Citation: 2009 TCC 465
Date: 20090918
Docket: 2005-1619(IT)G

BETWEEN:

PAUL ANTLE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
Renee Marquis-Antle Spousal Trust, 2005-1620(IT)G
on March 9, 10, 11, 12 and 13, 2009,
at Vancouver, British Columbia
and on April 27, 28, 29 and 30, 2009, at Ottawa, Ontario,

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Joel A. Nitikman and Michelle Moriartey
Counsel for the Respondent:	Robert Carvalho, Eric Douglas and Johanna Russell

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JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 1999 taxation year is dismissed, with one set of costs to the Respondent.

Signed at Ottawa, Canada, this 18th day of September, 2009.

"Campbell J. Miller"

C. Miller J.

Citation: 2009 TCC 465
Date: 20090918
Docket: 2005-1620(IT)G

BETWEEN:

RENEE MARQUIS-ANTLE SPOUSAL TRUST,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of *Paul Antle*, *2005-1619(IT)G* on March 9, 10, 11, 12 and 13, 2009, at Vancouver, British Columbia and on April 27, 28, 29 and April 30, 2009, at Ottawa, Ontario,

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Joel A. Nitikman and Michelle Moriartey
Counsel for the Respondent:	Robert Carvalho, Eric Douglas and Johanna Russell

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JUDGMENT

The purported appeal from the reassessment made under the *Income Tax Act* for the 1999 taxation year is quashed, with one set of costs to the Respondent.

Signed at Ottawa, Canada, this 18th day of September, 2009.

"Campbell J. Miller"

C. Miller J.

Citation: 2009 TCC 465
Date: 20090918
Docket: 2005-1619(IT)G
2005-1620(IT)G

BETWEEN:

PAUL ANTLE and
RENEE MARQUIS-ANTLE SPOUSAL TRUST,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Miller J.

[1] Tax practitioners delight in attaching labels to tax transactions – rollovers, bumps, freezes, loopholes. These cases concern a transaction known in the tax community as a capital property step-up strategy. Briefly, this strategy involves a shifting of capital property (with an accumulated gain) from husband to a Barbados spousal trust, and in this case, the trust then selling the property to the beneficiary wife, the wife selling the property to a third party purchaser using the proceeds to pay off the trust, the trust then distributing the funds to the wife as beneficiary and the trust then dissolving. Result – no tax, as there is no capital gain taxable in Canada, as there would have been had the husband sold the capital property directly to the third party. The capital gain arises in the trust in Barbados where there is no tax on capital gains. The Respondent takes exception to this strategy implemented by the Antles on a number of fronts:

(i) The trust is a sham;

(ii) The trust has not been properly constituted;

(iii) Requirements of subsection 73(1) of the *Income Tax Act* (the "*Act*") have not been met;

(iv) Subsection 69(11) of the *Act*; and

(v) The application of GAAR.

[2] If the capital property step-up strategy is considered acceptable tax planning, then there would be two tiers of taxation of capital gains in Canada: one tier for those whose capital gain can justify professionals' fees to implement the strategy, in which case there is no tax on a capital gain in Canada; the second tier for everyone else, in which case capital gains are subject to tax in accordance with Part I of the *Act*. This is an unacceptable result to the Respondent. The real question before me is whether it is for the legislators to introduce legislation to defeat such a result, or can existing legislation and jurisprudence be relied upon by the Courts to do so?

Facts

[3] There were many days of testimony by several witnesses, including Mr. Antle and his wife, their professional advisors and the Trustee from Barbados, aptly named Mr. Truss. The key facts to review are those in connection with the sale of the capital property in question, the establishment of the Trust, the closing of the transactions and the subsequent events.

Sale of Shares of PM Environmental Holdings Ltd. ("PM")

[4] Mr. Paul Antle and Mr. Mukesh Kapila incorporated PM in Newfoundland to acquire shares of SCC Environmental Group Inc. ("SCC") from an arms length company, Stratos Global Corporation ("Stratos"). Mr. Antle owned some shares in Stratos. He owned 2,390,000 shares of PM. In 1998, PM acquired the SCC shares from Stratos in exchange for Stratos receiving preferred shares, debt and a right to 50% of profits in the event of a future sale by the new owners (the 50-50 clause). The share certificate for Mr. Antle's shares of PM was endorsed in blank by him and held as security by Stratos.

[5] In August 1999, Mr. Antle entered discussions with MI Drilling Fluids Canada Inc. ("MI"), a subsidiary of the American company MI Drilling Fluids, for a possible sale of PM to MI. It was evident that part of the deal would include buying out any remaining obligations to Stratos. Mr. Antle obtained a letter from

Stratos on September 28, 1999 indicating that it would be prepared to accept $797,000 for its preferred shares and $2.2 million for the debt, plus accrued interest to settle all outstanding obligations.

[6] In a letter of September 30, 1999 from MI to Mr. Antle, MI indicated it "would like to make the following offer for the purchase of the SCC Group". The letter went on to provide:

> - This was to be a purchase of all shares for $3.7 million and assumption of debt up to $4.8 million;
>
> - Mr. Antle and Mr. Kapila were to provide non-competition agreements for $1.5 million;
>
> - Mr. Antle and Mr. Kapila were offered employment contracts; and
>
> - The parties would use their best efforts to negotiate and execute a definitive agreement by October 31, 1999.

Mr. Antle agreed and accepted this offer as a principal of the SCC group on October 1, 1999.

[7] Lawyers for MI prepared a first draft of a purchase and sale agreement dated October 12, 1999, in which Mr. Antle and Mr. Kapila were described as the sellers of the PM shares. Mr. Antle commented on this draft in an email to Mr. Chandler, MI's in-house counsel, that the deal structure was obviously not finalized "due to taxation matters", though was clear in his evidence this was not a reference to the capital step-up strategy specifically.

[8] By the end of October, it was clear that Stratos was aware of the potential sale and in November, Mr. Antle's lawyer, Mr. Chalker, and Mr. Wood, President of Stratos, discussed the possibility of Stratos invoking their 50-50 clause to capture half of the profits from the sale. Mr. Antle advised Mr. Wood that the share price was $2,763,000. Stratos would not provide its consent and release without receiving half that amount, or $1,381,500, as additional consideration over and above the payments for the preferred shares and debt. Indeed, in mid-November, Mr. Antle believed that due to Stratos' position, the deal with MI was dead. But on November 23, Stratos consented to the sale of shares in consideration for the $2,997,000 plus interest, plus 50% of the purchase price, being $1,381,500. MI had drafted a form of release to be signed by Stratos, which acknowledged that Mrs.

Antle and Mrs. Kapila, would ultimately be the vendors, though there was no mention of any trust arrangement. Similarly, Stratos' consent of November 23rd only referred to a transfer of shares from Mr. Antle and Mr. Kapila, but no mention of spouses or a trust. Mr. Chalker corrected this on December 3, 1999 requesting the consent be amended to reflect a transfer from husbands to wives, again with no mention of a trust arrangement. According to Mr. Antle, Stratos was not interested in this personal planning. Mr. Wood, President of Stratos, testified he was unaware shares would go through a trust to the spouses, notwithstanding Mr. Antle's testimony to the contrary.

[9] Mr. Antle had told Stratos by letter on November 22nd that part of the deal included a $1.5 million non-compete and "for tax purposes the additional income may be structured with a portion allocated to the purchase price". Mr. Antle confirmed with MI by letter of December 9th that the agreed portion of the purchase price for the sellers (Mr. Antle and Mr. Kapila) was $1,381,500, but that they would transfer $500,000 of their non-compete payment to the purchase price for a revised price of $1,881,500, and that Mr. Antle alone would transfer a further $274,200 of his non-compete payment to the purchase price, to bring the final price to $2,155,700. The day before closing, December 13th, Stratos provided written acknowledgment that it had no further interest in the revised purchase price beyond the additional $1,381,500.

[10] Meanwhile, throughout November, the Purchase and Sale Agreement was being finalized through negotiations between the parties, so that by early December a closing date of December 14th had been agreed upon. In early December, Stratos was made aware that the shares would be sold by Mrs. Antle, not Mr. Antle.

[11] MI certainly knew that Mr. Antle was considering an arrangement such that the shares would be sold by Mrs. Antle. The Purchase and Sale Agreement was amended to reflect that fact, and Mr. Antle entered the agreement as a co-covenantor only, with respect to representations and warranties contained in the Purchase and Sale Agreement. Mr. Pritchard, the Calgary lawyer who represented MI, could not recall any reference to a Barbados trust, only that the shares would ultimately be sold by the spouses. He had no concern with that.

The Trust

[12] Mr. Kapila's accountant, Mr. Thakar, contacted Mr. Antle's accountant, Mr. Power, in October 1999 in connection with the potential PM share sale, suggesting that Mr. Power get in touch with Mr. Myron Brown at Probity International Capital Corp. in the Bahamas. This suggestion led to a conversation and an email from Mr. Brown to Mr. Power on October 18, 1999 enclosing a standard engagement letter outlining the capital property step-up strategy. Mr. Power understood the strategy was that Mr. Antle would establish a spousal trust in Barbados (the "Trust") for his wife and transfer the PM shares into it. Mr. Power advised Mr. Antle that such an arrangement would involve relinquishing control of his PM shares. Mr. Power was well aware at this stage that Mr. Antle was in the process of selling the PM shares and acknowledged the trust arrangement was tied to the potential sale. He advised Mr. Antle that if Mrs. Antle ultimately received funds from the Trust, it had to be clear those proceeds were hers. He explained that the tax advantage was that Mrs. Antle would not be taxable, and that the trust also would not be taxable on any capital gains in Barbados. Mr. Antle indicated he wanted to give something in the form of a liquid investment to his wife for her family's support earlier in his career (Mrs. Antle's father had lent Mr. Antle $200,000 at a crucial time in Mr. Antle's career: such funds had subsequently been repaid) and this would be a way of accomplishing that.

[13] Mr. Power spoke to Mr. Chalker, Mr. Antle's lawyer, around October 19th, after which Mr. Chalker wrote to Mr. Nitikman[1] with Fraser Milner, who had provided a legal opinion on the capital property step-up strategy, copying this to Mr. Brown and Mr. Butalia, an accountant with BDO Dunwoody, who was the original strategist of the plan. Mr. Chalker states in part:[2]

> On September 30, 1999 Messrs. Antle and Kapila signed an Offer Letter under which they agreed to sell their shares in PM Environmental to M-I or its designee for a total purchase price of $3.7 M, and assumption of debt up to $4.8 M. …
>
> … I am of the view that the Offer Letter is not a binding agreement, but is merely an agreement to agree. …

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1 Exhibit AR-1, Volume 4, Appellant's Response to Undertakings -July 31, 2006, Tab 287, pages 33 and 34.

2 (Tab 287-page 33 and 34)

> Should Messrs. Antle and Kapila decide to proceed with the "Capital Property Step-Up", the following steps are proposed:
>
> (1) The Offer Letter would be cancelled and superseded by a new offer letter naming the wives of each of Antle and Kapila as the sellers of the shares in PM Environmental.
>
> (2) A Barbadian trust would be established, and my client would gift his shares in PM Environmental to this trust. Mr. Antle's wife would be the sole beneficiary of the trust.
>
> (3) The trust would sell the shares to my client's wife at a fair market value which would be 74% of $3.7 M or $2,738,000 ($2,738 M), and my client's wife would sign a promissory note in favour of the trust for that amount.
>
> (4) The trust would wind-up, and the promissory note would be distributed to my client's wife, as the sole beneficiary of the trust.
>
> (5) Mrs. Antle would then sell the shares in PM Environmental to the designee or M-I for the purchase price of $2,738 M.
>
> (6) Mrs. Antle could subsequent to the closing of the M-I transaction gift the cash proceeds received by her to her husband. There would be an agreement to do so, but there is a possibility that such a transaction would take place. …

This series of steps accords with the testimony of Mr. Butalia, who I would describe as the mastermind behind the strategy. Mr. Butalia did not use the term "step-up strategy" to describe the plan, but simply referred to the plan as the Barbados Spousal Trust. He confirmed the strategy was developed to step up the cost base of shares so when they are sold by the spouse, there would be no Canadian tax liability. That was the whole purpose.

