

Docket: 2000-3248(IT)G

BETWEEN:

S.T.B. HOLDINGS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on June 7, 8 and 9, 2010, at Toronto, Ontario.

Before: The Honourable Gerald J. Rip, Chief Justice

Appearances:

Counsel for the Appellant: Max Weder
Sadie Wetzel
Counsel for the Respondent: Robert Carvalho

JUDGMENT

The appeals from reassessments made under the *Income Tax Act* for the 1990 and 1991 taxation years are allowed with costs, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant is entitled to deduct a non capital loss of \$9,882,810 and a write down of inventory of \$1,224,937 in its 1990 taxation year, and a non capital loss carried forward from a previous year of \$1,164,124 and a non capital loss on disposal of the Newport land in the year of \$86,778 in its 1991 taxation year.

Signed at Ottawa, Canada, this 8th day of March, 2011.

“G.J. Rip”

Rip C.J.

Citation: 2011 TCC 144
Date: 20110308
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BETWEEN:

S.T.B. HOLDINGS LTD.,

Appellant,

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REASONS FOR JUDGMENT

Rip, C.J.

[1] S.T.B. Holdings Ltd. ("STB") appeals income tax reassessments for its 1990 and 1991 taxation years. In its 1989 fiscal year STB acquired all of the shares of Newport Industries Ltd. ("Newport") and immediately thereafter Newport was wound up into STB. Assets transferred to STB on wind up included land that was in Newport's inventory. On the basis the appellant carried on a real estate business previously carried on by Newport during the relevant years and the land it owned was also inventory, STB purported to apply paragraph 88(1.1)(e) of the *Income Tax Act* ("Act") and claimed:

- a) in its 1990 taxation year a non capital loss of \$9,882,810 and a write down of inventory of \$1,224,937; and
- b) in its 1991 taxation year, a non capital loss carried forward from a previous year of \$1,164,124 and a non capital loss on disposal of the Newport land in the year of \$86,778.

[2] The Minister of National Revenue ("Minister") denied the write down and the losses on the basis that the business carried on by Newport in which the losses were incurred was not carried on by STB for profit or with a reasonable expectation of profit throughout its 1990 and 1991 taxation years, and, in any event, the land in

issue was not acquired by STB for the purpose of gaining or producing income from a business or property.

Statement of Agreed Facts

[3] The appeals proceeded to trial with the testimony of James R. Houston, the prime mover of STB, Richard Browning, a former officer of STB and Jeffrey Wren, a real estate developer. Also, the following Partial Agreed Statement of Facts and Definition of Issues ("Agreed Statement of Facts") was filed:

A. FACTS:

1. The Appellant, S.T.B. Holdings Ltd. ("STB"), is a company incorporated under the laws of the Province of British Columbia with a registered and records office at 1500 – 1040 West Georgia Street, Vancouver, British Columbia.
2. STB's fiscal year end was May 30 for its 1990 and 1991 taxation years.
3. During STB's 1989 taxation year, STB acquired all the issued and outstanding shares in the capital of Newport Industries Ltd. ("Newport"). Newport was subsequently wound-up prior to STB's 1989 taxation year end.
4. Prior to the acquisition of Newport by STB, Newport and STB were not related corporations.
5. In computing income for its 1990 and 1991 taxation years STB:
 - (a) deducted the amount of \$9,832,810 in 1990, which represented non-capital losses carried forward from Newport;
 - (b) deducted the amount of \$1,164,124 in 1991 which represented non-capital losses carried over from Newport;
 - (c) claimed a write-down of its land inventory in the amount of \$1,224,937 in 1990; and
 - (d) deducted a loss on income account in the amount of \$86,778 in 1991 resulting from the disposition of the land.
6. On May 13, 1996, the Minister of National Revenue reassessed STB to disallow the amounts set forth in paragraph 5 above.
7. The land referred to in paragraph 5 above consisted of approximately 50 lots (the "Victoria Square Property") and a 3 foot by 50 foot strip of land (the "Austin Property").
8. The Victoria Square Property and the Austin Property are located on the

southern edge of Calgary's downtown core and near Stampede Park. The Victoria Square Property and the Austin Property comprised a significant portion of two city blocks. Stampede Park includes the Calgary Stampede Grounds and the Olympic Saddle Dome.

9. The Victoria Square Property and the Austin Property are shown in yellow in the plan of Blocks 90 and 97 at Tab 1 of the Joint Book of Documents¹.
10. The legal descriptions for the Victoria Square Property and the Austin Property are at Tab 2 of the Joint Book².

Background

11. Newport was incorporated on January 2, 1974 under the laws of the Province of Alberta. At all material times prior to May 29, 1989, Newport had a fiscal year-end of September 30.
12. At all material times, Newport carried on business. An operating motivation of Newport was to make a profit on the purchase and sale of real estate. Newport acquired the Victoria Square Property and the Austin Property with this operating motivation in mind.
13. From incorporation to April 23, 1983, all 100 issued and outstanding common shares of Newport were owned legally and beneficially by Edward Wensel ("Wensel").
14. On April 23, 1983, Wensel pledged legal title to 99 of his 100 common shares of Newport to Austin Curtin Sales Ltd. ("Austin Curtin Sales") as security for a \$300,000 loan made in July 1982 by Austin Curtin Sales to Wensel and Newport (the "Austin Loan"). Legal title to the remaining common share of Newport was transferred from Wensel to Austin Curtin Sales on November 15, 1983. At all material times, Newport and Austin Curtin Sales were not related.
15. Wensel was the beneficial owner of all the issued and outstanding common shares of Newport until he sold his shares to STB in May 1989.
16. 257262 B.C. Ltd. (renamed S.T.B. Holdings Ltd. on June 21, 1983) was incorporated on November 30, 1982 under the laws of the Province of British Columbia.

¹ Tab 1 has been incorporated as Annex 1 to these reasons and revised to delete colors but otherwise identify the lands.

² The Agreed Statement of Facts has been edited to delete references to all other tabs. Copies of all documents referred to in the Agreed Statement of Facts were produced in the Joint Book of documents.

17. On June 22, 1983, 75 Class A voting shares of STB were issued from treasury to Jacqueline Houston and 25 Class A voting shares were issued to the Houston Family (No. 2) Trust. At all material times, the Class A voting shareholdings of STB remained unchanged. At all material times, the Class A voting shares were the only issued voting shares of STB.
18. On June 22, 1983, Jacqueline Houston and her husband, James R. Houston ("Houston"), were appointed secretary and president, respectively, and both were appointed directors of STB. At all material times, they remained directors and retained their respective offices.
19. On or about June 29, 1986, STB acquired a 37.5% interest in two Calgary, Alberta real estate projects as a joint venturer (Airways Distribution Centre Joint Venture and Riverview Distribution Centre Joint Venture.)
20. On May 4, 1987, STB was registered as an extra-provincial corporation in the Province of Alberta and was certified to carry on business under the name of 257262 British Columbia Ltd.
21. On April 13, 1989, 400967 Alberta Ltd. ("400967") was incorporated under the laws of the Province of Alberta. At all material times Houston was the president, secretary and sole director and owned all the issued and outstanding voting shares of 400967.

Victoria Square Property & Austin Property

22. In 1981, Newport purchased the Victoria Square Property for \$8,445,365. The purchase was financed by loans from the Royal Bank of Canada ("RBC"). The RBC loans were guaranteed by Wensel and Camalta Motors Ltd. ("Camalta") and were secured by, among other things, a mortgage in favour of RBC over the Victoria Square Property.
23. Camalta was a private corporation which was associated (within the meaning of the *Income Tax Act* (Canada) (the "Act")) with Newport.
24. Subject to the agreements described below in paragraphs 32, 33, 35, 37, 39, 40, 42 and 47 legal title and beneficial interest for the Victoria Square Property was held by Newport until its wind-up.
25. By August 1982, the fair market value of the Victoria Square Property had risen to approximately \$25,000,000. In the fall of 1982 and in 1983 the fair market value of the Victoria Square Property fell dramatically in conjunction with the overall Calgary real estate market. In August 1983, the fair market value of the Victoria Square Property was approximately \$4,650,000.

