Docket: 2016-4783(IT)G

BETWEEN:

DAMIS PROPERTIES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Sabel Investments II-A Limited (2016-4785(IT)G), Zagjo Holdings Limited (2016-4787(IT)G), Devamm Investments II-A Limited (2016-4788(IT)G) and Microbjo Properties Inc. (2016-4789(IT)G) on
March 11 to 12, 2020 and September 21 to 23, 2020, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	Yves St-Cyr Jacob Yau
Counsel for the Respondent:	Natalie Goulard Dominic Bédard-Lapointe Simon Vincent Alain Gareau

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AMENDED JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is allowed and the assessment under section 160 of the *Income Tax Act* is vacated. The Appellant has 30 days from the date of this judgment to make a single submission regarding costs and

the Respondent has 15 days to respond to that submission. The submissions on costs shall not exceed ten pages for the Appellant and ten pages for the Respondent.

The Amended Judgment is issued in substitution for the Judgment dated March 24, 2021. The Amended Judgment corrects the order of Appellant's counsel.

Signed at Ottawa, Canada, this 26th day of March 2021.

"J.R. Owen"

Owen J.

Docket: 2016-4785(IT)G

BETWEEN:

SABEL INVESTMENTS II-A LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of Damis Properties Inc. (2016-4783(IT)G), Zagjo Holdings Limited (2016-4787(IT)G), Devamm Investments II-A Limited (2016-4788(IT)G) and Microbjo Properties Inc. (2016-4789(IT)G) on March 11 to 12, 2020 and September 21 to 23, 2020, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	Yves St-Cyr Jacob Yau
Counsel for the Respondent:	Natalie Goulard Dominic Bédard-Lapointe Simon Vincent Alain Gareau

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AMENDED JUDGMENT

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and the Respondent has 15 days to respond to that submission. The submissions on costs shall not exceed ten pages for the Appellant and ten pages for the Respondent.

The Amended Judgment is issued in substitution for the Judgment dated March 24, 2021. The Amended Judgment corrects the order of Appellant's counsel.

Signed at Ottawa, Canada, this 26th day of March 2021.

"J.R. Owen"

Owen J.

Docket: 2016-4787(IT)G

BETWEEN:

ZAGJO HOLDINGS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Damis Properties Inc. (2016-4783(IT)G), Sabel Investments II-A Limited (2016-4785(IT)G), Devamm Investments II-A Limited (2016-4788(IT)G) and Microbjo Properties Inc. (2016-4789(IT)G) on
March 11 to 12, 2020 and September 21 to 23, 2020, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	Yves St-Cyr Jacob Yau
Counsel for the Respondent:	Natalie Goulard Dominic Bédard-Lapointe Simon Vincent Alain Gareau

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AMENDED JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is allowed and the assessment under section 160 of the *Income Tax Act* is vacated. The Appellant has 30 days from the date of this judgment to make a single submission regarding costs and

the Respondent has 15 days to respond to that submission. The submissions on costs shall not exceed ten pages for the Appellant and ten pages for the Respondent.

The Amended Judgment is issued in substitution for the Judgment dated March 24, 2021. The Amended Judgment corrects the order of Appellant's counsel.

Signed at Ottawa, Canada, this 26th day of March 2021.

"J.R. Owen"

Owen J.

Docket: 2016-4788(IT)G

BETWEEN:

DEVAMM INVESTMENTS II-A LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Damis Properties Inc. (2016-4783(IT)G), Sabel Investments II-A Limited
(2016-4785(IT)G), Zagjo Holdings Limited (2016-4787(IT)G) and
Microbjo Properties Inc. (2016-4789(IT)G) on
March 11 to 12, 2020 and September 21 to 23, 2020, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	Yves St-Cyr Jacob Yau
Counsel for the Respondent:	Natalie Goulard Dominic Bédard-Lapointe Simon Vincent Alain Gareau

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AMENDED JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is allowed and the assessment under section 160 of the *Income Tax Act* is vacated. The Appellant has 30 days from the date of this judgment to make a single submission regarding costs

and the Respondent has 15 days to respond to that submission. The submissions on costs shall not exceed ten pages for the Appellant and ten pages for the Respondent.

The Amended Judgment is issued in substitution for the Judgment dated March 24, 2021. The Amended Judgment corrects the order of Appellant's counsel.

Signed at Ottawa, Canada, this 26th day of March 2021.

"J.R. Owen"

Owen J.

Docket: 2016-4789(IT)G

BETWEEN:

MICROBJO PROPERTIES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Damis Properties Inc. (2016-4783(IT)G), Sabel Investments II-A Limited (2016-4785(IT)G), Zagjo Holdings Limited (2016-4787(IT)G) and Devamm Investments II-A Limited (2016-4788(IT)G) on
March 11 to 12, 2020 and September 21 to 23, 2020, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant: Yves St-Cyr
Jacob Yau

Counsel for the Respondent: Natalie Goulard
Dominic Bédard-Lapointe
Simon Vincent
Alain Gareau

AMENDED JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is allowed and the assessment under section 160 of the *Income Tax Act* is vacated. The Appellant has 30 days from the date of this judgment to make a single submission regarding costs

and the Respondent has 15 days to respond to that submission. The submissions on costs shall not exceed ten pages for the Appellant and ten pages for the Respondent.

The Amended Judgment is issued in substitution for the Judgment dated March 24, 2021. The Amended Judgment corrects the order of Appellant's counsel.

Signed at Ottawa, Canada, this 26th day of March 2021.

"J.R. Owen"

Owen J.

Citation: 2021 TCC 24
Date: 20210324
Docket: 2016-4783(IT)G

BETWEEN:

DAMIS PROPERTIES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2016-4785(IT)G,

AND BETWEEN:

SABEL INVESTMENTS II-A LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2016-4787(IT)G,

AND BETWEEN:

ZAGJO HOLDINGS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2016-4788(IT)G,

AND BETWEEN:

DEVAMM INVESTMENTS II-A LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2016-4789(IT)G

AND BETWEEN:

MICROBJO PROPERTIES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Owen J.

I. Introduction

[1] These appeals address the income tax consequences to the five Appellants under section 160 of the *Income Tax Act* (the "ITA") and under the general anti-avoidance rule in section 245 of the ITA (the "GAAR") of transactions undertaken by the Appellants to increase the after-tax return of the Appellants from a sale of farmland in Brampton (the "farmland") owned by five general partnerships (the "general partnerships"), which were in turn owned as to 99.99% by the Appellants—each Appellant owning a 99.99% interest in one of the five general partnerships.

[2] At the commencement of the hearing, the parties agreed that the appeals of all the Appellants would be heard on common evidence but that to avoid repetition the evidence would be directed only to the transactions undertaken by Microbjo Properties Inc. (“MPI”) and Damis Properties Inc. (“DPI”) (the “reference transactions”).

[3] The transactions undertaken by each Appellant, all of which took place in 2006, isolated the proceeds and income from the sale of the farmland in a newly incorporated subsidiary of each Appellant (individually, a “subsidiary” and collectively, the “subsidiaries”). Each Appellant then sold its subsidiary to Wilshire Technology Corporation (“WTC”), a corporation incorporated by an unrelated person to acquire the shares in all the subsidiaries.

[4] At the time the shares in the subsidiaries were sold to WTC, three of the subsidiaries held only cash and two of the subsidiaries held cash and an intercompany receivable.

[5] Microbjo (Chinguacousy) Inc. (“MCI”) (owned by MPI) is representative of the two subsidiaries that held cash and an intercompany receivable and 1685471 Ontario Inc. (“471”) (owned by DPI) is representative of the three subsidiaries that held only cash.

[6] Accordingly, the reference transactions collectively address the two ways in which the transactions occurred. The parties agreed that the decision of the Court in respect of the reference transactions would determine the result in all five appeals.

[7] The reference transactions are described in detail in partial agreed statements of fact (the “PASFs”) filed with the Court in respect of the appeals by DPI and MPI, copies of which are appended to these reasons as Appendix A and Appendix B, respectively.

[8] Each of the PASFs references documents in a joint book of documents for the appeal to which the PASF applies. The parties agreed that the documents in the joint books are authentic and relevant and the joint books were entered into evidence holus-bolus on that basis (exhibits AR-1 and AR-2) subject, of course, to the subsequent exercise of the Court’s discretion to exclude all or part of a particular document under the applicable rules of evidence. All other exhibits were entered into evidence individually as the hearing progressed.

[9] The transactions described in the PASFs can be summarized as follows:

A. Prior to the closing on January 16, 2006 of the sale of the farmland by the general partnerships, have each Appellant incorporate a new taxable Canadian corporation (i.e., the subsidiaries), issue one class B share in the subsidiary to the Appellant for nominal consideration, transfer the Appellant's 99.99% general partnership interest in its general partnership to the subsidiary for 100 common shares in the subsidiary and jointly elect with the subsidiary under subsection 85(1) of the ITA to have the Appellant's proceeds of disposition and the subsidiary's cost of the general partnership interest be equal to the adjusted cost base to the Appellant of that partnership interest.

B. Close the sale of the farmland by the general partnerships, deposit the proceeds from the sale in the bank account of the general partnerships and, in the case of two of the general partnerships, lend a significant portion of the proceeds to the Appellant or to the parent corporation of the Appellant.

C. Following the May 31 year end of the general partnerships, allocate each subsidiary's 99.99% share of the partnership's income from the sale of the farmland to the subsidiary.

D. Distribute from the general partnerships to each subsidiary either cash or cash and an intercompany receivable.

E. On December 28, increase the stated capital of the 100 common shares held by each Appellant in its subsidiary to an amount approximating the expected sale price of the shares in the subsidiary in order to increase the adjusted cost base of those shares by the same amount.

F. On December 29, enter into a share put agreement with WTC pursuant to which each Appellant could put the shares in its subsidiary to WTC for a price equal to the after-tax value of the subsidiary plus 46% of the tax liability of the subsidiary resulting from the allocation by the general partnership to the subsidiary of the income from the sale of the farmland.

G. On December 29, have the director and officer of the subsidiary resign and be replaced by Craig Nerland, the nominee of WTC.

H. On December 31, exercise the put and close the sale of the shares in the subsidiary to WTC with WTC using the cash or receivable in the subsidiary to discharge the payment of the purchase price immediately after the transfer of the purchased shares.

[10] The Minister of National Revenue (the "Minister") assessed each Appellant under subsection 160(1) of the ITA for the income tax liability of that Appellant's subsidiary (the "underlying tax liability") for its taxation year ending December 31, 2006 (the "taxation year")[1] determined without regard to a deduction for capital cost allowance claimed by each subsidiary for the taxation year that, if allowed, would have reduced each subsidiary's income to nil.

[11] The Appellants submit that the Minister has not established the existence of the underlying tax liability of the subsidiaries for the taxation year, and that even if that liability did exist, three of the four conditions for the application of subsection 160(1) have not been met: there was no transfer of property from the subsidiaries to the Appellants; even if there was a transfer, the subsidiaries and the Appellants were dealing at arm's length at the time of the transfer; and, the fair market value of the consideration given by the Appellants equalled or exceeded the fair market value of the property transferred by the subsidiaries.

[12] In the alternative, the Minister assessed the Appellants under the GAAR. The Respondent submits that the transactions summarized above were avoidance transactions that resulted directly or indirectly in an abuse of section 160 of the ITA. The Appellants submit that the transactions were ordinary commercial transactions to which section 160 simply does not apply and therefore there is no abuse. The relevant statutory provisions are reproduced in Appendix C to these reasons.

II. <u>**The Witnesses**</u>

[13] Five fact witnesses and one expert witness testified for the Appellants. No witnesses testified for the Respondent.

[14] The fact witnesses are:

A. Michael Naiberg, a member of the family that owns MPI and various related companies. In 2006, Mr. Naiberg was a director of MPI and the sole director, president and secretary of MCI.

B. Howard Meyer, a former member by marriage of the family that owned DPI and various related companies. In 2006, Mr. Meyer was a director of DPI and the sole director, president and secretary of 471.

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[1] The parties did not address whether December 31, 2006 (rather than December 30, 2006) was the correct end of the taxation year given the application of subsection 256(9) discussed later in these reasons.

C. Paul Bleiwas, a tax lawyer with Goodman & Carr LLP ("G&C") in 2006 who advised MPI and Devamm Investments II-A Limited ("DIL") regarding the transactions. Another lawyer with G&C advised the other three Appellants regarding the transactions in issue.

D. David Steinberg, a chartered professional accountant with RSM Richter LLP in 2006 who prepared pro forma financial statements and tax-related calculations for MPI.

E. Craig Nerland, a director of WTC during the period in issue and the individual appointed as the sole director of the subsidiaries on December 29, 2006.

[15] In addition, Helen Mallovy Hicks of PricewaterhouseCoopers LLP was qualified as an expert in share valuation. Ms. Hicks provided expert opinion evidence regarding the fair market value of the shares held in the subsidiaries immediately prior to the sale of those shares to WTC on December 31, 2006. The valuations disregarded any transactions that occurred in the subsidiaries after December 29, 2006—that is, transactions effected in the subsidiaries by WTC.

III. **The Evidence of the Witnesses**

A. Mr. Michael Naiberg and Mr. Howard Meyer

[16] In the 1950s, Mr. Naiberg's grandfather (the original principal of MPI) and two other individuals (the original principals of DPI and Sabel Investments II-A Limited ("SIL")) started a real estate development company called the Nu Style Group, which built houses for sale, built apartment buildings and acquired land for development. These activities were sometimes carried on in partnership with others, including DIL and Zagjo Holdings Limited ("ZHL").

[17] In the 1970s, the Appellants and others acquired the farmland (known as the Chinguacousy farmland) for the purpose of developing the farmland into residential properties at some point in the future.

[18] In 2005, the Appellants held an aggregate 70% interest in the farmland through five general partnerships as follows:

A. MPI through the Irber II Partnership as to a 16 2/3% undivided interest in the farmland.

B. DPI through the Damis II Partnership as to a 16 2/3% undivided interest in the farmland.
C. SIL through the Sabel II Partnership as to a 16 2/3% undivided interest in the farmland.
D. DIL through the Devamm II Partnership as to a 10% undivided interest in the farmland.
E. ZHL through the Zagjo II Partnership as to a 10% undivided interest in the farmland.

[19] At some point in 2005, the Appellants and the persons that owned the remaining 30% of the farmland (collectively, the "owners") determined that they were unlikely to agree on how and when to develop the farmland. The owners decided that the best course of action was to offer the farmland for sale through a public auction.

[20] The owners retained counsel other than G&C to carry out the auction and sale of the farmland. On December 8, 2005, each of the five partnerships executed an agreement to sell its interest in the farmland to one of the owners that is not an Appellant in these appeals. The sales of the farmland by the partnerships closed on January 16, 2006.

[21] G&C provided advice to the Appellants regarding post-sale planning. This advice included the plan to carry out the transactions summarized in the introduction section of these reasons (the "plan"). G&C provided the advice separately to each of the Appellants. The Appellants did not meet to discuss the plan and no Appellant took the lead with G&C, but the plan was discussed in conversations among the Appellants.