[14] Mr. Power discussed the strategy with Mr. Antle, including the sale of shares by the Trust to Mrs. Antle, and the plan that she would pay for the shares from the proceeds of a subsequent sale to the third party. On October 26th, Mr. Brown provided a more specific engagement letter to Mr. Power, who forwarded it on to Mr. Antle. The engagement letter[3] stated in part:

> You have indicated to me that your primary purpose for pursuing this special planning is its application as part of your long-term personal financial and estate plans. …

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[3] Tab 287, page 44

[15] Mr. Brown acknowledged that the engagement letter was a standard form of letter.

[16] Mr. Power testified that, given the players involved, he was satisfied with the legitimacy of the plan and believed a real trust would be established to effect the plan. He also relied on Mr. Nitikman's prior opinion and on advice that he sought from KPMG.

[17] Mr. Antle discussed the concept with his wife, whose view was that receiving such significant funds would give her some financial freedom, as well as saving taxes. She also felt that as Mr. Antle was vetting everything through Mr. Power and Mr. Chalker, long-time respected advisors, she thought no more of it: with no disrespect to Mrs. Antle, my impression of her testimony was that she had little appreciation of the mechanics of the strategy, but was, understandably, more interested in the outcome. As she testified, she knew she was a beneficiary in 1999 because "my husband told me so".

[18] Probity, through Mr. Brown, engaged the services of a Calgary lawyer, Mr. DeVries, to deal with the Canadian corporate commercial side of the step-up transaction. Mr. DeVries described the strategy as one whereby a spousal trust would be settled with a Barbados trustee, "with intent to have as a result the avoidance of the capital gain tax in Canada". Mr. DeVries, Probity and BDO Dunwoody were to split the fee that Probity negotiated on the step-up strategy on a 1/3, 1/3 and 1/3 basis. The fee was divided into a minimum fee based on the percent of the capital gain tax avoided, and a success or reserve fee, if the strategy accomplished what was intended. In this case, that latter fee will depend on the outcome of this litigation. The minimum fee, according to Mr. Brown, would be earned upon completion of the transaction, including the settlement of the shares in the Trust, the transfer of shares to Mrs. Antle, and the subsequent sale by her to the third party and the paying off of the promissory note to the trust from such proceeds. As Mr. Brown indicated, it was an all or nothing proposition.

[19] In late October, Mr. DeVries provided documents to Mr. Chalker to implement the strategy including PM Director's Resolutions, Bill of Sale and Promissory Note dated November 1st. Mr. Chalker responded that he was awaiting the consent of Stratos to the sale, so the dating was premature. To that point, Mr. Antle was still hoping for an October 31st closing. He signed a Memorandum of Wishes dated October 27, 1999, but did not in fact settle the trust at that point due to the Stratos problem. Mr. DeVries replied to Mr. Chalker on November 15th that

the date of the transaction could be changed, and that there was no need for a step-by-step outline as the documents are simply executed in sequence. Mr. DeVries was well aware there was a third party sale involved.

[20] Probity, again through Mr. Brown, was at the same time engaging the services of Mr. Truss, a Barbados lawyer, whom he had come to know through Mr. Butalia. Mr. Truss, recently admitted to the Barbados Bar, was prepared to act as Trustee. Neither Mr. Antle, Mr. Chalker, nor Mr. Power knew Mr. Truss. On October 27th, Mr. Brown provided Mr. Truss with a client information checklist, from which Mr. Truss prepared a first draft of a Trust Deed. Mr. Truss acknowledged that he had standard trust documents from prior transactions and was therefore able to provide drafts the same day, along with his invoice of $3,300 US for “Creation of one Barbados Trust”. Mr. Truss explained that the fee was not only to prepare the trust documents but also to provide trustee services for one calendar year.

[21] Mr. Truss had done research into the law of trusts and satisfied himself that he could avoid any potential liability by ensuring that all decisions he made were in the best interests of the beneficiary. Consequently, if he had the beneficiaries’ consent to a decision, he was satisfied he had mitigated any risk. For this reason he had no issue with the beneficiary, Mrs. Antle, buying the shares from the Trust. He confirmed that he had every intent to act as Trustee and would not engage in any fake or sham arrangement. He acknowledged that a goal of the trust was to obtain a tax benefit, though he never quite understood what the advantage was, although he did believe there was some rush to complete the transaction by the end of the year due to impending Canadian tax law amendments.

[22] On November 2nd, Mr. Truss sent the trust documents to Mr. Chalker, who, with a minor modification, found them acceptable. Mr. Antle relied upon Mr. Chalker and did not review the Trust Deed in detail. On November 3rd, Mr. Truss advised the Barbados Exchange Control Authority of the Trust, seeking permission to hold foreign property. The Authority approved this on November 8th. Mr. Truss did not advise the Authority that the Trust was not actually established until some time later. The Trust Deed is dated December 5th, notwithstanding Mr. Truss initially signed it on October 27th, and Mr. Antle did not sign until December 14th.

[23] Mr. Truss did not hear anything further regarding the Antle Trust until December. He was unaware of anything going on with respect to a third party sale and the need for the Stratos consent. He asked Mr. DeVries on December 8th for a copy of the Trust Deed, presuming the Trust was already in place. He testified that

he likely found out around December 5th that the Trust was probably settled at that time (although, in fact, it was not), as he would then have inserted the December 5th date on the parchment copy of the Deed. Indeed, Mr. DeVries indicated on December 9th by letter to Mr. Chalker, the sequencing of events:

> - The Trust was settled on December 5th;
>
> - The sale from the Trust to the spouse was December 8th; and
>
> - The repayment of the promissory note was to take place after the third party sale on December 14th (Mr. DeVries requested funds be wired to him.).

[24] With respect to the signing of the Trust Deed itself, it appears Mr. Truss signed when he prepared it on October 27th, though later changed the date on the front page to December 5th. It was not until closing on December 14th that he actually saw Mr. Antle's signature on a copy. Mr. Antle was not certain when he actually signed the Trust Deed, but given he was still suggesting to Mr. Brown on December 12th that the Trust must be finalized, I conclude he likely did not sign the Trust Deed until closing on the 14th of December. The Trust Deed he signed would have been dated December 5th. I note that Mr. Antle never met or communicated with Mr. Truss.

[25] Notwithstanding Mr. DeVries' request, Mr. Antle saw no need for funds to have to go to Mr. DeVries' office. He was concerned about the time this would take. It was agreed by all concerned, including Mr. Truss, that all transfers of funds would simply be handled through Mr. Antle's lawyer's trust account in Canada.

[26] Mr. DeVries testified that he understood the trust was settled December 5th so he decided December 8th would be an appropriate date for the sale from the Trust to Mrs. Antle, the beneficiary, acknowledging that there had not actually been an agreement between the Trust and Mrs. Antle that day. Mr. DeVries explained that the parties were *ad idem* as to what was going to occur and the date was not that relevant as long as it was before the closing of the third party sale on December 14th. One of the documents signed by Mr. Antle on December 14th was a PM Director's resolution effective December 5th, approving the transfer of the shares from Mr. Antle to the Trust.

[27] Mr. DeVries provided documents by fax (Bill of Sale, Promissory Note, etc.) on December 13th to Mr. Truss, who signed and returned them. This included a document[4] which read:

> The Trust hereby distributes all its capital property to the beneficiary …
>
> Dated as of this 14th day of December, 1999 as at 1:10 p.m.

And also a Direction to Pay[5]:

> I, the undersigned Trust, hereby direct that you pay to Renee Marquis Antle (the "creditor") the amount of $1,641,145.76 which you hold to my credit in your trust account. Dated as of this 14th day of December, 1999 as at 1:15 p.m.

[28] Mr. DeVries faxed these signed documents to Mr. Chalker the next day, December 14th, the day of closing.

[29] Mr. Truss had no issue with signing the documents. He felt no need to investigate the value of shares as the Trust was selling to the beneficiary, who would be entitled in any event to the property. He saw no risk as Trustee. Further, he signed the documents as they were consistent with his understanding of the transaction, not because he felt obliged to do so. He also relied on Mr. DeVries. If the sale had been from the Trust to a third party, he testified that he would have either got the beneficiary's consent or investigated the fair market value of the property.

Closing and Subsequent Events

[30] The closing of the sale of the PM shares took place on December 14th at Mr. Chalker's office. The MI representatives arrived around three or four in the afternoon for the closing of the sale of the shares from Mrs. Antle. The Antles arrived before noon to sign the documents in connection with the Trust. Mr. Antle signed the Trust Deed. Mrs. Antle signed the Bill of Sale, Promissory Note and a receipt dated the 14th day of December as at 1:20 p.m. Mr. Truss was faxed and signed the Distribution of capital property, which indicated on its face a time of 1:10 p.m., the Acknowledgment in full of the Promissory Note, indicating a time of

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4 Exhibit AR -1, volume 3, no. 32.

5 Exhibit AR -1. volume 3, no. 32.

1:10 p.m., and the Direction to Pay to Mr. Chalker of the $1,645,145 to Mrs. Antle timed at 1:15 p.m..

[31] At 2:55 p.m., Mr. Chalker faxed Mr. Truss asking him to sign off the share certificates, though not the original share certificate in Mr. Antle's name, which he did and returned by fax. Clearly the documents were prepared to reflect a certain sequencing, notwithstanding the timing of the actual signing. As Mr. Antle indicated, there were a number of parties involved, it was very complex and not every date was gone over meticulously, but he indicated "what I do recall is all the documents were signed in the sequence in which we had the authority to transfer and to sell and to offer and so on". He understood Mr. Truss would follow through with all the required steps as it was in the best interests of the beneficiary to do so. Mr. Antle was not concerned Mr. Truss would do anything other than sell the shares and ultimately make a cash distribution to Mrs. Antle. He acknowledged it was difficult to reconcile some of the dating of documents, for example, share certificates reflecting a December 8th change of ownership while the Bill of Sale for such transfer was dated December 13th.

[32] Later in the afternoon of December 14th, the MI representatives arrived for the closing of the share sale from Mrs. Antle to them. All monies went through Mr. Chalker's trust account. MI directed Mr. Chalker to pay $4,426,376.71 to Stratos, $1,636,782 to Mrs. Antle, $518,918 to Mrs. Kapila and $275,000 to Mr. Antle (shareholder's loan). Mr. Chalker's trust account summaries show the payments coming from Mrs. Antle into the spousal trust. Mr. Chalker paid $95,700 to Mr. DeVries for the professional fees and ultimately paid out to Mrs. Antle $1,542,227.76, which she deposited in her bank account.

[33] There was some follow-up in the couple of days after closing to ensure originals of documents, rather than just faxed copies, were signed, including the Trust Deed. Mr. Truss filed the Trust Deed with the Stamp Duty Office in Barbados on January 31, 2000. Fraser Milner provided a legal opinion with respect to the transaction on April 11, 2000. Mr. Antle was not aware the trust dissolved shortly after the transaction.

[34] On December 7, 1999, Mr. Antle incorporated Koli Enterprises: he was the sole shareholder and director. On December 15th, Mrs. Antle used the sale proceeds to lend $1.4 million to Koli, asking her husband to manage the money for her. There was no loan documentation. Koli acquired a GIC. According to Mr. Power, Mrs. Antle would earn interest on the loan based on the interest Koli would earn on its investment. Mrs. Antle received income from Koli both in the form of

interest and salary. In 2005, Koli repaid part of the loan to Mrs. Antle and she provided $200,000 to Mr. Antle to assist with the payment of taxes in connection with this matter.

[35] Mr. Antle later successfully sued Stratos for the additional $1,381,000 Stratos had received out of this deal on the basis Mr. Antle had agreed to that under duress.

Issues

[36] There are two Appellants: Mr. Antle and the Renee Marquis-Antle Spousal Trust. The issue is whether the Minister has properly included the taxable capital gain from the sale of the PM shares in Mr. Antle's income or, in the alternative, in the Trust's income, on the basis that the Trust was a Canadian resident. The questions to be addressed in resolving this issue are as follows:

(i) Was there a valid trust?

