a corresponding amount by virtue of subparagraph 53(2)(*c*)(i.2). This election had the effect of bringing the appellant's CDA balance to a negative amount of roughly $12,000,000.

[17] Both the appellant and the partnership ceased operations after the transactions in issue were completed and have since remained inactive (Partial Agreed Statement of Facts, Appeal Book, Vol. 1, para. gg, p. 105).

[18] In the end, the appellant's CDA was increased twice by roughly the same amount, with the result that an amount equal to the entire capital gain arising from the disposition of the real estate assets was distributed on a tax-free basis.

[19] By Notice of determination issued on March 27, 2014, the appellant's CDA available for distribution during its 2008 taxation year was reduced by $12,153,827, thereby eliminating the increase resulting from the triggered application of subsections 40(3.1).

[20] The appeal before the Tax Court ensued.

DECISION UNDER APPEAL

[21] At the beginning of his reasons, the Tax Court judge noted, in a footnote, that the tax benefit in this case was the avoidance of the additional tax on excessive elections provided for under subsection 184(2) on the payment of the excessive capital dividend to the appellant (Reasons, para. 6). Given the appellant's concession that the series of transactions were avoidance transactions within the meaning of subsection 245(3), the only issue to be addressed was whether those transactions were abusive (Reasons, para. 32).

[22] He began by conducting an object, spirit and purpose analysis of the relevant provisions in order to identify their underlying rationale. Dealing with the CDA regime, the Tax Court judge explained that the purpose of the CDA, as defined under subsection 89(1), was to allow "private corporations to keep track of certain types of tax-free surpluses accumulated over time […] [and] to determine its CDA balance at a particular time so that it may elect in a prescribed form to pay a tax-free capital dividend to its shareholders without incurring a liability under Part III of the Act" (Reasons, para. 39).

[23] He went on to explain that the legislative history of the CDA regime confirmed that subsections 89(1), 83(2), and 184(2) were implemented to give effect to what is commonly referred to as the principle of integration. Indeed, those provisions were enacted as a result of the 1966 *Report of the Royal Commission on Taxation*, which among other things recommended that income be taxed at the same rate whether earned directly by an individual, or indirectly through a corporation. Consistent with the principle of integration, the CDA regime was put in place to ensure that the tax-free portion of capital gain could be distributed to an individual shareholder without any tax (Reasons, paras. 41-42). Although integration is not perfectly achieved in all circumstances, the Tax Court judge held that the CDA provisions were nevertheless intended to promote integration (Reasons, para. 46).

[24] The Tax Court judge concluded his analysis of the CDA regime by considering the subsequent legislative amendment brought to subsection 89(1) in 2013 and held that they were not instructive in determining whether the avoidance transactions were abusive (Reasons, para. 47).

[25] The Tax Court judge then considered the effect of subsection 40(3.1) as well as the 1994 Budget Supplementary Information that accompanied the enactment of this provision (1994 Budget Supplementary Information, Department of Finance, Tax Measures, February 22, 1994, p. 42). He observed that subsection 40(3.1) had been enacted to put an end to tax shelter planning arrangements that took advantage of the fact that partnership interests were excluded from the application of subsection 40(3), a provision which deems a capital gain to be realized whenever the ACB of a capital property of a taxpayer becomes negative (Reasons, paras. 49-51).

[26] He further explained that subsection 40(3.1) applies to limited partners or other passive partners in circumstances where the ACB of their partnership interest is negative at the end of the partnership's fiscal period by deeming them to realize a capital gain equal to this negative ACB (Reasons, para. 55). Relying on the 1994 Budget Supplementary Information, the Tax Court judge concluded that the "purpose and effect of subsection 40(3.1) are to dissuade taxpayers from extracting from a partnership on a tax-free basis funds in excess of their investment in the partnership" (Reasons, para. 58).

[27] Turning to subsection 40(3.12), he found, based on the 1994 Budget Supplementary Information and the harsh effect that subsection 40(3.1) can have, that this provision operates as a relieving provision by allowing taxpayers to offset the deemed gain realized pursuant to subsection 40(3.1) and recover the tax paid on the gain (Reasons, paras. 63-64).

[28] The Tax Court judge then turned to the second part of the abuse analysis, namely whether the appellant frustrated the underlying rationale of the CDA regime by the triggering of the second capital gain and by electing to offset it by the deemed capital loss under subsections 40(3.1) and 40(3.12) (Reasons, para. 68).

[29] The Tax Court judge answered this question in the affirmative based on his finding that the avoidance transactions were specifically designed to achieve a result that was inconsistent with the rationale underlying subsections 40(3.1) and 40(3.12) and the CDA regime. He explained that, but for the application of the GAAR, the appellant would be able to make a tax-

free distribution equal to the entire capital gain realized from the sale of the real estate assets (Reasons, para. 85-86).

[30] Finally, the Tax Court judge concluded that subsections 40(3.1) and 40(3.12) were not intended to allow the appellant to achieve the tax benefit obtained. According to him, the result achieved was inconsistent with the underlying rationale of these provisions as well as the underlying rationale of the CDA regime (Reasons, paras. 88-89).

POSITION OF THE APPELLANT

[31] In support of its appeal, the appellant submits that the Tax Court judge erred in concluding that the series of transactions was abusive as he failed to consider the existence of the two different assets, i.e. the real estate assets and the appellant's partnership interest which generated distinct gains (Memorandum of the Appellant, para. 35). Although the Tax Court judge held with apparent conviction that the series of transactions was abusive, the reasons offered in support of this conclusion do not follow the principled approach that is to be used in conducting the abuse analysis.

[32] When regard is had to the GAAR framework, the appellant argues that taxpayers are allowed to carry out transactions that will minimize their tax liability, and that "the term abuse does not imply a moral opprobrium regarding the actions of the taxpayer in doing so." It insists that determining the underlying rationale of the provisions at issue should be an objective exercise rather than a "value judgment of what is right or wrong" (Memorandum of the Appellant, paras. 38-40). As a last observation on the GAAR framework, the appellant notes that

section 245 is a measure of last resort, and that in the case at hand, the appropriate remedy was a legislative amendment in order to change the existing policy, a step which took place when Parliament altered the definition of CDA in subsection 89(1) in 2013 (Memorandum of the Appellant, para. 44).

