Docket: 2014-2991(IT)G

BETWEEN:

DON GILLEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 23, 24, 25 and 27, 2017
at Saskatoon, Saskatchewan

Before: The Honourable Justice Steven K. D'Arcy

Appearances:

Counsel for the Appellant:	Kurt Wintermute
Counsel for the Respondent:	Brooke Sittler

JUDGMENT

In accordance with the attached Reasons for Judgment:

1. The appeal with respect to a reassessment made under the *Income Tax Act* for the Appellant's 2008 taxation year is dismissed.

2. Costs are awarded to the Respondent.

Signed at Antigonish, Nova Scotia, this 30th day of August 2017.

"S. D'Arcy"

D'Arcy J.

Citation: 2017 TCC 163
Date: 20170830
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BETWEEN:

DON GILLEN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D'Arcy J.

[1] The Minister reassessed the Appellant's 2008 taxation year so as to deny his claim for a capital gains deduction in respect of the capital gain realized on the disposition of shares of Devonian Potash Inc. ("Devonian").[1] The disposition was made by the GDC Potash Holdings Limited Partnership (the "Limited Partnership").

[2] The Appellant has appealed from the reassessment. The sole issue before the Court is whether the conditions set out in subparagraph 110.6(14)(f)(ii) of the *Income Tax Act* (the "Act") were satisfied when Devonian issued shares to the Limited Partnership. More particularly, the issue is whether Devonian issued such shares to the Limited Partnership as part of a transaction or series of transactions in which the Limited Partnership disposed of property to Devonian that was

[1] As will be discussed, the Appellant received a capital distribution from a family trust in respect of the share disposition.

comprised of all, or substantially all, of the assets used in an active business carried on by the Limited Partnership or its members.

[3] The Appellant called three witnesses: the Appellant himself; Mr. Bruce Carson, whose family trust was one of the limited partners in the Limited Partnership; and Mr. Milton Holter, who provided services in respect of the potash project that is at the centre of this appeal.

I. Summary of Facts

[4] The Appellant grew up on a farm in Dodsland, Saskatchewan. He worked in the oil services business from 1984 to 1990. In 1990, he became involved in the oil production business. He testified that the business primarily involved the purchase of marginal oil wells. He carried on this business through two separate corporations: General Resources Inc. and Kinderock Resources Ltd. ("Kinderock"). The Appellant owned 100% of the shares of General Resources Inc. and 50% of the shares of Kinderock. His spouse owned the remaining shares of Kinderock.

[5] While carrying on the oil production business the Appellant became familiar with both freehold and Crown mineral rights. At some point, the Appellant developed an interest in mineral rights relating to potash.

[6] Sometime in either 2005 or 2006, the Appellant made a $200,000 investment in a company called Athabasca Potash. He made this investment after seeing a dramatic increase in the worldwide use of potash, particularly in the production of fertilizer. He disposed of his shares in Athabasca Potash in 2007, when the company went public. It appears to have been a very successful investment.

[7] The Appellant believed that potash prices would continue to rise. As a result, in the summer of 2007 he started looking into acquiring from the Province of Saskatchewan permits that would allow him to explore for potash in specific areas of the province (the "Potash Permits"). He reviewed a publication called AccuMap that contains historic drilling data on all wells that have been drilled in Saskatchewan. The Appellant noted that he had had a subscription to this publication "on and off" since 1992 or 1993.[2] At the relevant time for the purposes

[2] Transcript, January 23, 2017, pages 16-17, 27-28.

of this appeal he was using a subscription that Kinderock held for the period from March 1, 2007 to February 28, 2008.[3]

[8] He used AccuMap to determine where potash exploration had occurred in the 1960's and what specific areas were currently available for exploration. He travelled to Regina to examine core samples kept by the Government of Saskatchewan and eventually identified areas he was interested in exploring.[4]

[9] Kinderock then began to take steps to acquire the Potash Permits. The Appellant explained that Kinderock incurred the relevant expenses since it had the necessary financial resources.

[10] In September 2007, Kinderock retained Mr. Brian Reilly to help the Appellant with the permit application process.[5]

[11] On October 4, 2007, Mr. Reilly and the Appellant travelled to Regina and filed, on behalf of Kinderock, four separate applications for Potash Permits (the "First Permit Applications") with the Saskatchewan Government. Four separate applications were required since Kinderock was applying for potash exploration permits for 340,960 acres[6] and individual applications could not exceed 100,000 acres.

[12] The First Permit Applications were referred to as KP361, KP362, KP363 and KP364.[7] When making the applications, Kinderock paid, for each application, a $100 application fee, a deposit of $2,000 and a rental fee of $0.50 per acre. As mentioned previously, the four applications covered 340,960 acres, resulting in a rental fee of $170,480.

[13] On October 12, 2007, Kinderock retained Mr. Milt Holter as a consultant to provide advice with respect to its permit applications. The Appellant described Mr. Holter as someone who had extensive knowledge of potash deposits in Saskatchewan.[8]

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[3] Exhibit A-59.
[4] Transcript, January 23, 2017, pages 27-31.
[5] Transcript, January 23, 2017, pages 33 -35.
[6] See Exhibit A-1
[7] See Exhibits A-1, A-2, A-3, and A-4.
[8] See Exhibits A-61 to A-63 and Transcript, January 23, 2017, pages 55-59.

[14] The Appellant testified that he wanted to build a management team to help with the potash project. He first approached Mr. Brad Devine. Mr. Devine was a hockey agent that the Appellant had met when dealing with his son's hockey agent. Mr. Devine had previously worked as a vice-president with the investment firm Scotia McLeod. Mr. Devine informed the Appellant that he would like to be involved in the project. Mr. Devine apparently suggested that the Appellant consider taking Mr. Bruce Carson as a member of the team.[9]

[15] Mr. Carson is a chartered accountant. He worked for the international accounting firm KPMG (and its predecessor firms) from 1981 (as a tax specialist from 1984) to 1995 and from 1999 until he semi-retired in 2008. From 1995 to 1999, Mr. Carson worked for a Mr. Pinder, a hockey agent who was also very active in the oil and gas industry. It was during this period that he met Mr. Devine.[10]

[16] A meeting was arranged between the Appellant, Mr. Carson and Mr. Devine (the "First Group Meeting"). I heard conflicting evidence as to when the meeting took place. Although the Appellant could not remember the exact date of the meeting, on cross-examination he stated that the meeting occurred after the date he retained Mr. Holter, October 12, 2007, and before Kinderock applied for additional Potash Permits, October 17, 2007.[11]

[17] Mr. Carson testified that the First Group Meeting occurred on October 10, 11 or 12, 2007. He explained that on October 17 he had read a news story about a Russian ship docking at the Port of Churchill. Apparently, this was the first use of the port for importing products into Canada in a very long time. Mr. Carson explained that the imported product was fertilizer, which the news story indicated was being imported by a buying group called Farmers of North America. Mr. Carson remembered this because he had a meeting scheduled for either October 18 or 19 with brothers Jim and Jason Mann, who apparently ran Farmers of North America. As I will discuss, the meeting with Jim and Jason Mann started a chain of events that eventually led to the sale of the shares of Devonian.