[22] Mr. Naiberg could not recall the specific advice given by G&C or any details regarding the plan. He testified that G&C presented the plan to MPI and that he accepted the plan based on G&C's recommendation.[2] In cross-examination, Mr. Naiberg described the plan as a packaged proposal that came from G&C. He also testified that his father had been a tax lawyer with G&C for many years prior to 2006 and that he would have been a point of contact with G&C and would have had questions regarding the plan.

[23] Mr. Naiberg testified that the intercompany receivable held by MCI resulted from the fact that MCI did not have a bank account so Irber II Partnership advanced the funds from the sale of the farmland to Microbjo Holdings Inc. ("MHI") as a non-

[2] Lines 23 to 28 of page 31 and lines 1 and 6 to 10 of page 32 of the transcript of the hearing of these appeals on March 11 and 12, 2020 and September 21 through 23, 2020 (the "Transcript").

interest bearing loan and MHI invested the cash in short-term debt. The Irber II Partnership subsequently distributed an intercompany receivable to MCI. Mr. Naiberg testified that pooling surplus funds in MHI was standard practice for the related group of companies under MHI.

[24] In cross-examination, Mr. Naiberg was asked why the Irber II Partnership lent $3,254,012 to MHI, leaving behind $767,000 of the proceeds received by the partnership from the sale of the farmland. Mr. Naiberg could not recall the reason. Mr. Naiberg also could not recall if there was a connection between the amount of the intercompany receivable and the amount WTC agreed to pay MPI for its shares in MCI.

[25] In cross-examination, Mr. Naiberg was asked about the reason for incorporating MCI and transferring MPI's interest in the Irber II Partnership to MCI on a "rollover" basis. Mr. Naiberg repeatedly stated that these steps were done on the advice of G&C and that he did not know the specific reason for these steps.

[26] Mr. Naiberg agreed with counsel for the Respondent that the only purpose of MCI was to hold MPI's share of the farmland by acquiring its interest in the Irber II Partnership and to hold the proceeds from the sale by the partnership of its interest in the farmland.

[27] In re-examination, Mr. Naiberg agreed with counsel for the Appellants that MPI's interest in the Irber II Partnership was transferred to MCI to isolate in MCI the proceeds and income from the sale of the farmland.

[28] In cross-examination, Mr. Naiberg agreed that MCI had a tax liability from the sale of the farmland by the Irber II Partnership of approximately $1,300,000.

[29] Mr. Naiberg was asked if there was a commercial reason for selling the shares in MCI to WTC. Mr. Naiberg stated that the advice was that some taxes could be saved by selling MCI to WTC.

[30] Mr. Naiberg was asked why a share put agreement was used rather than a direct sale of the shares in MCI. Mr. Naiberg agreed with counsel for the Respondent that it was a specific mechanic to reduce the tax on the income from the sale of the farmland but he did not know specifically why the sale of the shares in MCI was done that way. Mr. Naiberg stated that the deal with WTC was different from the normal purchase and sale agreements he would deal with.

[31] Mr. Naiberg agreed with counsel for the Respondent that the price received by MPI for its shares of MCI exceeded the after-tax value of MCI by approximately $600,000 and that this amount related to the tax savings on the sale of the farmland.

[32] Mr. Naiberg was asked why MPI elected Craig Nerland as a director of MCI on December 29, 2006 while MPI still controlled MCI. Mr. Naiberg testified that once the share put agreement was executed, he had no interest in what happened to MCI because he had the option to sell the shares of MPI two days later. He also stated that he had no idea what Mr. Nerland was going to do with MCI.

[33] Mr. Meyer testified that after the agreement to sell the farmland was executed by the Damis II Partnership, G&C presented DPI with a plan to increase the after-tax amount received by DPI as a consequence of the sale of the farmland by the partnership. Mr. Meyer described his objective as maximizing the return from the sale of the farmland to the family and stated that he was satisfied that the plan presented by G&C would accomplish that result.

[34] In cross-examination, Mr. Meyer repeatedly stated that he did not ask questions but relied on the advice he was given and that he did not recall the details. He stated that "some structure was put together in order to see that all the families could optimize their dollars".[3] He also stated the following:

> The structure was told to us by our team [of advisers], and they put the structure in place. So I have no knowledge as to, well, why the pieces were put the way they were put. It wasn't my department. My department was to take the advice, listen to the other families, all agree. And sign it.[4]
>
> . . .
>
> . . . what I have a recollection of is that there was a specific structure and timing that everything had to take place, and that the lawyers came to us, brought documents, told us what had to be signed, when and where, and that is the way it was done – period.[5]

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[3] Lines 2 to 4 of page 177 of the Transcript.
[4] Lines 3 to 8 of page 186 of the Transcript.
[5] Lines 14 to 19 of page 192 of the Transcript.

[35] Mr. Meyer was asked why Damis Holdings Limited ("DHL") deposited funds with G&C rather than DPI.[6] Mr. Meyer confirmed that DHL owned all the shares in DPI, but he did not know why DHL transferred funds to G&C rather than DPI.[7]

[36] Mr. Naiberg and Mr. Meyer each testified that they had not heard of WTC or Craig Nerland prior to the execution of the documents implementing the sale of the shares in the subsidiaries to WTC in December 2006, that they did not meet with anyone from WTC at any time, and that the closing of the sale of the subsidiaries to WTC did not occur in the presence of WTC.

[37] Mr. Naiberg and Mr. Meyer also testified that they had no contemporaneous knowledge of the transactions that WTC caused to be carried out in MCI and 471 after they had resigned as directors on December 29, 2006. Their only knowledge came from these appeals.

[38] Mr. Naiberg and Mr. Meyer each acknowledged in cross-examination that they had received requirement letters from the Canada Revenue Agency ("CRA") and both stated that they passed the letters on to their professional advisers and did not review the responses.

B. Mr. Paul Bleiwas

[39] Mr. Bleiwas testified that he provided advice regarding the plan to MPI and DIL and that Earl Miller, another partner at G&C at the time, was the primary contact for the other Appellants.

[40] Mr. Bleiwas's primary contact on the WTC[8] side of the transaction was Robert J. MacRae, a lawyer based in Vancouver. Mr. Bleiwas knew of Mr. MacRae for one or two years prior to December 2006 and he knew of his involvement in one or two similar transactions undertaken by other lawyers at G&C. Mr. Bleiwas never met Mr. MacRae in person and communicated with Mr. MacRae only by telephone and e-mail.

[41] Mr. Bleiwas became aware of Craig Nerland's involvement with WTC in December 2006. Mr. Bleiwas did not meet Craig Nerland in person.

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[6] Paragraph g) of the PASF for DPI.

[7] Lines 12 to 28 of page 189 and lines 1 to 6 of page 190 of the Transcript.

[8] Mr. Bleiwas refers to WTC throughout his testimony in chief but WTC was not incorporated until December 18, 2006 so I take his references to WTC to mean Robert MacRae.

[42] Mr. Bleiwas testified that G&C presented the plan to the Appellants shortly after the agreements to sell the farmland were executed by the general partnerships in December 2005.

[43] In his examination in chief and cross-examination, Mr. Bleiwas provided an explanation for some of the transactions comprising the plan.

[44] MCI was incorporated and MPI's interest in the Irber II Partnership was transferred to the subsidiaries because WTC required the corporation being purchased (i.e., MCI) to be a single purpose corporation with only cash or near cash assets. MPI did not meet this criterion because it had other assets.

[45] On December 28, 2006, prior to the sale of the shares in MCI to WTC, the stated capital of the shares in MCI was increased by $3,053,000 to $3,336,643 through a series of special resolutions by MPI in its capacity as the sole shareholder of MCI. The increase in stated capital resulted in a commensurate taxable dividend and an increase in MPI's adjusted cost base[9] in its shares in MCI. Mr. Bleiwas described this as a standard pre-sale technique.

[46] On December 29, 2006, Mr. Naiberg resigned his position as the sole director of MCI and MPI elected Craig Nerland as his replacement. Mr. Bleiwas testified that this step was insisted upon by WTC in order to allow WTC to enter into "some kind of arrangements with respect to the company [MCI] to make their planning work."[10]

[47] Mr. Bleiwas stated that the views of MPI's corporate counsel (i.e., other lawyers at G&C) were obtained and that he believed that the principal reason the arrangement was acceptable to them was that MPI could put the shares in MCI to WTC two days later "so it didn't really matter what the directors [sic] did or didn't do during that short period of time."[11]

[48] Mr. Bleiwas testified that the representation of MPI in the share put agreement with WTC regarding the assets of MCI was amended at the last minute to reflect the fact that MCI had cash and an intercompany receivable rather than just cash. Mr. Bleiwas explained that MPI's corporate banking practice was to consolidate its investable cash and that to do that a substantial portion of the cash from the sale of the farmland was lent by the Irber II Partnership to MHI. Mr. Bleiwas described this

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[9] The adjusted cost base was $283,643 prior to the increase in stated capital and $3,336,643 after the increase.
[10] Lines 27 and 28 of page 229 and line 1 of page 230 of the Transcript.
[11] Lines 24 to 26 of page 230 of the Transcript.

as “very standard banking practice for them”.[12] He thought that the receivable was not converted back to cash before the sale of MCI because that would have triggered a penalty on the term deposit.

[49] With respect to the amount of the intercompany receivable, Mr. Bleiwas testified that MPI was aware of the purchase price to be paid for the shares of MCI and that the $767,000 left in cash was roughly 54% of the $1,302,731 tax liability in MCI because of the sale of the farmland.[13]

[50] Mr. Bleiwas testified that the financial terms were set by WTC from the outset and that the deal was presented to MPI on a take-it-or-leave-it basis. Any negotiation that occurred related only to the timing of the transactions.

[51] In cross-examination, Mr. Bleiwas testified that it was obvious that WTC would need to do something in MCI to reduce MCI’s tax liability but that he had no specific knowledge of what that something was. He also stated that G&C did not provide a written tax opinion to MPI, that there was nothing controversial about the transactions and that the verbal advice given was not lengthy or complicated. He described the steps as a rollover, an allocation of partnership income, an increase in stated capital and a share sale.

[52] Mr. Bleiwas was asked whether there was consideration for the assignment of the $3,253,687 receivable held by MCI from MCI to WTC on December 31, 2006. Mr. Bleiwas stated that it was not up to him to know whether there was consideration for that assignment but noted that the PASF indicated that this assignment was booked as a loan from MCI to WTC. Paragraph x) of the PASF states that the aggregate of the receivable and $83,603 (i.e., $3,337,723—the amount of the purchase price paid by WTC to MPI) was recorded as accounts receivable of MCI in Schedule 100 of its T2 tax returns for 2007 to 2012.

[53] When directed by counsel for the Respondent to the assignment executed by MCI in favour of WTC (tab 25 of AR-1) and the assignment by WTC in favour of MPI (tab 27 of AR-1), and the absence of any mention of consideration in the former assignment, Mr. Bleiwas stated “Well, the purpose of this is not to document the entire arrangement regarding the receivable. All it is is an assignment. It’s just the direction to the parties to do something. It’s not a full contract, if you like.”[14]

[12] Line 13 of page 225 of the Transcript.
[13] In fact, $767,000 is approximately 58.8% of the tax liability.
[14] Lines 27 and 28 of page 253 and lines 1 to 3 of page 254 of the Transcript.

Mr. Bleiwas also stated that he did not think it was important that WTC give consideration to MCI for the receivable.

C. Mr. David Steinberg

[54] Mr. Steinberg testified that in 2006 his then accounting firm RSM Richter LLP were the accountants for MPI and the Irber II Partnership.

[55] Mr. Steinberg testified that Mr. Bleiwas provided him with the relevant transaction steps in an e-mail dated December 19, 2006 and he provided various numbers to Mr. Bleiwas in an e-mail dated December 20, 2006.[15]

[56] The accounting staff at RSM Richter LLP prepared draft pro forma financial statements for MCI for the period January 10, 2006 through December 31, 2006.[16] The Notice to Reader is dated December 20, 2006 and states that the draft statements are based on information provided by management. Mr. Steinberg stated that he had no communication with WTC or Mr. MacRae prior to the closing on December 31, 2006.

[57] Mr. Steinberg testified that in 2007 he was asked to prepare and file the tax returns of MCI for its 2006 taxation year but he refused because MCI was no longer a client of RSM Richter LLP as a result of the sale to WTC. Instead he provided MCI's business number and miscellaneous other information to Mr. MacRae.[17] Mr. Steinberg testified that he had no other communications with Mr. MacRae and that he had no information regarding transactions in MCI effected by WTC.

D. Mr. Craig Nerland

[58] Mr. Craig Nerland qualified as a chartered accountant in 1977. Around 1986, Mr. Nerland left public practice as a chartered accountant and started to work in other areas including two years with Revenue Canada. From 2005 to 2017, Mr. Nerland was the controller at a group of architectural firms in British Columbia.

[59] Mr. Nerland testified that in 2005, he was approached by his brother, Philip Gordon Nerland, to act as a director of various corporations, one of which was WTC, that were acquiring computer software. In exchange, he received a fee for his

[15] The e-mails are in tab 13 of AR-1.
[16] Exhibit R-3.
[17] The information provided is in a chain of e-mails entered into evidence as Exhibit A-2.

services. Mr. Nerland testified that his brother worked with a tax lawyer in Vancouver called Robert MacRae.

[60] In cross-examination, Mr. Nerland stated that he was not a hands-on director, that he was not involved in the day-to-day operations of WTC and that his duties involved "looking at things that have been done and signing documents that were required to be signed".[18] He also stated that he was not an officer of WTC and did not know who was an officer of WTC.

[61] Mr. Nerland understood that the transactions involved the acquisition of computer software. He testified that he had no knowledge of how interested parties were identified or who brought the interested parties to WTC. He stated that his brother would advise him that "we have a tax deal" and "we need you to sign some documents".[19]

[62] Mr. Nerland was asked to describe the transactions entered into by WTC in more detail. He suggested that WTC purchased class 12 computer software and sold interests in the software to other persons. Upon being presented with the PASF, Mr. Nerland agreed that his description of the transactions was incorrect and that in fact WTC purchased corporations under a share put agreement. Mr. Nerland stated that there was always a share put agreement.

[63] Mr. Nerland could not recall why a share put agreement was required or how the purchase price was determined. He also did not know the reason for the key terms of the share put agreement or why WTC agreed to pay more than the net value of MCI for the shares in MCI.

[64] Mr. Nerland was asked how WTC benefitted from the transactions and he stated:

> So a corporation, the guys vending the land, wished to find a means to shelter their income. They did so. They paid us money. We ran through this series of transactions, for which I got a tiny bit of money, my brother Philip I assume got some money, the lawyer was paid, et cetera. End result was the land vendors ended up getting a shelter or the gain on the sale of the farmlands, and I gather that's what they were attempting to do.[20]

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[18] Lines 5 to 6 of page 354 and lines 14 to 28 of page 360 and line 1 of page 361 of the Transcript.
[19] Lines 7 to 10 of page 319 of the Transcript.
[20] Lines 22 to 28 of page 357 and line 1 of page 358 of the Transcript.