26. In 1985, Austin Curtin Sales acquired legal title to the Austin Property. Subject to the agreements described below in paragraphs 32, 33, 35, 37, 39, 40, 42 and 47 legal title and beneficial interest for the Austin Property were held by Austin Curtin Sales immediately prior to the purchase by STB of the Austin Property in 1989.
27. On October 9, 1984, the City of Calgary adopted By-Law No. 18P83, the "Victoria Park East – Area Redevelopment Plan", which set forth a redevelopment plan for a large area of Calgary which included the Victoria Square Property and the Austin Property.
28. From 1984 to 1989, among other activities, Wensel sought a purchaser of either the Newport lands (Victoria Square Property and Austin Property) or the shares of Newport.
29. In May 1985, RBC wrote to Clarkson Gordon, Thorne Riddell Inc. and Coopers & Lybrand informing them that Newport may be an attractive takeover target for one of their client's companies preferably in the same line of business.
30. On May 30, 1985, RBC started a foreclosure action for the Victoria Square Property against Newport, and Wensel and Camalta as guarantors. Newport, Wensel and Camalta defended and counter-claimed for damages arising from advice provided by RBC to Newport. The litigation was resolved by way of agreements described in paragraphs 33 and 35 below.
31. On December 17, 1987, 376182 Alberta Ltd. (renamed Homa Holdings Ltd. ("Homa") on April 21, 1988) was incorporated. At all material times, Homa was not related to Newport, STB, 400967 or Austin Curtin Sales.
32. On February 16, 1989, Homa entered into an agreement with Newport to purchase the Victoria Square Property, other than certain excluded lots, and the Austin Property.
33. On March 2, 1989, RBC, Newport, Wensel, 396414 Alberta Ltd. ("396414") and Camalta entered into a settlement agreement (the "Settlement Agreement") regarding Newport's indebtedness to RBC and associated litigation.
34. 396414 was a corporation established by Wensel. At all material times, Wensel was the sole shareholder and director of 396414.
35. On March 2, 1989, RBC, Newport, Wensel, 396414 and Camalta entered into a side agreement (the "Bank Side Agreement").
36. On April 17, 1989, Homa entered into an agreement with Austin Curtin Sales

to purchase the Austin Property (the "Austin Purchase Contract").

37. On April 19, 1989, Newport, 396414, Camalta, Wensel and Homa entered into a settlement and sale agreement (the "Settlement and Sale Agreement")³.
38. On April 19, 1989, Wensel, 396414 and Homa entered into a consulting agreement (the "Consulting Agreement").
39. On April 19, 1989, Newport, 396414, Camalta and Wensel assigned to Homa certain of their rights under the Settlement Agreement and the Bank Side Agreement (the "Assignment of Rights").
40. On April 19, 1989, Homa agreed with Newport, 396414, Camalta and Wensel that should Homa exercise its rights under the Assignment of Rights and become the registered owner of the Victoria Square Property, its obligations under the Settlement and Sale Agreement and the Compensation Agreement would crystallize (the "Letter Agreement").

Acquisitions and wind-up of Newport

41. On May 9, 1989, STB, Newport, 396414 and Wensel entered into an agreement for the purchase by STB (or one or more of its nominees) of all the issued and outstanding shares and the debts and liabilities of Newport. The anticipated closing date was May 26, 1989.
42. On May 23, 1989, Wensel, 400967 and STB entered into an agreement under which STB would purchase from Wensel the beneficial interest in all the issued and outstanding shares of Newport. In addition, 400967 would purchase all right, title and interest in and to Newport's indebtedness to RBC. Wensel was also to use his best efforts to cause the debts listed in Schedule A of the agreement to be assigned to 400967.
43. On May 23, 1989, Austin Curtin Sales, 400967 and STB entered into an agreement under which STB would purchase from Austin Curtin Sales legal title to all the issued and outstanding shares of Newport and the Austin Property. In addition, Austin Curtin Sales would assign the Austin Loan to 400967.
44. Through an escrow closing on May 29 and 30, 1989, the transactions contemplated under the agreements described in paragraphs 42 and 43 above were completed.
45. On May 29, 1989, STB resolved to wind-up Newport effective May 30, 1989.

³ The April 19, 1989 agreement provided Homa with an option on Lots 17 through 20.

46. By agreement dated May 29, 1989 and delivered by release from escrow on May 30, 1989, the assets of Newport were assigned to and assumed by STB.
47. By agreement dated May 30, 1989, Newport, 396414, Camalta, Wensel and Homa agreed to terminate (effective midnight May 29, 1989) the Settlement and Sale Agreement, the Consulting Agreement, the Assignment of Rights and the Letter Agreement. The agreement was held in escrow and, as part of the escrow closing, the conditions of the escrow were satisfied and the agreement released from escrow prior to Newport's dissolution.
48. By agreement dated May 30, 1989, Austin Curtin Sales and Homa agreed to terminate (effective midnight May 29, 1989) the Austin Purchase Contract. The agreement was held in escrow, and as part of the escrow closing, the conditions of the escrow were satisfied and the agreement released from escrow prior to Newport's dissolution.
49. On May 30, 1989, Newport was formally dissolved.
50. By agreement dated May 30, 1989, STB granted an option to Homa for the purchase of the Austin Property and the Victoria Square Property (other than Lots 17-20, Block 90, Plan C).
51. By agreement dated May 30, 1989, STB granted an option to Homa for the purchase of Lots 17-20, Block 90, Plan C in the event that Homa did not obtain an option over Lots 19 and 20, Block 97, Plan C (the "Khullar Property") prior to noon on May 30, 1989. The Khullar Property is shown on Annex 1.
52. An option in favour of Homa for the Khullar Property was obtained prior to noon on May 30, 1989.
53. On May 30, 1989, Homa granted STB an option with respect to the Khullar Property.
54. Effective May 30, 1989, STB (extra provincially registered in Alberta as 257262 British Columbia Ltd.) was the registered owner in the South Alberta Land Registration District of the Victoria Square Property and the Austin Property. Lots 17-20, Block 90, Plan C were free of any charges other than a mortgage in favour of the Canadian Imperial Bank of Commerce.

55. The transactions outlined above in paragraphs 36 to 54 are schematically summarized in the diagrams at (Annex 2)⁴.
56. At the conclusion of the transactions outlined above in paragraphs 36 to 54 the status of the Victoria Square Property, the Austin Property and the Khullar Property was as shown on the plan at Annex 1.
57. A copy of the caveat forbidding registration filed by STB in connection with its option related to the Khullar Property (described in paragraph 53 above) and the accompanying Certificate of Title was produced.
58. By letters dated March 30, 1990, Homa elected to exercise its options to acquire the Victoria Square Property, the Austin Property and the Khullar Property.
59. Notwithstanding paragraph 58, in the end Homa did not exercise its options to acquire the Victoria Square Property (excluding Lots 17-20 of Plan 90), the Austin Property or the Khullar Property, and Homa never became the owner of any of those properties under the various options or otherwise.
60. By agreement dated July 12, 1990, STB granted 383148 Alberta Ltd. ("383148") an option to purchase the Victoria Square Property and the Austin Property and provided further arrangements with respect to the Khullar Property. 383148 was a company created by the Calgary Stampede for the purpose of assembling lands for the Calgary Stampede.
61. By notice dated July 23, 1990, 383148 gave notice of its intent to exercise the July 12, 1990 option.
62. On August 22, 1990, STB sold the Victoria Square Property and the Austin Property to 383148 for \$4,430,846.
63. On August 31, 1990, 383148 purchased the Khullar Property for \$490,063.59.
64. The agreements described in this Partial Agreed Statement of Facts and Definition of Issues are authentic and each agreement accurately reflects the particular agreement between the parties as of the date of the agreement or as otherwise described.
65. The Statement of Claim and the Statement of Defense and Counterclaim described in paragraph 30 above are authentic and accurately reflect the

⁴ The ownership of the properties and various rights are summarized as of April 19, 1989, May 30, 1989 (immediately prior to escrow closing) and May 30, 1989 (immediately after escrow closing). See Annex 2.

pleadings as of the date shown.

66. True copies of STB's tax returns for its taxation years ending in 1987 to 1991 were produced.
67. True copies of Newport's tax returns for its taxation years ending in 1988 to 1989 were produced.
68. True copies of 400967's tax returns for its taxation years ending in 1989 to 1991 were produced.
69. At the time of its dissolution, Newport had available losses of \$10,996,934 which could be carried forward to reduce future years income for income tax purposes. The losses were in respect of Newport's business activities and were in relation to the Victoria Square Property and the Austin property.
70. When STB entered into the agreement described in paragraph 41 above, STB was aware that Newport had significant non-capital losses available to be carried forward.
71. The parties agree that all of the requirements of subsection 88(1.1) of the *Act* (as it read at all material times) are met for STB's 1990 and 1991 taxation years other than the requirements in subparagraphs 88(1.1)(e)(i). The applicability of subparagraphs 88(1.1)(e)(i) is in dispute.

B. ISSUES

72. The issues to be decided are therefore:
 - (a) Are the requirements of subparagraph 88(1.1)(e)(i) met for STB's 1990 taxation year?
 - (b) Are the requirements of subparagraph 88(1.1)(e)(i) met for STB's 1991 taxation year?

C. DISPOSITION:

73. If paragraph 72(a) is answered in the affirmative, the Appeal for 1990 should be allowed in full.
74. If paragraph 72(a) is answered in the negative, the Appeal for 1990 should be dismissed subject to the Court's consideration of the claim for the inventory write down described in paragraph 5(c) above.
75. If paragraph 72(b) is answered in the affirmative, the Appeal for 1991 should be allowed in full.

76. If paragraph 72(b) is answered in the negative, the Appeal for 1991 should be dismissed subject to the Court's consideration of the loss deducted described in paragraph 5(d) above.

[4] Subsection 88(1.1) of the *Act* in general provides how a parent may use the non-capital losses (net capital losses, restricted farm losses or limited partnerships losses) of its subsidiary on its winding up as may reasonably be regarded as a loss from carrying on a particular business and any other portion of a non-capital loss of the former subsidiary. Subparagraph 88(1.1)(e)(i) restricts the use of a former subsidiary's non-capital losses where control of the parent or subsidiary has changed. It is the interpretation of subparagraph 88(1.1)(e)(i) on the facts before me that determines these appeals.