[18] Mr. Carson believed his meeting with Jim and Jason Mann occurred a week to ten days after he first met the Appellant. This would mean his first meeting with the Appellant occurred somewhere between October 8 and October 12, 2007.

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[9] Transcript, January 23, 2017, pages 61-63.
[10] Transcript, January 24, 2017, pages 178-179.
[11] Transcript, January 24, 2017, pages 76-80.

[19] I accept the Appellant's testimony on this point. Although he had difficulty remembering the exact date of the First Group Meeting, he consistently stated that it was after Kinderock had retained Mr. Holter. In other words, it was after October 12, 2007. In light of Mr. Carson's testimony, the meeting appears to have occurred closer to October 12 than October 17, 2007.

[20] The Appellant testified that the meeting with Mr. Carson and Mr. Devine went well. He described it as "a warm meeting that had connotations of doing business together."[12] Mr. Carson provided similar testimony. He stated that the Appellant described the potential potash project and noted that he was looking to put a team together.

[21] Both the Appellant and Mr. Carson testified that the three individuals did not enter into a written agreement at that point in time. However, they agreed that Mr. Carson would "orchestrate a structure".[13] Mr. Carson testified that he accepted the task of structuring the project from a corporate and ownership point of view. Once he came up with the structure and received the approval of the Appellant and Mr. Devine, he was to take the necessary steps to put the structure in place.[14]

[22] Mr. Carson noted that he was not asked to make a financial contribution at the meeting, but agreed to make such a contribution once they decided how they were going to proceed in terms of raising capital.[15]

[23] On October 17, 2007, Kinderock filed seven additional applications for Potash Permits (the "Second Permit Applications"). The Second Permit Applications were referred to as KP365, KP366, KP367, KP368, KP369, KP370 and KP371 and covered approximately 647,000 acres. Kinderock paid the required application fees, deposits and rental fees. The rental fees were approximately $320,000.[16]

[24] As I stated previously, Mr. Carson had a meeting on October 18 or 19, 2007 with Jim and Jason Mann. The purpose of the meeting was to sell KPMG's tax services. In the course of the meeting, Jason Mann asked Mr. Carson if he knew of anyone who had a potash mine for sale. Mr. Carson replied that he did not know of

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[12] Transcript, January 24, 2017, page 88.
[13] Transcript, January 23, 2017, pages 63-64; Transcript, January 25, 2017, page 6.
[14] Transcript, January 24, 2017, page 183.
[15] Transcript, January 24, 2017, page 182.
[16] See Exhibits A-1, A-7 to A-12 and A-14 (for rental fee for KP371), and Transcript, January 23, 2017, pages 65-75.

anyone selling a mine, but he did know of a group that had some potential potash exploration permits. Apparently, the Mann brothers were interested in the permits and Mr. Carson agreed to speak with the Appellant and Mr. Devine to determine if they wished to meet with the Mann brothers.[17] Mr. Carson spoke with the Appellant and Mr. Devine in early November and, as I will discuss shortly, a meeting with Jim and Jason Mann occurred in early December 2007.

[25] In early November 2007, the Appellant, Mr. Carson and Mr. Devine had a second meeting (the "Second Group Meeting"). Mr. Carson presented his proposed structure at this meeting. He testified that his advice was to have a "clean" or new company in place to hold the Potash Permits. He did not want to use Kinderock since it had other assets.

[26] However, he also advised that the group should begin as a partnership. He told the Appellant and Mr. Devine that if they properly implemented the structure, then once they incorporated they could preserve their ability to claim the capital gains exemption without "being saddled with a two-year hold". He also suggested that the group use a "family trust partnership type structure" that would allow for the participation of family members.[18]

[27] The Appellant and Mr. Devine agreed to the structure. Mr. Carson then contacted the Appellant's lawyer, Paul Grant and instructed him to create a new corporation. The new corporation, Devonian, was incorporated on November 22, 2007. The Appellant was the only shareholder of Devonian, he and his spouse were the only officers, and the Appellant and his son were the only directors.[19]

[28] On November 21, 2007, the Government of Saskatchewan cancelled applications KP364 and KP371 and refunded to Kinderock the rental fees it had previously paid in respect of those two applications (the "Cancelled Applications").[20]

[29] Mr. Carson testified that in early December 2007 the Appellant, Mr. Carson and Mr. Devine met with Jim and Jason Mann.[21] The Appellant described the

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[17] Transcript, January 24, 2017, pages 184-185.
[18] Transcript, January 24, 2017, pages 188 -189.
[19] Exhibits A-17, A-18, Transcript, January 23, 2007, pages 86-90.
[20] Exhibits A-13 to **A**-16.
[21] Transcript, January 24, 2017 page 187; January 25, 2017 pages 5. The Appellant referred to the meeting as being in late October, and then on cross-examination said he was not aware of the

meeting as uneventful.[22] Mr. Carson testified that, after the Appellant described the project, Jason and Jim Mann informed them that they would speak with someone who represented certain Russian investors to see if they had any interest in meeting with the Appellant, Mr. Carson and Mr. Devine. The following week either Jason or Jim Mann got back to them and scheduled a meeting for December 22, 2007.[23]

[30] On December 7, 2007, the Appellant, Mr. Carson and Mr. Devine met with the lawyer, Paul Grant, to put Mr. Carson's structure in place (the "Third Group Meeting"). Mr. Carson testified that they informed Mr. Grant of what they needed for their structure, namely family trusts, a limited partnership and an agreement to transfer assets to Devonian. Mr. Grant was instructed to prepare the required documents.[24]

[31] Mr. Grant subsequently did prepare the required documents. I was not told the date when the parties actually executed the documents; however, each of the documents states that it is made "as of the 7th day of December, 2007" or "as of December 7, 2007". Although the parties may have executed the documents at the same time, the family trust documents would have to have taken effect first since the family trusts are the limited partners in the Limited Partnership. The limited partnership agreement would be the next document to have effect, since the Limited Partnership would have to exist before it could enter into the asset transfer agreement.