(ii) Were the transactions undertaken by the Trust and the settlement of the Trust itself a sham?

(iii) Where was the Trust resident?

(iv) Was the rollover under subsection 73(1) of the *Act* effective?

(v) Does subsection 69(11) of the *Act* apply to deem Mr. Antle to have disposed of the shares at fair market value?

(vi) Do the General Anti-Avoidance Rules ("GAAR") in subsections 245(2) and (5) apply to Mr. Antle or the Trust?

(vii) Can the Minister reassess the Trust?

[37] As will become clear, it is unnecessary for me to address all the issues raised by the parties. Indeed, I intend to reorder and limit the issues. I will explain why.

[38] This case deals with tax planning; an ingenious strategy devised by clever tax practitioners and adopted by Mr. Antle. Tax planning is on a continuum. At one end of the spectrum is the type of avoidance planning found acceptable by the *Duke of Westminster*, entitling a taxpayer to arrange affairs to minimize tax

payable. Moving along the spectrum is avoidance planning which runs afoul of the GAAR legislation as it is found to be abusive. And then, at the other end of the spectrum is avoidance planning that is evasive, and subject to criminal charges. The Respondent's main argument was that the Trust was a sham. A finding of sham requires a finding of an element of deception (see for example, *Faraggi v. the Queen*[6] and *Stubart Investments Limited v. The Queen*[7]) on the part of both the settlor and trustee. This moves the matter further along the continuum than the Parties perhaps contemplated, as how far apart are wilful evasion and intentional deception? No, I would rather not go down that very serious path, and indeed I see no need to do so. If there has been a deception, I would describe it as self-deception, albeit innocent, on the part of Mr. Antle and Mr. Truss. The latter was a young pawn in a masterful game of chess by some experienced chess masters. The former did not fully appreciate what a Trust even was, as evidenced by his question two years after the Trust had been dissolved as to whether it was still in place to be used.

[39] Notwithstanding the parties' detailed, multi-issue approach to this case, my view is that it hinges on two issues:

(i) Was there a validly constituted Trust?

(ii) If so, does GAAR apply to the capital property step-up strategy, or as Mr. Battalia would prefer, the Barbados Spousal Trust?

As the parties spent a considerable amount of argument on the concept of sham, I will also address that issue.

Analysis – Validity of Trust

[40] To establish a valid trust, there must be three certainties: the certainty of intention, the certainty of subject matter, and the certainty of objects. Also, given that a Trust is simply a means of holding property, there must be a transfer of property to the Trust to effectively constitute the Trust. The Respondent argues that

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6 2009 FCA 398.

7 84 DTC 6305 (SCC).

the arrangement before me lacks two of the certainties: the certainty of intention to create a Trust and the certainty of subject matter.

[41] First, with respect to certainty of intention, it is the Respondent's position that the settlor, Mr. Antle, never intended Mr. Truss to have discretion to deal with the shares, but rather intended to use the Trust as a conduit to avoid tax. This is somewhat circuitous reasoning as the arrangement was only effective to avoid tax if it was a valid Trust. Mr. Antle certainly intended a Trust for the purpose of accomplishing his goal of avoiding tax.

[42] The Trust Deed is clear that a Trust is intended. And it is pointed out by Gillese and Milczynski in *The Law of Trusts*[8]:

> Certainty of intention is a question of construction; the intention is inferred from the nature and manner of the disposition considered as a whole. The language employed must convey more than a moral obligation or a mere wish as to what is to be done with certain property. The language used need not be technical, so long as the intention to create a Trust can be found or inferred with certainty.

The express language of the Trust is supported by Mr. Antle's and Mr. Truss' testimony, which was unequivocal. According to the Appellant, the language of the Trust Deed is imperative and that is conclusive of certainty of intention. He argues that subjective intention plays no role in ascertaining the certainty of intention: it is only to be derived from the language of the Trust Deed itself.

[43] The Respondent argues that the language of the Deed is insufficient if it does not accord with Mr. Antle's actions, which suggest that he never intended to give Mr. Truss any control or discretion over the subject matter of the Trust. In the case of *Patricia M. Fraser v. Her Majesty the Queen*,[9] Justice Reed, in addressing the issue of the certainty of intention, indicated:

> And in any event, intention is determined by all of the evidence, including the conduct of the parties and the terms of their written documentation which flowed between them, and not merely on the basis of one person's subjective view. I have little doubt that the requirement of certainty of intention existed.

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8 (2nd ed 2005) p. 39.

9 91 DTC 5123 (FCTD)

[44] There has been considerable jurisprudence on the issue of parol evidence. In this case, however, it is not so much a question of interpretation of a contract, but the determination of the certainty of intention to create a trust. The Trust is a relationship. It is not a contract for consideration. The Trust Deed is to define the rights and responsibilities of those in that relationship. To suggest that only the words in the document can be relied upon to define the relationship is presuming the arrangement is a negotiated contract between two parties where each side has provided consideration to get to a mutually acceptable deal. Those are very different circumstances from a trust, especially where, as in this case, one party, the Trustee, provides the document, a standard trust deed he has created in cookie-cutter fashion, which the settlor, at best, paid little attention to. In this situation, I am not prepared to limit the search for certainty of intention to that document alone. It would be a vacuous inquiry.

[45] Further, I analogize this situation to something I see often: an employer and employee entering an independent contractor agreement, yet continuing to behave as employer/employee. They state their intention is to be in an independent contractor relationship, yet scrape the surface just a little and it is clear the true intention is to not to have to pay and remit source deductions: entering an independent contractor arrangement is simply the means to accomplish this. But this Court must determine if the actions of the parties are consistent with those of the independent contractor arrangement and thus support the intention to truly be in such a relationship, or whether the real employer/employee relationship is simply masked to meet the underlying intention to avoid source deductions. I see no reason why a determination of intent, for purposes of the establishment of a trust, cannot be subjected to similar scrutiny.

[46] Unlike the concept of a sham trust, which I will soon address, which requires a deception on the part of both the settlor and trustee, the certainty of intention requirement only looks to the intention of the settlor. There is no question Mr. Antle intended to avoid capital gains tax in Canada. His professional advisors told him this could only be accomplished by means of settling a Barbados Spousal Trust, therefore, he intended the trust. But let us explore exactly what he did in "settling" the trust.

[47] Notwithstanding the Trust Deed was dated December 5th, I find Mr. Antle did not sign the Deed until December 14th and only then could the Trust have been created. Recall that on December 12th, Mr. Antle was contacting Mr. Brown suggesting that the Trust must be finalized. Mr. Antle and Mr. Truss never communicated on or before December 14th, so December 14th would be the first

time both settlor and trustee saw their respective signatures on the Trust Deed. What were the circumstances then on December 14th that might shine a light on Mr. Antle's true intentions?

- Mr. Truss had already signed a Bill of Sale on December 13th transferring the shares on to Mrs. Antle;

- Mr. Truss had already signed on December 13th a Capital Property Distribution and a Direction to Pay;

- Mr. Antle's request that funds be handled only through his lawyer's trust account was acceded to;

- Mr. Antle had inquired into the need for share certificates to go to Barbados and told it was unnecessary;
- Mr. Antle had agreed to the additional consideration for Stratos under duress, maintaining his right to sue Stratos personally for $1.38 million;

- It was not Mr. Truss' idea to sell the property to the beneficiary and distribute the proceeds back to her;

- Mr. Antle understood Mr. Truss would follow through with all steps of the strategy as they were all in the best interests of the beneficiary; there was no reason (commercial, economic, fiduciary or otherwise) to do anything other than what the strategy stipulated, effectively stripping him of discretion;

- Mr. Antle understood all steps in the strategy had to be completed for a successful avoidance result;

- Mr. Antle was aware that MI had been concerned about the need for Stratos' consent on release, which was in hand, removing any impediment to the closing of the sale: the Trust was never mentioned as an impediment;

- Mr. Antle had never spoken to Mr. Truss; and

- Nothing in the body of the Trust Deed itself operates to settle the shares in the Trust.

[48] Under these circumstances, on December 14th Mr. Antle signed a Trust Deed dated December 5th claiming, in the preamble, to have transferred the shares. This is not illustrative of an intention to settle a trust. If Mr. Antle intended any role for Mr. Truss, it may at best have been as agent in a gift from him to his wife.

[49] I reach the inevitable conclusion that Mr. Antle did not truly intend to settle shares in trust with Mr. Truss. He simply signed documents on the advice of his professional advisers with the expectation the result would avoid tax in Canada. I find that on December 14th, he never intended to lose control of the shares or the money resulting from the sale. He knew when he purported to settle the Trust that nothing could or would derail the steps in the strategy. This is not indicative of an intention to settle a discretionary trust. Frankly, I have not been convinced Mr. Antle even fully appreciated the significance of settling a discretionary trust, beyond an appreciation for the result it might provide. I conclude that his actions and the surrounding circumstances cannot support a conclusion that signing the Trust Deed, as worded, reflects any true intention to settle shares in a discretionary trust. I do not find that Mr. Antle is saved by the language of the Trust Deed itself, no matter how clear it might be. It does not reflect his intentions. Paragraph 2.1 of the Trust Deed states:

> "2.1 The purpose of the… Trust is to create a means for holding investment and business interests for the benefit of the Beneficiaries…"

This was not the purpose, which was for the Trustee to immediately sell the trust property to the Beneficiary and distribute proceeds back to the Beneficiary to perfect the Antles' tax avoidance strategy.

[50] Next, I will deal with the certainty of subject matter. The Respondent's position is that while the Trust Deed was clear that the PM shares were the subject matter of the Trust, title to those shares was never transferred to, and consequently held by, the Trustee, and therefore, there was no certainty of subject matter. I believe the Respondent may be confusing certainty of subject matter with the requirement for an effective constitution of the Trust by the transfer of property.

[51] The issue with respect to certainty of subject matter, however, arises around the determination of just what Mr. Antle thought he was passing on to Mr. Truss, and in effect, to Mrs. Antle. Mr. Antle retained some kind of interest in the shares so that he could get back from Stratos $1.38 million of the additional consideration deducted from the value of the shares, purportedly transferred to Mr. Truss. So

what interest was Mr. Antle attempting to transfer to Mr. Truss? It was clear Mr. Antle had carved out an amount from the value of the shares to pay out Stratos, effectively removing any charge against the shares to be dealt with by either the Trust or Mrs. Antle. As far as Mr. Truss was concerned, he received shares with a value equal to the value Mrs. Antle was prepared to pay for them. Neither Mr. Truss nor Mrs. Antle expressed any concern about any charge against the shares which they would have to deal with, nor that the shares might be worth an additional $1.38 million if Mr. Antle was successful in suing Stratos. Mr. Antle had taken care of that in his dealings with Mr. Wood of Stratos. As it turned out, Mr. Antle sued Stratos for that additional consideration and it was Mr. Antle that recovered that amount. That amount reflects value in the shares wrongly provided to Stratos. Why does Mr. Antle get this? Because it was not Mrs. Antle or the Trustee but Mr. Antle who, under duress, agreed to have the additional consideration paid to Stratos. This leads full circle to the question of whether Mr. Antle, in attempting to settle the shares on the Trust, was in fact settling his full interest in the shares. He retained some right to get $1.38 million personally from the ultimate sale of shares to MI. If he transferred anything to Mr. Truss, it was not his full interest in the PM shares: there was an element of his ownership in PM that did not pass. This creates a lack of certainty of subject matter.