[5] During the years in appeal subparagraphs 88(1.1)(e)(i) read as follows:

Where a Canadian corporation (in this subsection referred to as the “subsidiary”) has been wound-up and not less than 90% of the issued shares of each class of the capital stock of the subsidiary were, immediately before the winding-up, owned by another Canadian corporation (in this subsection referred to as the “parent”), ... for the purpose of computing the taxable income of the parent under this Part ... for any taxation year commencing after the commencement of the winding-up, such portion of any non-capital loss ... of the subsidiary as may reasonably be regarded as its loss from carrying on a particular business (in this subsection referred to as the “subsidiary's loss business”) ... for any particular taxation year of the subsidiary (in this subsection referred to as the “subsidiary's loss year”), to the extent that it ...

Lorsqu'une corporation canadienne (appelée « filiale » au présent paragraphe) a été liquidée, qu'au moins 90 % des actions émises de chaque catégorie du capital-actions de la filiale appartenaient, immédiatement avant la liquidation, à une autre corporation canadienne (appelée « corporation mère » au présent paragraphe) ... aux fins du calcul du revenu imposable de la corporation mère en vertu de la présente partie ... pour toute année d'imposition commençant après le début de la liquidation, la fraction d'une perte autre qu'une perte en capital ... subie par la filiale, qu'il est raisonnable de considérer comme résultant de l'exploitation d'une entreprise donnée (appelée « entreprise déficitaire de la filiale » au présent paragraphe), ... (appelée « année de la perte subie par la filiale » au présent paragraphe), dans la mesure où chacune de ces fractions

...

(a) was not deducted in computing the taxable income of the subsidiary for any taxation year of the subsidiary, and

...

shall, for the purposes of this subsection, ...

(c) in the case of such portion of any non-capital loss ... of the subsidiary as may reasonably be regarded as its loss from carrying on the subsidiary's loss business, be deemed, for the taxation year of the parent in which the subsidiary's loss year ended, to be a non-capital loss ... of the parent from carrying on the subsidiary's loss business, ...

except that

(e) where at any time control of the ... subsidiary has been acquired by a person or group of persons, no amount in respect of the subsidiary's non-capital loss ... for a taxation year ending before that time is deductible in computing the taxable income of the parent for a particular taxation year ending after that time, except that such portion of the subsidiary's non-capital loss ... as may reasonably be regarded as its loss from carrying on a business ... is deductible only

a) n'a pas été déduite dans le calcul du revenu imposable de la filiale pour une année d'imposition de celle-ci, et

...

est, pour l'application du présent paragraphe, ...

c) dans le cas de la fraction d'une perte autre qu'une perte en capital, ... subie par la filiale qu'il est raisonnable de considérer comme la perte qu'elle a subie dans l'exploitation de son entreprise déficitaire réputée être, pour l'année d'imposition de la corporation mère dans laquelle s'est terminée l'année de la perte subie par la filiale, une perte autre qu'une perte en capital, ... subie par la corporation mère résultant de l'exploitation de l'entreprise déficitaire de la filiale, ...

sauf que

e) en cas d'acquisition, à une date donnée, du contrôle ... de la filiale par une personne ou un groupe de personnes, aucun montant n'est déductible au titre d'une perte autre qu'une perte en capital ... subie par la filiale pour une année d'imposition se terminant avant cette date, dans le calcul du revenu imposable de la corporation mère pour une année d'imposition donnée se terminant après cette date, à l'exception de la fraction de cette perte qu'il est raisonnable de considérer comme résultant de l'exploitation d'une entreprise ... qui sont déductibles

(i) if that business is carried on by the subsidiary or the parent for profit or with a reasonable expectation of profit throughout the particular year, and ...	(i) seulement si cette entreprise est exploitée par la filiale ou par la corporation mère à profit ou dans une attente raisonnable de profit tout au long de l'année donnée, et ...
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Background

[6] There is little, if any, evidence as to what activities and business were carried on by Newport prior to 1984. Mr. Wensel, the controlling mind of Newport, was deceased at time of trial. The Minister, in assuming facts when assessing STB, concluded that the business of Newport was buying and selling land without incurring development costs and described this as a business of land speculation. On the other hand, the Minister considered the appellant to carry on the land development business, a business different from that carried on by Newport. The actual evidence before me does not lead me to conclude one way or the other what Newport's business was when it incurred the losses subject to this appeal. I discuss this later in these reasons.

[7] The principal of the appellant, James Houston, a professional engineer, has been active in the real estate business since arriving in Vancouver in 1957. In 1982 his business had a "big fall" and he "started over again", incorporating the appellant in 1983. Through the appellant and other entities, before and after 1983, Mr. Houston said he bought land for resale, for development and sale and to develop for investment.

[8] Before 1983, Mr. Houston had purchased subdivided land in Port Moody which he owned for several years and then "took in" Canadian Industries Limited ("CIL") and later "bought them out". Eventually he sold his interest in the Port Moody property to Corma, an Alberta land development company. He had also acquired land in Pitt Meadows and built houses for sale as well as acquiring land which he sold to the British Columbia government. Mr. Houston estimated that prior to the incorporation of STB he was involved in "somewhere between 50 and 100" investments.

[9] Sometime after STB was incorporated Mr. Houston got together with Richard Browning and Bev Armstrong and after "developing a relationship" agreed to participate in projects together. Mr. Armstrong was a former employee of Mr. Houston who had a background in finance and development. Mr. Browning had construction experience. Mr. Houston described Messrs. Armstrong and Browning as

"young guys in their late 20's or early 30's". Mr. Houston was 49 years of age at the time. The three agreed that all future projects would be held as to Houston, 50 percent, and each of Browning and Armstrong as to 25 percent. Projects would be held by different entities, corporations and partnerships. "Pacific Western Realty" was the marketing name to be used for the projects.

[10] At all relevant times Pacific Western had a small group of employees, about seven or eight, according to Mr. Houston. All construction was done by contractors "whom we worked closely with".

[11] In 1990 STB had 12 investments in limited partnerships and joint ventures. All, except one, were in real estate. The exception was the Red Robin Restaurants of Canada partnership. The ownership interests in real estate properties varied from 37.5 percent to 50 percent. The investments included options in properties in False Creek which were sold at a profit, "probably" before taking title to the properties. STB also purchased a property across from the B.C. Hydro building in Vancouver but sold the property to Hong Kong interests before the start of construction. Another property, at Thurlow and Alberni streets in Vancouver, was acquired and a mixed-use building was constructed. The building consisted of commercial tenants and a rental apartment tower, which STB had "condominiumized" but sold as a single property. Other properties owned by STB included investments in the Vancouver area and a rental property in Calgary, "operationally almost identical to Thurlow and Alberni". Mr. Houston commented that being active in trying to find Red Robin locations made the appellant "fairly knowledgeable" about the real estate market and development business.

[12] Mr. Browning corroborated much of Mr. Houston's evidence. He described Mr. Houston, Mr. Armstrong and himself as opportunists in that any property they purchased would be put to account in the most profitable way, depending on demand at the time. If there was a low vacancy of office space, an office building would be built, if there was a low residential rate, housing would be built and if money could be made by turning over the property, the property would be sold. All depended on the market place at the time.

Acquisition of Newport

[13] Mr. Houston first became aware of the possibility of acquiring the shares of Newport "a maximum of 60 days" before STB agreed to purchase the shares. He acknowledged he was motivated to purchase the Newport shares "because it had the potential of sheltering income". The transaction was brought to Mr. Houston by his

lawyer as "a tax deal". STB expected to have income in its 1990 fiscal year of over \$13,000,000 from two limited partnerships, both of which had May 31 year-ends. Newport had substantial non-capital losses that could be carried forward to STB's 1990 and later taxation years.

[14] Mr. Wensel, the principal of Newport, discussed the possible sale of the shares to the appellant. Mr. Houston soon learned that Homa had an option to purchase much of the Victoria Square Property and the Austin Property. Lots 17 to 20 were not under option, however, at the time. Mr. Houston also learned that Mr. Wensel once had an offer for the Properties but "the Royal Bank talked him out of it".

[15] The Victoria Square property acquired by Newport in 1981 "was very interesting", according to Mr. Houston, because it and the Austin Property consisted of two city blocks very close to downtown Calgary. At the time the land was used as parking for Stampede and Saddledome events. In 1984 the Victoria Park East Area redevelopment plan, where the Newport Land was situated, foresaw commercial and residential development with "very high densities for the residential"; this attracted Mr. Houston due to his background in residential properties.

[16] Mr. Browning testified that "we were moderately familiar with the Calgary market". He spent a lot of time in Calgary and is of the view he "was reasonably well-connected in the business community and ... had a pretty good idea of the lay of the land, politically ... as far as development approval went". He was the "go to partner" on developing real estate and he was responsible for vetting the feasibility uses for the Victoria Square Property.

[17] Politically, Mr. Browning explained, Calgary operated differently from Vancouver. Calgary had a ward system with elected aldermen. Homeowner associations in Calgary wards were influential. The two aldermen representing the area where the Victoria Square Property is located "vigorously" supported affordable housing and "that would encourage us to go down that route", Mr. Browning declared.