[32] I was provided with one of the family trust agreements, namely the agreement that established the Gillen Family Trust.[25] However, Mr. Carson testified that he and Mr. Devine entered into virtually identical trust agreements. I will refer to these two trusts as the Carson Family Trust and the Devine Family Trust respectively.

[33] As I mentioned previously, the trust agreement establishing the Gillen Family Trust was made as of the 7th day of December 2007. The Appellant is the trustee of the Gillen Family Trust. The Appellant, his spouse and his two sons are the capital and income beneficiaries of the trust.

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exact time it could have been early November. I have accepted Mr. Carson's testimony on this point.

[22] Transcript, January 23, 2017, pages 84 - 85.

[23] Transcript, January 24, 2017, pages 187-188.

[24] Transcript, January 24, 2017 page 193.

[25] Exhibit A-19.

[34] Mr. Carson testified that, in addition to himself, the beneficiaries of the Carson family trust were his spouse, his children and their spouses.[26]

[35] The next relevant agreement is the limited partnership agreement. It is also made as of December 7, 2007. The agreement is between Kinderock as the general partner and three limited partners: the Gillen Family Trust, the Devine Family Trust and the Carson Family Trust.[27]

[36] Section 2.1 of the limited partnership agreement states that the partnership commenced on December 7, 2007. Section 2.4 stipulates that its sole business is to acquire, own, manage, operate and/or develop potash properties and resources in the province of Saskatchewan or elsewhere. This section also allows the partnership to invest in corporations and other entities engaged in the potash industry.[28]

[37] Section 3.3 states that as at December 7, 2007, a total of 3,000 units of the limited partnership had been issued to the family trusts as follows:

- the Gillen Family Trust – 2,000 units
- the Devine Family Trust – 300 units
- the Carson Family Trust – 700 units

[38] The Limited Partnership issued each unit for $1, meaning the total capital of the partnership was $3,000. Further, the Gillen Family Trust held two-thirds of the units.[29]

[39] Section 2.9 of the limited partnership agreement is entitled "Pre-registration, Expenses and Liabilities". It attempts to address certain expenses incurred by Kinderock prior to the formation of the partnership.[30]

[40] The third relevant agreement is entitled the "Subscription and Roll-Over Agreement" (the "Subscription Agreement"). It is between Devonian and the Limited Partnership.

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[26] Transcript, January 24, 2017, page 192.
[27] Exhibit A-20.
[28] Exhibit A-20, page 6.
[29] Exhibit A-20, page 9.
[30] Exhibit A-20, page 8.

[41] Section 2.1 provides for the Limited Partnership's subscription for 999 shares of Devonian (the "Devonian Shares") for the subscription price of $675,000 (the "Subscription Price"). It reads as follows:

> Subject to the provisions of this Agreement, the Subscriber [the Limited Partnership] hereby subscribes for and agrees to purchase from the Corporation [Devonian] and the Corporation [Devonian] agrees to sell and issue to the Subscriber [the Limited Partnership], nine-hundred and ninety-nine (999) Shares [of Devonian] (the "Purchased Shares") at and for the aggregate subscription price of Six-hundred and seventy-five [thousand] ($675,000) dollars (the "Subscription Price")[31]

[42] Section 2.2 of the Subscription Agreement provides for the payment by the Limited Partnership of the $675,000 subscription price for the Devonian shares. It contains two components.

[43] Paragraph (a) of Section 2.2 provides that the Limited Partnership shall transfer to Devonian on the Closing Date all Potash Permits that have been issued to the Limited Partnership on, or prior to, the Closing Date and all Applications that are then outstanding but in respect of which Potash Permits have not yet been issued as of the "Closing Date".

[44] The word "Applications" is defined in Section 1.1(d) of the Subscription Agreement as meaning the applications for Potash Permits listed in Schedule A to the agreement, which are comprised of all of the First Permit Applications and all of the Second Permit Applications other than KP371 (which was cancelled). The word is defined as including any additional applications that may be made in substitution for the First Permit Applications and the Second Permit Applications or otherwise pertaining to any of the lands covered by those applications. I will refer to the Applications, as defined by Section 1.1, as the "Purchased Applications".

[45] I will refer to the Potash Permits related to the Purchased Applications (and referred to in Section 2.2) as the "Purchased Permits".

[46] The "Closing Date" is defined in Section 1.1(i) of the Subscription Agreement as the date the first of the Purchased Permits is issued or such other date as the parties may agree upon.

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[31] Exhibit A-21, page 4.

[47] Paragraph (b) of Section 2.2 refers to the Limited Partnership performing, and/or providing or engaging appropriate professionals and other service providers, at the Limited Partnership's expense, to perform and/or provide, all engineering, geological and/or other work, studies, reports, surveys, information and other services necessary for the preparation and/or filing of the Purchased Applications or otherwise necessary or desirable in order to obtain the Purchased Permits, and all other services necessary in connection with the incorporation and organization of Devonian and/or the administration of the business and affairs of Devonian pending the closing date (the "Purchased Services").[32]

[48] Mr. Carson testified that he determined the $675,000 purchase price of the shares on the basis of the money spent on the Purchased Applications and on acquiring other assets and on his estimate of the economic value of the Purchased Applications and Purchased Permits on December 7, 2007.[33]

[49] Section 6.2 clarifies that on the Closing Date the Limited Partnership is only required to execute transfers in respect of Purchased Permits that the Saskatchewan Government has issued. The Limited Partnership agrees to execute transfers in respect of any remaining Purchased Permits once they are issued by the government.[34]

[50] Mr. Carson explained why the Limited Partnership did not transfer legal ownership of the Purchased Applications to Devonian on December 7, 2007, the effective date of the agreement. He testified that the relevant Saskatchewan legislation did not provide for the transfer of ownership of applications for potash permits. He noted that if the Limited Partnership had tried to transfer the applications they would have been cancelled and new applications would have had to have been filed.[35]

[51] However, on December 7, 2007, the Limited Partnership transferred, pursuant to Section 2.3 of the Subscription Agreement, beneficial ownership of the Purchased Applications and Purchased Permits to Devonian while retaining legal title to the Purchased Applications and Purchased Permits in trust for Devonian. I will shortly discuss this section in more detail.

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[32] Exhibit A-21, pages 4-5.
[33] Transcript, January 24, 2017, page 218.
[34] Exhibit A-21, pages 10-11.
[35] Transcript, January 25, 2017, page 13.