[33] The appellant does not take issue with the inner workings of the CDA regime as described by the Tax Court judge. It argues that the definition of CDA is nothing more than a formula provided to compute the CDA balance at a point in time. Further, it contends that this regime is not concerned with the origins of the capital gains and losses, but only by the maximum amount a corporation can pay out tax-free to a shareholder. There is therefore no distinction to be made between gains arising from a true disposition and a deemed gain, nor is it relevant to consider whether Part I tax has been paid on the taxable portion of the gain. Finally, it submits that section 184 also is of no relevance in determining what should be included in the CDA balance, as it is simply the remedy chosen by Parliament to address excessive payments (Memorandum of the Appellant, paras. 55-61).

[34] Turning to subsections 40(3.1) and 40(3.12) (also referred to as the negative ACB rules), the appellant acknowledges that subsection 40(3.1) is a specific anti-avoidance rule and goes on to explain its application as well as its interaction with subsection 40(3.12) the same way as does the Tax Court judge. The appellant, however, relies on the last quoted paragraph of 1994 Budget Supplementary Information and insists that the mischief that the negative ACB rules sought to address was the circumvention of the partnership “at-risk” rules by “having partnership loss allocations precede distributions” (Memorandum of the Appellant, para. 68). It points out that in

the instant case, the distribution preceded the allocation and that, as a specific anti-avoidance provision, subsection 40(3.1) operated exactly as it should. Regarding subsection 40(3.12), the appellant posits that the loss it elected pursuant to that provision did trigger a reduction of its CDA pursuant to subsection 89(1) (Memorandum of the Appellant, paras. 69-71).

[35] When regard is had to the Tax Court judge's view that the series of transactions had enabled the appellant to distribute the entire capital gain resulting from the sale of the real estate assets without tax, the appellant argues that he is ignoring *bona fide* legal relationships, contrary to *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622 (Memorandum of the Appellant, para. 74). Given that the two realized capital gains reflected "economic realities" (i.e. the one resulting from the sale of the real estate assets and the deemed gain resulting from the negative ACB), the appellant argues that both these gains must be recognized in computing the CDA balance (Memorandum of the Appellant, para. 76). Additionally, the appellant submits that a failure to take into account both gains ignores two further Supreme Court decisions holding that separate transactions must be viewed independently (*Friedberg v. Canada*, [1993] 4 S.C.R. 285 and *Singleton v. the Queen*, 2001 SCC 61, [2001] 2 S.C.R. 1046) (Memorandum of the Appellant, paras. 76-81). As well, the appellant relies on *Canada Trustco Mortgage Co. v. The Queen*, 2005 SCC 54, [2005] 2 S.C.R. 601 [*Canada Trustco*] to argue that the economic substance of a transaction should not be "viewed in isolation from a textual, contextual and purposive interpretation" of the relevant provisions (Memorandum of the Appellant, para. 87 citing *Canada Trustco* at para. 76).

[36] Lastly, the appellant contends that the Tax Court judge erred in holding that the series of transaction had led to “over-integration” and that, in any case, integration is a mere concept as there is no broad or overarching integration policy in the Act (Memorandum of the Appellant, paras. 89-92). If such a policy ever existed, submits the appellant, the question is whether timing the CDA is inappropriate, specifically, whether paying a dividend when the underlying tax has not been paid frustrates this policy (Memorandum of the Appellant, paras. 97-98). Pointing to specific provisions of the Act that promote integration, the appellant posits that “Parliament chose not to adopt a general integration regime, and as such, there can be no general integration policy in the Act” (Memorandum of the Appellant, para. 108).

[37] As to the 2013 legislative amendment that was brought to the CDA definition set out in subsection 89(1), the appellant argues that the Tax Court judge erred in holding that this amendment was not instructive as it “clearly modified the existing law” (Memorandum of the Appellant, para. 110). The appellant submits that reading the new enactment as clarifying the existing law amounts to using this amendment in order to support a finding of abuse, a proposition that runs against the decision of this Court in *Univar Holdco Canada ULC v. Canada*, 2017 FCA 207, [2019] 2 F.C.R. 569 [*Univar*] (Memorandum of the Appellant, para. 128 citing *Univar* at para. 29).

POSITION OF THE CROWN

[38] The Crown begins by citing *Lipson v. Canada*, 2009 SCC 1, [2009] 1 S.C.R. 3 [*Lipson*] at paras. 42 and 47 and the decision of this Court in *Fiducie financière Satoma v. Canada*, 2018 FCA 74 [*Satoma Trust*] at para. 52 for the proposition that using an anti-avoidance provision in

order to obtain a tax benefit gives rise to an abuse. The Crown adds that subsection 40(3.1) is an anti-avoidance provision that was used for that purpose (Memorandum of the Crown, Overview, p. 1).

[39] The Crown further contends that the GAAR framework requires going behind the words of the provisions relied on by the taxpayer, in order to determine their underlying rationale. The Crown argues that the "Tax Court judge correctly concluded that the underlying rationale of the CDA regime is to promote integration and not over-integration" (Memorandum of the Crown, para. 41). In that respect, the Crown submits that the "CDA regime, which includes subsections 83(2), 89(1) and 184(2), is an integral part of the Act's mechanism with respect to integration" and that these provisions viewed as a whole allow the non-taxable portion of capital gains realized by a private corporation to flow through an individual taxpayer without attracting further tax (Memorandum of the Crown, para. 54).

[40] With respect to the rationale underlying the CDA regime, the Crown submits that the intention was to provide a mechanism ensuring that the non-taxable portion of capital gains retains its character in the hands of the recipient, and that only this non-taxable half is capable of being distributed tax-free (Memorandum of the Crown, para. 60).

[41] As to the legislative amendment brought to subsection 89(1), the Crown submits that the amended text expressly provides for a rationale already found in the Act (Memorandum of the Crown, para. 65).

[42] With respect to the negative ACB rules, the Crown agrees with the Tax Court judge's determination of the rationale underlying subsections 40(3.1) and 40(3.12), namely to prevent passive investors to receive tax-free distributions in excess of their investment and the undistributed income allocated to them (Memorandum of the Crown, paras. 66, 81-82).