[18] A feasibility study for development potential of the Victoria Park Property was made by Jeff Wren, an employee of Pacific Western. Mr. Wren had spent a significant time "physically working in Calgary". Mr. Houston said Mr. Wren would be the person at Pacific Western who would get involved in looking at the property's potential. The study was prepared "to make sure that we hadn't made any mistakes", Mr. Houston testified. While he was confident in his own appreciation of property potential, Mr. Houston wanted "somebody [to] have a good look at it" and Mr. Wren

came back "with a theoretical development plan". Mr. Wren prepared his report on the basis of a hotel development and a Red Robin restaurant and some residential potential. A reason for including the restaurant was that he knew STB owned the franchise. He included a parkade because of the proximity to the Stampede and hockey arena. Mr. Wren was not aware Homa had an option on the Property. However, Mr. Wren, according to Mr. Houston, "wasn't a housing man" and there was no housing on the plan. Mr. Houston stated that in 1989 the Calgary residential vacancy rate was "quite low" and that was a "key item" in thinking about the residential aspects of the property.

[19] Crown counsel challenged Mr. Houston's view that residential, or a large portion of the property being residential, was required to make the property viable. Crown counsel questioned Mr. Houston why there were no documents to confirm his evidence. Mr. Houston declared that it was not necessary to have someone undertake a study of the property based on residential development in the same way Mr. Wren did for commercial development. It is not necessary, Mr. Houston insisted, because in his view commercial was not the best potential for the property. He said that at the time he had no idea exactly what was going to take place. Mr. Wren's job, Mr. Houston recalled, was to show us " ... that we had not missed anything and that it was economically viable". Mr. Houston repeated that Mr. Wren's expertise was commercial and Mr. Wren did the study, rather than someone with residential expertise, because he was handy at the time.

[20] While Mr. Houston was not excited about Homa's plans for the Properties — Homa planned a commercial development including a hotel and 20,000 square foot restaurant — he acknowledged that if some hotel operator were interested, "we would have looked at it". Restaurants were under consideration by the appellant but not the size contemplated by Homa. The Red Robin restaurants operated by Mr. Houston's group were about 6,500 square feet. However, the Stampede Association did find favour with Homa's plans which also included retail sites and a "small" office building. Mr. Browning thought there was room for commercial interests but Mr. Houston believed the site was too far from downtown Calgary to be a prime retail site. Residential units together with traffic from the Stampede and conventions, which Mr. Houston described as "sporadic", would be required to support commercial enterprises and "a moderately priced residential development close to downtown was a winner", in his view.

[21] Mr. Houston was not worried about the option Homa had on the Victoria Park and Austin properties. He had spoken to a Mr. Hartung of Homa and concluded that Homa was not a professional developer and was getting into something its principal

had no experience. He viewed Homa's chances of getting financing "pretty remote". However, Homa informed Mr. Houston it represented West German investors who had financial capability and that there were tax advantages for West Germans investing in Canadian real estate. So while there was a possibility of producing a major equity position, Mr. Houston was of the view that under Canadian rules, that is, what and how Canadian banks would finance, the Homa project was not "financeable".

[22] If Homa exercised its option, Mr. Houston stated, Newport would still have land on a corner, Lots 17-20, that would be beside a major development and, once built, would generate a lot of traffic. STB would be in a position to build a mixed-use building similar to Thurlow and Alberni. Also, he saw STB as a possible joint venturer with Homa because of its experience and background in development. Mr. Houston and Mr. Browning recalled that STB had dealt with the same person at the hotel chain that Homa did. "We understood costs, architects ... these guys had no idea". In any event, Lots 17-20 would have increased in value.

[23] Mr. Houston stated that he knew the Austin property had potential as mixed-use development so "any land you can get your hands on was good business as long as the price was right". Besides, the Austin Property was part of the package that included the Newport shares.

[24] In any event when STB purchased the shares of Newport, it was looking at the development feasibility of the Properties, according to Mr. Browning. This was a large block of land and STB was "trying to look into the crystal ball five years down the road" to see what the Calgary market would be. In 1989, Mr. Browning recalled, "Calgary was not in good shape" economically. Most exploration companies were shut down, the price of oil was low. Calgary office buildings had a high vacancy rate.

[25] STB acquired all of the issued and outstanding shares of Newport on May 29, 1989 for the sum of \$468,476 and the nominee of STB, 400967 purchased the indebtedness of Newport by payment to the Royal Bank of \$2,000,000. Newport was wound up on May 30, 1989. The cost of settling the other Newport debts aggregated \$1,401,524⁵.

⁵ The letter of May 9, 1989 by which Mr. Wensel agrees to sell his share of Newport to STB states that the purchase price for the shares and loans aggregate \$4,865,000, which would include commissions on the sale owing by either party but not to exceed \$146,000. It appears the total consideration paid by STB was \$3,870,000

[26] Lots 17, 18, 19 and 20 were also acquired by STB "free and clear" on May 30, 1989.

[27] Mr. Houston agreed that there was "some urgency" — words used by respondent's counsel — that the acquisition of Newport be concluded by May 30, 1989 so that Newport's losses would be able to be utilized by STB in its 1990 fiscal year when it anticipated substantial income.

[28] In Mr. Houston's view the Royal Bank loan⁶ had to be preserved "because it's what had created the deduction". 400967 Alberta Ltd. purchased the debt from the Royal Bank so as to avoid the application of the debt forgiveness rule in the *Act*⁷. Another reason proffered by Mr. Houston for acquiring the debt was that the transaction was complex and part of the deal was that Mr. Wensel had to settle with creditors. He did not want "unknown creditors coming out the woodwork" [and] "by maintaining the debt position in the entirety, it protected us from unknown creditors".

[29] Prior to the acquisition of the shares of Newport, STB arranged for the Canadian Imperial Bank of Commerce ("CIBC") to finance the transactions. The amount of the loan was \$2.5 million with interest at the rate of prime plus one and one quarter percent interest. The term of the loan was one year, to be paid in full by May 31st, 1990. Mr. Houston described this loan and the interest on the loan as "pretty standard" since one ordinarily does not get involved in amortization on a one year loan. He reiterated that STB "had no idea exactly what was going to happen with the property" once purchased⁸.

[30] Mr. Houston acknowledged on several occasions that tax planning went into the construction of the transaction for the acquisition of the shares of Newport. STB had to acquire an Alberta license to carry on business in Alberta. Precautions had to be taken to ensure that Newport's debts were not forgiven and that once acquired, Newport's business would have to be carried on by STB with a reasonable expectation of profit throughout the year in which it wished to utilize Newport's losses. However, Mr. Houston also said that he saw the underlying property in Newport as a "real opportunity" for development and whether Homa was successful or not, STB could wind up with a good piece of development real estate to work on its own or together with another developer.

⁶ See paragraph 22 of the Agreed Statement of Facts.

⁷ See paragraph 43 of the Agreed Statement of Facts. Messrs. Armstrong and Browning owned preferred shares in 400967.

⁸ Mr. Houston frequently referred to the purchase of the Newport shares as a purchase of the property.

[31] In his opening statement, counsel for the respondent commented that very little documentation exists concerning STB's acquisition of Newport. This was pursued in cross-examination. For example, STB did not prepare any development plan for the properties. Mr. Houston's position was that since Homa controlled the land, Homa would be the party to the development plan. Newport would co-operate with Homa. And, he said, there was no reason to do anything further with Lots 17-20 until the ultimate development of the site was settled. Again, Mr. Houston did not think Homa was going to be able to do what it wanted to, even if they got the money. STB felt that Homa would have to hire someone in the development business who knew what they were doing because Homa had no idea what was happening. And Mr. Houston believed that it was possible that STB could integrate into the project that would be contiguous to its property. There was no need for written documents or written reports in these circumstances. There were no documents prepared for a joint venture with Homa because Homa was doing its own thing at the time.

[32] Appellant's counsel questioned Mr. Houston on discussions he or his associates had with the Calgary Stampede Association. Mr. Browning dealt with the Stampede Association on behalf of STB and it was Mr. Houston's impression that the Stampede Association had been told not to buy any property but once STB acquired the Victoria Park and Austin properties, the Stampede Association "were prepared to oppose us ... in doing any major residential development ...". Mr. Browning initiated a meeting with a Calgary Stampede official, Mr. Ron Jaqus, after the purchase and it became clear to him that the Stampede wanted the Victoria Square Property developed in a way that would not "hinder" its operations. The Stampede wanted a use of the Property that would be beneficial to it and "that meant ... commercial use". Mr. Browning's impression was verified in discussions with a director of the Stampede, Mr. Robert Poffenroth, who was also a lawyer in Calgary and represented the Stampede.

[33] To clarify several of the key transactions: the agreement between STB, Newport, 396414 and Wensel for the purchase by STB (or a nominee) of the shares of Newport and its debts and liabilities is dated May 9, 1989. The transaction was structured so that STB would purchase the shares of Newport and its nominee, 400967, would purchase, among other debts, all right, title and interest in Newport's indebtedness to the Royal Bank. STB also agreed to purchase the Austin Property and legal title to the Newport shares from Austin Curtin Sales. These transactions were closed before May 31, 1989.