[52] The Appellant testified that, between the time when Kinderock made the First Permit Applications and when the Limited Partnership was formed, Kinderock incurred expenses in respect of the applications and the potential potash exploration project.[36] He also referred this Court to the purchase of seismic data in respect of the potash exploration project. A $103,251.04 invoice for seismic data was issued on November 21, 2007. The vendor issued the invoice to Kinderock "for Devonian Potash Inc.".[37] Kinderock paid the invoice.[38]

[53] On cross-examination, the Appellant confirmed that the agreement for the seismic data was between DS Seismic and Devonian. He also testified that the substantial physical seismic data covered by the invoice was not obtained until late April 2008, after the shares of Devonian were sold to a third party.[39]

[54] On December 22, 2007 the Appellant, Mr. Carson, Mr. Devine and Mr. Holter met with the Mann brothers and Mr. Igor Medge, who represented certain potential Russian investors. The Appellant testified that the parties discussed the potential for the areas covered by the expected potash permits. The Appellant did not think the discussion would lead to any future investment. The parties did not schedule a follow-up meeting.[40]

[55] The parties continued to incur expenses after the December 7 formation of the Limited Partnership and the transfer of the beneficial interest in the Purchased Applications and Purchased Permits to Devonian. It is difficult to determine who actually incurred the expenses. Some of the invoices were made out to Kinderock and some to General Resources Inc., the previously mentioned company that is 100% owned by the Appellant, and some to Devonian.[41] I was not provided with any accounting records or financial statements of Kinderock, the Limited Partnership or Devonian. Certain of these expenses pertained to services rendered by Mr. Holter. Mr. Holter stated that he did not know much about the general

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[36] See for example Exhibits A-66, A-67 and A-68.
[37] Exhibit A-64.
[38] Transcript, January 23, 2017, pages 91-92.
[39] Transcript, January 24, 2017, pages 167-170.
[40] Transcript, January 23, 2017, pages 140-145. See also Transcript, January 24, 2017, pages 201-203, A-69 to A-72.
[41] Exhibits A-69, A-71, A-83, A-84, A-86 to A-89, A-97 to A-105, A-107 and A-108 and the testimony of the Appellant: Transcript, January 23, 2017, pages 83-89, 94-108, 133-180, 134-139 and 182-188; Transcript, January 24, 2017, pages 7-23.

evolution of Devonian, but eventually the "hardcore work was done under the banner of Devonian Potash".[42]

[56] In January and February 2008, the Appellant attended meetings with potential investors in Calgary, Saskatoon and Vancouver. The Appellant provided the Court with a copy of the presentation made in Vancouver. The document consistently refers to Devonian.[43]

[57] On January 8, 2008, the Gillen Family Trust transferred 77 of the units it held in the Limited Partnership to various individuals. The Appellant testified that the units were transferred either to individuals he had worked with in the past or to individuals he hoped would become involved with Devonian.[44]

[58] On February 14, 2008, Kinderock filed two new applications for Potash Permits. The Appellant noted that these two applications replaced application KP364 that was part of the First Permit Applications and, as previously discussed, was included in Schedule A to the Subscription Agreement as one of the Purchased Applications.[45]

[59] On February 15, 2008, the Limited Partnership received an offer to purchase the shares of Devonian. A numbered company made the offer (the "Numbered Company"). The Appellant testified that Jim Mann, Jason Mann and Igor Medge were the controlling minds of the Numbered Company. He testified that the offer came out of the blue.[46]

[60] The parties then entered into negotiations. The Appellant did not participate in the negotiations. Mr. Devine, who had experience negotiating large transactions, took the lead in the negotiations. Mr. Carson also participated in the negotiations. Eventually the parties agreed that the Numbered Company would purchase all of the outstanding shares of Devonian for a selling price of $15 million, with a $1 million non-refundable deposit.[47]

[61] The parties entered into an option to purchase agreement dated February 15, 2008 (the "Share Purchase Agreement"). The agreement is between the Appellant,

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[42] Transcript, January 25, 2017, page 43.
[43] Exhibit A-93, references to Devonian are found at pages 33, 42 and 43, for example.
[44] Exhibit A-22, Transcript, January 23, 2017, pages 188-193.
[45] Exhibits A-5, A-6; Transcript, January 23, 2017, pages 206-213.
[46] Transcript, January 23, 2017, pages 196-199.
[47] Exhibit A-24; the non-refundable deposit is provided for in section 3.5.

Kinderock and the Numbered Company.[48] The Limited Partnership was not a party to the agreement, since, at that time, Devonian had not issued shares to it. At that time, the Appellant was the only shareholder of Devonian, although Devonian was required to issue shares to the Limited Partnership once the Government of Saskatchewan issued the Purchased Permits.

[62] The Share Purchase Agreement includes the following:

- A recital stating that Kinderock had made the permit applications (i.e., the Purchased Applications).

- Section 2.1, which grants the Numbered Company an exclusive option to purchase the Appellant's share in Devonian for $15 million. Section 4.20 allows for the issuance of Devonian shares to the Limited Partnership pursuant to the Subscription Agreement, provided the new shareholders agree that these new shares will be included in the shares that are subject to the $15 million option.

- Section 3.2, which provides that the option will be deemed to have been exercised once all of the permits (i.e., the Purchased Permits) have been issued by the Saskatchewan Government.[49]

[63] Pursuant to Section 2.5 of the Share Purchase Agreement, Kinderock is required to take all steps necessary to ensure that the Purchased Permits will be issued in the name of Devonian prior to the transfer of the Devonian shares to the Numbered Company.

[64] On March 31, 2008, the Government of Saskatchewan granted Purchased Permits, KP361, KP365, KP367, KP368, KP369 and KP370.[50]

[65] The Limited Partnership then executed a bill of sale as of March 31, 2008 in favour of Devonian. The bill of sale transfers the legal title in the "Purchased Assets" to Devonian for the consideration provided for in the Subscription Agreement.[51] On March 31, 2008, Devonian issued a share certificate in the name

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[48] Exhibit A-24.
[49] This does not include the permits to be issued following the permit applications filed on February 14, 2008 in place of cancelled permit application KP364.
[50] Exhibits A-26, A-29, A-31, A-32, A-33 and A-34.
[51] Exhibit A-42. The Appellant testified that the date should be March 31, 2008; 2007 was entered erroneously.

of the Limited Partnership for 999 common shares of Devonian.[52] The Appellant then issued a notice to the Numbered Company pursuant to Section 4.20 of the Share Purchase Agreement regarding the issuance of those shares and the Limited Partnership issued to the Numbered Company an acknowledgement that it would fulfill the terms of the Share Purchase Agreement.[53]

[66] On April 9, 2008, the government issued permits KP362, KP363 and KP366. It then issued amended permit KP366A, replacing permit KP366, on April 15, 2008.[54]