[52] I will now address the major stumbling block for Mr. Antle which is the question of the constitution of the Trust. Mr. Truss re-signed the Bill of Sale transferring the shares to Mrs. Antle on December 14th. I am satisfied this was subsequent to the settlement of the Trust by Mr. Antle, which I find also occurred on December 14th. The Respondent's concern is that the physical share certificates, endorsed in blank by Mr. Antle, were held by Stratos until December 14th when it received payment from MI, at which time, according to the Respondent, "the terms of the agreement required title to be transferred to MI Drilling". The Respondent concludes that Mr. Truss could not have had "clear title" to those shares. The Respondent's position appears to be that the shares, held as security by Stratos, could not effectively be transferred to the Trust, and presumably on to Mrs. Antle, before Stratos was paid out, which in fact occurred later in the day on December 14th. Mr. Antle counters that he had Stratos' consent to a transfer: the release from Stratos acknowledges in its preamble the transfer to the spouses, though no mention of the Trust. I suggest it is not material whether Mr. Truss got "clear" title or even if the shares were transferred from Mr. Antle to him and on to Mrs. Antle in breach of the security arrangement with Stratos. The more pertinent question is what evidence do I have that Mr. Antle ever settled the shares on the Trust.

[53] The Trust Deed dated December 5th indicates in its preamble that Mr. Antle has transferred the shares to the Trustee. Nothing in the body of the Deed purports to be a gift or transfer of the shares. This Deed was not effective until December 14th, so the "transfer" must have taken place earlier on that day, or on an earlier day. Mr. Devries, Mr. Truss' counsel, unilaterally determined that December 5th was an appropriate date for the settlement, so he prepared a Director's Resolution of the company purportedly authorizing the transfer. The Resolution reads:

> Certified Resolution of the Directors of PM Environmental Holdings Ltd. ("the Corporation") dated the 5th day of December, 1999 ("Effective Date").
>
> And whereas Paul G. Antle (the "settlor") has settled the Renee Marquis-Antle Spousal Trust (the "Trust") with the 2,390,000 common shares issued to and now formerly held by the settlor in the corporation (the "shares");
>
> On motion duly made, seconded and unanimously adopted, it was resolved that;
>
> 1. The Corporation is authorized to transfer the shares held by the settlor to the Trust;
>
> 2, The Corporation cancel the certificates representing the shares held by the settlor and issue a new certificate respecting the shares to the Trust when such certificates are presented for cancellation.
>
> Secretarial Certificate
>
> Certified a true and correct copy of the Resolution of the directors of the Corporation dated the Effective Date, and that the said Resolution is still in full force and effect, given as of the Effective Date.

[54] This Resolution, according to Mr. Antle, was likely signed by him on December 14th, as only on that day were he and Mr. Kapila together so that Mr. Antle could certify a Resolution had effectively been passed. The wording "Resolution of the Directors dated the Effective Date" is simply incorrect. I presume by inserting "given as of the Effective Date" that the Directors were attempting to have the transfer effective back on December 5th, notwithstanding when it might have been passed. This too is inaccurate. The Secretary cannot pretend he gave the certification on December 5th. This approach to drafting Directors' Resolutions is at best confusing, especially when it is admitted that nothing was passed until December 14th. Apart from the suspect Directors' Resolution, what other evidence do I have that Mr. Antle did transfer shares to Mr. Truss? The Deed doesn't do it. How about Mr. Antle's share certificate? It was held by Stratos. The copy I saw as an Exhibit was endorsed in

blank by Mr. Antle back in June 1998: there was no indication of a transferee. Presumably, Stratos provided the certificate at closing – a closing that occurred after the purported settlement of the Trust and sale by the Trust of those very shares to Mrs. Antle. Interestingly, section 124 of the *Newfoundland Corporation Act*[10] states that an:

> Endorsement of a security … in blank does not constitute a transfer until delivery of the security.

This codifies the common law requirement of endorsement and delivery for a valid transfer[11].

[55] Though Mr. Antle may have believed the PM shares were meant to pass through the Trust to Mrs. Antle, he never did transfer all of his right and interest in the shares to the Trust. As put by Professor D.W.M. Waters in *Waters' Law of Trusts in Canada:*[12]

> It is also essential, unless the Trustee has given value, that the property is held in title by the Trustee. Only then can there be a valid Trust.

Professor Waters is also clear that a Trust is not completely constituted unless the property has been transferred:[13]

> A Trust is incompletely constituted on the other hand when every trust element is clear and precise but the settlor has not transferred the property to the Trustees.
>
> …
>
> And where a statutory form of transfer is required, as in the case of shares, the share transfer form must be completed in their names and their names registered in the company's books.
>
> …
>
> If the trust is created by way of indenture, its moment of creation is the date of the indenture, unless the terms of the indenture postpone it to a later date. However,

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10 R.S.N.L. 1990, c. C-36

11 see for eg. *Fenton v Whitties*, 1977 26 NSR 2d 662

12 3rd ed. (Toronto: Thomson, 2005) p. 149

13 3rd ed. (Toronto: Thomson, 2005) pp 26, 617, 167

> until the Trustees have received the trust property, not merely by way of a legal or equitable assignment by the mode of transfer appropriate to a particular property, the trust is ineffective, and generally speaking, nothing can be done by the trustees if no value has been given by the trust beneficiaries for the transfer. The moment of complete constitution of the trust occurs the moment when the transfer in appropriate form is itself complete. It is, of course, fraudulent to backdate a Deed of Trust.
>
> …
>
> The so called "incompletely constituted trust" is therefore a situation where the three certainties exist, but the settler has not vested the trust property in the trustees… Is such a situation a trust at all? Strictly speaking it is not. It is the shell of a trust but it is an inoperative shell which consequently has no legal significance.

[56] In summary, the following suggests that title was never effectively transferred to Mr. Truss:

- the Directors' Resolution purports to do something on December 5th: Does this make it efficacious for December 14th?

- Mr. Antle's share certificate is not delivered until after the purported settlement of the Trust;

- Mr. Antle's share certificate is not delivered to Mr. Truss but directly to MI;

- Stratos' release makes no mention of the transfer to Trust;

- There is no transferee indicated on Mr. Antle's share certificate; and

- The Trust Deed is not worded to effect a transfer.

[57] In these circumstances, I question how title to the shares was ever transferred from Mr. Antle to Mr. Truss. Mr. Antle has fallen short of the test set forth so long ago in *Milroy v Lord*;[14]

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[14] (1862) 4 De G.F. & G. 264: ER 45 Ch 1185

> I take the law of this court to be well settled, that, in order to render voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him.

I conclude Mr. Truss never became owner of the shares. Mr. Truss was not a purchaser for value and is not helped by the provisions of the *Newfoundland Corporation Act*. Mr. Antle would have me believe that at some point on December 14th something occurred to transfer title to Mr. Truss. If he could even have referred me to some elaborate trust conditions which specifically laid out how share certificates were to be held and for whom, and on what terms, I may have been able to follow title from Mr. Antle to Mr. Truss, but simply stating that the plan was always that the steps would be sequential is not sufficient. Show me. Instead, I see backdated Resolutions and incomplete share endorsements. As Professor Waters puts it, this is only a shell with no legal significance.

[58] With certainty of intention and certainty of subject matter in question and, more significantly, no actual transfer of shares, there is no properly constituted trust: the Trust never came into existence. This conclusion emphasizes how important it is, in implementing strategies with no purpose other than avoidance of tax, that meticulous and scrupulous regard be had to timing and execution. Backdating of documents, fuzzy intentions, lack of transfer documents, lack of discretion, lack of commercial purpose, delivery of signed documents distributing capital from the trust prior to its purported settlement, all frankly miss the mark – by a long shot. They leave an impression of elaborate window dressing. In short, if you are going to play the avoidance game, it is not enough to have brilliant strategy, you must have brilliant execution. I find no Trust was duly constituted. The Trust's appeal is therefore quashed. With respect to Mr. Antle's appeal, with no valid trust he either sold the shares to his wife and triggered a gain in his hands or he rolled the shares to his wife and had the gain attributed back to him. Either way, he has been correctly assessed on the resulting capital gain, and his appeal is dismissed.

[59] Given my conclusion in this regard, it is unnecessary to analyze the sham transaction arguments, but as that was the Respondent's main argument, I intend to comment.

Sham Transaction

[60] The Respondent argues that if I had found a validly constituted trust, that its creation was a sham, as the terms of the Trust which give the Trustee discretion are a deception. According to the Respondent, it was never intended that Mr. Truss have discretion, and indeed, he did not have any discretion: accordingly, third parties, primarily Canada Revenue Agency, have been deceived.

[61] The leading case on sham is *Snook v. London West Riding Investments Ltd.*,[15] in which Lord Diplock stated:

> As regards to contention of the Plaintiff that the transactions between himself, Auto-Finance, Ltd. and the Defendants were a "sham", it is , I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them, to give to third parties or the Court, the appearance of creating between the parties, legal rights and obligations different from the actual legal rights and obligations (if any), which the parties intend to create. … that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived.

[62] The Federal Court of Appeal has had occasion recently to comment on the sham concept. In *Faraggi*, Justice Noël, after distinguishing sham from abuse, concluded that in Canadian law, sham requires an element of deceit which generally manifests itself by a misrepresentation by the parties of the actual transaction taking place between them. The Appellant further relied on the English Chancery case of *Shalson v. Russo*,[16] which suggested it was necessary for both the settlor and the trustee to be parties to the sham. Justice Rimer had this to say:

> The settlor may have an unspoken intention that the assets are in fact to be treated as his own and that the trustee will accede to his every request on demand, but unless that intention is from the outset shared by the trustee (or later becomes so shared), I fail to see how the settlement can be regarded as a sham. Once the assets are vested in the trustee, they will be held on the declared trust, and he is

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15 [1967] 1 All ER 5518 (CA).

16 [2005] Ch 281 (July 11, 2003).

> entitled to regard them as so held and to ignore any demands from the settlor as to how to deal with them. I cannot understand on what basis a third party could claim, merely by reference to the unilateral intentions of the settlor, that the settlement was a sham and that the assets in fact remained the settlor's property.

[63] This distinguishes the idea of a sham trust versus no trust at all. I have already addressed Mr. Antle's intention and concluded that notwithstanding the words of the Deed, he never intended Mr. Truss to have control of the shares: nothing stood between him and the final sale of the shares to MI. But what about Mr. Truss? He certainly said all the right things in evidence – but of course, he would. It would make no sense for Mr. Antle or Mr. Truss to testify other than they believed a valid trust was being established. Yes, Mr. Truss did some prior research on trusts and yes, he drafted the Trust Deed, and yes, he was a man of integrity and would not engage in any intentional deceit. No doubt you can hear the "but" coming. But, what did or didn't he do?

[64] He signed and provided documents to Mr. Antle confirming the sale of the shares to Mrs. Antle and subsequent distribution of capital prior to even having Mr Antle's signature on a Trust Deed. The Appellants argue it is not clear whether Mr. Antle actually had the signed documents from Mr. Truss before he signed the Deed, in effect, suggesting there simply was no guarantee that Mr. Truss would distribute. It was as good as a guarantee.

[65] Second, he said he felt comfortable not having to investigate the value of the shares because the sole beneficiary was the purchaser of the shares, yet he never even spoke to the settlor or the beneficiary. Some investigation might have revealed that the shares were initially worth twice the amount, but half was being carved out for a third party, yet Mr. Antle, the settlor, was retaining a right to go after that half. What interest did Mr. Truss presume he was getting? He was agreeing to accept shares from husband to hold for wife, simply presuming because wife, whom he never spoke to, signed a Bill of Sale at $1.38 million that she was getting full and fair value for the shares.

[66] Third, there is no evidence that Mr. Truss ever saw Mr. Antle's signature on any document purporting to actually transfer shares to Mr. Truss. He never spoke to Mr. Antle. At best, he relied on others (Mr. Devries and Mr. Brown) to satisfy himself that Mr. Antle had somehow transferred shares to him. The only evidence would have been Mr. Antle's share certificate, which he had previously endorsed in blank and left with Stratos. I received no evidence that this certificate was ever

delivered to Mr. Truss, let alone delivered prior to him having already signed documents purporting to sell such shares on to Mrs. Antle.