[43] Further, the Crown submits that the Tax Court judge did not err when he concluded that the overall result of the series of transactions frustrated the underlying rationale of both the CDA regime and the negative ACB rules (Memorandum of the Crown, para. 84). Specifically, the Crown argues that the abuse resides in the fact that the appellant triggered subsection 40(3.1), an anti-avoidance provision, which, combined with the election provided for under subsection 40(3.12), offends the purpose of both these provisions (Memorandum of the Crown, para. 90).

[44] Finally, the Crown argues that the Tax Court judge did not reintroduce the doctrine of economic reality in the GAAR analysis, but rather properly conducted the mandated analysis (Memorandum of the Crown, para. 96).

ANALYSIS

[45] In order to conclude that GAAR applies, the Tax Court judge had to answer three questions in the affirmative: was there a tax benefit? If so, were the transactions which gave rise to this benefit avoidance transactions? If so, were the avoidance transactions abusive? (*Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R. 721 [*Copthorne*], para. 33, citing *Canada Trustco* at paras. 18, 21, 36).

A. *The Tax Benefit*

[46] As to the first two questions, there is agreement that we are dealing with avoidance transactions that resulted in a tax benefit, but there is no agreement as to what this benefit actually is. The Tax Court judge surmised that if the appeal fails, the Minister will assess an additional tax on excessive elections under subsection 184(2) unless the appellant elects to treat the excessive capital dividend as a taxable dividend. He concluded from this that the tax benefit was the avoidance of the additional tax on the excessive amount (Reasons, para. 6). The Crown agrees with this characterization of the tax benefit (Memorandum of the Crown, para. 26).

[47] The appellant for its part contends that the tax benefit results from the CDA increase in the amount of $12,155,827 (Memorandum of the Appellant, para. 1). However, it is now established that the modification of tax attributes, such as an increase in a taxpayer's CDA, does not give rise to a tax benefit unless and until a capital dividend is paid out of that account to a recipient capable of benefiting from its tax-free character (see *1245959 Alberta Ltd. v. Canada (Attorney General)*, 2018 FCA 114 [*Perry Wild*]). Although distributions have been made from the appellant's CDA, the recipients so far are all related corporations which can otherwise receive inter-corporate dividends on a tax-free basis (subsection 112(1)).

[48] The tax benefit identified by the Tax Court judge, and agreed to by the Crown, no more qualifies as a tax benefit. The GAAR may only be used to deny a tax benefit that results from an avoidance transaction. The tax benefit in the form of the avoidance of the additional tax on excessive elections provided for under subsection 184(2) would result from the Notice of

determination itself which reduced the appellant's CDA by half of the second capital gain in order to deny the tax benefit. A tax benefit cannot be the result of a Notice of determination issued under the GAAR as the purpose of such a determination is to deny the tax benefit, not to bring the benefit into existence.

[49] Faced with the parties' desire to obtain a resolution in this matter and the absence of a tax benefit, counsel for the appellant made the undertaking (now fulfilled) that a dividend be paid to non-corporate shareholders so as to allow the matter to be resolved at this juncture. With the agreement of the Crown, the Court agreed to conduct the abuse analysis on the basis that a tax benefit arose by reason of such a dividend having been paid.

[50] The question that arises in that context is whether the series of transactions which allowed for the payment of a capital dividend for the benefit of the non-corporate shareholders, equal to the whole of the capital gain realized on the sale of the real estate assets, frustrates the provision of the Act that were relied upon in order to achieve this result.

B. *Standard of Review*

[51] The question whether there has been an abuse is one of mixed fact and law (*Canada Trustco,* para. 44; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*], para. 37). The abuse analysis requires in turn that the object, spirit and purpose of the provisions enabling the tax benefit be determined (*Copthorne*, para. 70), an exercise that gives rise to an extricable question of law to be assessed on a standard of correctness *(Canada Trustco*, para. 44; *Housen*, paras. 8, 37).

C. *Statutory Interpretation in the Context of the GAAR*

[52] The Tax Court judge properly instructed himself as to the exercise that must be undertaken in construing the relevant provisions in a GAAR context (Reasons, para. 33):

> The first step involves identifying the object, spirit and purpose of the relevant rules. Statutory interpretation under the GAAR differs from traditional word-based interpretation. Whereas, under the traditional rule of statutory interpretation, the analysis seeks to determine what the meaning of a provision is, under the GAAR, statutory interpretation is used to determine the object, spirit or purpose of the provision. The object, spirit or purpose is the rationale underlying the provision. Transactions may be found to be abusive of a provision's underlying rationale, even though they are consistent with the literal, contextual and purposive meaning of the words of the statute. [*Copthorne*, para. 70 and *Canada v. Oxford Properties Group Inc*., 2018 FCA 30, [2018] 4 F.C.R. 3 [*Oxford*], paras. 40-46 are cited in support.]

[53] It follows that a GAAR analysis can lead to a result that is different from that obtained by a traditional, textual, contextual and purposive interpretation focused on the meaning of the words. Indeed, this must be so given that (*Copthorne*, para. 109):

> [w]hen the Minister invokes the GAAR, he is conceding that the words of the statute do not cover the series of transactions at issue. Rather, he argues that although he cannot rely on the text of the statute, he may rely on the underlying rationale or object, spirit and purpose of the legislation to support his position.

And that:

> if the Court [was] 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 [*Copthorne*, para. 111, citations omitted].

D. *Statutory Context*

[54] Because we are concerned here with provisions that deal with partnership interests—specifically the manner in which their ACB is computed—it is useful to have in mind in broad terms the tax treatment of partnerships under the Act. As was explained in *Oxford* (para. 48):

> [p]artnerships have a hybrid status under the Act. Although partnership income is allocated to the partners, it is computed "as if the partnership were a separate person" (paragraph 96(1)(*a*)). Because partnerships are distinct from the partners at the income computation stage – Division B – computation of income – they, much like corporations, can hold assets, in which case the interest of the partners in those assets is reflected by their partnership interests. Partnership interests are distinct from the underlying property held by the partnership and can be subject to a different treatment under the Act.