When asked why it was necessary to go beyond selling the software, Mr. Nerland stated that he did not know and that he could not recall.

[65] Mr. Nerland testified that the corporations purchased by WTC would continue to exist for a number of years but that he did not know what happened to them. Mr. Nerland was asked what happened between the parties following the purchase and he stated the following: "What happens -- I mean, the companies were acquired under the Wilshire banner, and as far as I know, the company, Microbjo in this case, or MCI, that would be the end of it, as far as I knew".[21]

[66] Mr. Nerland also stated that he had no communication with Michael Naiberg and that "there was no communication, as far as I can recall".[22] Mr. Nerland also stated that he had no involvement with G&C.

[67] Counsel for the Respondent presented Mr. Nerland with a 2014 letter addressed to him in which the CRA requested information. After reviewing the letter with counsel, Mr. Nerland speculated that he may have been a director of as many as 50 corporations. Mr. Nerland stated that he resigned as a director of all the corporations in October 2014 and that he did not know what happened to the corporations after that date.

[68] Mr. Nerland stated that he sent the CRA letter to Robert MacRae to "help me craft the responses to Mr. Lee".[23]

[69] Mr. Nerland was asked about Securitas Video Corp ("Securitas") and about the software purchase by MCI from Securitas. He stated that he did not know anything about Securitas or about the software or what it did.

[70] Mr. Nerland was asked if there were any payments to Securitas for the software. Mr. Nerland responded that he did not recall any payments on the notes issued to Securitas and that the interest on the notes was accrued but not remitted. When asked if there were payments other than by way of promissory note, he stated that there were no payments of cash and that any other payments would have been made by cheque on the lawyer's trust account as MCI did not have a bank account.

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[21] Lines 17 to 21 of page 325 of the Transcript.
[22] Lines 2 to 3 of page 326 of the Transcript.
[23] Lines 1 to 15 of page 359 of the Transcript.

[71] Mr. Nerland was asked if he could “tell us anything about . . . NG Global Marketing Corp.” He stated that he could not.[24] Mr. Nerland also did not have any knowledge of the marketing services agreement with NG Global Marketing Corp. (“NG Global”) other than that NG Global agreed to market the software globally. He stated that he had not seen the marketing agreements.

[72] Mr. Nerland stated that he did not know if any marketing was ever conducted by NG Global. He also stated that he did not recall any marketing reports being prepared even though the service contract required annual reports.

[73] Mr. Nerland was asked about the 2006 tax return filed by MCI. Mr. Nerland acknowledged that he signed the return and that he was the contact person named on the return. However, he stated that a Vancouver accounting firm prepared the return. Mr. Nerland stated that he would review the return of MCI and other returns to confirm that the corporation had no tax liability.

[74] Mr. Nerland testified that he satisfied himself that he was not personally liable as a result of being a director of WTC because it had no employees and no sales that would attract GST. Mr. Nerland also stated that he did not believe there were any activities in WTC but that he did not recall.[25] Mr. Nerland did not know why the 2006 tax return of MCI was filed on November 16, 2009.

[75] Mr. Nerland was asked why Mr. Naiberg resigned as a director and officer of MCI on December 29, 2006 and why he was elected as a director on that same date. He responded that it was because his brother asked him to become a director to do the transactions. He provided the same response as to why he was appointed president and secretary of MCI.

[76] Mr. Nerland was asked who signed the software purchase agreement with Securitas. Mr. Nerland stated that he did not know, that as far as he was aware he had never met anyone from Securitas and that he did not participate in any negotiations regarding the agreement. He believed that his brother defined the terms of the agreement. Mr. Nerland did state that he had met one individual from the British Virgin Islands who was introduced as a friend of his brother and whom he believed may have been behind the various offshore companies.

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[24] Lines 22 to 24 of page 338 of the Transcript.
[25] Lines 27 to 28 of page 372 and lines 1 to 3 of page 373 of the Transcript.

[77] Mr. Nerland also stated that he did not believe that any compensation for the purchase of the software changed hands other than the note for $8.1 million. He did not know if MCI made money from the software, but he stated that he had no reason to believe that the financial statements for 2007 to 2012 that showed zero revenue were incorrect.

[78] Mr. Nerland was asked whether the assignment by MCI to WTC of the $3.253 million receivable owed by MHI to MCI was for consideration and Mr. Nerland stated that he did not recall. Mr. Nerland was also asked about two debt refinancing agreements dated January 31, 2007—one entered into by MCI and one entered into by 471—that suggested payments had been made on the $8.1 million software purchase notes but he stated that he did not know where the payments came from and he did not recall why the agreements were necessary.

[79] Mr. Nerland was asked about a software purchase agreement dated May 30, 2007 entered into by MCI that indicated that MCI had sold its interest in the computer software purchased from Securitas to a numbered company for $9 million.[26] Mr. Nerland had no explanation for, and no recollection of, the sale or the lack of any change in the financial statements of MCI reflecting the sale. He also did not know why this sale was not reported in the 2007 T2 tax return of MCI.

E. Ms. Helen Mallovy Hicks

[80] Ms. Helen Mallovy Hicks testified regarding the fair market value as of December 31, 2006 of the shares held by the Appellants in the subsidiaries disregarding any transactions effected in the subsidiaries by WTC after December 29, 2006.

[81] Ms. Mallovy Hicks opined that of three possible valuation methods, the asset-based approach was most suitable in the circumstances. That approach yielded a median value for the shares in each subsidiary essentially equal to the cash, or cash and receivable, held by the particular subsidiary less the tax liability of the subsidiary resulting from the sale of the farmland.[27]

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[26] Exhibit R-12.

[27] The detailed calculations are in Appendix H of Ms. Hicks's expert report dated November 19, 2019.

[82] Ms. Mallovy Hicks's valuations also considered the value of the intercompany receivables held by MCI and another subsidiary and concluded that the value of these receivables was equal to their face amount.

[83] The Respondent did not challenge Ms. Mallovy Hicks's evidence.

IV. <u>The Positions of the Parties</u>

A. The Appellants' Position

[84] The Appellants challenge the correctness of the assessments of the subsidiaries' 2006 taxation years. The tax liability of the subsidiaries for the taxation year has not been established by the Respondent because the Respondent failed to call the CRA auditor and failed to present the basis on which the CRA issued the assessments.

[85] If the subsidiaries are found to be liable for the tax assessed by the Minister for their 2006 taxation years, three of the four requirements for the application of subsection 160(1) to the Appellants have not been met. Specifically, there has been no transfer of property from the subsidiaries to the Appellants directly or indirectly in any manner whatever, the Appellants dealt at arm's length with WTC at the time of any transfer of property that could be traced to the subsidiaries, and the Appellants gave consideration for that property equal to the value of the property.

[86] With respect to the application of the GAAR, the tax benefit alleged by the Respondent assumes the application of subsection 160(1). The Respondent cannot recharacterize the relevant series of transactions to establish the existence of a tax benefit.

[87] If, however, a tax benefit is found to exist, the only transactions that are relevant to determining whether that benefit accrued to the Appellants are the transactions commencing with the incorporation of the subsidiaries and ending with the payment by WTC of the purchase price for the shares held by the Appellants in the subsidiaries.

[88] The Respondent cannot recharacterize the relevant series to fit the transactions within the ambit of subsection 160(1) and maintain on that basis that a tax benefit has accrued to the Appellants. If on the basis of a textual, contextual and purposive interpretation of subsection 160(1) the subsection does not apply to the Appellants, then there can be no tax benefit that accrued to the Appellants by virtue of the non-application of subsection 160(1) to the relevant transactions.

[89] While there may have been tax benefits as a result of the relevant series of transactions such as the reduction of the capital gain on the sale of the shares in the subsidiaries to WTC by virtue of the increase in stated capital effected prior to the sale, the Respondent has not identified any benefit other than the non-application of subsection 160(1).

[90] The Respondent cannot recharacterize the relevant series to establish that there was an avoidance transaction. The relevant series was entered into for *bona fide* non-tax purposes: to realize a financial gain on the sale of the shares in the subsidiaries. Any tax liability existed only in the subsidiaries and therefore it cannot be said that the Appellants undertook or arranged the relevant series in order to obtain a tax benefit.

[91] In the event that the Court finds a tax benefit and an avoidance transaction, there has been no abuse. The fact that section 160 did not apply to the Appellants is not in and of itself sufficient to find abuse. The text of subsection 160(1) is conclusive of the underlying rationale of the provision. The Appellants did not abuse the provisions of the ITA relied upon to carry out the relevant transactions and subsection 160(1) operated exactly as it should have having regard to its underlying rationale.

B. The Respondent's Position

[92] The Respondent submits that she does not bear any onus with respect to the correctness of the assessments of the subsidiaries' 2006 taxation years. Under the share put agreement, the Appellants could have reviewed the tax returns of the subsidiaries for 2006 but chose not to do so. In any event, the Respondent submits that on the basis of the evidence of what did happen in the subsidiaries after December 29, 2006, the subsidiaries were barred from claiming capital cost allowance for their 2006 taxation year because they did not meet the requirement in paragraph 1102(1)(c) of the *Income Tax Regulations* (the "ITR"), they did not meet the requirements in subsection 13(24) of the ITA and/or the software acquired by the subsidiaries was not available for use at the end of 2006.

[93] With respect to subsection 160(1), the Respondent submits that all the conditions for its application to the Appellants have been satisfied.

[94] Subsection 160(1) requires that the subsidiaries transferred property directly or indirectly in any manner whatever. Having regard to the broad scope of the words "property" and "transfer", for a transfer of property within the meaning of the

provision to occur all that is required is for a transferor to deal with property so as to divest itself of the property and vest the property in the transferee. The transfer may be direct, or it may be circuitous. In this case, the subsidiaries indirectly transferred property—cash or cash and a receivable—to the Appellants through WTC.

[95] Subsection 160(1) requires the amount that may be assessed under the provision to be reduced by the consideration given for the property. The phrase "consideration given", when interpreted in accordance with the approach mandated by the Supreme Court of Canada, must, in the present factual context, mean "consideration given to the transferor" as any other interpretation would defeat the purpose of subsection 160(1) by allowing the subsidiaries to impoverish themselves to the detriment of the CRA. The subsidiaries transferred property to WTC in return for no consideration.

[96] There is no evidence that a loan existed between the subsidiaries and WTC other than the tax returns filed by the subsidiaries, and the return for 2006 was not filed until late in 2009. If, however, a loan did exist, it was a sham as WTC and the subsidiaries had no intention that the amount of the loan be repaid. Alternatively, the loans from the subsidiaries to WTC were worthless as, given the terms of the loans and the identity of the debtor, no arm's length person would pay for the loans.

[97] The Appellants and the subsidiaries were not dealing at arm's length at the time of the transfer. The Appellants directed the relevant transactions for the subsidiaries and the subsidiaries did not act in their own interests at any time during the negotiations. The Appellants and the subsidiaries acted in concert to indirectly transfer the assets of the subsidiaries to the Appellants. The negotiations leading to the planning, putting into effect and managing of a common interest do not transform those negotiations into evidence of independent interests. Even if *de jure* control of the subsidiaries was transferred to WTC prior to the transfer, the Appellants controlled the exercise of the put and forced the execution of the preordained transactions. Finally, the Appellants and WTC acted in concert to direct the subsidiaries to indirectly transfer their assets to the Appellants. Consequently, the Appellants, WTC and the subsidiaries were not dealing at arm's length.

[98] With respect to the GAAR, the relevant series of transactions commences with the incorporation of the subsidiaries and ends with the closing of the sale of the shares in the subsidiaries by the Appellants to WTC (i.e., the relevant series is as identified by the Appellants).

[99] The existence of a tax benefit may be established by comparison with an alternative transaction. In this case, the alternative transaction that might reasonably have been carried out but for the existence of the tax benefit is a distribution of the assets in the subsidiaries to the Appellants by way of a dividend.

[100] The Minister may assume the facts that give rise to the existence of an avoidance transaction and the onus falls on the appellant to show that the assumptions of fact are not correct. The Appellants have not met their onus of showing that the primary purpose of the following transactions was to avoid liability for the subsidiaries' tax under subsection 160(1):[28]

A. The incorporation of the subsidiaries.

B. The transfer of the Appellants' interests in the general partnerships to the subsidiaries on a rollover basis pursuant to subsection 85(1) of the ITA.

C. The increase of the stated capital of the shares in the subsidiaries held by the Appellants.

D. The conclusion of the share put agreements on December 29, 2006.

E. The exercise of the put by the Appellants on December 31, 2006.

F. The assignment of the property of the subsidiaries to WTC.

G. The assignment of the property received from the subsidiaries to the Appellants in satisfaction of the purchase price of the shares in the subsidiaries.

[101] For the GAAR to apply, the avoidance transaction(s) giving rise to the tax benefit must be abusive. An avoidance transaction is abusive if it achieves an outcome the statutory provisions were intended to prevent, defeats the underlying rationale of the provisions, or circumvents the provision in a manner that frustrates or defeats its object, spirit or purpose. Whether an avoidance transaction is abusive will only become apparent when the transaction is considered in the context of the series of which it is a part and in light of the overall result that is achieved.

[102] In this case, the overall result of the relevant transactions was that the subsidiaries transferred property to the Appellants in a manner that defeated the purpose, or underlying rationale, of subsection 160(1), which is to prevent the

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[28] I have paraphrased the Respondent's description of the transactions.

subsidiaries from depleting through transfers to non-arm's length persons the assets available to pay the subsidiaries' tax liability from the sale of the farmland.

V. Analysis

[103] In *Eyeball Networks Inc. v. R.*,[29] Noël C.J. summarizes the application and the purpose of subsection 160(1) as follows:

> Subsection 160(1) provides that when a person transfers property to a non-arm's length person, the transferee and transferor are jointly and severally liable to pay any amount that the transferor was liable to pay under the Act for the taxation year in which the transfer occurred and any preceding years. Under paragraph 160(1)(*e*), the transferee's liability is limited to the excess of the fair market value of the property transferred over the fair market value of the consideration given for the property. . . .
>
> . . .
>
> As affirmed by this Court, the purpose of subsection 160(1) is to protect the tax authorities against any vulnerability that may result from a transfer of property between non-arm's length persons for a consideration that is less than the fair market value of the transferred property. . . .[30]

[104] Consistent with Noël C.J.'s summary of the application of subsection 160(1), the subsection can be divided into two parts. The first part, which comprises the text before the mid-amble (i.e., before the words "the following rules apply"), identifies the conditions that must be satisfied for the subsection to apply. The second part, which comprises the text after the mid-amble, describes the rules that apply when the conditions in the first part are satisfied. I will refer to these two parts as "part one" and "part two".

[105] The Respondent argues with respect to the Appellants that on the facts of these appeals the conditions in part one have been met. The Appellants counter that three of the four conditions have not been satisfied.

[106] In argument, the parties described the question of whether the transferee has provided fair market value consideration as a condition for the application of subsection 160(1). However, on the basis of the text of the mid-amble,

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[29] 2021 FCA 17 ("Eyeball Networks").