[67] Fourth, the Appellant argues that there is no evidence that Mr. Truss believed he had to sell the shares. Frankly, this is disingenuous. The strategy required the shares be sold to Mrs. Antle, the sole beneficiary. There is absolutely no reason why, based on his research, Mr. Truss would not do so. He acknowledged this. His only concern was not being in breach of the trust, and how could he be in breach if he sold the trust property to the sole beneficiary. I do not accept that Mr. Truss had any real discretion. These matters were absolutely preordained. The pretence of discretion was critical to make the strategy work, but I entertain no doubt whatsoever in this situation, it was a pretence. If Mr. Truss received the shares at all, he received them on the basis that the sole beneficiary had already agreed to buy them. By distributing the proceeds of such sale back to the sole beneficiary, there was no possibility of any comeback against him. The arrangement was, in and of itself, effectively void of discretion.

[68] Fifth, the Appellants point to Mr. Truss' decision to allow funds to be handled through Mr. Chalker's trust account as an indication of Mr. Truss' exercise of his discretion. This followed from a call he had with his Canadian counsel, Mr. Devries, after Mr. Antle had expressed concern about the funds going to Barbados. In the greater scheme of things, this is insignificant.

[69] Sixth, the release from Stratos, prepared by MI's lawyer, only refers to a transfer from the husbands to the wives, not through a Trustee.

[70] Seventh, no share certificates from Mr. Antle show up in the index to the closing. Did Stratos bring it to closing? Mr. Pritchard's closing binder only had copies of share certificates ultimately in his client, MI's, name and a copy of a share certificate in the name of Mr. Kapila, in trust.

[71] The stumbling block for the Respondent is that, while all the circumstances point to an arrangement that was inaccurately reflected in the Trust Deed, there was no intentional deception but, if there was deception it was by the very existence of this clever avoidance strategy. Although Mr. Antle and Mr. Truss and indeed, Mr. Brown, Mr. Devries and Mr. Batallia could all, with some legitimacy, say we believe the trustee always had the discretion to say no, I find they all knew with absolute certainty that the trustee would not say no. The plan was such it made no sense for the Trustee to say no. The Appellant says, short of a guarantee to that effect, I must find there was discretion and therefore, no deception and no

sham. The essence of this argument is that because Mr. Truss believed he had some discretion, then the fact that no one, including Mr. Truss and Mr. Antle, expected Mr. Truss to do anything other than what the strategy called for, the integrity of the trust is intact. There is no deception. The Appellant concludes that Mr. Truss did legally hold the shares in trust for Mrs. Antle for a few hours on December 14th.

[72] What to conclude from these circumstances? Mr. Nitikman argues it is not enough for me to find some artificiality in the "Trust" arrangement (see *Asset Management Limited v. Commissioner of Inland Revenue*[17]), nor that a pre-planned series of transactions constitute a sham (see *The Queen v. Esskay Farms Limited*[18]). Further, tax motivation does not create a sham. The Appellants' view on avoidance schemes not being shams is summarized in the following passage from Shipright ed., *Tax Avoidance and The Law:*[19]

> … Now it will be readily perceived that the participants in virtually every tax avoidance scheme have not the slightest incentive to produce a sham. The strategies depend for their effectiveness on the steps being taken being real. … Given that there is no difficulty in taking the artificial steps, there is no point whatsoever in not taking them but in merely pretending to take them. Indeed, there is every point in taking them; as otherwise the scheme certainly will not work and will depend for its de facto effectiveness on a criminal fraud which is totally unnecessary and the discovery of which will normally give rise not only to the tax, which continues to be due, being in fact collected but also the perpetrators being indicted on serious charges.

[73] In effect, because the scheme only works if Mr. Antle and Mr. Truss intend to create a real Trust, then it is nonsensical to consider they would have intended anything different. This is somewhat circuitous reasoning, as the intent, certainly on Mr. Antle's part, was to avoid tax on the sale of shares to a third party. The Barbados Spousal Trust was the means to achieve that: therefore, he intended the Barbados Spousal Trust. Yet, affairs were arranged so he retained control of the shares. It does not matter says Mr. Nitikman, relying on comments in *Lewin on Trusts*[20]:

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17 [2007] NZCA 230.

18 72 DTC 6010 (FCTD).

19 1997 Key Haven Publications 27.

20 (18th ed., 2008).

> So long as the trusts are intended to take effect according to their terms, the retention of large powers or weighty influence by a settlor does not itself make the trusts void as a sham … A trust is either a sham in the sense explained in paragraphs 4 – 19 and – 20 above, or it is valid and enforceable. There is no third state of affairs between a valid trust on the one hand and a sham on the other. If the settlor retains power to direct investments, that does not make the trusts a sham. Indeed, his directing investments through the machinery of the trusts recognized them as real. Even if the settlor retains practical control of the whole administration of the trust through informal, personal influence over the trustees, that does not enable his creditors to "pierce the veil of the trust".

Nor, according to the Appellant, does it matter that the Trust was for a relatively short period of time (see *ATB Financial v. Apollo Trust*[21] and also *Continental Bank of Canada v. Canada*[22]).

[74] I agree with Mr. Nitikman's submissions on each of these points. They must, however, be looked at cumulatively and in context. I find there certainly is an element of artificiality in an arrangement where the exercise of discretion is rendered meaningless by the very nature of the strategy itself, the elaborate, but certain and fixed preordained steps. There is no better evidence of this than the pre-signing of documents by the Trustee. And yes, as I have found, there was one reason and one reason only for the Trust – to avoid taxes: any suggestion of estate planning using this Trust is not credible. Further, Mr. Antle did continue to call the shots and did not ever sign any transfer document or deliver his share certificates to Mr. Truss on a timely basis. Cumulatively, these factors still cannot lead me to a conclusion that there was intentional deceit by Mr. Antle and the Trustee justifying a sham, but certainly confirms my view on the issue of the creation of a valid Trust.

GAAR

[75] If I am wrong, and the language of the Trust Deed is sufficient to establish certainty of intention and, notwithstanding the lack of transfer of the property, the peripheral documents are sufficient to establish certainty of subject matter, and the lack of *de facto* discretion by the trustee is overridden by *de jure* discretion as set

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21 45 B.L.R. (4th) 201 (Ont. S.C.).

22 94 DTC 1858 (TCC).

out in the Trust Deed, then does this form of avoidance planning run afoul of GAAR? I believe it does.

[76] The applicable sections read as follows:

> 245(1) In this section, "tax benefit" means a reduction, avoidance or deferral of tax or other amount payable under this *Act* or an increase in a refund of tax or other amount under this Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this *Act* but for a tax treaty or an increase in a refund of tax or other amount under this *Act* as a result of a tax treaty;
>
> …
>
> "transaction" includes an arrangement or event.
>
> 245(2) Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.
>
> 245(3) An avoidance transaction means any transaction
>
> (*a*) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit; or
>
> (*b*) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.
>
> 245(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction
>
> (*a*) would, if this *Act* were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of
>
> (i) this *Act*,

(ii) …

(iv) a tax treaty, or

(v) …

(*b*) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.

245(5) Without restricting the generality of subsection (2), and notwithstanding any other enactment,

(*a*) any deduction, exemption or exclusion in computing income, taxable income, taxable income earned in Canada or tax payable or any part thereof may be allowed or disallowed in whole or in part,

(*b*) any such deduction, exemption or exclusion, any income, loss or other amount or part thereof may be allocated to any person,

(*c*) the nature of any payment or other amount may be recharacterized, and

(*d*) the tax effects that would otherwise result from the application of other provisions of this *Act* may be ignored,

in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction.

[77] The Supreme Court of Canada has recently provided guidance as to the proper approach to the application of GAAR (*Canada Trustco Mortgage Co. v. The Queen,*[23] and *Lipson v. Canada*[24]). What have they told us? They have told us that GAAR is a distinct three-step process:

(i) there must be a tax benefit arising from a transaction or series of transactions within the meaning of subsections 245 (1) and (2);

(ii) the transaction must be an avoidance transaction within the meaning of subsection 245(3), in the sense that it cannot have been reasonably undertaken or

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23 [2005] 2 S.C.R. 601, 2005 SCC 54

24 2009 SCC 1, para 41

arranged primarily for a *bona fide* purpose other than to obtain the tax benefit; and

(iii) the avoidance transaction giving rise to the tax benefit must be abusive under subsection 245(4) in the sense that it cannot be reasonably concluded that a tax benefit would be consistent with the object, spirit or purpose of the provisions relied upon by the taxpayer.

It is up to the taxpayer to refute the first two points and for the Minister to refute the third. With respect to the third point, the issue of abuse, the Supreme Court of Canada said in *Canada Trustco*:[25]

> 44 The heart of the analysis under s. 245(4) lies in a contextual and purposive interpretation of the provisions of the *Act* that are relied on by the taxpayer, and the application of the properly interpreted provisions to the facts of a given case. The first task is to interpret the provisions giving rise to the tax benefit to determine their object, spirit and purpose. The next task is to determine whether the transaction falls within or frustrates that purpose. The overall inquiry thus involves a mixed question of fact and law. The textual, contextual and purposive interpretation of specific provisions of the *Income Tax Act* is essentially a question of law but the application of these provisions to the facts of a case is necessarily fact-intensive.
>
> 45 This analysis will lead to a finding of abusive tax avoidance when a taxpayer relies on specific provisions of the *Income Tax Act* in order to achieve an outcome that those provisions seek to prevent. As well, abusive tax avoidance will occur when a transaction defeats the underlying rationale of the provisions that are relied upon. An abuse may also result from an arrangement that circumvents the application of certain provisions, such as specific anti-avoidance rules, in a manner that frustrates or defeats the object, spirit or purpose of those provisions. By contrast, abuse is not established where it is reasonable to conclude that an avoidance transaction under s. 245(3) was within the object, spirit or purpose of the provisions that confer the tax benefit.
>
> 46 Once the provisions of the *Income Tax Act* are properly interpreted, it is a question of fact for the Tax Court judge whether the Minister, in denying the tax benefit, has established abusive tax avoidance under s. 245(4). Provided the Tax Court judge has proceeded on a proper construction of the provisions of the *Act* and on findings supported by the evidence, appellate tribunals should not interfere, absent a palpable and overriding error.

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25 [2005] 2 S.C.R. 601, 2005 SCC 54

> 47 The first part of the inquiry under s. 245(4) requires the court to look beyond the mere text of the provisions and undertake a contextual and purposive approach to interpretation in order to find meaning that harmonizes the wording, object, spirit and purpose of the provisions of the *Income Tax Act*. There is nothing novel in this. Even where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities. "After all, language can never be interpreted independently of its context, and legislative purpose is part of the context. It would seem to follow that consideration of legislative purpose may not only resolve patent ambiguity, but may, on occasion, reveal ambiguity in apparently plain language." See P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (4th ed. 2002), at p. 563. In order to reveal and resolve any latent ambiguities in the meaning of provisions of the *Income Tax Act*, the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation.

[78] The Supreme Court of Canada confirmed their approach in *Lipson* and in particular stated:

> [40] According to the framework set out in *Canada Trustco*, a transaction can result in an abuse and misuse of the *Act* in one of three ways: where the result of the avoidance transaction (a) is an outcome that the provisions relied on seek to prevent; (b) defeats the underlying rationale of the provisions relied on; or (c) circumvents certain provisions in a manner that frustrates the object, spirit or purpose of those provisions (*Canada Trustco*, at para. 45). One or more of these possibilities may apply in a given case. I should reiterate that in a case like the one at bar, the individual tax benefits must be analyzed separately, but always in the context of the entire series of transactions and bearing in mind that each step may have an impact on the others, in order to determine whether any of the provisions relied upon for each tax benefit was misused and abused.

(i) *Was there a tax benefit?*

[79] Yes. The parties agree that there were tax benefits in the form of the paragraph 73(1)(*c*) tax-free rollover and the zero gain on the sale of shares by Mrs. Antle due to her high cost base in the shares. The Respondent raises an additional benefit being the benefit of the trust not being taxed on its capital gain.

Was there an avoidance transaction?

[80] The Appellant admits that the settlement of the Trust in Barbados was an avoidance transaction, though only to take advantage of Article XIV(4) of the Treaty. He also argues that Mrs. Antle's sale of shares does not constitute an avoidance transaction. I disagree with the Appellant. The settlement of the Trust was an avoidance transaction as I find as a fact that the sole purpose of taking advantage of the subsection 73(1) rollover was tax avoidance. Further, the sale by the Trust to Mrs. Antle, the sale by her to MI and the subsequent capital distribution from the Trust are transactions that are part of a series, the sole purpose of which was to obtain a tax benefit.