[55] While the text of subsection 245(4) provides that abusive tax avoidance is to be determined "having regard to [the] provisions [of the Act], […] read as a whole," it is appropriate to circumscribe the analysis to provisions that are "grouped together" or "work together to give effect to a plausible and coherent plan" (*Copthorne*¸ para. 91 citing R. Sullivan, Sullivan on the *Construction of Statutes* (5th ed. 2008), at pp. 361 and 364). Two distinct groups of related provisions interact in the present case, the first relating to the CDA regime and the second to the negative ACB rules.

E. *The Object, Spirit and Purpose of the Relevant Provisions*

I. Subsections 83(2), 89(1) and 184(2): the CDA Regime

[56] A CDA is a notional account maintained by private corporations to keep track of certain types of tax-free surpluses accumulated over time (Reasons, para. 39). As per the definition

found at subsection 89(1), the balance of the CDA is determined at any particular time by adding, *inter alia*, (i) the tax-free portion of capital gains, (ii) the amount of tax-free capital dividends received by the corporation from other corporations and (iii) the proceeds of certain life insurance policies and subtracting, *inter alia*, (iv) the non-deductible portion of capital losses and (v) capital dividend distributions made before the particular time (Reasons, para. 39).

[57] Because a CDA is computed by reference to the qualifying amounts that may be distributed tax-free, it must, by definition, reflect a positive amount. Mathematically, however, amounts that impact negatively on the CDA are kept track of even when they bring the balance below zero in which case the CDA cannot become positive again unless and until the negative balance is compensated by additional qualifying amounts specified in subsection 89(1). Of significance for present purposes is that should a negative balance be caused by a capital loss that offsets a capital gain that has already been used to make a tax-free distribution, the system is kept whole and its integrity is preserved by the fact that the CDA deficit will have to be compensated by additional qualifying amounts before a capital dividend can again be paid.

[58] When a private corporation has a positive CDA balance, it may distribute those surpluses, tax-free, by way of a capital dividend, but only to the extent of the corporation's CDA balance immediately before the dividend becomes payable (subsection 83(2)). Should a corporation elect to pay a capital dividend in excess of the CDA, it incurs the additional tax on excessive elections imposed under Part III of the Act, specifically subsection 184(2), unless it elects, with the agreement of the relevant shareholders, to treat the excess as a regular taxable dividend (subsection 184(3) and 184(4)).

[59] As explained by the Tax Court judge, the CDA regime plays a fundamental role in giving effect to the principle of integration by ensuring that income is "taxed at the same rate whether it is earned directly or indirectly by a corporation" (Reasons, para. 41).

[60] In broad terms, the CDA regime seeks to achieve this result by neutralizing the impact of the interposition of a corporation in the manner in which capital gains are taxed. Given that only one half of capital gains is taxable (section 38), Parliament provided for a mechanism whereby a corporation can preserve the tax-free portion of the gain for distribution to a shareholder without attracting an extra level of tax—this mechanism governs the manner in which the CDA is computed. In essence, the CDA regime ensures that no more than the tax-free portion is distributed to shareholders by way of a capital dividend so as to mirror the tax treatment of an individual taxpayer who generates the underlying gain directly.

[61] The same rationale governs the tax treatment of capital losses. For that purpose, when a corporation suffers a capital loss, a portion of the loss that corresponds with the non-taxable capital gain portion is deducted from the CDA, thereby lowering the amount available for capital dividend election and distribution. This again mimics the effect of a capital loss when incurred by an individual taxpayer directly. The CDA computation mechanism reflects this by decreasing the amount that can be paid out tax-free by a corresponding amount whenever a private corporation suffers a capital loss.

[62] As pointed out by the Tax Court judge, although the CDA regime does not achieve integration in all instances or perfectly, this does not detract from the fact that subsections 83(2),

89(1) and 184(2) were enacted to promote integration. Private corporations must keep track of the tax-free portion of capital gains and the non-deductible portions of capital losses, determine how and when capital dividends may be paid out, and suffer penalties when excessive dividends are paid out (Reasons, para. 46).

II. Subsections 40(3.1) and 40(3.12): the Negative ACB Rules

[63] The 1994 Budget Supplementary Information presents subsection 40(3.1) as an anti-avoidance provision which was enacted in the following context (p. 42):

> The adjusted cost base (ACB) of a taxpayer's property reflects the cost to a taxpayer of the property and is taken into account in computing a capital gain or loss on the sale of the property. In certain circumstances the ACB of a taxpayer's property may become negative in which case the taxpayer is treated as having realized a capital gain. This rule generally does not apply where the property is a partnership interest; this exception recognizes that a partner's negative ACB may result from legitimate, and possibly temporary, circumstances such as the withdrawal of partnership capital or where losses of the partnership are allocated to the partner for tax purposes.
>
> Certain tax shelters have been structured to utilize this exception to permit limited or passive investors to claim tax-deductible losses and receive cash distributions which exceed the amount invested: that is, to extract tax-free from the partnership more than the cost of the partnership interest to the investor. The budget proposes that limited and certain other passive partners will be required to report as a capital gain any negative ACB in their partnership interest at the end of a fiscal period of the partnership.
>
> These rules are a logical extension of the existing limited partnership "at-risk" rules which constrain the amount of losses that may be flowed out to an investor. In particular, the budget proposal will ensure that the at-risk rules cannot be circumvented by having partnership loss allocations precede distributions. Subject to transitional provisions, the new rules will apply to fiscal periods of partnerships ending after February 22, 1994.

[64] Prior to the 1994 amendments, partnership interests were excluded from the application of subsection 40(3), which deems a capital gain to arise when the ACB of capital property

becomes negative. The application of this rule to partnership interests was considered to be ineffective and cumbersome given that partnerships often make distributions from available cash as opposed to accumulated net income (Reasons, para. 50). However, the exclusion of partnership interests from the application of subsection 40(3) became a source of concern with the advent of tax sheltered partnership investments, a development which led to the 1994 amendments (Reasons, paras. 52-56). The negative ACB rules were said to be a logical extension of the partnership "at-risk" rules (Reasons, para. 57 citing 1994 Budget Supplementary Information at p. 42). These amendments bring partnership interests within the scope of the negative ACB rules (subsection 40(3.1)) but also provide relief by allowing the deemed gain that arises when the ACB of partnership interests become negative to be offset by a deemed loss up to an elected amount not to exceed the deemed gain (subsection 40(3.12)). When regard is had to the circumstances which led to the adoption of these provisions, subsection 40(3.1) is a specific anti-avoidance measure which levies tax and subsection 40(3.12) provides corresponding relief.