[30] *Eyeball Networks* at paragraphs 2 and 44. Noël C.J. cites *Canada v. 9101-2310 Québec Inc.*, 2013 FCA 241 at paragraph 60.

paragraph 160(1)(e) is not a condition for the application of the subsection but is one of the rules that applies if the conditions in part one are met.

[107] Consequently, the questions raised by the positions of the parties are whether the events in issue fall within the scope of part one and, if so, what are the consequences to the Appellants under part two. This requires the interpretation of both parts of subsection 160(1).

[108] It is trite to say that subsection 160(1) is to be interpreted in accordance with the modern approach to statutory interpretation adopted by the Supreme Court of Canada. The Supreme Court recently reiterated the correct approach in *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66:

> The scope of the CRTC's authority under s. 9(1)(h) is to be determined by interpreting that provision in accordance with the modern approach to statutory interpretation. As this Court has reiterated on numerous occasions, this approach requires that the words of the statute be read "in their entire context and in their grammatical and ordinary sense harmonious with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87, as quoted in Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 21, and most recently in R. v. Barton, 2019 SCC 33, at para. 71).[31]

[109] In *Canada (Attorney General) v. Utah*,[32] Stratas J.A. emphasizes the need to interpret statutes neutrally, dispassionately, and objectively:

> We determine the authentic meaning of paragraph 3(1)(a) by taking the plain meaning of its words, seeing them in their proper context, and keeping front of mind the purposes the provision is to serve: [citations omitted]. We do this neutrally, dispassionately and objectively: [citations omitted].[33]

[110] In *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54 ("Canada Trustco"), the Supreme Court provided the following additional guidance relating specifically to the interpretation of the ITA:

> . . . The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play[s] a dominant role in the interpretive process.

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[31] Paragraph 41. Driedger explains the origin of his approach to statutory interpretation in E.A. Driedger, *Statutes: The Mischievous Literal Golden Rule*, Canadian Bar Review, Vol. 59, No. 4, December 1981 at pages 780–786.
[32] 2020 FCA 224.
[33] Paragraph 9.

> On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> As a result of the Duke of Westminster principle (*Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1 (H.L.)) that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable, Canadian tax legislation received a strict interpretation in an era of more literal statutory interpretation than the present. There is no doubt today that all statutes, including the *Income Tax Act*, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.[34]

[111] The last sentence of the above quote from *Canada Trustco* can be restated for present purposes as follows: “where Parliament has specified precisely what conditions must be satisfied for a statutory provision to apply, it is reasonable to assume that Parliament intended that taxpayers would rely on those conditions to determine whether the provision applies to them”. The issue in these appeals is what precisely are the conditions in part one that must be met for part two to apply to the Appellants?

[112] The relevant text of the preamble states:

> Where a person has . . . transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to . . . a person with whom the person was not dealing at arm’s length . . .[35]

[113] The preamble uses the word “person”[36] three times. The grammatical and ordinary sense of the text is that the first reference is to a person that has transferred property (the “transferor”), the second reference is to a person to whom the property has been transferred (the “transferee”) and the third reference is again to the

[34] Paragraphs 10 and 11.

[35] The omitted words are of no relevance to the facts in issue (i.e., “on or after May 1, 1951” and paragraphs 160(1)(a) and (b)) but are taken into consideration in the interpretation of the subsection. The French version of the text is not materially different from the English version and therefore I will address only the English version.

[36] The word “person” is defined in subsection 248(1) to include a “corporation”, which in turn is defined in subsection 248(1) to include an incorporated company. Accordingly, the Appellants and the subsidiaries are persons.

transferor. The context and the purpose of subsection 160(1) do not suggest a different meaning.

[114] For the taxation year in issue, subsection 248(1) defined the word “property” as follows:

> “property” means property of any kind whatever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes
>
> (a) a right of any kind whatever, a share or a chose in action,
>
> (b) unless a contrary intention is evident, money,
>
> (c) a timber resource property, and
>
> (d) the work in progress of a business that is a profession;

[115] The definition of “property” uses the word “means” so the definition is determinative of the meaning of the word for the purposes of the ITA. With respect to paragraph (b) of the definition, there is nothing in the text, context or purpose of subsection 160(1) to suggest that the word “property” in that subsection was not intended to include money.

[116] The relevant property in these appeals is the cash, or the cash and receivable, held by the subsidiaries on December 29, 2006 when the share put agreements were executed.[37] I will refer to this cash, or cash and receivable, as the “Property”. For the purposes of the analysis required by the preamble, I see no need to distinguish between the cash, and the cash and receivables, held by the subsidiaries as the expert evidence supports the conclusion that the receivables had a value no less than their face value.

[117] The first major point of contention vis-à-vis the preamble is whether the Property was transferred by the subsidiaries, directly or indirectly, by means of a

[37] Paragraph (g) of the PASF for DPI states that on December 22, 2006, DHL deposited $4,132,886 with G&C in trust for 471. Paragraph k) of the PASF for MPI states that on December 22, 2006, MCI deposited an amount of $785,737 with G&C, in trust for MCI. The PASF for MPI does not address the movement of the MHI receivable from the Irber II Partnership to MCI but the Minister assumed as fact at paragraph 7.10 of the Reply in the MPI appeal that the receivable due from MHI was assigned by the Irber II Partnership to MCI on April 28, 2006 and the Appellants have not disputed that fact.

trust or by any other means whatever, to the Appellants. The Appellants say that it was not, and the Respondent says that it was.

[118] In *Eyeball Networks*, Noël C.J. observed that "the concept of 'series of transactions' is foreign to subsection 160(1)"[38] but that the words of the preamble "capture all forms of transfers including those resulting from the combined effect of multiple transactions, whether preordained or not."[39]

[119] The cases interpreting the word "transfer" alone have given the word a broad meaning. In *David Fasken Estate v. Minister of National Revenue*, [1948] Ex CR 580 ("*Fasken Estate*"), President Thorson stated the following at pages 591 and 592:

> The next question is whether there was a transfer of such property from David Fasken to his wife. The word "transfer" is another term of wide meaning. The New English Dictionary gives this meaning of it:
>
>> 2. Law. To convey or make over (title, right or property) by deed or legal process.
>
> And Webster's New International Dictionary, Second Edition, says:
>
>> 2. To make over the possession or control of, to make transfer of; to pass; to convey, as a right, from one person to another; as, title to land is *transferred* by deed.
>
> In *Gathercole* v. *Smith* James L.J. spoke of the word "transfer" as "one of the widest terms that can be used" and Lush L.J. said, at page 9:
>
>> The word "transferable," I agree with Lord Justice James, is a word of the widest import and includes every means by which the property may be passed from one person to another.
>
> The word "transfer" is not a term of art and has not a technical meaning. It is not necessary to a transfer of property from a husband to his wife that it should be made in any particular form or that it should be made directly. **All that is required is that the husband should so deal with <u>the property</u> as to divest himself of <u>it</u> and vest <u>it</u> in his wife, that is to say, pass the property from himself to her. The means by which he accomplishes this result, whether direct or circuitous, may properly be called a transfer**.

[38] *Eyeball Networks* at paragraph 47.
[39] *Eyeball Networks* at paragraph 48.

[Emphasis and double emphasis added.]

[120] In the preamble, the word "transfer" is followed by the words "directly or indirectly, by means of a trust or by any other means whatever". In *Eyeball Networks*, Noël C.J. observed that "this broad introductory language is aimed at broadening the notion of transfer".[40]

[121] Although undoubtedly broad, the meaning of the phrase "directly or indirectly, by means of a trust or by any other means whatever" is not open-ended but is subject to reasonable limits. In *R. v. Hinchey*, [1996] 3 SCR 1128, Justice L'Heureux-Dubé states:

> I do not agree that the phrase "of any kind" was meant to widen the scope of the provision's reach. It was not worded or intended to mean "of whatever amount" or "of any value" such that the recipient of a cup of coffee should come within the confines of the section. On the contrary, I believe that Parliament's true intent in adding the words "of any kind" was to trap diverse <u>forms</u> of benefits, as opposed to indicating that it would be criminal to accept benefits of <u>any</u> value. . . .
>
> . . .
>
> I believe that the approach taken in *Pezzelato v. The Queen*, 96 D.T.C. 1285 (T.C.C.), in this regard is quite instructive. The decision deals with s. 6(1)(*a*) of the *Income Tax Act*, which is concerned with whether a person receives a benefit "of any kind whatever received or enjoyed . . . in the year in respect of, in the course of, or by virtue of an office or employment".
>
> While the specific facts of *Pezzelato* are not particularly helpful as the main question was whether it was a benefit received by virtue of the appellant's employment, the pragmatic approach taken to the term "benefit of any kind" by Bowman T.C.C.J. merits consideration. I recognize of course that as a taxation case, this decision deals with markedly different principles; however it is interesting in that it states clearly that the term "benefit of any kind" is not unlimited in scope. . . . [41]

[122] Other cases have recognized that open-ended language such as "by any other means whatever" can be limited in scope. *Manrell v. R.*, 2003 FCA 128[42] and *Aitchison Professional Corporation v. R.*, 2018 TCC 131, which interpret the phrase "a right of any kind whatever", are good examples of the courts placing a reasonable limit on such open-ended language where the limit is consistent with a textual, contextual and purposive analysis of the provision in issue. Placing a reasonable

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[40] *Eyeball* Networks at paragraph 50.
[41] Paragraphs 53, 55 and 56.
[42] In particular, paragraph 50.

limit on the scope of open-ended language is also consistent with the objective of providing certainty, predictability and fairness in tax law.

[123] The question therefore is where does the reasonable limit on the words "transferred property, either directly or indirectly, by means of a trust or by any other means whatever," fall?

[124] In *Medland v. The Queen,* 98 DTC 6358 (FCA) ("Medland"), an individual made mortgage payments to a bank that held a mortgage on a home solely owned by his spouse. The Court reviewed the facts and decision in *Fasken Estate* and then stated:

> The words "indirectly . . . by . . . any other means" in subsection 160(1) of the Act refer to any circuitous way in which property of any kind passes from one person to another. In the case at bar, when Mr. Medland made the payments to the mortgagee, he specified that such money was to be attributed in diminution of the mortgage on the property on which he had no more interest. While it is true that subsection 160(1) of the Act does not contain the words "for the benefit of" or "on behalf of" as found in subsections 15(1) or 74.1(1) or paragraph 224(1.1)(*b*) of the Act, the applicant does not deny that she became less indebted by the payments and her equity in the property increased. The means by which this result occurred were monies paid to the Bank which was then transferred by the Bank on the account of the mortgage of a house owned solely by the applicant. The payment to the Bank was simply a conduit through which the funds passed indirectly from her husband to her.
>
> The applicant's submission, that no transfer of property occurred because what Mr. Medland divested himself was money which monies were never transferred [physically] to the applicant, is without merit. The present scheme, although different from that in *Her Majesty the Queen v. Kieboom* and *White (D.P.) v. Canada*, amounts to the same thing.[43]

[125] In *Kieboom v. MNR*, [1992] 2 C.T.C. 59 #2 (FCA) ("Kieboom"), Mr. Kieboom owned nine common shares in a corporation and his spouse owned one common share. No other shares were outstanding. After a new class of common shares was created (the class A common shares), the spouse acquired eight such shares for nominal consideration, which was well below their fair market value. This had the effect of changing the equity ownership in the corporation from 90-10 in favour of Mr. Kieboom to 50-50.

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[43] Paragraphs 20 and 21.

[126] The issue considered by the Court of Appeal that is of interest here is whether Mr. Kieboom had "transferred property either directly or indirectly by means of a trust or by any other means whatever to his spouse" such that an attribution rule applied.

[127] The Court of Appeal reviewed the jurisprudence interpreting the words "transfer" and "property" and then stated:

> In this case, therefore, the taxpayer transferred property to his wife, that is, he gave a portion of his ownership of the equity in his company to his wife. The 40 per cent capital interest in his company which he gave to his wife was clearly property. His beneficial interest in his company was reduced by 40 per cent and hers was increased by 40 per cent. The fact that this transfer of property was accomplished through causing his company to issue shares makes no difference. Subsection 74(1) covers transfers that are made "directly or indirectly" and "by any other means whatever." **The transfer, which in this case was indirect, in that the taxpayer arranged for his company to issue shares to his wife, is nevertheless a transfer from the husband to the wife**. **There is no need for shares to be transferred in order to trigger this provision of the Act**, as was erroneously concluded by the Tax Court judge. By this transfer of property to his wife, he divested himself of certain rights to receive dividends should they be declared. Hence, when the dividends were paid to the wife in 1982, that was income from the transferred property and was rightly attributable to the taxpayer.
>
> In addition, the property transferred to Mrs. Kieboom in 1980 was a portion of his ownership equity. As a result of the transfer, the taxpayer's entitlement of 40 per cent was transferred to Mrs. Kieboom. . . . [44]

[Emphasis and double emphasis added.]

[128] In my view, *Kieboom* is the high-water mark of what constitutes a transfer of property from one person to another.[45] Mr. Kieboom's equity interest in a corporation was diluted and his spouse's equity interest in the same corporation was increased because Mr. Kieboom "arranged" for the corporation to issue eight class A common shares to Mrs. Kieboom.

[129] Two aspects of the Court's conclusion are of note.

[130] First, the Court finds that Mr. Kieboom "arranged" the transactions that constituted the transfer of the property from himself to his spouse. In my view, this

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[44] Page 65.
[45] See, also, *Strachan v. R.*, 2013 TCC 362.

is a summary of what occurred and is not a condition in the preamble. The words "a person has . . . transferred property . . ." require an objective determination of what has occurred. The words do not require a determination of who brought about what has occurred.

[131] Second, the Court dismisses Mr. Kieboom's narrow classification of the property in issue as particular shares in the corporation. This suggests to me that rather than attempting to trace particular property, one must consider all the circumstances and determine whether it is reasonable to conclude that there is a connection between the diminishment of the property of one person and the increase in the property of another person. This is the approach taken in *Kieboom* and *Medland*.

[132] The subsidiaries transferred the Property to WTC. WTC in turn transferred approximately 82%[46] of the Property to the Appellants to pay for the shares in the subsidiaries. These transfers took place one immediately after the other on December 31, 2006 in satisfaction of the terms and conditions of the arrangements between the Appellants and WTC.[47] While the cash payments appear to have taken place on January 2, 2007—the first banking day after the closing—the Appellants' rights in the Property came into existence on December 31, 2006.

[133] The transfers from the subsidiaries to WTC were brought about by the subsidiaries executing assignments of receivable and/or directions in favour of WTC.[48] The transfers from WTC to the Appellants were brought about by WTC executing assignments of receivable and/or directions in favour of the Appellants.[49] All of these documents were executed by Mr. Nerland.

[134] The form that the transfer of the Property from the subsidiaries to the Appellants took is of no consequence. What is of consequence is that approximately 82% of the Property moved from the subsidiaries to the Appellants through WTC. Even though I accept that the transactions were "ordinary commercial transactions"

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[46] The percentage varied slightly for each subsidiary. The purchase price of the shares in the subsidiaries was equal to the value of the Property in the subsidiaries on December 29, 2006 less 54% of the income tax liability of the subsidiaries as of December 29, 2006. Hence, WTC retained 54% of the income tax liability of the subsidiaries as of December 29, 2006.