[34] As set out in paragraphs 47 and 48 of the Agreed Statement of Facts, on May 30 the agreements described in paragraphs 36, 37, 38, 39 and 40 were terminated. On the same day, after the dissolution of Newport, STB granted an option to Homa on the Austin Property and the Victoria Square Property as well as Lots 17-20 in the event Homa did not obtain an option on the Khullar Property prior to noon on May 30. The purchase price to be paid by Homa for the Properties was \$4,000,000. The option was to expire on April 1, 1990. Homa's original option to purchase the Properties was also for the price of \$4,000,000. Homa did acquire an option on the Khullar Property and also on May 30, Homa then granted an option with respect to the Khullar Property to STB⁹ who, on acquiring the Khullar Property, sold it to the Stampede's nominee.

[35] STB did nothing with the Properties until Homa attempted to exercise its option, notwithstanding Mr. Browning's earlier discussions with Stampede officials. Mr. Houston explained that there would be no plans by STB for the Properties until Homa decided what they were going to do "and we had no way of knowing at that point". In other words, until Homa decided what it was going to do with the property, STB was powerless to do anything on the site.

[36] When Homa gave notice on March 30, 1990 that it would exercise the option on the Properties, Mr. Houston's reaction was that "They decided they were not going to be able to do the project". Homa did not have the money to proceed. Mr. Houston explained that Homa "had a development permit but they had no working drawings, they had nothing other than sketches and some pictures and some basic plans." In his view, in order to proceed with this project one had to have a "very major equity position" to make it work. He added that "if they were going to use anybody on the Canadian side, any bank, unless they have that major equity position, they did not have enough information at that point. They could not tell you exactly what it was going to cost. They did not have any tenants. They did not have a hotel commitment. The logical thing for them to do would be to ask for an extension, ... [but] ... if they asked for an extension, ... presumably we would have asked them for some money." Something, in Mr. Houston's view, would have happened. He stated that "If they asked for an extension at that point, then he thought there was a chance that they were going to eventually exercise the option." In his view, "Anybody who was knowledgeable in the development business, if they really thought they could do the deal, would have negotiated an extension of the option, as opposed to saying ... in terms of where they were with the development process".

⁹ See paragraphs 47 to 54 of the Agreed Statement of Facts.

[37] STB asked Homa "Where is the money?" to purchase the Properties and, according to Mr. Houston, Homa replied that the titles to the Properties were not clear. Mr. Houston did not agree since both the Royal Bank of Canada and the CIBC had loaned money on security of the Victoria Square Property and "so the idea that there was something wrong with the title just did not make any sense." Finally, Mr. Hartung of Homa acknowledged that the option had expired but wanted \$50,000 from STB. STB refused. Homa countered with an offer of selling their drawings and plans to STB for \$250,000. Again, the offer was refused by STB because, in Mr. Houston's opinion, their drawings and plans had no value whatsoever. Homa filed various caveats on the property and finally, in July 1990, a settlement was reached: Homa agreed that they would not exercise the option and they would clear title to the properties; STB agreed that if it used Homa's drawings in any form, STB would pay Homa \$250,000. Mr. Houston said this was quite an easy thing to agree to because he did not intend to use the drawings.

[38] In reply to appellant's counsel's question as to the reasons STB took ownership of Newport itself rather than with a partner, Mr. Houston was not shy in replying "Because STB needed the losses." Mr. Houston added that if the property had not been sold and STB would have had to proceed with its development, the property would have been reorganized in such a way that the three partners, that is himself, Messrs. Browning and Armstrong would have owned the Properties as to 50 percent, 25 percent and 25 percent respectively.

Sale to Calgary Stampede

[39] Mr. Houston could not recall specifically whether STB approached the Stampede to sell or whether the Stampede approached STB to purchase the properties. Until July 1990, Homa was dealing with the City of Calgary and Mr. Houston understood that Homa may have received a development permit. Again, discussions between Mr. Browning and Stampede officials led STB to realize that the Stampede wanted control of the Properties if not by ownership, then by what was to be developed on them.

[40] In reply to his counsel's question as to what led to his decision to sell the Properties, Mr. Houston recalled that in 1984, the Victoria Park East area redevelopment plan offered a variety of options including high density housing, retail and commercial zoning. However, he repeated that he did not believe it was realistic to convert the whole site into a commercial development. He was adamant that a "big portion of it" had to be housing but the Stampede Association made it very clear that they would oppose housing, notwithstanding what two aldermen thought or some

other people in the district thought. Mr. Houston saw this as "a long drawn out battle" with the Stampede and STB was not interested in getting into a long drawn out battle with the Stampede Association. But STB concluded there was only one buyer under these circumstances and that buyer was the Stampede Association; the Properties were sold to the Stampede Association through its nominee 383148 Alberta Ltd.

[41] The Stampede's initial offer for the Properties was \$3.725 million, approximately \$20 per square foot. Mr. Houston thought this was their minimum offer. Mr. Houston did not have any concern if the properties would not be sold because "We were big enough that we could carry it and hang on to it. We did not have to sell it." Negotiations continued until a counter offer at \$4.8 million was accepted, provided that another apartment property known as the Khullar Apartments be included with the property. Mr. Houston explained that the Khullar property was on a corner on 13th Avenue and by acquiring the Khullar property, that the Stampede would be in a position to "cancel" 13th Avenue and make the properties contiguous. The price for the Properties, including the Khullar property, which was acquired by STB for the Stampede Board, aggregated \$4.432 million. Mr. Houston calculated that the Khullar property was about \$25 a square foot for a corner and he believed the amount for the both properties, not including Khullar, was about \$23.50 a foot. He believed this was the top of the market at the time.

[42] In cross-examination of Mr. Houston, respondent's counsel distinguished between the business of STB and the businesses of other corporations or entities owned by Mr. Houston, either directly or indirectly. Mr. Houston confirmed that in only one instance before 1989 was STB involved in the purchase of land for resale and that was the property in False Creek. In the False Creek project STB was the partner. Mr. Houston confirmed that STB would usually be a part of a limited partnership which would buy a particular property. In his examination for discovery Mr. Houston stated that the partners of the partnership would usually be STB and two other corporations. STB also participated in joint ventures.

Analysis

[43] For the appellant to succeed subparagraph 88(1.1)(e)(i) of the *Act* requires that Newport's business that incurred the losses, the loss business, be carried on by STB once its assets are wound up into STB. There is no issue before me that Newport's assets were acquired by STB in STB's 1989 taxation year. The Minister, in assessing, assumed that Newport had ceased to carry on any business, including the business that incurred the losses, in 1984. The issues are whether STB carried on STB's business in 1990 and 1991 taxation years and, if so, whether Newport's business was

carried on by STB for profit or with a reasonable expectation of profit throughout 1990 and 1991.

[44] Appellant's counsel's declared that the issue before me is quite simple: whether, after acquiring control of another corporation and acquiring the assets of that corporation, a taxpayer corporation in the real estate business may deduct non-capital losses incurred by the other corporation in the real estate business.

[45] There are, as the Minister states, three questions I must consider:

- i) was STB carrying on Newport's loss business;
- ii) if STB was carrying on Newport's loss business, was it carrying on that loss business throughout 1990 and 1991;
- iii) if the answer to ii) is yes, then was the loss business carried on by STB for profit or with a reasonable expectation of profit.

i) Business of Newport

[46] As I stated earlier, evidence of the business Newport carried on during the years it experienced the losses is wanting. Mr. Wensel, the controlling shareholder of Newport during the early 1980s, was dead at time of trial. No witness who may have had knowledge of Newport's business testified. I am loathe to accept without question as fact an assumption made by the Minister in assessing that may be an essential element in deciding an appeal and, while it is not proven to be false, the truth of the fact assumed is uncertain. Such assumption may be based on hearsay, for example. On the evidence before me the fact assumed appears to be the result of a conclusion of an auditor reading a bank manager's report of March 9, 1981 that includes the comment that, "As a rule of thumb, they [i.e. Newport] endeavour to turn the land over within 12 to 24 months without incurring development costs." The writer also refers to Mr. Wensel gathering land on the basis of a "quick turnover". A "Personal Resume" of Mr. Wensel states that he incorporated Newport and started to assemble land for sub-division as well as for "reorganizing and selling" for development. There was also a description of Newport's business in another bank report, dated October 21, 1988, that it was in real estate development. Also produced were an appraisal report of 1982 noting the Properties had potential for development, an undated Laventhol & Howath hotel marketing study for the Property, probably prepared in 1983 or 1984 describing Mr. Wensel as a developer,¹⁰ and

¹⁰ There are 20 pages attached to the Laventhol & Howath report which do not identify the author. It is in these unidentified pages entitled "Newport Industries Ltd., 270 Room Hotel

correspondence dated July 29, 1983 from the Mayor of Calgary to Mr. Wensel referring to his plan for developing the Victoria Square Property with a hotel. The financial statements of Newport for 1988 describe the Properties as being held for future development. The submission by the Minister that before September 1984 Newport carried on the business of land speculation "and it was this business ... that gave rise to the non-capital losses ..." and the submission by STB that before September 1984 Newport was in the land development business are both based on hearsay. It is clear, however, that at all relevant times, Newport carried on a real estate business and that this business *may* have included land speculation and land development.

ii) Business of STB

[47] Respondent's counsel denied that STB carried on a business in 1990 and 1991 that had been carried on by Newport. In particular, STB was not carrying on a business with the Properties. Counsel reviewed STB's real estate activity and concluded that prior to 1989 STB had purchased land on its own account only on one other occasion. All other acquisitions of land were "through the limited partnerships of which it is a member." And Mr. Houston, himself, admitted to purchasing land, subdividing the land and then selling. But, counsel argued, STB itself was never engaged in buying land for quick resale.