[65] The mechanical operation of these provisions is premised on paragraph 53(2)(c) which provides that the ACB of a partner's partnership interest is to be reduced by an amount equal to that of the distribution made to it by the partnership. Where, at the end of the fiscal period, the partner is a limited partner or a specified member of the partnership (mostly passive partners) and the amount of this distribution exceeds the ACB leading it to be negative, the Act provides for a deemed capital gain in the amount of the negative ACB so as to bring it back to 0 (subsections 40(3.1) and 40(3.11)). In a subsequent fiscal period, when the ACB of the partnership interest becomes positive again, the partner can elect to have a deemed capital loss of an amount equal to the deemed capital gain triggered in a previous fiscal period, but not

exceeding the current ACB (subsection 40(3.12)). The deferral of this relief to a subsequent fiscal period results from the fact that the negative ACB triggering the deemed gain is to be computed at the close of a fiscal period.

[66] From a tax policy perspective, the impact of subsections 40(3.1) and 40(3.12) was to be a wash as it was expected that, the ACB of their partnership interest permitting, partners would elect to recover the tax that they had to pay on the deemed capital gain arising in a prior year. For the same reason, the corresponding upward and downward impact that these provisions have on the CDA was expected to self-erase.

F. *The Abuse Analysis*

[67] Two preliminary comments are in order. In resisting the appeal, the Crown asserts, with reference to subsection 40(3.1), that "[t]he use of an anti-avoidance provision to obtain a tax benefit […] is abusive tax planning under the GAAR" (Memorandum of the Crown, Overview, p. 1). *Lipson* and *Satoma Trust* are cited in support of this proposition.

[68] I do not believe that these decisions support so broad a proposition. As *Lipson* makes clear, the abuse lies in using an anti-avoidance measure in order to obtain the result that it is intended to circumvent. In that case, subsection 74.1(1), a provision that was intended to prevent spouses from reducing their tax burden by taking advantage of their non-arm's length relationship, was shown to have been used to achieve a tax reduction (*Lipson*, para. 42). Similarly, in *Satoma Trust*, an anti-avoidance measure that was intended to prevent income

splitting (subsection 75(2)) was used in combination with another provision (subsection 112(1)) to achieve income splitting (*Satoma Trust*, para. 52).

[69] As is the case for any other provision, what must be shown at the abuse stage of the analysis is that the anti-avoidance provision was used in a manner that defeats its underlying rationale. In the present case, I agree with the appellant that subsection 40(3.1) operated exactly as it should when regard is had to its underlying rationale (see para. 34 above).

[70] I also agree with the appellant, based on the binding decisions that it cites (see para. 35 above), that in conducting the abuse analysis, the Court must give effect to the transactions as they unfolded, and refrain from assessing the abuse on the basis of the overall result achieved. What must be shown is that the provisions used to achieve this result, when construed with a focus on their object, spirit and purpose, reveal a clear underlying rationale that was frustrated by the series of transactions. As explained below, I am satisfied that this demonstration has been made in the present case.

[71] In considering whether the avoidance transactions carried out by the appellant were abusive, it is important to track the evolution of the appellant's CDA as the plan was being implemented. The triggered application of subsection 40(3.1) on October 1, 2007, increased the appellant's CDA by half of the deemed gain (approximately $12,000,000). On the same day, the appellant's CDA was further increased by approximately $12,000,000, being half of the capital gain allocated to it further to the sale of the real estate assets, thereby bringing the CDA up to roughly $24,000,000. The declaration of the capital dividend in the approximate amount of

$24,000,000 on May 30, 2008, then brought the CDA down to zero. The CDA balance subsequently became negative by some $12,000,000 when, on September 30, 2008, the appellant elected the deemed loss pursuant to subsection 40(3.12).

[72] The negative CDA balance resulting from this election means that on a go-forward basis, the appellant would have to generate qualifying amounts in excess of $12,000,000 before it could erase the CDA deficit that it created and again be in a position to declare tax-free capital dividends. However, the appellant will never be confronted with this downside as it ceased operations after the plan was implemented and has been inactive ever since. The definitive cessation of activities was a must in the context of the plan as replenishing the negative CDA balance in the course of on-going operations would effectively reverse the tax benefit obtained. Although this step was not included in the avoidance transactions that the appellant admitted to have engaged in (see Partial Agreed Statement of Facts, Appeal Book, Vol. 1, para. hh, pp. 105-106), creating the CDA deficit at a time that coincided with the cessation of operations was an essential part of the plan.

[73] The tax-free distribution of the whole capital gain resulting from the sale of the real estate assets (approximatively $24,000,000) is the high point in the series of transactions implemented by the appellant. However, electing the loss and causing the CDA balance to become negative by $12,000,000 was a necessary step in order for the appellant to offset the tax that would otherwise have been payable on the deemed capital gain that it triggered.

[74] The appellant chose to trigger the deemed gain and declare the capital dividend before the deemed loss was elected so that the CDA effectively stood at $24,000,000 rather than $12,000,000 at the time the dividend was paid. This doubling of the CDA before the offsetting loss was elected allowed for the payment of the extra $12,000,000 dividend.

[75] The first question that arises is whether the appellant could, pursuant to subsections 40(3.1) and 40(3.12), pay the capital dividend before the offsetting loss was elected. There is no doubt that these provisions, when construed with a focus on the words, did not prevent the interim payment of the capital dividend. The issue is whether their underlying rationale prevents it. I do not believe so.