[47] Paragraphs m) to q) of the PASF in the DPI appeal, paragraphs q) to u) of the PASF in the MPI appeal and the documents referenced in those paragraphs.

[48] See Exhibit AR-1 at tabs 25, 26 and 29 and Exhibit AR-2 at tab 21.

[49] See Exhibit AR-1 at tabs 27 and 28 and Exhibit AR-2 at tab 22.

as contended by the Appellants, that does not alter what in fact occurred vis-à-vis the Property.

[135] According to the evidence, WTC presented the transactions to the Appellants on a take-it-or-leave-it basis. The Appellants determined whether the transactions would or would not occur by virtue of their acceptance or non-acceptance of the proposed transactions. Once the Appellants accepted the terms of the transactions, the parties were committed to the transactions that did occur. These transactions had the effect of transferring approximately 82% of the Property from the subsidiaries to the Appellants.

[136] The fact that WTC could have sourced funds otherwise than from the subsidiaries is not relevant to whether the Property was transferred from the subsidiaries to the Appellants. As well, the fact that the subsidiaries did not participate in the transfer from WTC to the Appellants does not alter the fact that as a consequence of the series of transfers initiated by the subsidiaries through the execution of assignments of receivable and/or directions in favour of WTC, the subsidiaries ceased to hold the Property and the Appellants began to hold approximately 82% of the Property.

[137] Similarly, the participation of WTC in the indirect transfer of the Property does not alter the basic fact that the Property that was originally in the subsidiaries ended up in the hands of the Appellants. In *Medland*, Mr. Medland paid money to a bank. The bank in turn applied the money to reduce the liability of Mr. Medland's spouse on a mortgage held by the bank. The involvement of the bank in the transfer of property from Mr. Medland to his spouse did not affect the Court's determination that Mr. Medland had indirectly transferred property to his spouse.

[138] In this case, the connection between the diminishment in the property of the subsidiaries and the increase in the property of the Appellants is clear because the parties agreed to and WTC effected transactions that caused the transfer of the Property at essentially a point in time on December 31, 2006[50] and because the property that started in the subsidiaries is the same property that ended up in the Appellants (less the portion of the Property retained by WTC).

[139] In conclusion, there is a clear connection between the reduction in the property of the subsidiaries and the increase in the property of the Appellants. Consequently,

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[50] *Eyeball* Networks at paragraph 52 and 53.

I find that the subsidiaries indirectly transferred approximately 82% of the Property to the Appellants on December 31, 2006.

[140] Having found that there was an indirect transfer of property from the subsidiaries to the Appellants, the next point of contention is whether at the time the subsidiaries transferred the Property to the Appellants, each of the Appellants and its former subsidiary was dealing at arm's length. This in turn requires a determination of when the transfers of the Property to the Appellants took place.

[141] In *Kieboom*, the transfer took place when the spouse acquired the eight class A common shares which simultaneously diluted the equity interest of Mr. Kieboom. In *Medland*, the transfer took place when the bank credited the mortgage account of Mr. Medland's spouse. In both cases, the acquisition of property by the transferee governed the timing of the transfer.

[142] In *Eyeball Networks,* Noël C.J. states:

> . . . a transfer of property takes place instantaneously both at civil and common law. The precise and clearly identifiable time when a transfer takes place under both legal systems is the notion that Parliament seized on in providing both that the value of the property is determined "at the time it was transferred" and the value of the consideration given is determined "at that time". Indeed, construing these words as referring to an elastic notion of time that runs from the beginning to the end of the series of transactions, as the Crown advocates, begs the question as to precisely when the respective values should be determined and compared. This is significant because the value of property is in constant flux and can vary significantly in very little time.[51]

[143] In that case, the transfer in issue was a direct transfer by the transferor to the transferee. Hence, there was no need to consider the timing of the transfer itself because the transfer and receipt were simultaneous. In this case, the transfer occurred in two steps and therefore it is necessary to identify the "precise point in time"[52] that the transfer occurred.

[144] When interpreting legislation, "[i]t is assumed that the legislature is an accomplished user of language and has fully mastered the linguistic conventions through which meaning is communicated to an audience".[53] It is therefore instructive to consider the grammatical meaning of the text used by the legislature.

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[51] *Eyeball* Networks at paragraph 52.
[52] *Eyeball* Networks at paragraph 53.
[53] Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016) at page 40.

[145] The preamble uses the phrase "has transferred". The word "transferred" is the main verb and is the past participle of the verb "transfer". The word "has" in this context is used as an auxiliary verb. The use of "has" coupled with the past participle of the verb "transfer" identifies the use of the present perfect tense. The present perfect tense identifies the completion of the action "transferred" and the continuation of that completed action into the present.

[146] Given the use of the present perfect tense, it is reasonable to conclude that a person has transferred property to another person for the purposes of subsection 160(1) only when all the steps required to carry out that transfer have taken place.[54] In some cases, there will be a single step that effects a transfer of property, as in *R. v. Livingston*[55] and *Kieboom*, while in other cases there may be more than one step, as in *Medland* and in these appeals.

[147] The use of the past tense "was" with the present participle "dealing" in paragraph 160(1)(c) indicates the past continuous tense. This tense is commonly used to describe an action or event that began in the past and was still going on when another action or event occurred—the other action in this case being the transfer of property.

[148] The final step in the transfer of the Property to the Appellants occurred when WTC transferred the Property to the Appellants to pay for the shares of the subsidiaries.[56] Upon conclusion of the final step, the indirect transfer that commenced with the transfer of the Property by the subsidiaries to WTC and ended with approximately 82% of the Property being owned by the Appellants had concluded. The issue, therefore, is whether at that point in time the Appellants and the subsidiaries were dealing at arm's length.

[149] The ITA uses two approaches to arm's length. Under the first approach, persons that are related under rules in the ITA are deemed not to deal with each other at arm's length. In general, the rules use certain familial relationships and legal (i.e., *de jure*) control to determine when persons are related.

[150] During the period that an Appellant owned all the issued shares in a subsidiary, the Appellant had legal control of that subsidiary and was therefore related to that subsidiary. At the point in time that the Appellant ceased to own any

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[54] *Eyeball Networks* at paragraphs 55 to 57.
[55] 2008 FCA 89 ("*Livingston*"). In that case, each deposit would be a transfer of property.
[56] For the mechanic of the payment by WTC to MPI and DPI, see the assignment at Exhibit AR-1 at tab 27 and the direction at Exhibit AR-2 at tab 22.

shares in the subsidiary, the Appellant ceased to have legal control of the subsidiary and therefore ceased to be related to the subsidiary. WTC had legal control of the subsidiaries from the time it acquired ownership of the shares in the subsidiaries.

[151] To determine whether two or more persons are related in the circumstances in issue, regard must also be had to paragraph 251(5)(b) and subsection 256(9).

[152] Paragraph 251(5)(b) includes a set of rules that treat a person with certain specified rights as if those rights had been exercised. For example, a person that has a right to acquire shares is deemed by subparagraph 251(5)(b)(i) to "have the same position in relation to the control of the corporation as if the person owned the shares at that time".

[153] The execution by WTC of the share put agreements with the Appellants did not give WTC any right to acquire shares in the subsidiaries. Control of the put was exclusively with the Appellants. Accordingly, WTC was not deemed by subparagraph 251(5)(b)(i) to own shares in the subsidiaries by virtue of entering into the share put agreements.

[154] Upon the exercise on December 31, 2006 of the put, a binding agreement of purchase and sale was deemed to exist.[57] According to the PASFs, there was a series of consecutive steps on December 31, 2006[58] and the final step was concluded upon the payment of the purchase price by WTC to the Appellants.[59] At that point in time, all of the terms of the sale were met and ownership of the shares in the subsidiaries passed from the Appellants to WTC. Also at that point in time, WTC acquired control of the subsidiaries. According to the time stamp on an e-mail from Ruby Wong of G&C, the transactions were completed at or before 12:28 p.m. on December 31, 2006.[60]

[155] Subsection 256(9) provides that for the purposes of the ITA (other than for certain specified purposes not relevant here),[61] where control of a corporation is acquired by a person or group of persons at a particular time on a day, subject to an election being made, control of the corporation is deemed to have been acquired at the beginning of that day. There is no suggestion in the assumed facts or in the oral

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[57] Paragraph 2.2(b) of the share put agreements.
[58] Paragraphs q), r), s) t) and u) of the PASF for MPI and paragraphs m), n), o) p) and q) of the PASF for DPI.
[59] Paragraph u) of the PASF for MPI and paragraph q) of the PASF for DPI.
[60] Tab 23 of Exhibit AR-1 and tab 19 of Exhibit AR-2.
[61] Subsection 256(9) does not apply for the purposes of determining if a corporation is, at any time, a small business corporation or a Canadian-controlled private corporation. In addition, paragraph 88(1)(c.6) expressly overrides subsection 256(9) in favour of its own end-of-the-day timing rule.

and documentary evidence that elections were filed under subsection 256(9) so I can only conclude that the default timing rule applies.

[156] In *Survivance v. R.*, 2006 FCA 129, the Federal Court of Appeal held that subsection 256(9) applies equally to the person relinquishing control such that control is deemed to cease at the commencement of the day on which control is acquired by the purchaser.[62]

[157] In this case, the Appellants were deemed by subsection 256(9) to have ceased to control the subsidiaries at the commencement of December 31, 2006. This is before the time of the transfer of the Property later that same day. Accordingly, the Appellants were not related to the subsidiaries at the time the Property was indirectly transferred from the subsidiaries to the Appellants.

[158] This leaves only the determination to be made under paragraph 251(1)(c). That paragraph states "in any other case, it is a question of fact whether persons not related to each other are, at a particular time, dealing with each other at arm's length".

[159] Paragraph 251(1)(c) states that whether persons are dealing at arm's length is a "question of fact". In *RMM Canadian Enterprises Inc. v. R.* (1997), [1998] 1 CTC 2300 (TCC), Justice Bowman (as he then was) explains this characterization of the test as follows:

> . . . All that paragraph 251(1)(*b*) [now paragraph 251(1)(c)] means is that in determining whether, as a matter of law, unrelated persons are at arm's length, the factual underpinning of their relationship must be ascertained. The meaning of "arm's length" within the *Income Tax Act* is obviously a question of law.[63]

[160] In *Keybrand Foods Inc. v. R.*,[64] the Federal Court of Appeal considered the approach taken by the majority of the Supreme Court of Canada in *R. v. McLarty*[65] and concluded:

> The reference to a "question of fact" (in paragraph 45 quoted above) appears to simply be a repetition of the words as used in the Act. In my view, it is still necessary to determine the meaning of "dealing at arm's length" for the purposes of the Act. The meaning of this

[62] The Court's analysis of subsection 256(9) is at paragraphs 53 to 79. The relevant principle is stated at paragraph 63 and applied at paragraph 66.
[63] Paragraph 33. Paragraph 251(1)(b) became paragraph 251(1)(c) when new paragraph 251(1)(b) was added by a 2001 technical bill effective December 24, 1998.
[64] 2020 FCA 201 ("Keybrand Foods").
[65] 2008 SCC 26 ("McLarty").

> expression is a question of law, which will require an interpretation of the decisions of the courts that have addressed this issue. The applicable law will then be applied to the facts of a particular situation. The result, in any particular case, will depend significantly on the facts of that case.[66]

[161] In *McLarty*, the Supreme Court of Canada addressed whether Mr. McLarty, a purchaser of seismic data that was sold to a group of purchasers seeking tax shelter, was dealing at arm's length with the vendor of the seismic data. The arrangement was structured such that the vendor acted for itself and as agent for Mr. McLarty and the other purchasers of the seismic data.

[162] The majority states that "all the relevant circumstances must be considered to determine if the acquiring taxpayer was dealing with the vendor at arm's length."[67] The majority then considers and endorses the following three indicia:[68]

- was there a common mind which directs the bargaining for both parties to a transaction;
- were the parties to a transaction acting in concert without separate interests; and
- was there "de facto" control.

[163] The majority and minority[69] conclude that notwithstanding the structure employed to carry out the sale which suggested the vendor was acting on both sides of the transaction, Mr. McLarty did deal at arm's length with the vendor of the seismic data because he had not subordinated his independent interest to the vendor. The majority states:

> Had the trial judge found that **McLarty had subordinated his entire decision making power to Compton as his agent**, his dealings with Compton as vendor would not have been at arm's length. **He would not have been making an independent decision** about the purchase but would have left that completely to Compton. But those are not the facts found or inferences drawn by the trial judge.[70]
>
> It was appropriate for the trial judge to have considered the entirety of the transactions by which McLarty bound himself to purchase his interest in the seismic

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[66] Paragraph 39.
[67] *McLarty* at paragraph 61.
[68] *McLarty* at paragraph 62. The majority also cites *Peter Cundill & Associates Ltd. v. Canada*, [1991] 1 CTC 197 (FCTD), aff'd [1991] 2 CTC 221 (FCA), in which the courts adopted these criteria from a prior version of IT-419R2.
[69] McLarty at paragraph 79. The minority did not provide a separate analysis of the arm's length issue.
[70] McLarty at paragraphs 72 and 73.

> data and place limitations on Compton as his agent with respect to the purchase price of the data. It was for the trial judge to draw inferences from these facts. . . .

[Emphasis added.]

[164] With respect to the individual indicia, the directing mind test was described in *MNR v. T.R. Merritt Estate*,[71] as follows:

> . . . where the "mind" by which the bargaining is directed on behalf of one party to a contract is the same "mind" that directs the bargaining on behalf of the other party, it cannot be said that the parties are dealing at arm's length. . . .[72]

[165] The *de facto* control test asks whether one party has *de facto* control over another party. If such control exists (whether exercised or not), the parties do not deal at arm's length. The application of the test is seen in *Special Risks Holdings Inc. v. The Queen*,[73] where the trial judge observed:

> The conclusion is inescapable, however, that despite the legal ownership of 50 per cent of the shares of MHR, there was never any intention that Mr Melling should lose *de facto* control of RMC. The correspondence of August and September 1976, in my view describes the **constant intention of the parties**. . . .[74]

[Emphasis added.]

[166] On appeal, the Federal Court of Canada - Appeal Division summarized the trial judge's findings as follows:

> The evidence before the trial judge showed clearly that at all relevant times RMC had remained under the "de facto" control of the appellant. It was clear, therefore, that, immediately after the disposition here in question, the appellant and RMC were not persons who could deal at arm's length.[75]

[167] *De facto* control for purposes of the arm's length test is similar to but not identical to the form of control described in subsections 256(5.1) and 256(5.11), which address the control of a corporation where the phrase "controlled, directly or indirectly in any manner whatever," is used.[76] For example, unlike under subsection

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[71] [1969] CTC 207 (Ex CR) ("Merritt Estate").
[72] Page 217.
[73] [1984] CTC 553 (FCTD), aff'd [1986] 1 CTC 201 (FCAD) ("Special Risks").
[74] Page 556.
[75] *Special Risks* at page 205 (CTC).
[76] See *Keybrand Foods* at paragraph 45.