[67] Kinderock, on April 15, 2008, transferred all of the issued permits, which collectively constitute the Purchased Permits, to Devonian.[55] The Numbered Company then, on April 25, 2008, purchased the shares of Devonian pursuant to the Share Purchase Agreement.[56]

[68] In its tax filings for its twelve-month reporting period ending on December 31, 2008, the Limited Partnership reported a $14,386,399 gain from the disposition of the shares of Devonian.[57] It classified this disposition as being a disposition of shares of a qualified small business corporation. An amount of $9,221,643.32 of the gain was allocated to the Gillen Family Trust.[58]

[69] In its T3 tax return for the twelve-month taxation year ending on December 31, 2008, the Gillen Family Trust reported a $9,221,643 capital gain and a $4,610,821 taxable capital gain from the disposition of qualified small business shares that it acquired in 2007.[59] The trust allocated all of the capital gain to its beneficiaries and indicated that all of the taxable capital gain was eligible for the beneficiaries' capital gains deduction.[60] The trust allocated the capital gain as follows:

- $3,110,821.66 to the Appellant
- $3,110,821.66 to the Appellant's spouse

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[52] Exhibit A-43.
[53] Exhibits A-44 and A-45.
[54] Exhibits A-27, A-28, and A-30.
[55] Exhibit A-48.
[56] Exhibits A-49 to A-52.
[57] Exhibit A-110, page 14.
[58] Exhibits A-111 and A-113.
[59] Exhibit A-114, page 5.

- $1,500,000 to the Appellant's son Steven Gillen

- $1,500,000 to the Appellant's son Darren Gillen

II. The Law

[70] Subsection 110.6(2.1) of the Act provides for an individual who is resident in Canada an enhanced capital gains deduction that can be used to offset capital gains arising on the disposition of shares of a qualified small business corporation.

[71] Subsection 110.6(1) of the Act contains the definition of qualified small business corporation share, of which the relevant portions for the purposes of this appeal, read as follows:

> **"qualified small business corporation share**" of an individual (other than a trust that is not a personal trust) at any time (in this definition referred to as the "determination time") means a share of the capital stock of a corporation that,
>
> (a) at the determination time, is a share of the capital stock of a small business corporation owned by the individual, the individual's spouse or common-law partner or a partnership related to the individual,
>
> **(b) throughout the 24 months immediately preceding the determination time, was not owned by anyone other than the individual or a person or partnership related to the individual**, and
>
> (c) throughout that part of the 24 months immediately preceding the determination time while it was owned by the individual or a person or partnership related to the individual, was a share of the capital stock of a Canadian-controlled private corporation more than 50% of the fair market value of the assets of which was attributable to
>
> (i) assets used principally in an active business carried on primarily in Canada by the corporation or by a corporation related to it,
>
> . . .
>
> [Emphasis added]

[72] Paragraph (b) of the definition contains the requirement that, throughout the 24-month period immediately preceding the disposition of the shares, the shares of

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[60] Exhibit A-114, pages 6 and 11.

the qualified small business corporation must not have been owned by anyone other than the individual or a person or partnership related to the individual (the "24-Month Holding Rule").

[73] Paragraph 110.6(14)(f) contains a deeming rule that applies to shares issued from the treasury of a qualified small business corporation. It is an anti-avoidance rule intended to prevent individuals from circumventing the 24-Month Holding Rule. That paragraph reads as follows:

> For the purposes of the definition "qualified small business corporation share" in subsection (1),
>
> . . .
>
> (f) shares issued after June 13, 1988 by a corporation to a particular person or partnership shall be deemed to have been owned immediately before their issue by a person who was not related to the particular person or partnership unless the shares were issued
>
> (i) as consideration for other shares,
>
> **(ii) as part of a transaction or series of transactions in which the person or partnership disposed of property to the corporation that consisted of**
>
> **(A) all or substantially all the assets used in an active business carried on by that person or the members of that partnership,** or
>
> (B) an interest in a partnership all or substantially all the assets of which were used in an active business carried on by the members of the partnership, or
>
> (iii) as payment of a stock dividend; and
>
> . . .
>
> [Emphasis added]

[74] As noted previously, the issue before the Court is the application of subparagraph 110.6(14)(f)(ii) to the 999 shares issued by Devonian to the Limited Partnership.

III. The Positions of the Parties

[75] It is the Respondent's position that the Devonian Shares are not qualified small business corporation shares since the conditions of subparagraph 110.6(14)(f)(ii) have not been satisfied. Therefore, pursuant to paragraph 110.6(14)(f), the shares are deemed to have been owned, immediately before they were issued to the Limited Partnership, by a person who was not related to the Limited Partnership. As a result, the conditions of the 24-Month Holding Rule are not satisfied.

[76] Counsel for the Respondent argued that subparagraph 110.6(14)(f)(ii) does not apply because the Partnership never had any assets it could use in its stated business activity. She argued that the Limited Partnership came into existence on December 7, 2007 and that, as soon as it came into existence, the Limited Partnership entered into the Subscription Agreement. As a result, the Subscription Agreement, particularly Section 2.3, applied immediately after the Limited Partnership came into existence. This resulted in the Limited Partnership immediately selling the beneficial interests in the Purchased Assets to Devonian, leaving the Limited Partnership with no right, title or interest in the Purchased Assets.

[77] The Respondent accepts that the bar is very low for determining whether an entity is engaged in an active business and does not dispute that the Limited Partnership may have been engaged in an active business after December 7, 2007. However, she argued that the Limited Partnership did not use the Purchased Assets in an active business of the Limited Partnership before they were transferred on December 7, 2007 to Devonian.

[78] The Appellant argued that the conditions of subparagraph 110.6(14)(f)(ii) were satisfied since the Purchased Assets were used in an active business carried on by the members of the Limited Partnership. Further, the Limited Partnership disposed of the Purchased Assets to Devonian as part of a series of transactions in which the Limited Partnership disposed of all or substantially all of the assets it used in the active business carried on by the members of the Limited Partnership.

[79] The Appellant's position is set out in his Trial Brief and may be summarized as follows:

- At all times from the time the First Permit Applications were made on October 4, 2007 to the time the shares of Devonian were transferred to the Numbered Company, being April 25, 2008, an active business was being carried on in accordance with clause 110.6(14)(f)(ii)(A).

- The Appellant, Mr. Carson and Mr. Devine began carrying on a business as a general partnership at the time of the First Group Meeting, shortly after October 12, 2007. He argues that Kinderock was part of this general partnership.

- The Appellant states the following at paragraph 24 of his Trial Brief: "This general partnership involving Kinderock and Don Gillen [the Appellant], Bruce Carson and Brad Devine, each in their capacity as trustee for their respective family trusts, was formally constituted as a general partnership on December 7, 2007 known as the GDC Potash Holdings Limited Partnership [the Limited Partnership], to be continued as a limited partnership."