[76] I note in this respect that the existence of a positive CDA balance, however generated, is the sole condition that governs a taxpayer's right to declare a capital dividend. A deemed loss is elected during fiscal periods that are subsequent to the one in which the gain is deemed to arise, which means that considerable time can lapse between the two events. That Parliament would have intended to freeze a taxpayer's right to declare a capital dividend out of its CDA in the interim without so saying in express terms is unlikely.

[77] During the trial, the example was given of a private corporation that owns GM shares having an accrued capital gain of $10.00 and IBM shares with the equivalent accrued loss. I agree with the Tax Court judge that in these circumstances, the Act contemplates that the private corporation could realize the gain, distribute a tax-free dividend out of its CDA and then trigger the capital loss in order to offset the gain (Transcript of Proceedings, Appeal Book, Vol. 4 at pp.

566-567). The same treatment is contemplated whenever a loss is carried back from another year to erase a gain that was used in the interim to declare a capital dividend.

[78] These frequently occurring instances involving the interim payment of capital dividends show that the Act is not concerned by the timing of capital dividends, and I can see nothing in the rationale that underlies subsections 40(3.1) and 40(3.12) that changes that. In my view, declaring the capital dividend before electing the deemed loss was not, in and of itself, objectionable.

[79] That said, it remains that we are dealing with a deemed gain and a deemed loss that are intended to self-erase. Just as the deemed loss neutralizes the deemed gain, the CDA decrease that results from the deemed loss should over time neutralize the CDA increase that results from the deemed gain.

[80] The appellant insists that this CDA neutrality was preserved here because the CDA is a running account and, while the CDA increase that results from the deemed gain was used to pay a capital dividend, the appellant continues to carry the negative CDA balance of $12,000,000 that results from the corresponding deemed loss (Memorandum of the Appellant, para. 100). This is how counsel explained the appellant's position during the trial (Transcript of Proceedings, Appeal Book, Vol. 4 at p. 569 lines 6-13):

> If ever they want to pay other capital dividend amounts, they will have to replenish the account because now it's reduced to – by $12 million. That can be an event in the future. So it's not that the Act does not contemplate that. It has the impact. It's a historical computation. But it's not – the dollars are not there in that year.

[81] However, as noted earlier, the reality is that the dollars will never be there and that the CDA deficit will never be replenished as the appellant, crippled as it was by this running tax account and intent on preserving the tax benefit obtained, was to cease operation and was destined to remain inactive after the plan was implemented.

[82] In this respect, the strategy is highly reminiscent of the one used in *Triad Gestco Ltd. v. Canada*, 2012 FCA 258, [2014] 2 F.C.R. 199 [*Triad Gestco*]. Like here, *Triad Gestco* implemented a series of transactions designed to avoid tax altogether on a substantial capital gain arising from the sale of a commercial property. It did so by generating a loss commensurate with the anticipated gain. The method used was a "value shift", the effect of which was to isolate in two distinct classes of shares the tax attributes reflecting the high fair market value (FMV) of the underlying property and its low cost so that they inversely mirrored each other. By disposing of the shares that carried the desired tax attributes, i.e. low FMV and high cost, while retaining permanently the shares that carried the inverse tax attributes, i.e. high FMV and low cost, *Triad Gestco* was able to generate the planned loss and use it to offset the gain without ever being exposed to tax on the corresponding capital gain embedded in the other class of shares (*Triad Gestco*, paras. 39, 57-59).

[83] Like *Triad Gestco*, the appellant managed to isolate and use for the benefit of its shareholders the upward impact that the deemed gain had on its CDA in circumstances where it continues to hold, but will never have to contend with the negative CDA balance resulting from the corresponding deemed loss that had to be elected in the process. In both cases, the undesirable tax attributes that had to be created in order to obtain the tax benefit were isolated

from the desirable ones and left to be forgotten without ever having any repercussion. As in *Triad Gestco* but in the reverse order, the gain was used to obtain the tax benefit and the negative impact of the corresponding loss will never be felt.

[84] This defeats the rationale that underlies the CDA regime because it allowed for the payment of a $12,000,000 capital dividend in circumstances where the $12,000,000 deficit that had to be created in the process will never be accounted for. Specifically, the extra $12,000,000 that was distributed tax-free will never be offset by the qualifying amounts that would have to be renounced on a go-forward basis in order to make up the deficit.

[85] This is not to say that this balance must be attained perfectly or always. However, a plan that deliberately sets out to create a permanent $12,000,000 CDA deficit in order to extract a commensurate tax-free dividend breaks the integrity of the CDA regime the same way as the strategy used in *Triad Gestco* broke the integrity of the capital gains regime. The use that was made of subsections 40(3.1) and 40(3.12) in order to achieve this result amounts to a plain misuse as these provisions were used so as to defeat altogether the CDA neutral application envisioned by their underlying rationale.

[86] The extra $12,000,000 capital dividend that was paid and the permanent CDA deficit of $12,000,000 that was created in the process fully account for the over-integration identified by the Tax Court judge in the course of his reasons (Reasons para. 86). As demonstrated above, there is no basis for the appellant's contention that this over-integration can only be explained by

the Tax Court judge's fixation on the overall result that was achieved or by an improper "economic reality" assessment of the transactions (Memorandum of the Appellant, paras. 72-78).

[87] I note before concluding the abuse analysis that the decision to have the two partnership fiscal periods fall within a single taxation year of the appellant was no more than an interesting quirk in the elaboration of the plan. Failing this, the deemed gain and loss under subsection 40(3.1) and 40(3.12) would have been realized in distinct taxation years of the appellant with the result that the tax advantage sought could only have been obtained by way of a carry-back loss. As was explained by the author of the plan, the timing of the fiscal periods "ensure[d] that [the appellant would not be asking] for money back from government after funding taxes on both gains required to generate the 2 CDA's" and would not be "giving the tax authorities an interest free loan for a year" (Email from Jerry Wise to Don Brazeau, dated April 10, 2007, Appeal Book, Vol. 1, p. 169). From a GAAR perspective, the plan would be equally objectionable if the deemed gain and loss had been realized by the appellant in successive taxation years.

G. *The Subsequent Amendment*

[88] The Act was amended in 2013, with effect as of November 1, 2011, to exclude a deemed capital gain under subsection 40(3.1) and a deemed capital loss under subsection 40(3.12) from the computation of the CDA (see the amended definition of CDA in subsection 89(1)). Because deemed gains and losses under these provisions were to be taken into account in the computation of the CDA prior to this enactment, the appellant contends that the amendment necessarily operates as new law.