256(5.1), *de facto* control under the arm's length test may exist where one individual exerts control or significant influence over another individual.

[168] In *Keybrand Foods*, the Federal Court of Appeal states that "there is no practical difference between the concepts of de facto control and directing mind, in relation to the determination of whether two persons are dealing with each other at arm's length"[77] and in *Robson Leather Co. Ltd. v. MNR*,[78] the Federal Court of Canada - Appeal Division did conflate the two concepts. Nevertheless, as illustrated by *Special Risks*, *de facto* control allows a determination of whether one person exerts sufficient influence over another to control the actions of the other without necessarily having regard to a particular transaction.[79]

[169] Justice Thurlow describes the acting in concert test in *Swiss Bank Corp. et al. v. MNR*,[80] as follows:

> . . . **where several parties**—whether natural persons or corporations or a combination of the two—**act in concert, <u>and in the same interest</u>,** to direct or dictate the conduct of another, in my opinion the "mind" that directs may be that of the combination as a whole acting in concert or that of any one of them in carrying out particular parts or functions of what the common object involves. . . On the other hand **if one of several parties involved in a transaction acts in or represents a different interest from the others** the fact that the common purpose may be to so direct the acts of another as to achieve a particular result will not by itself serve to disqualify the transaction as one between parties dealing at arm's length. . . .[81]

[Emphasis and double emphasis added.]

[170] In affirming the judgment of the Exchequer Court, the Supreme Court[82] emphasized the importance of separate interests as follows:

> Although the circumstances here do not present the common type of non-arm's length dealing referred to by this Court in *Minister of National Revenue v. Sheldon's Engineering Ltd.*, they bring this case within the principle that underlies the disqualification expressed in s.106(1)(*b*)(iii)(A), namely, that the payer and payee must not be persons who, effectively, are dealing exclusively with each other through a fund provided by the payee for the benefit of the payee. **A sound reason for this <u>that the enactment itself suggests is the assurance that</u> the interest rate will reflect ordinary commercial dealing**

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[77] At paragraph 53.
[78] [1977] CTC 132, 77 DTC 5106 (FCAD).
[79] This is also true of the approach to *de facto* control taken in subsection 256(5.1).
[80] [1971] CTC 427 (Ex CR).
[81] *Ibid*., pages 437–438.
[82] *Swiss Bank Corp. et al. v. MNR*, [1974] SCR 1144 ("Swiss Bank").

> **between parties <u>acting in their separate interests</u>. A lender-borrower relationship which does not offer this assurance because there are, in effect, <u>no separate interests</u> must be held to be outside of the exception that exempts a non-resident from taxation on Canadian interest payments.** The fact that the interest actually authorized or paid is consistent with arm's length dealing is not enough in itself to avoid this conclusion.[83]

[Emphasis and double emphasis added.]

[171] In *Petro-Canada v. R.*,[84] the Court upheld the Tax Court's finding of non-arm's length on the basis that "[t]he terms of the transactions did not reflect ordinary commercial dealings between vendors and purchasers acting in their own interests."[85]

[172] In *R. v. Remai Estate*,[86] the Federal Court of Appeal upheld the trial judge's conclusion[87] that an individual (Frank) and a corporation (Sweet), which was 90% owned by Frank's nephew (Darrell), dealt at arm's length.

[173] Frank had a private foundation to which he contributed promissory notes issued by a corporation he owned (FRM) in payment of management fees to him. After a change in the law in 1997, the charitable donation tax credits claimed by Frank for 1998 and 1999 were disallowed on the basis that the notes were "non-qualifying securities".

[174] Frank took steps to remedy this situation by selling the promissory notes to Sweet in exchange for notes from Sweet. The Minister again denied the claim for the charitable donation tax credits on the basis that Frank and Sweet did not deal at arm's length. On appeal to the Tax Court the Minister also relied on the GAAR.[88]

[175] The Tax Court allowed the appeal and the Minister appealed to the Federal Court of Appeal. The Federal Court of Appeal summarized the most salient facts and stated:

> . . . it is clear that the idea of the exchange of notes came solely from Frank and Mr Grozell, the purposes of the transaction were to benefit Frank and the Foundation, **and there was no bargaining over the terms of the exchange**. While Sweet sought professional opinions on the legality of the transaction and the financial risk involved, **there is no doubt that Frank drove the proposal**. Indeed, Darrell

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[83] *Swiss Bank* at page 1152.
[84] 2004 FCA 158.
[85] At paragraph 55.
[86] 2009 FCA 340 ("*Remai Estate*").
[87] *Remai v. R.*, 2008 TCC 344.
[88] The GAAR was added after the appeal was filed.

> testified that, while he assumed that the transaction had a business purpose, he did not know what it was and did not ask (Appeal Book, pp. 246-47).
>
> . . .
>
> It is true that, having addressed the *Peter Cundill* factors one at a time, the Judge did not stand back and ask whether, when considered in its complete factual context, the transaction constituted an **ordinary commercial transaction** between parties who were acting in their own interests. As I indicated earlier, **he was not required as a matter of law to ask this question**, although it can be helpful in enabling the judge to review the conclusion reached on the basis of the *Peter Cundill* factors as to whether the transaction was at arm's length.
>
> **I would only say that "ordinary commercial transactions" come in a variety of shapes and sizes, and the fact that it may seem that a transaction has been entered into largely as a favour by one party to the other does not necessarily mean that it cannot also be at arm's length**. It all depends on the particular facts. On basis of those before him, it was not a palpable and overriding error, unreasonable, or plainly wrong for the Judge to characterize Sweet's purchase of the FRM notes from the Foundation as an arm's length transaction. Nor did the Judge err in law by not expressly addressing in his reasons every aspect of either the relationship between Frank and Darrell or the transaction itself.[89]

[Emphasis added.]

[176] It can be seen from the foregoing decisions that the thread that holds the arm's length tests together is the concept of independent interests. This is a valid focus whether the transactions are commercial or not.

[177] The indicia sanctioned in *McLarty* are circumstances that are indicative of an absence of independent interests.[90] If a person directs both sides of any arrangement, that implies that the other person has not exercised his, hers or its independent interests. If a person is under the *de facto* control of another, that implies that the person has not exercised, or is not able to exercise, his, her or its independent interests. And, as stated by the Exchequer Court and the Supreme Court of Canada in *Swiss Bank*, the acting in concert test is concerned with whether persons are acting in their own interests.

[178] With respect to those who may hold a contrary view, the notion of an "ordinary commercial transaction" is not helpful. Commerciality is not a necessary

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[89] *Remai Estate* at paragraphs 37, 47 and 48.

[90] In McLarty at paragraph 63, the majority describes these three criteria as "indicia for identifying dealings not at arm's length".

hallmark of a transaction carried out at arm's length. For example, a gift to a charity is not in and of itself evidence that the donor and charity do not deal at arm's length.

[179] As stated in *Remai Estate*, even commercial transactions come in all shapes and sizes and the word "ordinary" does not reflect this fact. In *Swiss Bank*, the focus of the Supreme Court is on whether the parties acted in their separate interests so as to assure a commercial rate of interest. The Supreme Court states that the fact that the actual interest rate might be a commercial rate is not determinative.

[180] In these appeals, the only transactions between the Appellants and the subsidiaries occurred at a time when the Appellants owned all the shares in the subsidiaries and therefore were deemed not to deal at arm's length with the subsidiaries.

[181] The transactions in issue under subsection 160(1) (i.e., the transactions on December 31, 2006) were between the subsidiaries and WTC and between WTC and the Appellants and, as already stated, occurred after legal control of the subsidiaries was deemed to be relinquished by the Appellants and acquired by WTC.

[182] The test imposed by paragraph 251(1)(c) is applied "at a particular time" based on all the facts and circumstances, and the particular time in issue is the time at which the transfer of the Property occurred on December 31, 2006. Unless the facts dictate otherwise, it would run counter to the certainty and predictability created by the relationship rules to use events that transpired while the subsidiaries were legally controlled by (and therefore related to) the Appellants to determine at a later point in time that the subsidiaries and the Appellants did not deal at arm's length under paragraph 251(1)(c).

[183] The transfer of the Property from the subsidiaries to WTC and then from WTC to the Appellants on December 31, 2006 did not involve any contract or other arrangement between the subsidiaries and the Appellants. Rather, the transfers of the Property occurred because of share put agreements between the Appellants and WTC, which, on the exercise of the put, became binding agreements of purchase and sale.

[184] The Appellants relinquished board-level and officer-level control of the subsidiaries on December 29, 2006 to facilitate transactions that WTC wanted to

carry out and did in fact carry out in the subsidiaries.[91] Two days later, on December 31, 2006, the Appellants relinquished legal control of the subsidiaries when the share sale closed. The legal change of control was deemed by subsection 256(9) to occur at the beginning of December 31, 2006. Consequently, as of the time of the transfer of the Property, the Appellants had neither board or officer level control nor legal control of the subsidiaries. There is no evidence to suggest that after December 29, 2006 the Appellants continued to direct the actions of the subsidiaries or continued to influence or control the activities of the subsidiaries.

[185] There is also no evidence that after December 29, 2006, the Appellants acted in concert with WTC to direct the actions of the subsidiaries. The actions of the subsidiaries prior to December 30, 2006 were authorized and effected by persons elected or appointed by the Appellants and the actions of the subsidiaries after December 29, 2006 were authorized and effected by persons elected or appointed by WTC. All of these actions were consistent with the separate interests of the Appellants and WTC in the transactions.

[186] WTC agreed to purchase the shares in each of the subsidiaries for an amount that in each case was equal to the value of the Property in the particular subsidiary less 54% of the tax liability in that subsidiary determined as of December 29, 2006. WTC's economic profit depended on its ability to effect transactions in the subsidiaries that reduced the tax liabilities in the subsidiaries to below 54% of those liabilities determined as of December 29, 2006. WTC took on the risk associated with this strategy by obligating itself to purchase the shares in the subsidiaries on the exercise of the put by the Appellants.

[187] WTC took steps to realize its economic profit by effecting transactions in the subsidiaries after December 29, 2006. When viewed with hindsight these transactions were clearly of questionable efficacy but that is not relevant to whether the subsidiaries were dealing at arm's length in fact with the Appellants at the time that the Property was transferred to the Appellants. Mr. Naiberg and Mr. Meyer each testified that they had no contact of any kind with WTC or its representatives and that they had no knowledge of, or involvement in, the purchase of software by the subsidiaries. I accept this testimony and note that there is no evidence to suggest otherwise.

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[91] Specifically, after December 29, 2006, the sole officer and director of MCI was Mr. Nerland, who represented the interests of WTC and carried out transactions directed by his brother.

[188] The Appellants did facilitate WTC's ability to carry out transactions in and with the subsidiaries by electing/appointing Mr. Nerland as the sole director and officer of the subsidiaries on December 29, 2006. This step was dictated by WTC and the Appellants agreed to this step only after obtaining professional advice that their interests were protected by the share put agreement. The fact that this step is not common is not in and of itself evidence of non-arm's length dealings. The proper question is whether the parties acted in their own interests in agreeing to the arrangements, not whether the arrangements themselves are out of the ordinary.

[189] That is not to say that unusual arrangements are to be ignored. They certainly form part of the factual context that is the basis for determining whether the parties are dealing at arm's length. For example, if a transaction is on its face uneconomic and, based on all the evidence, there is no discernible explanation why that is the case—other than the parties were not acting in their own independent interests (i.e., were not dealing at arm's length)—then the transaction has in effect revealed the nature of the relationship. That was the case in *Keybrand Foods*.

[190] However, unless the ITA dictates otherwise, the economics of the transaction are not determinative. As stated by the Supreme Court in *Swiss Bank*, where the ITA requires a commercial result it is the assurance of commercial dealings that is required. Consequently, the focus is on whether the parties to the transaction acted in their own separate interests, which is implicitly assumed to ensure a commercial result.

[191] For their part, the Appellants sought to make an economic profit by selling the shares in the subsidiaries for more than the value of the Property in the subsidiaries less the expected tax liabilities in the subsidiaries. While the Appellants' advisers speculated as to what WTC would do to realize its anticipated profit, that speculation is not relevant to whether the subsidiaries were dealing at arm's length in fact with the Appellants at the time the Property was transferred to the Appellants.

[192] Unlike in *Keybrand Foods*, the arrangements between WTC and the Appellants were driven by economics. Those economics were determined with reference to the Property in the subsidiaries and the expected tax liabilities in the subsidiaries. The fact that taxes are a consideration in dealings between parties is not in and of itself indicative of the parties not dealing at arm's length. I would venture to say that taxes are likely an important consideration in many commercial and non-commercial arrangements.

[193] The actions of the subsidiaries after December 29, 2006 were dictated by WTC consistent with the economic interests of WTC, which were to preserve its expected profit by eliminating the tax liabilities in the subsidiaries (or at least to give the impression to the Minister that that was the case).

[194] The Appellants were confident that they were protected from any actions that WTC might take in the subsidiaries after December 29, 2006 because they could put the shares in the subsidiaries to WTC. In short, the Appellants and WTC had separate interests and the transactions were structured so as to realize upon and protect those interests.

[195] WTC used the Property in the subsidiaries to discharge its obligation under the share put agreements to pay to the Appellants the purchase price for the shares in the subsidiaries. While this may have been contemplated by all the parties involved in the transactions prior to the execution of the share put agreements, at the time the Property was transferred to the Appellants, the transactions required to accomplish this were under the control of WTC. The share put agreement simply stated that "[t]he Purchase Price for the Shares shall be paid by the Purchaser delivering a certified cheque or by electronic transmission of immediately available funds to a Canadian bank designated by the Vendor in the amount of the Purchase Price at Closing". WTC satisfied this obligation by executing assignments and directions in favour of the Appellants in relation to property it had in turn acquired from the subsidiaries.

[196] The fact that the Appellants implemented the series of transactions required to place the proceeds of the sale of the farmland in the subsidiaries and agreed to enter into the share put agreements knowing that they would likely be paid by WTC using funds in the subsidiaries is not in and of itself evidence that the Appellants and the subsidiaries were not dealing at arm's length at the time the Property was transferred. Pre-sale reorganizations are not unusual in share sale transactions and one might reasonably expect a vendor of property to be indifferent as to the source from which the purchase price of the property is paid provided that it is legal.

[197] The fact that the Appellants agreed to transactions presented by WTC on a take-it-or-leave-it basis is also not in and of itself evidence that that the Appellants and the subsidiaries were not dealing at arm's length at the time the Property was transferred. The terms of many commercial arrangements are dictated by one party to the arrangement (for example, renting a car). Accepting stipulated terms and entering into arrangements based on those terms is not in and of itself evidence of non-arm's length dealings. The question (again) is whether in accepting the

stipulated terms the party was acting in its own separate interests and that was clearly the case here based on all the evidence.