- At paragraph 27 of his Trial Brief the Appellant notes: "Prior to December 7, 2007, the members of GDC [the Limited Partnership], being Kinderock, Don Gillen, Bruce Carson and Brad Devine carried on business as a general partnership. Subsequent to December 7, 2007, the business was carried on by the same partners in the form of GDC [the Limited Partnership], albeit with Don Gillen, Bruce Carson and Brad Devine acting in the capacities as trustees of their respective family trusts."

- The Limited Partnership continued to carry on the business after December 7, 2007.

- When the Limited Partnership was formed on December 7, 2007, it acquired a business which was already active.

- After December 7, 2007, the Limited Partnership retained a legal interest in the Purchased Assets and a beneficial interest in the Devonian Shares, and therefore continued to carry on the business until March 31, 2008, the date legal title to the Purchased Assets was transferred to Devonian and Devonian issued the Devonian Shares to the Limited Partnership.

- Since the Subscription Agreement was an executory contract, Section 2.3 of the Subscription Agreement does not represent an unconditional disposition of the Limited Partnership's beneficial interest in the Purchased Assets. Devonian had no legally enforceable claim to the Purchased Assets until the Devonian Shares were issued.

- For these reasons, the Limited Partnership carried on the business from October 2007 to March 31, 2008.

IV. Application of the Law to the Facts

[80] I do not accept the Appellant's argument; it does not reflect the facts before me, particularly with respect to the activities of the Limited Partnership.

[81] I will begin by setting out my factual findings with respect to the events that occurred on December 7, 2007.

[82] In the first instance, the three family trusts were formed on that date. That is clear from the trust agreement establishing the Gillen Family Trust (Exhibit A-19) which states that the agreement is made as of the 7th day of December 2007. Further, pursuant to the declaration of trust contained in paragraph 7 of the trust agreement, the settlor of the Trust (Mr. Devine) directs the trustee (the Appellant) to hold the trust assets and income "from and after the date of this Trust Agreement", i.e., December 7, 2007.[61]

[83] As I noted previously, Mr. Carson testified that he and Mr. Devine entered into virtually identical trust agreements.

[84] On the basis of the evidence before me, I have concluded that the Limited Partnership was formed on December 7, 2007, immediately after the three family trusts came into existence. This was stated by the Appellant in paragraph 7 of his Notice of Appeal and accepted by the Respondent in her Reply. Further, Section 2.1 of the limited partnership agreement states that the Limited Partnership commenced on the 7th day of December 2007.[62]

[85] As a question of fact, the Limited Partnership could not have been formed prior to December 7, 2007, since three of its four partners, the family trusts, did not come into existence until December 7, 2007.

[86] The Appellant appears to be arguing that the Limited Partnership is a continuation of a general partnership formed by the Appellant, Mr. Carson, Mr. Devine and Kinderock at the time of the First Group Meeting. That is not consistent with the facts before me.

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[61] Exhibit A-19, pages 1 and 3.
[62] Exhibit A-20, page 6.

[87] The limited partnership agreement states that the Limited Partnership is a new partnership that commenced on December 7, 2007; it does not refer to the Limited Partnership as being a continuation of an existing partnership.

[88] The Appellant, Mr. Carson and Mr. Devine were not partners of the Limited Partnership. The limited partnership agreement clearly states that the only partners are Kinderock and the three family trusts. Mr. Carson, Mr. Devine and the Appellant did not sign the limited partnership agreement in their personal capacity, but rather as trustees for their respective family trusts.

[89] In addition, it is not clear to me that Kinderock, the Appellant, Mr. Carson and Mr. Devine formed a general partnership at the time of the First Meeting or at any time before December 7, 2007. The Appellant testified that the First Meeting had "connotations of doing business" with Mr. Carson and Mr. Devine. Further, the evidence before me is to the effect that, if they were to do business together, it would be based on a structure designed by Mr. Carson. It was not until the Second Group Meeting that Mr. Carson presented the structure. He chose a structure that involved family trusts and a limited partnership, not a structure involving a general partnership.

[90] Immediately after the Limited Partnership was formed, it sold, pursuant to the terms of the Subscription Agreement, the Purchased Assets to Devonian for a consideration of $675,000. I have previously discussed the relevant clauses of the Subscription agreement, particularly Sections 2.1, 2.2, 2.3 and 6.2.

[91] Pursuant to Sections 2.1 and 6.1 of the Subscription Agreement, Devonian in effect agrees to pay for the Purchased Assets a consideration of $675,000 in the form of the 999 Devonian Shares. Devonian agrees to pay such consideration by delivering share certificates for the Devonian Shares on the Closing Date, i.e., the date the government issues the first Purchased Permit.

[92] Since, under the Saskatchewan legislative regime, the Limited Partnership could not transfer legal title to the Purchased Applications to Devonian, the parties agreed that the Limited Partnership would transfer, as of December 7, 2007, beneficial ownership of the Purchased Assets to Devonian and would hold legal title to the Purchased Applications, and any other Purchased Assets, as bare trustee for Devonian.

[93] This is stipulated in Section 2.3 of the Subscription Agreement, which reads as follows:

> As and from the date hereof [December 7, 2007] and until the Closing Date the Vendor [the Limited Partnership] shall hold, and hereby acknowledges and declares that it does hold, the Applications [the Purchased Applications] and all other Purchased Assets [the Purchased Permits and the Purchased Services] that now exist or hereafter arise from the performance of its obligations under Section 2.2 for the benefit of and as trustee and agent for the Purchaser [Devonian] and **that the Vendor [the Limited Partnership] has no right, title or interest in any of such Purchased Assets** except the right to receive the Purchased Shares in accordance with the terms and conditions of this Agreement and the Vendor [the Limited Partnership] further acknowledges and agrees that, acting as such trustee and agent, it shall hold legal title to the Purchased Assets subject to the direction of the **Purchaser [Devonian] as the principal and beneficial owner thereof** and it shall not in any way convey, charge or otherwise encumber or deal with the Purchased Assets except in accordance with the directions of the Purchaser [Devonian] and it shall convey, charge or otherwise encumber or deal with the Purchased Assets as directed by the Purchaser [Devonian].[63]
>
> [Emphasis added]

[94] The Supreme Court of Canada in *Covert, et al v. Minister of Finance (N.S.)*[64] referred to the meaning of "beneficial owner" as formulated by the trial judge who stated that the term signifies the "real or true owner" of the property. The Supreme Court at page 784, quoted an earlier decision of the trial judge (*MacKeen Estate v. Minister of Finance of Nova Scotia* (1997), 36 A.P.R. S. 72):

> It seems to me that the plain ordinary meaning of the expression "beneficial owner" is the real or true owner of the property. The property may be registered in another name or held in trust for the real owner, but the "beneficial owner" is the one who can ultimately exercise the rights of ownership in the property.