[48] That a person is a member of a partnership is no indication that he or she is not carrying on a business. Indeed, the *Partnership Act* of Alberta defines "partnership" as:

the relationship that subsists between persons carrying on a business in common with a view to profit¹¹.

[49] Article 50 of the *Partnership Act* states that a limited partnership may be formed to carry on any business that a partnership without limited partners may carry on.

[50] The wording of the *Partnership Act* is clear: a partner carries on a business with one or more other partners¹². It is not the "partnership" that carries on the business. On the evidence, STB carried on a real estate business in 1990 and 1991, as

Development Project, Calgary, Alberta" that reference is made to Mr. Wensel as a developer.

¹¹ R.S.A. 2000, c P-3, article 1.

¹² See *Robinson (Trustee of) v. The Queen*, 98 DTC 6065 (FCA) at paras. 16 and 17.

well as in prior years. That it carried on a business with others does not change the fact it carried on a business.

[51] Respondent's counsel argued that Newport was in the speculation business while STB carried on the land development business, a different business. The respondent denies the appellant's position that the real estate business is a generic business that may include land speculation and developing land for resale. Counsel for respondent argued that the appellant's proposition does not accord with common sense since even if a real estate development business always includes the business of speculation, due to the possibility of an unsolicited offer carrying forward, the converse cannot always be true. A "taxpayer could arrange his business such that he only engages in the flipping of property" without any knowledge or ability to undertake development.

[52] Counsel for the respondent explained that if real estate business is a generic business and "always encapsulates the business to develop and the business to earn income from speculation, then there would be no basis for the income/capital test which involves a search for whether there was a secondary intention".

[53] The term "real estate business" conjures up many activities: land development, land speculation, property rental, real estate broker or agent ... the list is unlimited. There is a real estate business, one that covers every conceivable real estate activity, but not all real estate businesses are the same business or substantially similar businesses. For example, the land developer is not carrying on the same business as a real estate broker and the person who carries on business of renting residential units is not necessarily carrying on the same business as a person who is exclusively a land speculator. There are exceptions of course; each case will rely on its own facts.

[54] I cannot agree with respondent counsel's submission that real estate business cannot be considered a generic business. However, the real estate business is not a "one size fits all" sort of business. Often in the real estate business a private corporation's business activity is characterized by the personality of its principals and their toleration for risk. A taxpayer in the real estate business may own land for resale as well as land for development for its own account or to develop property for resale. A taxpayer may buy the land with the intention of subdividing and then sell the subdivided lots, or the taxpayer may buy the land, subdivide it and build residential properties and lots for its own account. There may be times that a taxpayer because of his experience and knowledge of the industry may know of a good buy of land, has no immediate plans for the land but nevertheless acquires the land. A taxpayer, similar to Mr. Armstrong's description of the Pacific Western group, may buy

property for one purpose and quickly change his or her mind and do something else with the property.

[55] The *Act* itself takes a rather liberal view in describing a particular activity in defining "farming" and "fishing", for example¹³. Farming includes such distinct activities as maintaining of horses for racing, raising of poultry, fur farming, fruit growing, keeping of bees. Fishing includes catching shellfish and marine animals. In Interpretation Bulletin 206R, published on October 29, 1979, the predecessor to the Canada Revenue Agency commented that "comprehensive rules on when business operations are of the same kind are not possible" but gave as examples the activities that come within the definitions of farming and fishing. Earlier in the Bulletin it is stated that "the fact that the business operations of a taxpayer are of different natures, for example manufacturing and selling, does not preclude them from being the same business" if there is some connection, interlacing or dependence between the activities.

[56] Mr. Houston and his associates appear to be savvy real estate operators. While the Properties were purchased for tax purposes, Mr. Houston, never lost sight of the fact that the Properties had development potential for profit. Once STB acquired the Properties Mr. Browning was in contact with the Calgary Stampede to determine how the Properties may be dealt with. Eventually he negotiated the price with the Stampede.

[57] I agree with my colleague Archambault J.'s comments in *Gaz Metropolitain Inc. v. The Queen*,¹⁴ that:

It seems clear that the purpose of s. 88 of the *Act* is to prevent a company whose principal activity is, for example, the sale of natural gas from buying a company whose principal activity is the manufacturing of television sets unless the latter business is carried on for profit, and the losses can be deducted only to the extent of the income from the television manufacturing business.

[58] Property purchased on speculation or for development for resale usually is inventory; the land is purchased for resale at a profit; the purchaser of the land is carrying on a business. It may be one thing to distinguish a business where land is purchased for resale from a business where land is purchased as an investment to earn income from the property, as rent, for example¹⁵. It is more difficult to

¹³ Subsection 248(1).

¹⁴ 98 DTC 1751, para. 42.

¹⁵ See *Friesen v. Canada*, [1995] 3 S.C.R. 103 at page 28, per Major J.

distinguish as separate businesses where the basic intent is the same, to buy land and resell, one way or the other. Land speculation and land development are not carried on in watertight compartments; there is frequent leakage from one to the other, in particular when carried on by the same person. Land purchased for development and resale may have to be sold, without the land being developed and land bought on speculation may turn out to be a good development site.

[59] The respondent alleged that the appellant lacked documentation to support its claim for what it could have done with the Properties. I agree with the appellant's witness that STB's efforts to plan for development of the Properties would not be worthwhile as long as Homa had an option to purchase the Properties. Also, there is no evidence before me that private corporations, closely held, require that all decisions and plans be documented. This is one of the attraction of a private corporation: it can make decisions move more quickly than a widely held or public corporation. Directors can make decisions waiting for an elevator for example; corporate formalities can be dealt with later. It need not be bottled up with paper.

[60] In the appeal at bar STB has sold real estate soon after purchase and has also developed land for resale: two branches of the same business insofar as STB is concerned. To put it in a nutshell, STB carried on the real estate business however it could do so to make money. Mr. Houston had a history of acquiring real estate, usually in a limited partnership. Mr. Houston explained that one could make money in real estate in at least three ways: a) buying and selling without any thought of development, b) buying and selling the land after taking the property through the development application process, and c) buying the land, completing the development application process, building on the land, and then either selling it or keeping it as an investment. Mr. Browning described the partnerships he participated with Mr. Houston as opportunist; they would deal with the land in the best way to make a profit by land not subject to the option and being near the Homa development. Although the transaction was tax motivated, STB acquired the Properties, according to Mr. Houston, as an opportunity to make a profit by building residential units on the Properties. And if Homa exercised its option on the Properties, STB could still make a profit by developing Lots 17 to 20, not subject to the option, that would be contiguous to Homa's development. STB had been carrying on a real estate business from its inception, buying, selling and improving real estate. And during 1990 and 1991 STB had substantial income from this business. STB's income from real estate partnerships and joint ventures in 1990 was approximately \$13,000,000.

[61] Newport's activities, as far as one could fathom, were not dissimilar from that of STB. On the balance of probabilities it sold land shortly after acquiring it. At the same time there is some basis to conclude that when Newport could not sell the Victoria Square Property, it made inquiries whether the Property could be developed. This was STB's business and for the short time it owned the Property STB was doing what Newport was attempting to do. But STB had smarter owners than Newport with better financial means, greater experience and knowledge and who were better able to control the situation. STB acquired the Properties with a reasonable expectation of gaining a profit one way or another. It was carrying on the same business as Newport when Newport incurred the losses. STB was holding the Properties it acquired from Newport and its other interests in the course of continuing to carry on its business for profit or with a reasonable expectation of profit¹⁶.

[62] The appeals are allowed with costs.

Signed at Ottawa, Canada, this 8th day of March, 2011 .