[198] The Court in *Remai Estate* held that the existence of ordinary commercial dealings is not a separate requirement of the legal tests for determining arm's length[92] but it is also true, as recognized in *Keybrand Foods*, that extraordinary terms warrant scrutiny. Here, the risks and rewards of the transactions were allocated as between WTC and the Appellants by the share put agreements and each party obtained an economic return. The fact that the economic return was determined with reference to a tax liability in the subsidiaries does not alter this conclusion.

[199] The Respondent placed a great deal of emphasis on the tax motivation of the Appellants and in particular the motive of the Appellants to avoid the payment of tax. In *Eyeball Networks*, Noël C.J. summarizes the law regarding motive:

> The law is clear that an intent to avoid the payment of outstanding taxes is not a prerequisite for the application of subsection 160(1), but an improper motive, if present, can inform the way in which the Court views the transactions and assesses their impact. . . .[93]

[200] The Appellants did nothing to avoid the payment of tax by the subsidiaries. The Appellants simply sold their shares in the subsidiaries to WTC. WTC took steps to avoid the payment of tax by the subsidiaries.

[201] WTC did seek to profit from the arrangements by taking steps to reduce the tax liabilities in the subsidiaries. The Appellants obtained more for their shares than one might in theory expect given the tax liabilities because WTC took on the tax risk associated with owning the subsidiaries. For its own reasons, WTC valued the tax liabilities of the subsidiaries at an amount less than the actual amount of the liabilities.

[202] WTC's offer to the Appellants was premised on it being able to take steps to reduce the tax liability of the subsidiaries. The commercial transactions were such that the risk relating to the tax liability of the subsidiaries clearly fell on WTC as the purchaser of the subsidiaries. The Appellants represented and warranted that the disclosure of the assets and tax liabilities of the subsidiaries in the share put agreements was accurate as of December 29, 2006, but nothing more.

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[92] Paragraphs 33 and 34.
[93] Paragraph 39.

[203] In light of the foregoing, I conclude that the Appellants and the subsidiaries were dealing at arm's length at the time of the transfer of the Property from the subsidiaries to the Appellants on December 31, 2006 and therefore the condition in paragraph 160(1)(c) for the application of paragraphs 160(1)(d) and (e) is not met.

[204] The conclusion that the arm's length test in the preamble precludes pursuing the Appellants under subsection 160(1) is in my view consistent with the fact that WTC assumed the tax risk when it purchased the subsidiaries. Given that there was a transfer of the Property from the subsidiaries to WTC after the time that WTC was deemed to have acquired legal control of the subsidiaries, one might reasonably have expected the CRA to pursue WTC for the tax liability of the subsidiaries. In my view, that approach would have been consistent with the fact that WTC assumed the tax risk and controlled the movement of the Property from the subsidiaries to the Appellants.

[205] Notwithstanding my conclusion on arm's length dealings, to be complete, I will also address the application of the rule in paragraph 160(1)(e) in the circumstances.

[206] Paragraph 160(1)(e) provides that where the conditions in part one are met, the transferor and transferee are jointly and severally, or solidarily, liable to pay under the ITA the lesser of two amounts:

> (i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and
>
> (ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

[207] Subparagraph 160(1)(e)(i) requires a determination at the time the Property was transferred of the fair market value of the Property and of the consideration given for the Property.

[208] I have previously concluded that the time the Property was transferred is the time that the movement of the rights in the Property from the subsidiaries to the Appellants was complete. There is no dispute regarding the fair market value of the Property at that time. There is a dispute over the consideration given for the Property.

The Respondent submits that to reduce liability under subparagraph 160(1)(e)(i), the consideration must be given by the transferee to the transferor.

[209] At the risk of being accused of reading words into the ITA, in my view the words "consideration given for the property", when read in the context of the entire subsection, can only mean consideration given *by the transferee* for the property regardless of who receives that consideration. I will endeavor to explain my reasons for this conclusion.

[210] Subsection 160(1) is imposing a liability on the transferee for the transferor's liability under the ITA. This can only be done in a fair and reasonable manner if the transferee receives credit for the consideration given for the property that triggers the liability. Otherwise, the subsection is imposing liability on the transferee even though the transferee is out of pocket by the amount of the consideration. I can identify no rational reason why the legislature would look to achieve such a result without clear and unambiguous words to that effect.

[211] The explicit scheme of the ITA is to impose tax liability on a taxpayer based on the circumstances of that taxpayer. Subsection 160(1) is an exception to that scheme. The legislature has chosen to use broad language in part one to capture transfers of property that may <u>not</u> occur directly between a transferor and a transferee and the text of paragraph 160(1)(e) must be read with that context and the general scheme of the ITA in mind.

[212] *Kieboom* provides a good example. If Mrs. Kieboom had paid the corporation fair market value consideration for the class A common shares issued to her by that corporation then it would have been absurd to fix Mrs. Kieboom with a liability under subsection 160(1) because she did not give the consideration to Mr. Kieboom. Statutory provisions must be interpreted to avoid absurd results if a reasonable alternative interpretation is available.

[213] The Appellants have given consideration for the Property in the form of the shares in the subsidiaries. This consideration was given by the Appellants to WTC because that was dictated by the terms of the commercial arrangements between the Appellants and WTC. The broad text of part one happens to capture these arrangements because the Property was originally in the subsidiaries. Paragraph 160(1)(e) ensures that the Appellants are not held liable under the subsection by giving full credit for the consideration paid for the Property.

[214] The Respondent submits that this interpretation defeats the purpose of subsection 160(1). While I agree that the Federal Court of Appeal has stated that "the object and spirit of subsection 160(1), is to prevent a taxpayer from transferring his property to his spouse [or to a minor or non-arm's length individual] in order to thwart the Minister's efforts to collect the money which is owned [*sic*] to him"[94], consistent with the dictum of the Supreme Court of Canada in *Canada Trustco* reproduced earlier, this broad statement of purpose should not be used to override the text of paragraph 160(1)(e) read in context.

[215] In *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63 ("Copthorne"), Justice Rothstein stated that the "object, spirit or purpose of the provisions has been referred to as the 'legislative rationale that underlies specific or interrelated provisions of the Act'"[95] and that the "object, spirit or purpose can be identified by applying the same interpretive approach employed by this Court in all questions of statutory interpretation—a 'unified textual, contextual and purposive approach'".[96]

[216] In other words, the purpose of a provision is determined by reference to the statute interpreted according to accepted rules of statutory interpretation. The only difference is that the aim of the exercise is not to determine the meaning of the text per se but to determine the legislative rationale of the provision (i.e., the object, spirit or purpose of the provision). Justice Rothstein cautions, however, that "determining the rationale of the relevant provisions of the Act should not be conflated with a value judgment of what is right or wrong nor with theories about what tax law ought to be or ought to do".[97]

[217] Since there is circularity in the notion that purpose is to be determined by reference to text, context <u>and</u> purpose, one might conclude that purpose is determined primarily by reference to the text and context of the provision taking into account however the text, context and purpose of any other relevant provisions.

[218] In any event, in my view, on the basis of a textual, contextual and purposive analysis of subsection 160(1), the underlying rationale of subsection 160(1) is to allow the Minister to recover from non-arm's length (and certain other) transferees of property a tax debt of the transferor regardless of how the transfer is accomplished but only to the extent of that tax debt and only to the extent that the transferee has paid consideration for the transferred property that is less than the value of the

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[94] *Medland* at paragraph 14.
[95] Paragraph 69.
[96] Paragraph 70.
[97] Paragraph 70.

transferred property. My interpretation of subparagraph 160(1)(e)(i) is entirely consistent with that rationale.

[219] I note that the purpose or rational of subsection 160(1) is not fulfilled here not because my interpretation of subparagraph 160(1)(e)(i) is at odds with that purpose but because the Minister chose not to pursue WTC for the taxes owed by its subsidiaries. The Minister cannot make up for this decision by disregarding the text of paragraph 160(1)(e) read in context, thereby extending the already considerably broad reach of subsection 160(1) to the detriment of transferees that do pay consideration for property caught by the broad words of part one.

[220] The Appellants submit that the consideration given by the Appellants for the Property is equal to the purchase price paid by WTC for the shares in the subsidiaries. The Appellants submit that this price is by definition the fair market value of the consideration because it is objective evidence of the highest price a willing buyer would pay for the shares in a market not exposed to undue pressures composed of willing buyers and sellers that deal at arm's length. I agree.[98]

[221] The valuation adopts a lower value for the shares based on general financial considerations. However, the fair market value test is flexible and recognizes that parties acting in their own interests is the best gauge for determining value. Here, the Appellants and WTC agreed on a price that reflected each party's independent (arm's length) interests and therefore the price reflects the fair market value of the transaction. Consequently, the liability of the Appellants under subparagraph 160(1)(e)(i) is nil and therefore the liability of the Appellants under paragraph 160(1)(e) is nil.

[222] With respect to subparagraph 160(1)(e)(ii), the Appellants submit that in accordance with the decision of the Tax Court in *Gestion Yvan Drouin Inc. v. R.* (2000), [2001] 2 CTC 2315 (TCC) and in other cases,[99] the onus to establish the tax liability of the subsidiaries falls on the Minister and that that onus has not been met.

[223] The Respondent counters that the facts concerning the tax debt of the subsidiaries are not exclusively or peculiarly within the knowledge of the Minister and therefore the circumstances do not warrant a reversal of the onus of proof. However, even if the onus falls on the Minister, the evidence is sufficient to conclude that the deductions for capital cost allowance claimed by the subsidiaries for their

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[98] See, generally, Canada *(Attorney General) v. Nash*, 2005 FCA 386 at paragraph 8 and *D'auteuil Lumber Co. Ltd. v. MNR*, [1970] Ex CR 414.
[99] *Lavie v. R.*, 2006 TCC 655, *Cappadoro v. R.*, 2012 TCC 267 and *Mignardi v. R.*, 2013 TCC 67.

2006 taxation years were properly disallowed by the Minister and therefore the subsidiaries were liable for the tax on the income allocated to them by the general partnerships.

[224] In *Gaucher v. R.* (2000), [2001] 1 CTC 125 (FCA), Rothstein J.A. (as he then was) stated:

> When the Minister issues a derivative assessment under subsection 160(1), a special statutory provision is invoked entitling the Minister to seek payment from a second person for the tax assessed against the primary tax payer. That second person must have a full right of defence to challenge the assessment made against her, including an attack on the primary assessment on which the second person's assessment is based.[100]

[225] The Federal Court of Appeal reiterated this position in *Canada v. 594710 British Columbia Ltd.*, 2018 FCA 166 ("*594710*") as follows:

> Holdco appealed the section 160 assessment to the Tax Court on several grounds, one of which was to deny that Partnerco had a tax liability. In an appeal of a section 160 assessment, Holdco is entitled to challenge the assessment issued to Partnerco on any grounds that would have been open to Partnerco if it had appealed directly (*Gaucher v. R.*, 2000 D.T.C. 6678, [2001] 1 C.T.C. 125 (Fed. C.A.)).[101]

[226] Neither of these cases addresses the burden of proof in an appeal concerning an assessment under subsection 160(2). To address the question of which party bears the burden of proof, it is important to understand the distinction between the burden of proof and the general rule in income tax appeals that the facts assumed by the Minister in making or confirming an assessment of tax are to be accepted as correct unless disproved, shown to be irrelevant or not supportive of the assessment, or shown not to have been made at the time of the assessment or confirmation.[102]

[227] Over 70 years ago in *Johnston v. MNR*,[103] four of five judges of the Supreme Court of Canada held that the burden of proof in a tax appeal falls on the taxpayer.[104]

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[100] Paragraph 7.
[101] At paragraph 5.
[102] Regarding assumptions of fact, see *Minister of National Revenue v. Pillsbury Holdings Ltd*., [1965] 1 Ex CR 676 ("Pillsbury Holdings"), *R. v. Anchor Pointe Energy Ltd.*, 2003 FCA 294 ("Anchor Pointe 2003") at paragraphs 29 to 41 and *R. v. Anchor Pointe Energy Ltd*., 2007 FCA 188 ("Anchor Pointe 2007") at paragraph 28.
[103] [1948] SCR 486 ("Johnston").
[104] This confirmed an earlier judgment of the Court addressing onus in *Anderson Logging Co. v. The King* (1924), [1925] SCR 45 at page 49, affirmed without comment on this issue at *Rex v. Anderson Logging Co.* (1925), [1926] AC 140.

To understand the basis for this decision, it is necessary to consider the statutory context in which it was made.

[228] The *Income War Tax Act*[105] (the "IWTA") provided that a taxpayer could appeal an assessment of taxes imposed under that statute to the Exchequer Court. However, to do so, the taxpayer first had to follow the procedure in the IWTA.

[229] Under the objection procedure in the IWTA, a taxpayer dissatisfied with "the amount at which he is assessed, or who considers that he is not liable to taxation" could appeal to the Minister setting out the reasons for the appeal and the relevant facts. On receiving a notice of appeal, the Minister was obliged to consider it, either affirm or amend the appealed assessment, and notify the taxpayer of his decision in writing.

[230] If the taxpayer was not satisfied with the Minister's decision, the taxpayer could appeal to the Exchequer Court by mailing a notice of dissatisfaction to the Minister, who was obliged to reply by admitting or denying the facts alleged and confirming or amending the assessment. Within two months after making the reply, the Minister was obliged to send documents relevant to the appeal, including the notice of dissatisfaction and the reply, to the Exchequer Court. Thereafter, the matter was deemed to be an action in the Exchequer Court as an appeal.[106]

[231] In this context, Rand J., writing for three of the five members of the Court, explained the rationale for placing the burden of proof on the taxpayer as follows:

> The appeal raises also the question of onus. By section 58 any person objecting to the amount at which he is assessed **may appeal to the Minister**. If the Minister rejects the appeal, under section 60(1) a Notice of Dissatisfaction may be served on the Minister and the taxpayer shall in it state that he desires his appeal to be set down for trial. By subsection (2),
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> > The appellant shall forward therewith a final statement of such further facts, statutory provisions and reasons which he intends to submit to the Court in support of the appeal as were not included in the aforesaid Notice of Appeal, or in the alternative, a recapitulation of all facts, statutory provisions and reasons included in the aforesaid Notice of Appeal, together with such further facts,

[105] RSC 1927, c. 97 as amended.
[106] See the IWTA sections 58 to 69.

> provisions and reasons as the appellant intends to submit to the Court in support of the appeal.

Section 61 provides for security for costs by "the party appealing". Section 62 calls for a reply by the Minister to the Notice of Dissatisfaction. Section 63(1) requires the Minister within two months from the making of the reply to cause to be transmitted to the Exchequer Court (*a*) the income tax return, (*b*) the Notice of Assessment, (*c*) the Notice of Appeal, (*d*) the decision of the Minister, (*e*) the Notice of Dissatisfaction, (*f*) the reply of the Minister, and (*g*) all other documents and papers relative to the assessment under appeal. Subsection (2) declares "**the matter shall thereupon be deemed to be an action in the said Court ready for trial or hearing**: Provided, however, that should it be deemed advisable by the Court or a judge thereof that pleadings be filed, an order may issue directing the parties to file pleadings.". . .