[95] As Associate Chief Justice Rip (as he then was) noted in *Prévost Car Inc. v. The Queen*,[65] the beneficial owner is the true owner who enjoys and assumes all the attributes of ownership, without having to be accountable to anyone, including to the legal owner, as to how the property is used or dealt with.

[96] In my view, Section 2.3 of the Subscription Agreement clearly states that as of December 7, 2007 Devonian was the true owner of the Purchased Applications and any resulting Purchased Permits and that the Limited Partnership had no right,

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[63] Exhibit A-21, page 5. The last paragraph of Section 2.2 defines Purchased Assets as being the Purchased Applications, the Purchased Permits and the Purchased Services.
[64] [1980] 2 S.C.R. 774, 41 N.S.R. (2d) 181.
[65] 2008 TCC 231 (aff'd. 2009 FCA 57 [2010] 2. F.C.R. 65), paragraphs 98 and 100.

title, or interest in these assets. In other words, the Limited Partnership unconditionally sold the Purchased Applications and any resulting Purchased Permits to Devonian on December 7, 2007.

[97] My finding of fact is consistent with the Share Purchase Agreement, an agreement involving an arm's length third party, entered into on February 15, 2008. In Section 4.14 of that agreement, the parties thereto (which include the Appellant) recognize that Devonian is the beneficial owner of the Purchased Applications and the Purchased Permits. Section 4.14 of the Share Purchase Agreement reads as follows:

> The only assets of the Corporation [Devonian] are the Permit Applications [the Purchased Applications]. The Corporation [Devonian] is the beneficial owner of such Permit Applications and as at the Closing Date shall be both the legal and beneficial owner of such Permit Applications (or of the Permits issued pursuant thereto [the Purchased Permits]), free and clear of all charges, demands, encumbrances or liens whatsoever.[66]

[98] In addition, as noted previously, Mr. Carson testified that the fair market value of the Purchased Assets was determined as at December 7, 2007. It can be inferred that he believed that was the date the Limited Partnership sold the Purchased Assets to Devonian.

[99] Since the Limited Partnership came into existence on December 7, 2007 and sold the Purchased Assets to Devonian on the same date, it must have acquired the Purchased Assets on December 7, 2007.

[100] I find, on the basis of the evidence before me, that the Limited Partnership acquired the Purchased Assets, including the Purchased Applications, on December 7, 2007 from Kinderock. My finding is consistent with the Limited Partnership's 2008 income tax information return, which states at page 15 that the Limited Partnership acquired the Potash exploration permits, which would include the Purchased Applications, on December 7, 2007.

[101] I was provided with very little evidence with respect to this sale.

[102] The Appellant's counsel argued, at paragraph 30 of his Trial Brief, that on December 7, 2007 the Limited Partnership gave consideration to Kinderock for the

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[66] Exhibit A-24, page 9.

Purchased Applications by agreeing to reimburse Kinderock for all costs incurred in connection with the permit applications. I accept his argument on this point.

[103] That agreement is evidenced by a direction provided by the Limited Partnership to its counsel to pay Kinderock, out of the proceeds from the sale of the Devonian shares under the Share Purchase Agreement, all amounts owing to it on account of the costs of the applications [the Purchased Applications] and related expenses, as contemplated by the limited partnership agreement and the Subscription Agreement.[67]

[104] In summary, on December 7, 2007, the Limited Partnership acquired the Purchased Applications and Purchased Permits and immediately sold these assets to Devonian.

[105] I do not accept the Appellant's argument that Kinderock made either the First Permit Applications or the Second Permit Applications on behalf of the Limited Partnership. Kinderock made the two sets of applications on October 4, 2007 and October 17, 2007 respectively. I am aware of paragraph (a) of Section 2.9 of the Limited Partnership agreement, which states that Kinderock made the Purchased Applications on behalf of the Limited Partnership. In my view, that clause does not reflect what actually occurred. It is a self-serving statement made by non-arm's length parties in, I assume, an attempt to achieve a certain income tax result.

[106] The Limited Partnership did not exist at the time Kinderock made these applications. It came into existence on December 7, 2007. Further, the use of a limited partnership was first contemplated in early November 2007 when Mr. Carson presented his proposed structure to the Appellant and Mr. Devine at the Second Group Meeting. This was after Kinderock had made the First Permit Applications and the Second Permit Applications. In fact, the Appellant met Mr. Carson for the first time at the First Group Meeting, which occurred after Kinderock had made the First Permit Applications. I find, on the basis of the evidence before me, that Kinderock made the First Permit Applications and the Second Permit Applications for its own account and not on behalf of any other party.

V. Application of Sub-paragraph 110.6(14)(f)(ii)

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[67] Exhibit A-46.

[107] I must determine whether the 999 shares issued by Devonian on March 31, 2008 to the Limited Partnership were issued as part of a transaction or series of transactions in which the Limited Partnership disposed of property to Devonian that consisted of all or substantially all of the assets used in an active business carried on by the members of the Limited Partnership.

[108] The first step is to determine what property the Limited Partnership disposed of to Devonian.

[109] The actual property is set out in Section 2.2 of the Subscription Agreement. It is the Purchased Applications and Purchased Permits. I have already found that the Limited Partnership sold the Purchased Applications and any resulting Purchased Permits to Devonian on December 7, 2007, the day the parties entered into the Subscription Agreement.

[110] The Appellant appears to be arguing that additional property was transferred under Section 2.2(b) of that agreement. As I discussed previously, this clause, in the first instance, requires the Limited Partnership to provide or to engage appropriate professionals and other service providers to provide certain specified studies, reports, surveys, information and other services necessary for the preparation and/or filing of the Purchased Applications or otherwise necessary or desirable in order to obtain the Purchased Permits. The second component requires the Limited Partnership to provide services necessary or desirable in connection with the incorporation and organization of Devonian and/or the administration of the business and affairs of Devonian pending the closing date.

[111] The clause does not, in my view, provide for the disposition of property used by the Limited Partnership in an active business. It refers mainly to services. It does, however, contemplate the production of certain reports and studies with respect to the making of the Purchased Applications. The evidence before me is that Kinderock provided to the Government of Saskatchewan at the time it made the First Permit Applications and Second Permit Applications, on October 4, 2007 and October 17, 2007 respectively, the documents required in respect of the Purchased Applications. In other words, there were no reports to be filed on or after December 7, 2007.