“G.J. Rip”

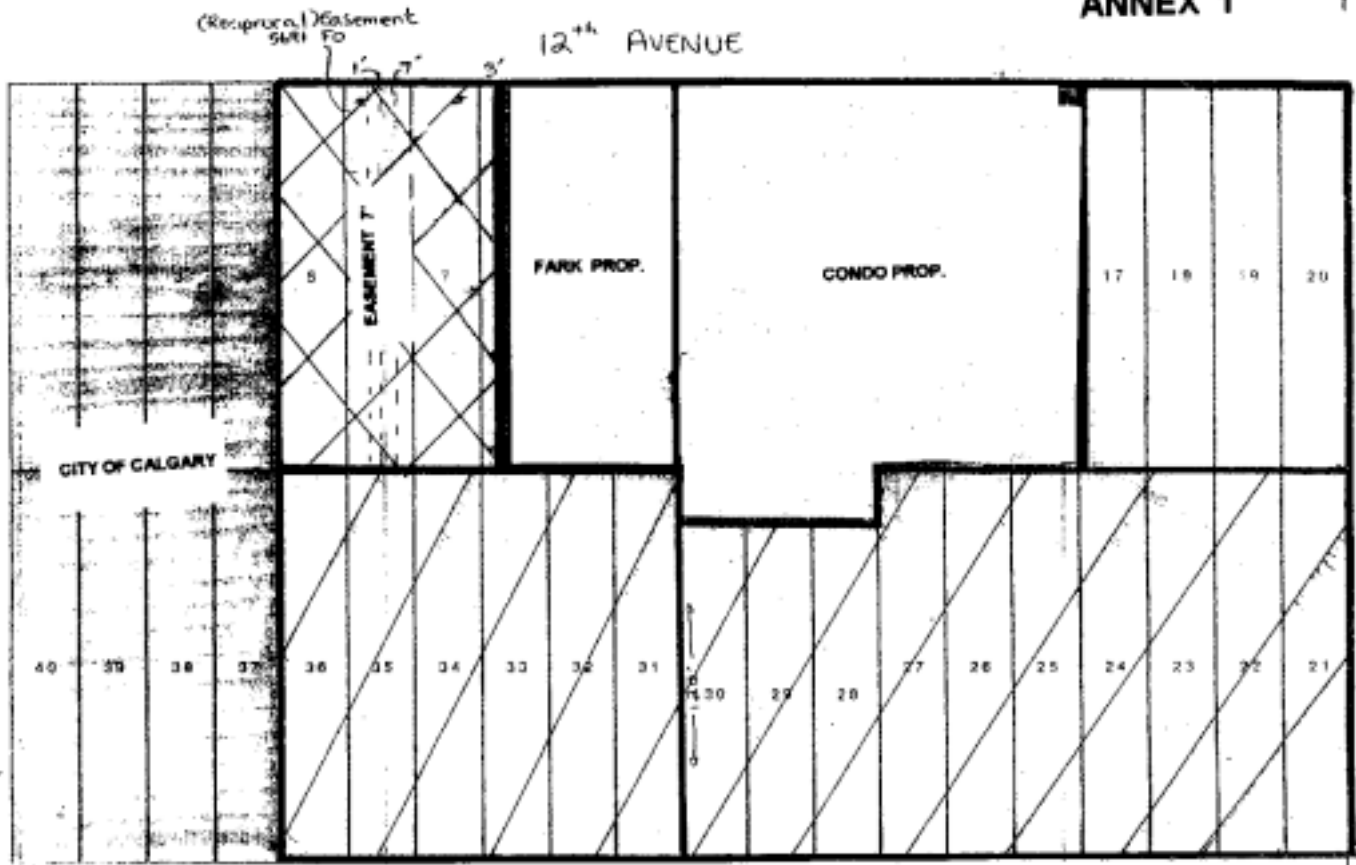
Rip C.J.

¹⁶ See *Duha Printers (Western) Ltd. v. The Queen*, 98 DTC 6334 (S.C.C.) at para. 86.