[89] When regard is had to the rationale underlying the negative ACB rules and the CDA regime, this submission is only partially correct. Although subsections 40(3.1) and 40(3.12) were to be taken into account in the computation of the CDA prior to the amendment, they were not to be used to turn the CDA regime on its head. Faced with tax plans such as the one in issue here, which allows taxpayers to successfully use the upward impact of subsection 40(3.1) on the CDA in order to distribute capital dividends while unaffected by the downward impact of subsection 40(3.12), Parliament decided to simply break the link between these provisions and the CDA regime altogether. In so doing, Parliament ensured that the negative ACB rules would continue to have a CDA-neutral application, thereby maintaining an observable policy that was already in place. To that extent, and this is the extent that matters in a GAAR context, the amendment does not operate as new law (*Oxford*, paras. 89-91).

DISPOSITION

[90] For the above reasons, I would dismiss the appeal with costs.

"Marc Noël"

Chief Justice

"I agree.

Yves de Montigny J.A."

"I agree.

René LeBlanc J.A."

ANNEX

Income Tax Act, R.S.C. 1985 (5th Supp.), c. 1

PART I

Income Tax

DIVISION B

Computation of Income

SUBDIVISION C

Taxable Capital Gains and Allowable Capital Losses

40(1)

[…]

Deemed gain for certain partners

(3.1) Where, at the end of a fiscal period of a partnership, a member of the partnership is a limited partner of the partnership, or is a member of the partnership who was a specified member of the partnership at all times since becoming a member, except where the member's partnership interest was held by the member on February 22, 1994 and is an excluded interest at the end of the fiscal period,

> **(a)** the amount determined under subsection 40(3.11) is deemed to be a gain from the disposition, at the end of the fiscal period, of the member's interest in the partnership; and
>
> **(b)** if the member is a member of a professional partnership, and that time is the end of the fiscal period of the partnership, the amount referred to in subparagraph 53(2)(c)(i) in respect of the taxpayer for that fiscal period; and

[…]

Loi de l'impôt sur le revenu, L.R.C. 1985 (5e suppl.), ch. 1

PARTIE I

Impôt sur le revenu

SECTION B

Calcul du revenu

SOUS-SECTION C

Gains en capital imposables et pertes en capital déductibles

40(1)

[…]

Gain présumé pour certains associés

(3.1) Dans le cas où, à la fin de l'exercice d'une société de personnes, un associé de celle-ci en est soit un commanditaire, soit un associé déterminé depuis qu'il en est un associé, les présomptions suivantes s'appliquent :

> **a)** le montant déterminé selon le paragraphe (3.11) est réputé être un gain provenant de la disposition, à la fin de l'exercice, de la participation de l'associé dans la société de personnes;
>
> **b)** la participation de l'associé dans la société de personnes est réputée, pour l'application du paragraphe 2(3), de l'article 110.6, des paragraphes 116(6) et (6.1) et de l'article 150, avoir fait l'objet d'une disposition par l'associé à la fin de l'exercice.

[…]

Deemed loss for certain partners

(3.12) If a corporation, an individual (other than a trust) or a graduated rate estate (each of which is referred to in this subsection as the "taxpayer") is a member of a partnership at the end of a fiscal period of the partnership, the taxpayer is deemed to have a loss from the disposition at that time of the member's interest in the partnership equal to the amount that the taxpayer elects in the taxpayer's return of income under this Part for the taxation year that includes that time, not exceeding the lesser of

(a) the amount, if any, by which

(i) the total of all amounts each of which was an amount deemed by subsection 40(3.1) to be a gain of the taxpayer from a disposition of the interest before that time

exceeds

(ii) the total of all amounts each of which was an amount deemed by this subsection to be a loss of the taxpayer from a disposition of the interest before that time, and

(b) the adjusted cost base to the taxpayer of the interest at that time.

Perte présumée pour certains associés

(3.12) Le contribuable — société, succession assujettie à l'imposition à taux progressifs ou particulier autre qu'une fiducie — qui est l'associé d'une société de personnes à la fin d'un exercice de celle-ci est réputé subir une perte lors de la disposition, à ce moment, de sa participation dans la société de personnes, égale à la somme qu'il a choisie à cette fin dans sa déclaration de revenu produite en vertu de la présente partie pour l'année d'imposition qui comprend ce moment, n'excédant pas la moins élevée des sommes suivantes :

a) l'excédent éventuel du total visé au sous-alinéa (i) sur le total visé au sous-alinéa (ii):

(i) le total des montants représentant chacun un montant réputé par le paragraphe (3.1) être un gain du contribuable provenant de la disposition de la participation avant ce moment,

(ii) le total des montants représentant chacun un montant réputé par le présent paragraphe être une perte du contribuable provenant de la disposition de la participation avant ce moment;

b) le prix de base rajusté de la participation pour le contribuable à ce moment.

SUBDIVISION H

Corporations Resident in Canada and their Shareholders

Definitions

SOUS-SECTION H

Les sociétés résidant au Canada et leurs actionnaires

Définitions

89 (1) In this Subdivision,

[…]

capital dividend account of a corporation at any particular time means the amount, if any, by which the total of

(a) the amount, if any, by which the total of

(i) the total of all amounts each of which is the amount if any, by which

(A) the amount of the corporation's capital gain — computed without reference to subclause 52(3)(a)(ii)(A)(II) and subparagraph 53(1)(b)(ii) — from the disposition (other than a disposition under paragraph 40(3.1)(a) or subsection 40(12) or a disposition that is the making of a gift after December 8, 1997 that is not a gift described in subsection 110.1(1)) of a property in the period beginning at the beginning of its first taxation year that began after the corporation last became a private corporation and that ended after 1971 and ending immediately before the particular time (in this definition referred to as the period)

exceeds the total of

(B) the portion of the capital gain referred to in clause (A) that is the corporation's taxable capital gain,

(B.1) the corporation's taxable capital gain from a disposition in

89 (1) Les définitions qui suivent s'appliquent à la présente sous-section.