[81] The Appellant argues that there were some earlier discussions between Mr. Antle and his counsel regarding establishing a family trust and he attempts to tie that in with the motivation to repay his wife's family's generosity by establishing a source of wealth for Mrs. Antle through the Barbados Spousal Trust. The circumstances simply do not bear this out. There was no *bona fide* purpose of the Barbados Spousal Trust other than to obtain the tax benefit. I find the only motivation for this Trust was to avoid tax, which would result in more money in Mrs. Antle's hands. There was no element of estate planning. Mr. Antle could give the shares to his wife, pay the tax, leaving his wife $1.1 million, or he could settle a Barbados Spousal Trust, pay no tax, and leave $1.4 million in his wife's hands. The purpose of the transaction is self-evident.

[82] In any event, if the transactions are viewed separately, it is clear from the Supreme Court of Canada's comments in *Canada Trustco*, if even one transaction in a series is an avoidance transaction, then the tax benefit that results from the series may be denied under GAAR. So, as is often the case in GAAR matters, the debate centers on the correct application of subsection 245(4).

Was the tax avoidance abusive?

[83] It is important to keep in mind the Supreme Court's comments in *Lipson* the overall approach to the application of subsection 245(4):[26]

> [41] The courts cannot search for an **overriding policy** of the *Act* that is not based on a **unified, textual, contextual and purposive interpretation of the specific provisions in issue.** First, such a search is incompatible with the roles of reviewing judges. The *Income Tax Act* is a compendium of highly detailed and often complex provisions. To send the courts on the search for some **overarching policy** and then to use such a policy to override the **wording** of the provisions of the *Income Tax Act* would inappropriately place the formulation of taxation policy in the hands of the judiciary, requiring judges to perform a task to which they are unaccustomed and for which they are not equipped. Did Parliament intend judges to formulate taxation policies that are **not grounded in the provisions of the *Act*** and to apply them to override the specific provisions of the Act? Notwithstanding the interpretative challenges that the GAAR presents, we cannot find a basis for concluding that such marked departure from judicial and interpretative norms was Parliament's intent. [emphasis added]

[84] The first step in this analysis as dictated by the Supreme Court of Canada is to apply a textual, contextual and purposive approach to interpret the provisions of the *Act* or Treaty relied upon by the taxpayer to obtain the tax benefit to determine their object, spirit and purpose. The first determination then is to identify those provisions relied upon. Harkening back to *Lipson* and *Canada Trustco*, which identified the three ways in which a transaction can be abusive, I find that I must consider not only the provisions relied upon by Mr. Antle (section 73 and paragraphs 94(1)(*c*) and 110(1)(*f*) of the *Act* and Article XIV(4) of the Treaty), but also those provisions circumvented by Mr. Antle, being the attribution rules in sections 74.1 to 74.5.

[85] Before addressing the object, spirit and purpose of these various provisions, I need to address the question posed by the Appellant as to whether GAAR can even apply to the 1980 Barbados Treaty. In 2005, section 245(4) was amended to include reference to a tax treaty: such amendment was made retroactive to 1988. At the same time, section 4.1 was added to the *Income Tax Convention Interpretation Act:*

> 4.1(1) Notwithstanding the provisions of a Convention or the *Act* giving the Convention the force of law in Canada, it is hereby declared that the law of Canada is that section 245 of the *Income Tax Act* applies to any benefit provided under the Convention;

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[26] 2009 SCC 1, para 41

> 4.1(2) Subsection 1 applies with respect to transactions entered into after September 12, 1988.

[86] Most statutes implementing Canada's Tax Treaties contain a provision which provides that the Treaty overrides any conflicting legislation, with the exception that the *Income Tax Convention Interpretation Act* overrides the Treaty. In fact, Canada has amended some older legislation implementing certain Treaties (for example, Canada-Germany) to ensure the *Income Tax Convention Interpretation Act* overrides the Treaty. This has not been done with respect to the Barbados Treaty and the Appellant therefore agues the Act implementing the Barbados Treaty (the *Canada-Barbados Income Tax Agreement Act* 1980) governs. It states:

> 26(2) In the event of any inconsistency between the provisions of this Part, or the agreement, and the provisions of any other law, the provisions of this Part and the agreement prevail to the extent of the inconsistency.

[87] It is a question of what trumps what. I conclude that specific reference in section 4.1 of the *Income Tax Convention Interpretation Act* to "notwithstanding the provisions of a Convention or the *Act* giving the Convention the force of law in Canada" is more specific, later in time and crystal clear as to its intent and effect. It governs. GAAR can apply to the Treaty.

[88] I turn now to the first step in the abuse analysis, to interpret the provisions to determine their object, spirit and purpose.

[89] Canada taxes its residents on capital gains realized on the disposition of shares held by them as capital property. So, had Mr. Antle sold the shares directly to MI, he would have been taxed on the gain arising. Subsection 73(1) of the *Act* however permits a tax-free transfer of shares to a spouse – a rollover. This results because the property is transferred at the spouse's adjusted cost base. The tax on the gain is deferred until the transferee spouse disposes of the property outside the marital unit. Spouses may elect out of this regime. Subsection 73(1) thus recognizes the economic mutuality between spouses, or as the Supreme Court of Canada put it in *Thibaudeau*[27]: "the unit represented by the couple in order to reflect the economic reality peculiar to it".

[90] In *Lipson*, the Supreme Court of Canada said the following about the subsection 73(1) rollover provisions:

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[27] [1995] 2 S.C.R. 627, para 93

> 31 The effect of s. 73(1) is to facilitate interspousal transfers of property without triggering immediate tax consequences. This is an exception to the general rule that capital gains and losses are recognized when property is disposed of. According to Professor Vern Krishna:
>
> > The rationale for permitting a taxpayer to rollover assets is that it is undesirable, and perhaps unfair, to impose a tax on transactions that do not involve a fundamental economic change in ownership, even though there may be a change in form or legal structure.

In *Principles of Canadian Income Tax Law*,[28] (Hogg, Magee and Li), the authors wrote:

> As discussed earlier, the spousal trust, the alter ego trust and joint spousal trusts are exceptions to the deemed disposition and acquisition on death rules because there are tax-free rollovers of assets into these trusts. Capital property which is transferred to a qualifying trust on a rollover basis, either *inter vivos* or on death, is deemed to have been disposed of for proceeds of disposition equal to the adjusted cost base of the property. This creates a rollover, because it means that no capital gain or loss is caused by the transfer of the property to the trust. The trust acquiring property on a rollover is deemed to acquire the property at its adjusted cost based (cost to the settlor), not at its fair market value, so that any tax liability is deferred until the property is actually disposed of by the trustee or until the beneficiaries of the trust die (when there's a deemed disposition). The general idea is to eliminate income tax consequences from transactions between spouses.

[91] The object or spirit of subsection 73(1) is not complicated. It does not impose tax on a spousal transfer of capital property, but is intended to defer that tax until the property is disposed of by the marital unit. It is not intended to allow a permanent tax avoidance – it is a deferral.

[92] But subsection 73(1) cannot be viewed in isolation: it must be viewed in the context of the attribution rules, which deal with the effect of property transfers between spouses. Subsection 74.2(1) of the *Act* provides that where an individual has transferred property to a spouse or a spousal trust, any gain on disposition of the property is deemed to be the gain of the transferor; in effect, end of deferral, and tax becomes exigible. However, in connection with transfers to spousal trusts, paragraph 74.3(1)(*b*) limits the amount of taxable gain which is attributable to the lesser of:

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28 2nd ed. (Scarborough Carswell 1992).

> (a) the amount designated under subsection 104(21) for the spouse and the trust's return of income for the year; and
>
> (b) the net taxable capital gains for the year of the trust from the disposition by it of the property.

So, only if the trust chooses to have the gain taxed in the beneficiary's hands does attribution occur, otherwise the trust is taxable. Effectively, the use of a spousal trust does not impact on the object, spirit and purpose of the rollover/attribution regime to ensure gains are taxed when property leaves the marital unit. It is important to keep in mind that a Trust is simply a means of holding property: it is not a separate legal third party outside the marital unit, notwithstanding what the *Income Tax Act* says it is for tax purposes. The *Act* may pretend the Trust is an individual for the limited application of its tax regime, but that remains a fiction. Property in the spousal trust has not left the marital unit. Not surprisingly these provisions do not contemplate the specific circumstances of the spousal trust triggering the gain on the disposition of property to the very spouse for whom the property is held – the situation before me.

[93] Together with the rollover rules, the attribution rules establish a regime for dealing with spouses under the *Income Tax Act*. The rules recognize income splitting within a marital unit as possible with spouses at different marginal rates, so attribution ensures the transferor remains liable for income or losses, including capital gains or losses, while for all other purposes the transfer is effective. The rules (see section 74.5) also recognize that if the transfer is of an ordinary commercial nature, the transferor can elect out of the attribution.

[94] The object, spirit and purpose of these provisions for the marital unit are clear, but what impact does paragraph 94(1)(*c*) have in the marital arena. The text of paragraph 94(1)(*c*) provides that where a resident of Canada has transferred property directly or indirectly to a non-resident discretionary trust, in which a related person (spouse) is also a beneficiary, the Trust will be deemed to be Canadian resident for purposes of Part I of the *Act*. According to Technical Notes from the Department of Finance in 1985, this is an anti-avoidance rule designed to prevent Canadian residents from deferring or avoiding Canadian tax by holding property in a non-resident trust established for the benefit of Canadian resident related beneficiaries. It has been relied upon in this case to take advantage of the subsection 73(1) rollover provisions, which of course only apply to Canadian residents.

[95] I conclude that the marital unit regime for tax as set forth in the rollover and attribution rules is intended to come into play with the paragraph 94(1)(*c*) deemed Canadian trust. The policy within the *Act* is to ensure liability for tax is not escaped by establishment of a certain offshore trust. The Trust would have been taxable in Canada but for the Treaty. In other words, the Appellant argues it is not paragraph 94(1)(*c*) that results in a lower tax bill for the Trust. I agree, but it is the object and spirit of paragraph 94(1)(*c*) in conjunction with the rollover and attribution regime to ensure that the marital unit, through a trust, not escape taxation in Canada.

[96] Now overlay what I consider quite clear policies within the *Act* with the application of Article XIV(4) of the Canada-Barbados Treaty and subparagraph 110(1)(*f*)(i) of the *Act*, which provides for a deduction for an amount that is exempt under a Treaty.

> *Article XIV*
>
> Gains from the Alienation of Property
>
> 1. Gains from the alienation of immovable property may be taxed in the Contracting State in which such property is situated.
>
> 2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) may be taxed in the other State. However, gains from the alienation of ships and aircraft operated in international traffic and movable property pertaining to the operation of such ships or aircraft, shall be taxable only in the Contracting State in which such property is taxable according to paragraph 3 of Article XXIV.

3.

a) Gains from the alienation of shares of a company, the property of which consists principally of immovable property situated in a Contracting State, may be taxed in that State.

b) Gains from the alienation of an interest in a partnership or a trust, the property of which consists principally of immovable property situated in a Contracting State, may be taxed in that State.

4. Gains from the alienation of any property, other than those mentioned in paragraphs 1, 2 and 3 may be taxed only in the Contracting State of which the alienator is a resident.

5. The provisions of paragraph 4 shall not affect the right of a Contracting State to levy, according to its domestic law, a tax on gains from the alienation of any property derived by an individual who is a resident of the other Contracting State and who

a) possesses the nationality of the first-mentioned State or was resident therein for ten years or more prior to the alienation of the property, and

b) was resident in the first-mentioned State at any time during the five years immediately preceding the alienation of the property.

Income Tax Act

110(1) For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted such of the following amounts as are applicable

(a) …

(*f*) any social assistance payment made on the basis of means, needs or income test and included because of clause 56(1)(*a*)(i)(A) or paragraph 56(l)(*u*) in computing the taxpayer's income for the year or any amount that is

(i) an amount exempt from income tax in Canada because of a provision contained in a tax convention or agreement with another country that has the force of law in Canada.