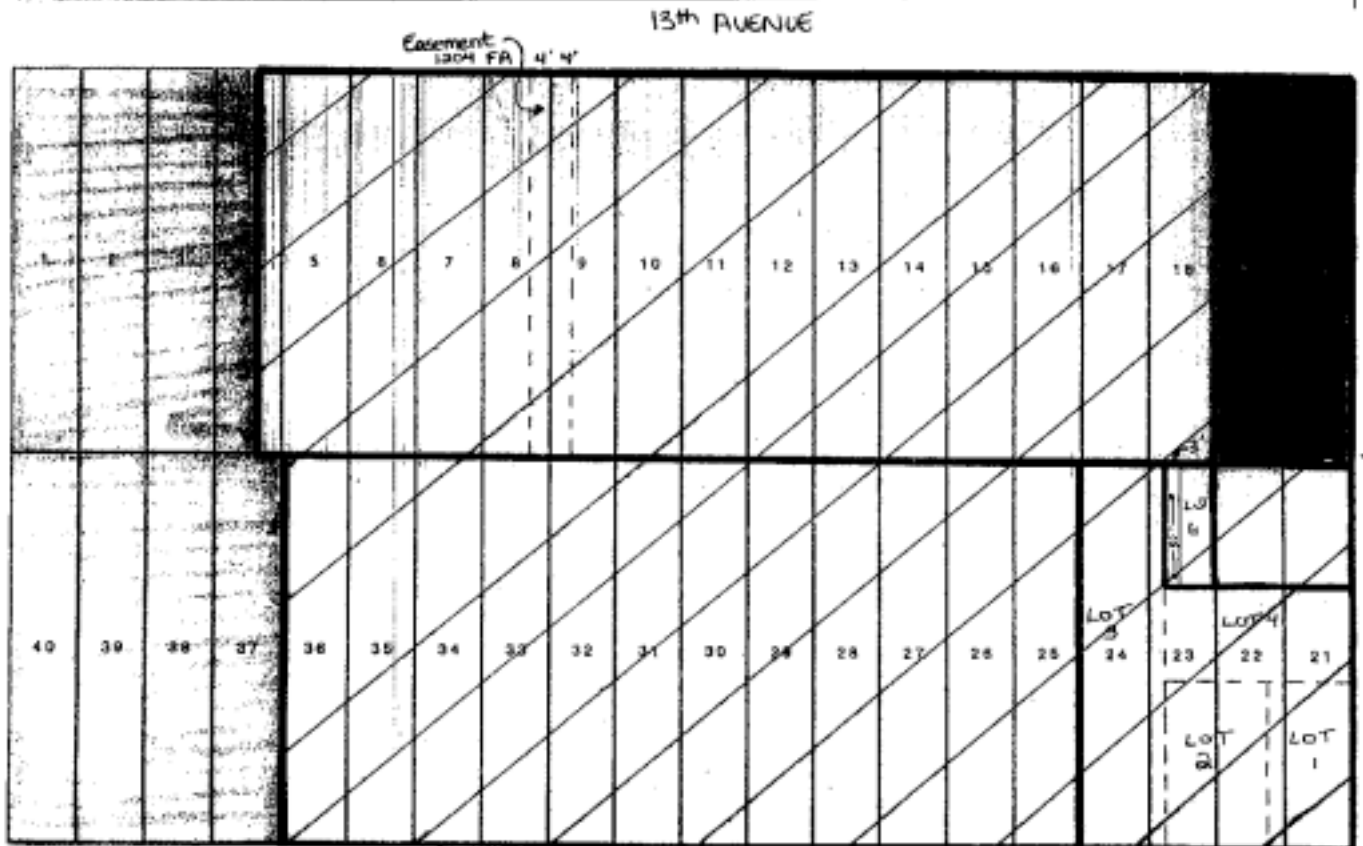
PLAN "C", BLOCK 90

ANNEX 1

(Drinkwater Street) MACLEOD TRAIL



(Drinkwater Street) MACLEOD TRAIL



14th AVENUE



AUSTIN PROP



STB HOME PROPERTY OPTION



KHULLAR HOME PROPERTY OPTION

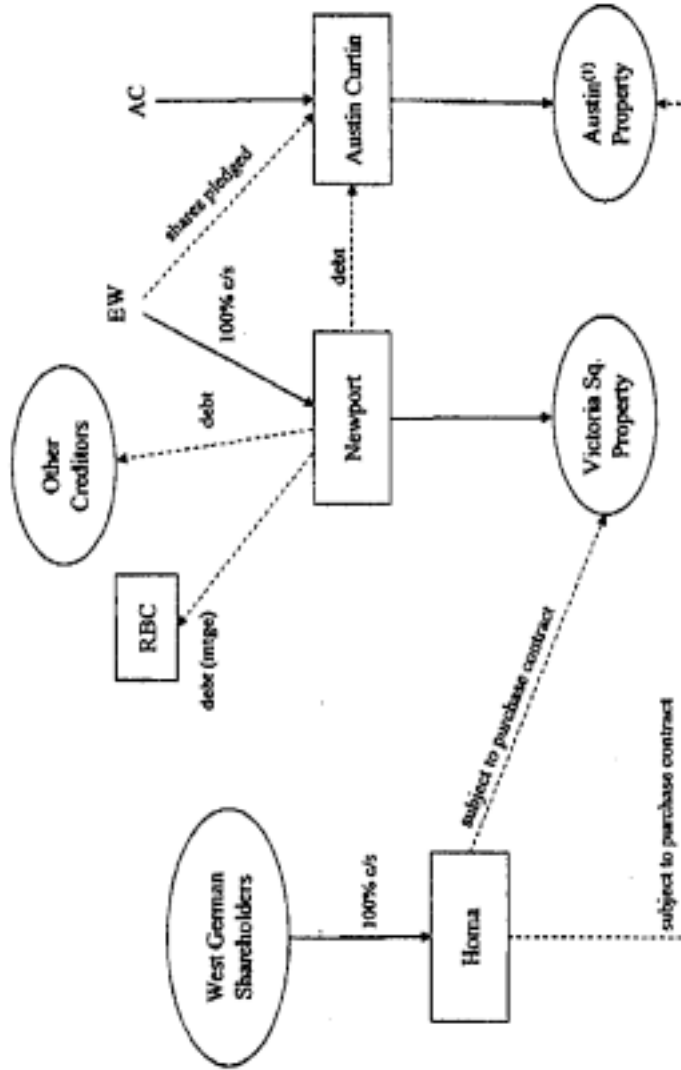


STB PROPERTY



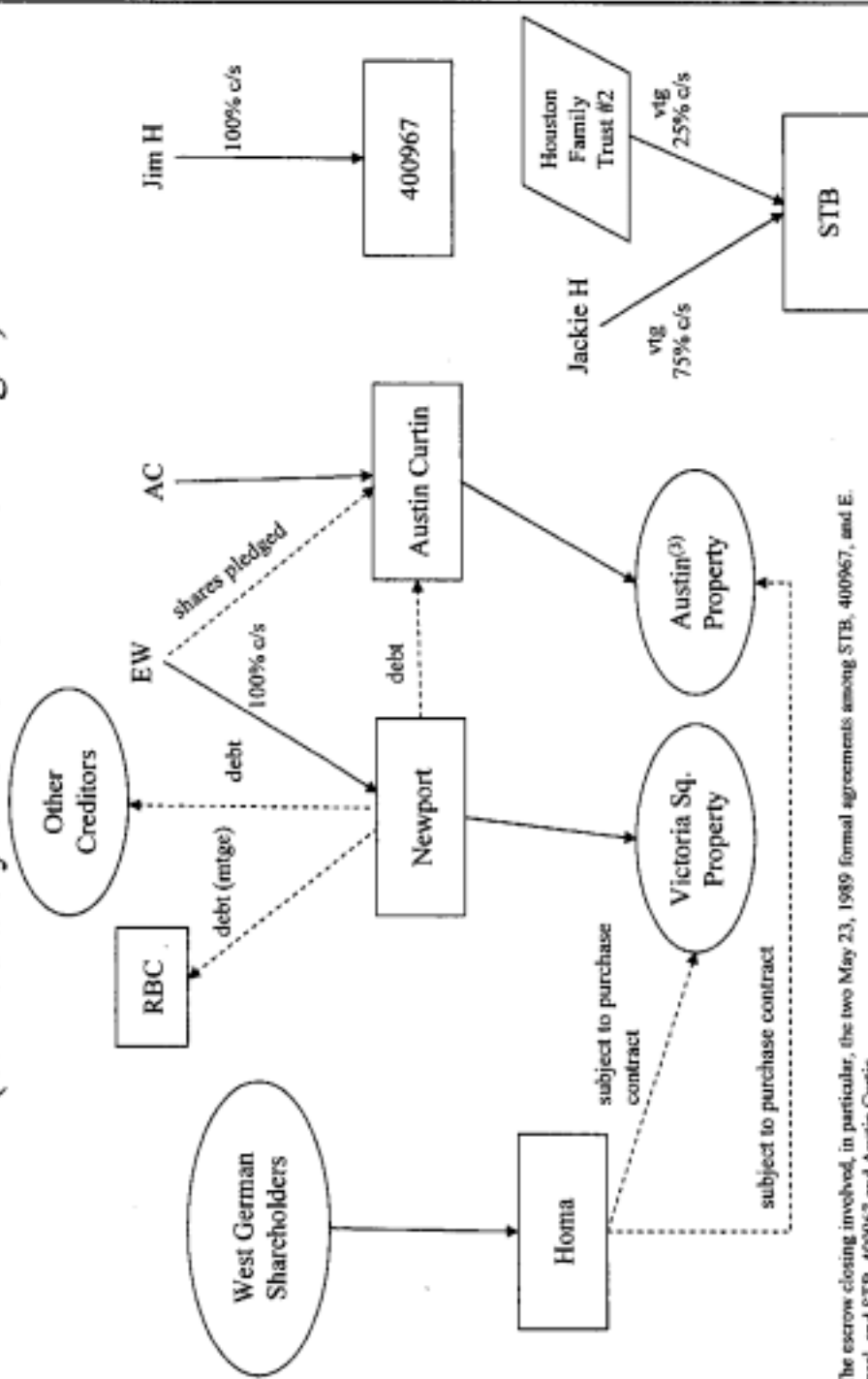
CITY OF CALGARY

As of April 19, 1989



(1) Subject to the agreements described in paragraphs 32, 33, 35, 36, 37 and 40.

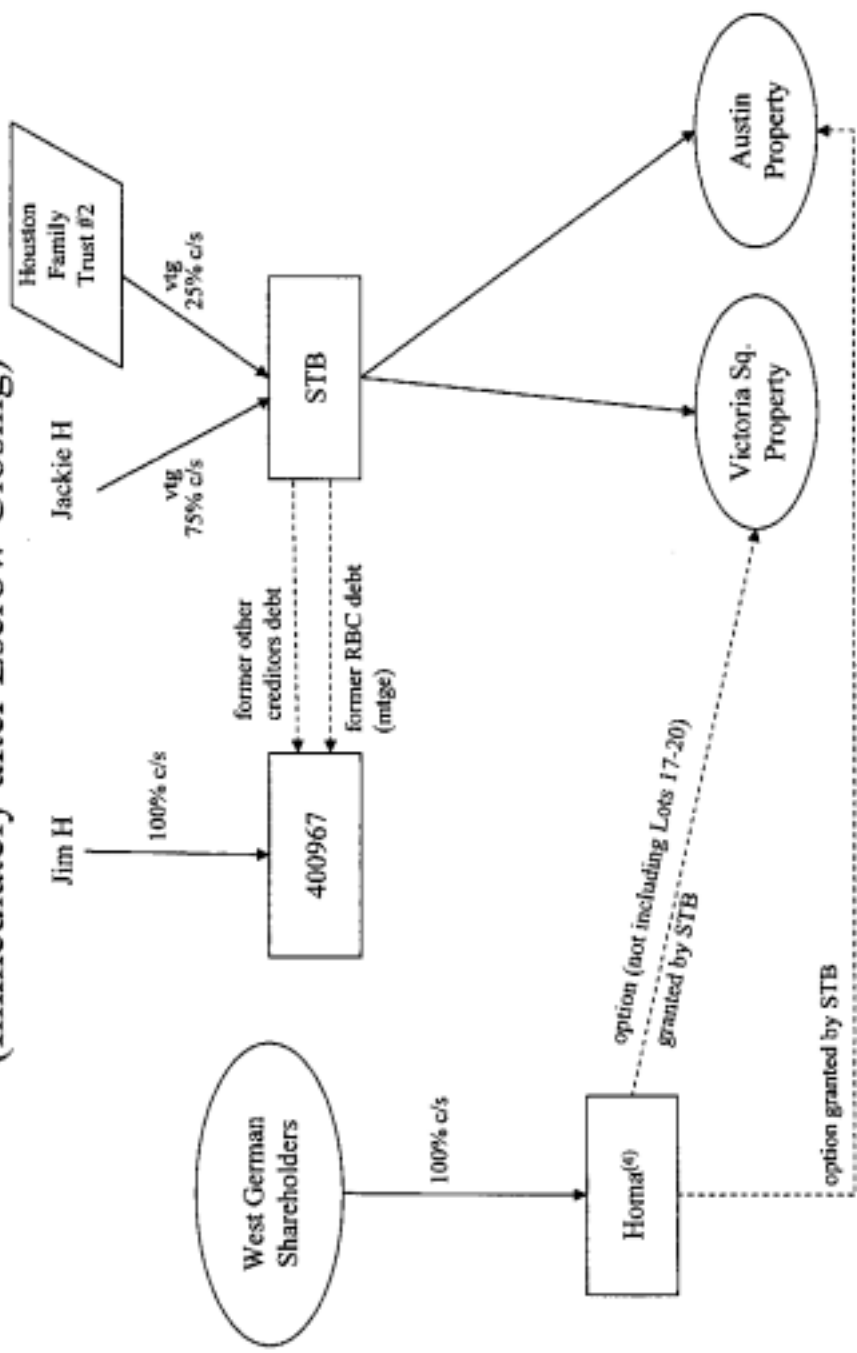
May 30, 1989
 (Immediately Prior to Escrow Closing⁽²⁾)



(1) The escrow closing involved, in particular, the two May 23, 1989 formal agreements among STB, 400967, and E. Wenzel, and STB, 400967 and Austin Curtin.

(2) Subject to the agreements described in paragraphs 32, 33, 35, 36, 37, 39, 40, 42 and 47.

May 30, 1989 (Immediately after Escrow Closing)



(6) Homa also had an option over the Khullar Property which in turn was further optioned to STB.

CITATION: 2011 TCC 144

COURT FILE NO.: 2000-3248(IT)G

STYLE OF CAUSE: S.T.B. HOLDINGS LTD. v. HER
MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 7, 2010

REASONS FOR JUDGMENT BY: The Honourable Gerald J. Rip, Chief Justice

DATE OF JUDGMENT: March 8, 2011

APPEARANCES:

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Sadie Wetzel

Counsel for the Respondent: Robert Carvalho

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