[…]

compte de dividendes en capital S'agissant du compte de dividendes en capital d'une société, à un moment donné, l'excédent éventuel du total des montants suivants :

a) l'excédent éventuel de la somme des totaux visés aux sous-alinéas (i) et (i.1) sur le total visé au sous-alinéa (ii) :

(i) le total des montants dont chacun représente l'excédent éventuel :

(A) d'un gain en capital de la société — calculé compte non tenu de la subdivision 52(3)a)(ii)(A)(II) ni du sous-alinéa 53(1)b)(ii) — provenant de la disposition (sauf celle qui est visée à l'alinéa 40(3.1)a) ou au paragraphe 40(12) ou qui constitue un don effectué après le 8 décembre 1997 qui n'est pas un don visé au paragraphe 110.1(1)) d'un bien au cours de la période commençant au début de sa première année d'imposition (ayant commencé après le moment où elle est devenue la dernière fois une société privée et s'étant terminée après 1971) et se terminant immédiatement avant le moment donné (appelée période à la présente définition),

sur le total des montants suivants :

(B) le gain en capital imposable de la société correspondant,

(B.1) le gain en capital imposable de la société provenant d'une

the period under subsection 40(12), and

(C) the portion of the amount, if any, by which the amount determined under clause (A) exceeds the amount determined under clause (B) from the disposition by it of a property that can reasonably be regarded as having accrued while the property, or a property for which it was substituted,

(I) except in the case of a disposition of a designated property, was a property of a corporation (other than a private corporation, an investment corporation, a mortgage investment corporation or a mutual fund corporation),

(II) where, after November 26, 1987, the property became a property of a Canadian-controlled private corporation (otherwise than by reason of a change in the residence of one or more shareholders of the corporation), was a property of a corporation controlled directly or indirectly in any manner whatever by one or more non-resident persons, or

(III) where, after November 26, 1987, the property became a property of a private corporation that was not exempt from tax under this Part on its taxable income, was a property of a corporation exempt from tax under this Part on its taxable income, and

exceeds

(ii) the total of all amounts each

disposition au cours de la période, prévue au paragraphe 40(12),

(C) la partie de l'excédent éventuel du montant calculé à la division (A) sur le montant calculé à la division (B), provenant de la disposition d'un bien par la société, qu'il est raisonnable de considérer comme s'étant accumulée pendant que le bien, ou un bien qui lui est substitué **:**

(I) sauf dans le cas de la disposition d'un bien désigné, soit appartenait à une société — sauf une société privée, une société de placement, une société de placement hypothécaire ou une société de placement à capital variable **—,**

(II) soit appartenait à une société contrôlée, directement ou indirectement, de quelque manière que ce soit, par une ou plusieurs personnes non-résidentes, si le bien est devenu, après le 26 novembre 1987, un bien d'une société privée sous contrôle canadien — autrement qu'à cause d'un changement de résidence d'un ou de plusieurs actionnaires de la société —,

(III) soit appartenait à une société exonérée de l'impôt prévu à la présente partie sur son revenu imposable, si le bien est devenu, après le 26 novembre 1987, un bien d'une société privée qui n'était pas exonérée de l'impôt prévu à la présente partie sur son revenu imposable,

(ii) le total des montants dont

of which is the amount, if any, by which

(A) the amount of the corporation's capital loss — computed without reference to subclause 52(3)(a)(ii)(A)(II) and subparagraph 53(1)(b)(ii) — from the disposition (other than a disposition under subsection 40(3.12) or a disposition that is the making of a gift after December 8, 1997 that is not a gift described in subsection 110.1(1)) of a property in the period

exceeds the total of

(B) the part of the capital loss referred to in clause (A) that is the corporation's allowable capital loss, and

(C) the portion of the amount, if any, by which the amount determined under clause (A) exceeds the amount determined under clause (B) from the disposition by it of a property that can reasonably be regarded as having accrued while the property, or a property for which it was substituted,

(I) except in the case of a disposition of a designated property, was a property of a corporation (other than a private corporation, an investment corporation, a mortgage investment corporation or a mutual fund corporation),

(II) where, after

chacun représente l'excédent éventuel :

(A) d'une perte en capital de la société — calculée compte non tenu de la subdivision 52(3)a)(ii)(A)(II) ni du sous-alinéa 53(1)b)(ii) — résultant de la disposition (sauf celle qui est visée au paragraphe 40(3.12) ou qui constitue un don effectué après le 8 décembre 1997 qui n'est pas un don visé au paragraphe 110.1(1)) d'un bien au cours de cette période,

sur le total des montants suivants :

(B) la perte en capital déductible de la société correspondante,

(C) la partie de l'excédent éventuel du montant calculé à la division (A) sur le montant calculé à la division (B), provenant de la disposition d'un bien par la société, qu'il est raisonnable de considérer comme s'étant accumulée pendant que le bien, ou un bien qui lui est substitué :

(I) sauf dans le cas de la disposition d'un bien désigné, soit appartenait à une société — sauf une société privée, une société de placement, une société de placement hypothécaire ou une société de placement à capital variable —,

(II) soit appartenait à une

November 26, 1987, the property became a property of a Canadian-controlled private corporation (otherwise than by reason of a change in the residence of one or more shareholders of the corporation), was a property of a corporation controlled directly or indirectly in any manner whatever by one or more non-resident persons, or

société contrôlée, directement ou indirectement, de quelque manière que ce soit, par une ou plusieurs personnes non-résidentes, si le bien est devenu, après le 26 novembre 1987, un bien d'une société privée sous contrôle canadien — autrement qu'à cause d'un changement de résidence d'un ou de plusieurs actionnaires de la société —,

(III) where, after November 26, 1987, the property became a property of a private corporation that was not exempt from tax under this Part on its taxable income, was a property of a corporation exempt from tax under this Part on its taxable income,

(III) soit appartenait à une société exonérée de l'impôt prévu à la présente partie sur son revenu imposable, si le bien est devenu, après le 26 novembre 1987, un bien d'une société privée qui n'était pas exonérée de l'impôt prévu à la présente partie sur son revenu imposable;

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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