[112] With respect to the Purchased Permits, the evidence before me is to the effect that Kinderock took steps to ensure that the permits were issued in the name of Devonian, but there is no evidence before me that this involved the transfer of reports or other property to Devonian on or after December 7, 2007.

[113] I received very little evidence as to the assets held by Devonian on December 7, 2007, or between December 7, 2007 and the time Devonian issued 999 of its shares to the Limited Partnership.

[114] Although I was provided with an April 25, 2008 letter from Devonian's lawyer to the lawyers for the Numbered Company[68], which states that one of the attachments to the letter is the financial statements of Devonian as at March 31, 2008, I was not provided with a copy of such financial statements. In fact, I was not provided with any financial statements with respect to any of the relevant parties, including Devonian and the Limited Partnership. Such financial statements would have provided circumstantial evidence of the assets held by the Limited Partnership and Devonian during the relevant period and of the timing of the acquisition and/or disposition of such assets.

[115] The best evidence before the Court of the assets held by Devonian during the relevant period is Section 4.14 of the Share Purchase Agreement, which states: "The only assets of the Corporation are the Permit Applications [the Purchased Applications]".[69] This supports my finding of fact that the only property acquired by Devonian under the Subscription Agreement was the Purchased Applications and the right to any Purchased Permits.

[116] As I noted previously, counsel for the Appellant argued that, since the Subscription Agreement was an executory contract, Section 2.3 of the Subscription Agreement does not represent an unconditional disposition of the Limited Partnership's beneficial interest in the Purchased Assets. Devonian had no legally enforceable claim to the Purchased Assets until the Devonian Shares were issued.

[117] The Appellant appears to be arguing that, on the basis of the distinction between true beneficial ownership and beneficial ownership in the context of an executory contract, the Limited Partnership, which retained legal title to the Purchased Assets, was allowed to use them in an active business carried on by the Limited Partnership between December 7, 2007 and the date of the closing of the Subscription Agreement.

[118] I do not agree with his argument.

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[68] Exhibit A-47.
[69] Exhibit A-24, page 9.

[119] In the first instance, regardless of the effect of an executory contract, as I previously found, the Limited Partnership, pursuant to Section 2.3 of the Subscription Agreement, unequivocally transferred the beneficial ownership of the Purchased Applications to Devonian on December 7, 2007. This is acknowledged by the Appellant in the Share Purchase Agreement, specifically, in the previously discussed Section 4.14 of the agreement.

[120] While the parties structured the Share Purchase Agreement as an option to purchase the Appellant's shares of Devonian, the Numbered Company is deemed to have exercised the option once the Saskatchewan Government has issued all of the Purchased Permits.[70] In my view, the Numbered Company, a sophisticated investor represented by a major Canadian law firm, would only have agreed to purchase the shares of Devonian for $15 million if, at the time the Share Purchase agreement was entered into, Devonian was the unconditional beneficial owner of the Purchased Applications and any issued Purchased Permits. As Section 4.14 of the Share Purchase Agreement states, the Purchased Applications were the only assets of Devonian at the time of the agreement.

[121] The Appellant cites an 1892 Supreme Court of Canada decision, *Harris v. Robinson*[71] ("*Harris*"), for the proposition that there is a distinction between true equitable title and equitable title in an executory contract. He cites the following comments from page 401 of that case:

> . . . A purchaser under an executory contract is sometimes said, in loose phraseology, to have an equitable title, but the distinction as regards equitable title between his rights under such a contract before payment of the purchase money, and a true equitable title, is well marked . . . Whilst his rights under such a contract are incomplete owing to the non-payment of his purchase money a purchaser has an undoubted right to assign his contract, but he cannot sell the land itself, and cannot be properly called the equitable owner of it.

[122] The Appellant appears to be ignoring the so-called "relation-back" theory. In *Clem v. Hants-Kings Business Development Centre Ltd*.[72] at paras. 15 to 17,[73] MacDonald A.C.J.S.C. (as he then was) distinguished *Harris* on the basis that the transaction at issue there did not close and that the agreement of sale was not

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[70] Exhibit A-24, pages 5-6.
[71] (1892), 21 S.C.R. 390, 1892 CanLII 14.
[72] 2004 NSSC 114.
[73] Cited with approval by the Nova Scotia Court of Appeal in *McIsaac v. Royal Bank of Canada*, 2015 NSCA 12, 380 DLR (4th) 528, leave to appeal to the Supreme Court of Canada denied.

completed, whereas the final conveyance in the matter before the Nova Scotia court was completed according to the terms of the contract. Therefore, the Court found (at paragraph 17) that the relation-back theory applied and that the vendor held the land in trust for the purchaser from the date of the agreement: "In other words, while the trust relationship between vendor and purchaser may be dubious before closing, once the agreement is completed the trust relationship is solidified retroactively. This has been referred to as the 'relation-back theory'".

[123] In the present appeal, the transactions under the Subscription Agreement were closed. Therefore, the trust relationship, in the context of an executory contract, was solidified on the closing date, retroactive to the date the agreement was entered into, i.e. December 7, 2007.

[124] Regardless, as I previously stated, the Limited Partnership unconditionally transferred beneficial ownership of the Purchased Applications and Purchased Permits to Devonian on December 7, 2007.

[125] In summary, the Purchased Applications and the Purchased Permits were the only assets disposed of by the Limited Partnership to Devonian during the relevant period.

[126] The second step in applying subparagraph 110.6(14)(f)(ii) is to determine if the Purchased Applications and Purchased Permits constituted all or substantially all of the assets used in an active business carried on by the members of the Limited Partnership.

[127] I agree with the Respondent that, while the Limited Partnership may have carried on an active business after December 7, 2007, the Limited Partnership did not use the Purchased Applications and Purchased Permits in that business.

[128] It acquired the Purchased Applications and Purchased Permits from Kinderock on December 7, 2007 and then instantly sold the same property to Devonian. In such a situation, it cannot be said that the Limited Partnership used the Purchased Applications and the Purchased Permits in an active business. As a result, subparagraph 110.6(14)(f)(ii) did not apply since the Limited Partnership did not dispose of all or substantially all of the assets that it used in an active business.

[129] For the foregoing reasons, the appeal is dismissed with costs to the Respondent.

Signed at Antigonish, Nova Scotia, this 30th day of August 2017.

"S. D'Arcy"

D'Arcy J.

CITATION:	2017 TCC 163
COURT FILE NO.:	2014-2991(IT)G
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PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
DATE OF HEARING:	JANUARY 23, 24, 25 and 27, 2017
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APPEARANCES:

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