The words of these provisions are also clear. The intention and purpose was to exempt gains realized by residents of Barbados from Canadian tax on the disposition of capital property in Canada. But put this interpretative result in the context of what Tax Treaties generally are intended to accomplish. In the background to the Canada-Barbados Tax Treaty it is indicated that the text of the agreement is patterned after the OECD model. The Supreme Court of Canada has been clear (*The Queen v.*

Crown Forest Industries Limited[29]); it is acceptable in interpreting Treaties to consider OECD commentary. The OECD commentary to Article I indicates that it is a purpose of tax conventions to prevent tax avoidance and evasion. It even provides an example of abuse in paragraph 9 of the Commentary;

> This would be the case, for example, if a person (whether or not a resident of a Contracting State), acts through a legal entity created in a State essentially to obtain treaty benefits that would not be available directly. Another case would be an individual who has in a contracting State both his permanent home and all his economic interests, including a substantial shareholding in a company of that State, and who, essentially in order to sell the shares and escape taxation in that State on the capital gains from the alienation (by virtue of paragraph 5 of Article XIII), transfers his permanent home to the other Contracting State, where such gains are subject to little or no tax.

[97] The Appellant maintains the more accurate purpose of a Treaty is to allocate taxing jurisdiction over various types of income between two countries, and not to prevent double non-taxation. In giving up its right to tax Barbados residents on capital gains, Canada would have foreseen double non-taxation. How, therefore, the Appellant asks, can that be an abuse of the Treaty. This can be countered somewhat by reference to the preamble of the Treaty itself which stipulates:

> The Government of Canada and the Government of Barbados desiring to conclude an agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, have agreed as follows:

[98] The Appellant's argument addresses only half the picture – the Trust. Certainly, Canada has agreed to not tax Barbados residents, including trusts, on capital gains. But does that policy preclude the taxation of an individual Canadian resident on its capital gain in Canada, when arranging to shift the gain to the Barbados Trust? I think not. The Appellant may be correct in identifying the difficulty in finding that non-taxation of the Trust is abusive of the Treaty, but that does not save Mr. Antle. The object, spirit and purpose of the Canadian legislation as it pertains to a Canadian resident is not to be swept aside because the policy of the Treaty, as pertaining to a non-resident Trust, might save the Trust, especially when one considers an overarching policy of entering treaties to prevent tax avoidance by Canadian residents.

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[29] 95 DTC 5389 (SCC).

[99] The Respondent argues that GAAR applies to both the individual Appellant, Mr. Antle, and to the Trust. To apply GAAR to the Trust itself would require identifying the spirit, object and purpose of the Treaty provision (Article XIV) or to identify the policy of that Treaty provision together with the relevant *Income Tax Act* provisions read as a whole. The former analysis is not difficult: for the most part gains on disposition of movable capital property are to be taxed in the alienator's country of residence. There is no further object or purpose to be found – it is clear from the provision itself. The latter analysis is not so straightforward. Indeed, it is, I suggest, unreceptive to analysis. To suggest one can cobble together some policy underlying the interplay between Article XIV of the Treaty and the *Income Tax Act* provisions at issue is to provide fodder perhaps for academics, but it is, with all due respect to the drafters of both, an attempt to create object, spirit and purpose – policy if you will – where none was contemplated. Certainly, no such policy has been pointed out to me. Article XIV(4) is what it is.

[100] The Appellant goes on to raise a number of very specific arguments that attempt to put a different hue on the policy glow. I will address each of them.

(i) *Former section 94*

[101] The Appellant argues that former section 94 would have applied to this transaction with no Treaty relief, as it would have deemed the Trust to be an offshore company and the beneficiaries to be shareholders. Mrs. Antle would have been taxable with no entitlement as a Canadian resident to Treaty exemption. Under the new rule, the Trust is taxable, and as a non-resident, can claim Treaty exemption. I agree that is how the rules are to operate, but that does not address any underlying policy. On its face, the object, spirit and purpose to allow the paragraph 94(1)(*c*) deemed resident trust to take advantage of paragraph 110(1)(*f*) of the *Act* is to avoid double taxation. The problem is with no capital gains tax in Barbados, this purpose is rendered meaningless, and indeed, has the effect of enabling double non-taxation. The fact of the change in section 94 does nothing to satisfy me there is any new policy to promote investment in Barbados just by allowing rollovers in combination with availing oneself of the paragraph 110(1)(*f*) Treaty exemption deduction. Indeed, it suggests to me a complete lack of object, spirit and purpose and the creation of an unintended loophole, as much as the Appellant dislikes that term.

(ii) *Section 73 was not amended until 2000.*

[102] The Appellant argues that by enacting a "no section 94 trust" rule for purposes of a section 73 rollover, effective after 1999, it was apparent there was no policy

before that time aimed at ensuring the Trust had to be created in Canada. That misses the point: the policy of the rollover and attribution rules is not limited to trusts. The Government of Canada was obviously reacting to close what it perceived to be a loophole. Loopholes are not policy-makers. The Appellant disagrees there was any loophole as the paragraph 94(1)(*c*) Trust is Canadian resident for all of Part 1, not just section 73. The loophole is created not just by the one provision, but by the interaction of the many provisions. I do agree with the Appellant, relying on the case of *The Queen v. Imperial Oil Limited*,[30] that taking advantage of the loophole in and of itself is not abusive: one must analyze whether in so doing, there has been a frustration of the object, spirit and purpose of the provisions in play.

(iii) *No limit on who can create the Trust.*

[103] The Appellant argues there is nothing in the Treaty preventing a Canadian resident from creating a Barbados Trust to take advantage of the Treaty. By contrast, Article IV(1) of the 1980 Canada-US Treaty defines a Trust to be resident in the US in respect of a gain only if it or its beneficiaries are taxable in the United States on that gain. As there is no such provision in the Barbados Treaty, Canada must have intended that the Barbados Spousal Trust remain resident in the Barbados for purposes of the Treaty. This simply confirms that, yes, the Barbados Spousal trust is a resident in Barbados. This adds nothing to the object, spirit and purpose of the Treaty already determined; residents in Barbados are intended to be subject to the Barbados tax regime on capital gains. This is not a policy directed to the Canadian resident.

(iv) *No time threshold.*

[104] The Appellant argues nothing in the Treaty requires a Barbados resident to exist for any particular period of time to take advantage of Article XIV(4). Agreed, but again, I do not get the impression that the Respondent suggests there is any policy for such requirement, other than set out in Article XIV(5).

(v) *No Denial of Treaty Benefits.*

[105] Under Article XXX(3) of the Treaty, Canada denies Treaty benefits to certain types of Barbados tax favoured corporations. The Appellants point out that no such

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30 2004 DTC 6044 (FCA).

denial applies to a Barbados Trust. I fail to see how this offers any contextual or purposive support to the notion that the use of a Barbados Trust is onside or offside a policy that the Treaty cannot be used to shift the gain of a Canadian resident to a non-taxable gain of a Barbados resident Trust. It simply confirms that there is nothing that restricts the authority of Barbados, and not Canada, to tax (or not) a Barbados resident on a capital gain. I agree. It does not, however, suggest to me that the lack of such denial is an open invitation to the manipulation of the Treaty to escape clear policy of Canadian legation *vis à vis* the taxing of gains of the family unit.

(vi) *No Reservation on Sections 73 or 94.*

[106] Similarly, the Appellant argues that because Canada reserved its right (Article XXX(2)) to apply Foreign Accrual Property Income (FAPI*)* rules under section 91 and to not do something similar for section 94 deemed resident trusts, no policy can be read into the Treaty reserving any Canadian right to tax a Barbados resident trust indirectly. The Appellant referred me to the Federal Court of Appeal's decision in *Landrus v Canada*,[31] specifically:

> 47 I agree with the Appellant that the fact that specific anti-avoidance provisions can be demonstrated not to be applicable to a particular situation does not, in and of itself, indicate that the result was condoned by Parliament (*Canada v. Central Supply Company (1972) Ltd.*, [1997] 3 F.C. 674 (F.C.A.). However, where it can be shown that an anti-avoidance provision has been carefully crafted to include some situations and exclude others, it is reasonable to infer that Parliament chose to limit their scope accordingly.

[107] Article XXX(2) relates to the FAPI provisions and makes it clear the Treaty does not interfere with the Canadian FAPI regime – that's all. At best, I would consider it a clarifying provision. The Appellant insinuates the Government of Canada knew a Canadian resident could do what Mr. Antle did, because otherwise, why would the Canadian Government not have put in the specific clarifying provision? Effectively, the Appellant is saying the Canadian Government knew that any Canadian resident could escape liability for tax on capital gains because the Barbados Treaty blatantly invites a Canadian resident to do so. This conclusion seems less reasonable than a conclusion that the Canadian Government never contemplated such an end-around as devised by tax planners, by having a

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[31] 2009 FCA 113.

non-resident trustee "sell" property to a beneficiary and immediately distribute proceeds back to that very beneficiary.

(vii) *Only one Anti-avoidance rule for Capital Gains.*

[108] The only anti-avoidance rule in the Treaty regarding capital gains is Article XIV(5). This really follows from the Appellant's earlier point. If the Canadian Government was to build in any other capital gain anti-avoidance rule, this is likely where it would go. I agree that it is not there. The question is does this confirm that there is no policy against using Article XIV to shift tax on a Canadian resident's capital gains to no tax on a Barbados resident Trust. No, it only confirms the Barbados resident Trust is not taxable in Canada.

(viii) *Canada strongly encourages investment in Barbados.*

[109] The Appellant relies on Regulation 5907(11.2)(*c*), which subjects the international Barbados corporation to paragraph 113(1)(*a*) of the *Act*, allowing Canadian corporate investors to deduct dividends from the international Barbados corporation, for support that Canada encourages investment in Barbados. This does not convince me that such encouragement extends to annihilating Canada's capital gains policy. This makes no sense.

(ix) *No Limitation of benefits clause.*

[110] A limitation of benefits article is an anti-abuse rule, according to the Appellant, designed to ensure that the Treaty residents are "really" Treaty residents. There is no limitation of benefits provision in the Treaty, and it is inappropriate to use GAAR to read one into the Treaty argues the Appellant. The lack of a limitation of benefits provision does nothing to help define the object, spirit and purpose of Article XIV of the Treaty, and how it was intended to work with paragraph 94(1)(*c*), subsection 73(1) and the attribution rules of the Act.

[111] The whole thrust of the Appellant's argument is that I would be reading some unintended policy into the Treaty, by somehow pretending it has provisions which it does not. This is not the point. I accept that the Treaty is clear: it reads how it reads, with certain provisions and without others. I accept there is no specific anti-avoidance provision that I can point to that deals with spousal trusts. There is no explicit general anti-avoidance rule in the Treaty. There is a provision that the resident Barbadian is not taxed on capital gains in Canada. This is all clear. Is there anything in the Treaty then to suggest any spirit, object or purpose of any provision

of the Treaty or the Treaty as a whole is to prohibit relying on Article XIV(4) to avoid tax on capital gains in Canada. Other than the preamble in the OECD commentary alluded to earlier, no. But put the question conversely: is there anything in the Treaty to suggest any spirit, object or purpose of any provision of the Treaty or the Treaty as a whole is to encourage relying on Article XIV(4) to avoid tax on capital gains in Canada? No, there is not. Article XIV(4) simply is what it is.

(x) *No Claw-Back for non-taxable gains.*

[112] The Appellant argues that Canada knew Barbados did not tax capital gains and proceeded to give up its jurisdiction to do so on gains of a Barbadian arising in Canada. It cannot now complain of double non-taxation; it must have contemplated it. I do not disagree *vis à vis* the taxation of the Trust, but I do not take this proposition to the extent that Canada contemplated the Canadian marital unit could escape tax on a capital gain by shifting the gain to a Barbados trust by using rollover provisions available to a deemed Canadian resident, who then adroitly falls back on Barbadian residence status to escape liability from tax.

[113] Further, the Appellant argues that because the Barbados-UK Treaty (in force 10 years before the Canada-Barbados Treaty) had a provision which would have prevented the trust from claiming exemption on the gain, had Mr. Antle resided in the United Kingdom, it must be concluded that Barbados will not agree to Canada taxing the gain even under GAAR, in contravention of the Treaty. I do not accept this reasoning as, firstly, the wording of the Barbados-UK provision suggests Barbados may have had a tax on capital gains back in 1970, and the landscape may have been quite different in 1980. I heard no evidence in this regard. Secondly, the current GAAR did not come into force until well after 1980. No, this element of the Appellant's argument does not satisfy me that there is any greater policy to Article XIV than its clear wording indicates.

(xi) *Section 54.2 of the Act allows for the same treatment domestically.*

[114] The Appellant argues the purpose of section 54.2 is to permit taxpayers to transform a taxable income gain into a capital gain, exempt under the lifetime capital gains exemption, and that the use of the Trust to transform an otherwise taxable capital gain into an exempt gain achieves the same purpose of section 54.2. I think not. Section 54.2 specifically addresses the transfer of all or substantially all of the assets used in an active business in exchange for shares, more to ensure the capital nature of the property, than to transform an income gain into a capital gain. Indeed, if one tried to simply transfer just inventory, for example, this provision would not

apply. This provision offers no assistance in seeking any object, spirit or purpose of the provisions in question.

[115] I have felt it necessary to address these many points put forward by the Appellant to satisfy myself whether, cumulatively, they can move me away from my position that the object, spirit and purpose of the *Income Tax Act* provisions is to ensure taxation of Canadian residents on capital gains arising on disposition of capital property outside the marital unit, including through the use of offshore trusts. The Treaty may save the Barbados Spousal Trust, but nothing sways me that it is intended to save the Canadian resident from the application of GAAR in the circumstances before me.

[116] So I turn now to the second element of the analysis, whether the avoidance transactions do indeed frustrate the object, spirit and purpose of the provisions. I intend to deal with the application of GAAR to Mr. Antle. As was made clear by the Supreme Court of Canada in *Lipson*, the Court may take into account the overall result of a transaction in determining whether a transaction resulted in abuse, but should be cautious in taking into account the overall purpose. The Supreme Court of Canada in *Lipson* did not say purpose can be ignored altogether, but said the following:

> 38 … it is clear from *Canada Trustco* that the proper approach under s. 245(4) is to determine whether the transaction frustrates the object, spirit or purpose of the provisions giving rise to the tax benefit. An avoidance purpose is needed to establish a violation of the GAAR when s. 245(3) is in issue, but is not determinative in the s. 245(4) analysis. Motivation, purpose and economic substance are relevant under s. 245(4) only to the extent that they establish whether the transaction frustrates the purpose of the relevant provisions (*Canada Trustco*, at paras. 57-60).

[117] What was the overall result for Mr. Antle? He incurred no liability for tax directly on the disposition of his shares nor by the application of the attribution rules. He moved the gain to an offshore Trust, resident in a jurisdiction which did not tax capital gains. But for the Treaty and paragraph 110(1)(*f*) of the *Act*, either the Trust would have been taxed in Canada on the gain, or had it elected under subsection 104(21), Mr. Antle would have been taxed on the gain as a result of the attribution rules. In either situation, the object, spirit and purpose of the rollover/attribution rules would have been maintained. But by relying on paragraph 94(1)(*c*) to deem the Trust to be a Canadian resident to take advantage of the subsection 73(1) rollover, and then escaping Canadian tax liability by invoking

paragraph 110(1)(*f*), due to what I would describe as the quirky nature of the tax treatment of trusts and the conflicting resident status treatment under the *Act* and the Treaty, Mr. Antle has blatantly frustrated the object, spirit and purpose of the rollover/attribution regime. Does this fit within any one or more of the three ways described in *Canada Trustco* and confirmed in *Lipson* that result in abuse: where the result of the avoidance transaction:

> (i) is an outcome that the provisions relied on seek to prevent;
>
> (ii) defeats the underlying rationale of the provisions relied on; or
>
> (iii) circumvents certain provisions in a manner that frustrates the object, spirit and purpose of those provisions.

Yes it does. It is an outcome that subsection 73(1), the attribution rules and paragraph 94(1)(*c*) specifically sought to prevent; that is, the marital unit cannot escape liability by using an offshore trust. And, as I have explained, a spousal trust is very much still a part of the marital unit.

[118] Further, the outcome also defeats the underlying rationale of these particular provisions and indeed Canada's policy of taxing capital gains generally. Canadian residents and deemed residents are to be taxed on their capital gains in Canada. Rules to capture the gain on disposition of capital property by the marital unit, in keeping with the Canadian policy, are rendered meaningless simply by finding a willing Barbados trustee.

[119] The Appellant argues that Canada has given up its jurisdiction to tax capital gains of Barbados residents arising in Canada, and that is simply what has happened here; therefore, there can be no abuse of Canada's system of taxing capital gains. Canada has not given up its authority to tax Canadian residents, however. Sleight of hand to inject a non-resident trust (not a legal entity but deemed an individual only for tax purposes) in the middle of a Canadian resident couple to take advantage of the tax treatment of the non-resident trust's own jurisdiction is intended to defeat Canada's policy of taxing residents on their capital gains. Let us be clear, <u>any</u> married Canadian resident with no ties whatsoever to Barbados can rely on these provisions to defeat Canada's tax policy of taxing his or her capital gain. Viewing the spousal trust as part of the marital unit, this result is, I find, abusive. I disagree with the Appellant that nothing in the text, context or purpose of sections 73 and 94 or Article XIV(4) suggests setting up a Spousal Trust to transfer wealth to one spouse is abusive. Quite the contrary – everything suggests it is abusive.

[120] If I consider Article XIV of the Treaty as part of the provisions relied upon, is its underlying rationale frustrated? Not with respect to the Trust. But what about with respect to Mr. Antle? This is a case of Mr. Antle using the Treaty to avoid taxation, which flies directly in the face of a general objective of the Treaty. The *Income Tax Act* and the Canada-Barbados Treaty contemplate payment by Canadian residents of Canadian income tax on the gain arising on the sale of property held by the Canadian marital unit. They do not contemplate, figuratively, running property through Barbados and returning it to the Canadian marital unit for the sole purpose of escaping that Canadian payment of tax. It is an abuse of the *Act*, of the Treaty and of the joint operation of both.

Conclusion on GAAR.

[121] Many technical, complex arguments have been presented, addressing the application of GAAR. The Supreme Court of Canada provided guidance with its two-step abuse analysis and the parties have fit their arguments within that carefully worded framework. Mr. Antle has invoked several provisions of the Act, along with the Canada-Barbados Treaty declaring the strategy was not abusive tax avoidance but clever tax planning to avoid tax on the capital gain. I disagree. The strategy is so contrary to the object, spirit, purpose, policy, call it what you will, of Canada's taxation laws with respect to capital gains, specifically as they relate to the marital unit, as well as to the very essence of international conventions that it could become a classic law school model of what GAAR was intended to capture.

[122] In finding GAAR applies to Mr. Antle, what do the rules entitle me to do. According to subsection 245(2), I can determine such tax consequences to Mr. Antle as are reasonable in the circumstances, including, according to subsection 245(5), ignoring tax effects that would otherwise result from the application of other provisions of the *Act*. All to say, I have wide legislative authority. The reasonable tax consequence is to deny Mr. Antle the ability to take advantage of the rollover to the Trust, and to include the taxable capital gain in his hands.

Residence

[123] While it is unnecessary to consider the residence issue, given my findings to this point, I want to just briefly address a couple of points. Interestingly, the Respondent raises two arguments: first, that the Antle Trust is a non-resident Trust by virtue of subsection 250(5) and, therefore, cannot avail itself of the subsection 73(1) rollover provisions. Alternatively, the deeming provision (paragraph 94(1)(*c*))

renders the Antle Trust a Canadian resident for Treaty purposes and as such, has the right to tax it as a Canadian resident. Were it necessary, I would find against the Respondent on both these arguments.

[124] With respect to the first argument, if there is a valid Trust and Mr. Truss is a legitimate Trustee, the Respondent acknowledges for purposes of this argument that the residence of the Trust is Barbados. Subparagraph 94(1)(*c*)(i), however, deems a discretionary trust to be resident in Canada for purposes of Part I. Subsection 250(5) of the *Act* then goes on to read:

> 250(5) Notwithstanding subsection (4) for the purposes of this *Act*, a corporation other than a prescribed corporation shall be deemed to be not resident in Canada at any time if, by virtue of an agreement or convention between the Government of Canada and the government of another country that has the force of law in Canada, it would at that time, if it had income from a source outside Canada, not be subject to tax on that income under Part 1.

The Respondent argues that subsection 250(5) trumps subparagraph 94(1)(*c*)(i) and consequently the Trust is a non-resident Trust which cannot avail itself of the subsection 73(1) rollover provision. The Appellant argues that is not how subsection 250(5) is to be read. It, according to Mr. Nitikman, is to apply in one situation only and that is if you are a resident under the Treaty of both countries at the same time, and then tie-broken under the Treaty rules into the foreign country. This interpretation is supported by Finance's Technical Notes to this section. The words of the section itself are also more consistent with this interpretation than with the Respondent's interpretation. There are two conditions to be met to be deemed non-resident:

> (i) but for subsection 250(5) and any Tax Treaty, the person would be resident in Canada for purposes of the *Act*;
>
> (ii) under a tax Treaty the person is a resident in another country and not resident in Canada;

[125] Neither condition is met here. The Trust was not resident in Canada pursuant to subparagraph 94(1)(*c*)(i) for purposes of the *Act*, but only for purposes of Part I. The Respondent draws no distinction between the two in the case of a Trust. I disagree. A paragraph 94(1)(*c*) Trust would not be taxable on foreign active business income. The Respondent says it would be rare for a Trust to carry on such activity: rare as it may be, the possibility exists and it cannot therefore be said the Trust is a Canadian resident for purposes of the *Act*, as for at least one purpose, it is

not. With respect to the second condition, the Trust must be found to not be resident of Canada under the tax Treaty. That is not the case. It is not the Treaty that determines the Trust is not a Canadian resident: no tiebreaker rules have been relied upon to make this determination. This section is inapplicable.

[126] To interpret subsection 250(5) as the Respondent argues would render subparagraph 94(1)(*c*)(i) meaningless as subsection 250(5) would always unilaterally deem the subparagraph 94(1)(*c*)(i) Trust a non-resident.

[127] With respect to the argument that the Antle Trust by virtue of subparagraph 94(1)(*c*)(i) and subsection 2(1) of the *Act* is liable to tax in Canada as a resident, and therefore, can be treated as such for Treaty purposes, I find the decision in *Crown Forest* is a complete answer to that argument. In addressing a similar provision in the Canada-US Treaty (Article IV), Justice Iacobucci concluded:

> The parties to the convention intended only that persons who are resident in one of the contracting States and liable to tax in one of the contracting States on their "worldwide income" be considered residents for purposes of the convention.

[128] The Respondent correctly pointed out the differences between the facts in *Crown Forest* and the case before me, and the focus in *Crown Forest* was on the term "liability to tax". However, the Supreme Court of Canada's conclusion is inescapable. As the Antle Trust would not be taxed on its worldwide income, it falls outside the Court's very clear enunciation of a Canadian resident for Treaty purposes. I agree with the Respondent that it would be unusual for a Trust to have income to be taxed outside of Part I, but it would not be impossible. Much more has been written on this and could be written, but I will not do so given my earlier reasoning. I did, however, want to make the parties aware of my conclusions on the residence issue.

[129] These were the only arguments respecting "residence" and it has therefore been unnecessary to address the broader question of the definition of that term as it pertains to a trust for Canadian income tax purposes.

Conclusion

[130] Mr. Antle's appeal is dismissed. The Antle Spousal Trust appeal is quashed on the basis that there was no Trust. Costs to the Respondent.

Signed at Ottawa, Canada, this 18th day of September, 2009.

"Campbell J. Miller"

C. Miller J.

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