Under section 65(1) "any fact or statutory provision not set out in the said notice of appeal or notice of dissatisfaction may be pleaded or referred to in such manner and upon such terms as the Court or a judge thereof may direct"; and by subsection (2) "the Court may refer the matter back to the Minister for further consideration".

Notwithstanding that it is spoken of in section 63(2) as an action ready for trial or hearing, **<u>the proceeding is an appeal from the taxation</u>; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged**. **<u>Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant</u>.** If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, **but the onus was his <u>to demolish the basic fact</u> on which the taxation rested.**

. . .

I am consequently <u>unable</u> to accede to the view that the proceeding takes on a basic change where pleadings are directed. **<u>The allegations necessary to the appeal depend upon the construction of the statute and its application to the facts</u>** and **<u>the pleadings are to facilitate the determination of the issues</u>**. **It must, of course, be assumed that the Crown, as is its duty, <u>has fully disclosed to the taxpayer the precise findings of fact</u> and rulings of law which have given rise to the controversy**. But unless the Crown is to be placed in the position of a plaintiff or appellant, **I cannot see how pleadings shift the burden from what it would be without them**. Since the taxpayer in this case must establish something

> it seems to me that **that something is the existence of facts or law showing an error in relation to the taxation imposed on him**.[107]

[Emphasis and double emphasis added.]

[232] Rand J. adopts two related but distinct propositions.

[233] The first proposition addresses the burden of proof. Rand J. observes that under the scheme of the IWTA, the taxpayer commenced the process by an administrative appeal to the Minister regarding the correctness of the assessment. If the taxpayer is not satisfied with the Minister's decision, the taxpayer can take the steps that will ultimately deem the appeal of the assessment to be an action in the Exchequer Court.

[234] Rand J. holds that notwithstanding that the matter is deemed to be an action in the Exchequer Court, under the scheme of the ITWA, it is an appeal of the assessment. Since the assessment is based on the Minister's view of the facts, the taxpayer is challenging the Minister's position regarding the facts and therefore the taxpayer must establish the existence of facts "showing an error in relation to the taxation imposed"[108] on the taxpayer.[109] In other words, the appeal procedure under the IWTA placed the burden of proof on the taxpayer and that burden was directed at the facts that underpinned the Minister's assessment.[110]

[235] Rand J. and Kellock J. both hold that, unlike in other civil proceedings, the pleadings do not determine or change the assignment of the burden of proof. Rather, the pleadings define the issues and facilitate the determination of those issues.[111] This continues to be the case today.[112]

[236] The second proposition addresses what are today known as the assumptions of fact. Rand J. holds that the Minister's position regarding the facts on which the

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[107] Pages 488 to 490.

[108] At page 490.

[109] Rand J. also states that the taxpayer may challenge the Minister's position regarding the law, but the burden of proof is not relevant to a question of law.

[110] Today, subsection 169(1) of the ITA allows a taxpayer that has filed a notice of objection to an assessment to appeal to the Tax Court to have the assessment vacated or varied. Hence, unlike the IWTA, the ITA explicitly frames the dispute as an appeal of the assessment. Section 12 of the *Tax Court of Canada Act* also refers to the process under subsection 169(1) as an appeal.

[111] Per Rand J. at pages 489 and 490 and Kellock J. at page 492. In dissent, Locke J. took a contrary position.

[112] Zelinski *v. R.* (2001), [2002] 1 CTC 2422 (TCC), affirmed without reasons in 2002 FCA 330 ("*Zelinski*") at paragraph 4 and *Beima v. R.*, 2016 FCA 205 ("*Beima*") at paragraph 17.

assessment of tax is based must be taken as correct provided that those facts are disclosed to the taxpayer.[113]

[237] The factual target presented by the assumptions of fact differentiates tax appeals from other civil appeals. In a civil appeal such as a claim for negligence, the plaintiff must establish to the standard of proof[114] the facts that support the allegation of negligence. The material facts are therefore set out in the document that initiates the proceeding (e.g., the plaintiff's statement of claim) and it is those facts that must be admitted by the defendant or proven by the evidence to the standard of proof if the plaintiff is to succeed.

[238] In a tax appeal, the appellant has the burden of proof as in a civil claim of negligence but the facts on which that burden is primarily (but not necessarily exclusively) focussed are the assumptions of fact on which the assessment of tax is based. Although the notice of appeal of the taxpayer in a general procedure appeal must set out the material facts on which the taxpayer relies,[115] in the words of Rand J. and Kellock J. in *Johnston*, the pleadings merely define the issues and facilitate the determination of those issues.[116]

[239] In summary, Rand J.'s two propositions place the burden of proof on the taxpayer and aim that burden of proof at the assumed fact or facts on which the assessment of tax is based.[117] Rand J. states that "the onus was [the taxpayer's] to demolish the basic fact on which the taxation rested".[118]

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[113] The Minister is required by the *Tax Court of Canada Rules (General Procedure)* (the "General Rules") and the *Tax Court of Canada Rules (Informal Procedure)* to plead all assumptions of fact.
[114] Technically, to avoid summary judgment or a successful motion of non-suit, the plaintiff must first meet an evidential burden. Once that threshold is met as determined by the judge, the plaintiff must establish the facts alleged by the plaintiff to the standard of proof.
[115] If the facts pleaded by the taxpayer require clarification so that the Minister can properly address those facts in discovery, under subsection 52(1) of the General Rules, the Minister may demand (and, in the event of non-compliance, the Court may order) particulars.
[116] See, also, *Zelinski* and *Beima*, and Sidney N Lederman, Alan W. Bryant and Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis, 2018) ("SLB") at paragraphs 2.51 to 2.53.
[117] Some commentators have suggested that an assumption of fact can be viewed as a statement that if not rebutted leads to a negative inference that the fact stated is correct. I prefer to think of a valid assumption of fact as simply a fact that if relevant to and supportive of the assessment of tax must be disproved by the taxpayer to a balance of probabilities. If the taxpayer agrees with a particular assumption of fact (and I have yet to hear a case in which the taxpayer disagrees with all the Minister's assumptions of fact), the fact becomes part of the factual record on which the appeal is decided. While agreement with an assumption of fact could be described as an admission of that fact by the taxpayer, I see no need to further complicate matters with that description since assumptions of fact are already taken as true subject to rebuttal.
[118] Page 489.

[240] Because an appeal to the Tax Court is a civil (as opposed to a criminal) matter, the standard of proof that the taxpayer must meet to discharge the burden of proof is a "balance of probabilities", which since the decision of the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53 ("*McDougall*") has been a single standard rather than a variable standard.[119] Decisions issued prior to *McDougall* that addressed the standard of proof in civil cases must now be read in light of *McDougall*.

[241] One further proposition from *Johnston* is important to note. In *Johnston*, the taxpayer did not plead in opposition to the "basic fact on which the taxation rested", which appeared only in the reply as a denial. While Rand J. noted that Mr. Johnston should have raised the fact asserted by the taxpayer in the claim, he concluded that this was not a bar to addressing Mr. Johnston's appeal because "it is incumbent on the Court to see that the substance of a dispute is regarded and not its form."[120]

[242] Rand J.'s focus on the substance of the appeal is particularly important in appeals under the Court's informal procedure because taxpayers pursuing such appeals often do not plead material facts but instead simply address at the hearing of the appeal the assumptions of fact pleaded by the Minister. Rand J.'s approach requires the Court to address the substance of the dispute, which is done by reference to the assumptions of fact and the evidence, if any, that addresses those assumptions.

[243] In general, the above principles have been followed by the Exchequer Court and by the Federal Court of Appeal in numerous cases including *Pillsbury Holdings*, *Pollock (J.A.) v. Canada*, (1993) [1994] 1 CTC 3 (FCA) ("*Pollock*"), *R. v. Loewen*, 2004 FCA 146 ("*Loewen*"), *Anchor Pointe 2003*, *Orly Automobiles Inc. v. R.*, 2005 FCA 425, *Anchor Pointe 2007* and *House v. R.*, 2011 FCA 234 ("*House*").

[244] As already stated, Rand J.'s proposition that the burden of proof is on the taxpayer is related to, but independent of, his proposition that the Minister's assumptions of fact are to be taken as correct. This was acknowledged by the Federal Court of Appeal in *Anchor Pointe 2007*:

> Unpleaded assumptions have no effect on the burden of proof one way or the other.[121]

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[119] See, also, *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at paragraph 94, and SLB at paragraphs 5.73 to 5.76.
[120] Page 489.
[121] Paragraph 28.

[245] In many tax appeals, the facts assumed by the Minister and stated in the reply are the only facts supporting the assessment of the taxpayer, particularly in appeals under the Court's informal procedure. The Minister may choose to lead evidence in support of assumptions of fact even though they are treated as true. However, this is a purely tactical decision made by the Minister.

[246] If the Minister has not assumed a fact in making or confirming the assessment of tax, or if an assumption of fact that was so made is not pleaded in the reply, the burden of proof remains on the taxpayer because the taxpayer is appealing the correctness of the assessment of tax. However, the "missing" fact has no bearing on the outcome of the appeal unless there is evidence on the record of the fact that is accepted by the judge.[122]

[247] Consequently, if the Minister wishes to rely on a fact in issue[123] that is not a valid assumption of fact[124] and that was not admitted or established by evidence introduced through the cross-examination of the appellant or the appellant's witnesses, the Minister must ensure that there is evidence on the record to support that fact. This is a purely tactical burden on the Minister.[125]

[248] A taxpayer is not required to prove facts or lead evidence on facts simply because they are alleged as facts in the notice of appeal. As stated by L'Heureux-Dubé J. in *Hickman Motors Ltd. v. Canada*,[126] "[t]he initial burden is only to 'demolish' the <u>exact</u> assumptions made by the Minister <u>but no more</u>".[127] Similarly, in *R. v. Placer Dome Canada Limited*,[128] the Supreme Court of Canada stated that "the taxpayer bears the burden of establishing that the factual findings upon which the Minister based the assessment are wrong" and "[t]he taxpayer bears the burden of displacing the Minister's factual assumptions, . . . ".[129] Consequently, once the pleadings are closed, the taxpayer may choose not to present evidence addressing facts pleaded in the notice of appeal in favour of directly addressing the assumptions of fact stated in the reply.

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[122] See *Pollock* at paragraph 20.
[123] As determined by the pleadings.
[124] A valid assumption of fact is one that is pleaded by the Minister and that was made by the Minister when assessing the tax in issue or confirming the assessment of tax in issue. See, generally, *Loewen* at paragraph 8 and paragraph 49(1)(d) of the General Rules.
[125] The Supreme Court of Canada describes a tactical burden in *R. v. Darrach*, 2000 SCC 46 at paragraph 50.
[126] [1997] 2 SCR 336 ("Hickman Motors").
[127] *Hickman Motors* at paragraph 92.
[128] 2006 SCC 20, [2006] 1 SCR 715 ("Placer Dome").
[129] Ibid., paragraphs 25 and 26. These comments are made in the context of the *Mining Tax Act* (Ontario) but the Court states in paragraph 25 that "[t]his is the same burden that applies under the *Income Tax Act*."

[249] A taxpayer is not required to lead evidence to disprove a fact on which an assessment of tax is based if the fact is not a valid assumption of fact and there is no evidence on the record to establish the existence of that fact.[130] The absence of the fact is, in and of itself, sufficient for the taxpayer to discharge the burden of proof.[131] This proposition rests on the fact that it would be patently unfair to the taxpayer to require the taxpayer to prove a negative.

[250] The foregoing discussion may suggest that the burden of proof is of critical importance in tax appeals. In fact, in most cases, an application of the burden of proof is not required at all to resolve a tax appeal. As stated by the authors of SLB: "In civil proceedings, the persuasive burden [burden of proof] does not play a part in the decision-making process if the trier of fact can come to a determinate conclusion on the evidence. . . ."[132]

[251] If, however, at the end of the hearing, the assumptions of fact and the evidence leave the judge in a state of uncertainty, the burden of proof/standard of proof is applied to determine the outcome.[133] Properly understood, therefore, the burden of proof is a tie-breaking mechanism that is applied at the conclusion of the case as part of the decision-making process.

[252] In *Hickman Motors*, L'Heureux-Dubé J. refers to the "initial onus" on the taxpayer. As well, it is common to have counsel for the appellant refer to the onus on the Minister to establish a fact pleaded in the reply that is not an assumption of fact.

[253] The "onus" being referred to in this manner is best explained as a procedural onus. That is to say, in tax appeals, as a general rule, the taxpayer as the appellant presents his, her or its case first and the Minister presents her case after the taxpayer.[134] However, only the taxpayer has a burden of proof with respect to the

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[130] *McLarty* at paragraph 64, which must be read together with the observation of the Tax Court judge at 2005 TCC 55, paragraph 51. Justice Rothstein's reference to "onus" is as explained below.
[131] *Ibid.,* and Andersen *v. R.*, 2020 TCC 51 at paragraphs 25 to 30.
[132] SLB at paragraph 3.14. See, also, *Robins v. National Trust Co*., [1927] AC 515. The majority decision in *Hickman Motors* is a good example of the Court reaching a determinate conclusion based on the evidence.
[133] SLB at paragraph 5.60. Given the role of the burden of proof, it makes no sense to suggest that the burden can shift or change during the course of the hearing or that a particular burden of proof can be split between the parties. A burden of proof is allocated at the outset by the substantive law and remains in place throughout the proceeding (SLB at paragraphs 3.11 and 3.46 to 3.53). Each party may bear a separate burden of proof as in an appeal of an assessment of tax and of a penalty. In addition, there may be subsidiary issues, such as whether a notice of assessment was received or a timely notice of objection was filed by the taxpayer, which raise separate burdens (evidential or of proof). See, for example, subsection 244(10) of the ITA and *Mpamugo v. R.*, 2017 FCA 136.
[134] Subsection 135(2) of the General Rules explicitly provides for this, but the same approach applies in appeals under the Court's informal procedure subject in each case to the judge directing otherwise, for example, in an appeal that

correctness of an assessment of tax and the evidential burden that typically accompanies such a burden of proof has no practical role in tax appeals.[135]

[254] A reference to an onus that cannot be either an evidential burden or a burden of proof based on the legal qualities of those burdens[136] is merely a convenient way of describing the procedure by which a party presents evidence in support of their case. As explained in a document titled "Burden of Proof" published by Savitribai Phule Pune University (formerly, the University of Pune) in India:

> There is a distinction between 'burden of proof' and 'onus of proof'. The burden of proof lies on the person who has to prove the fact and it never shifts, whereas the onus of proof shifts from one party to another. Such shifting of onus is [a] continuous process in the evaluation of evidence.[137]

[255] I agree with the propositions in *Eisbrenner v. R.*[138] that the standard of proof in tax appeals should be balance of probabilities (not *prima facie* case) and that the burden of proof placed on the taxpayer by *Johnston* does not shift to the Minister.[139] However, I am of the view that only the Supreme Court of Canada can address those issues as they arise from explicit comments in the decision of L'Heureux-Dubé J. in *Hickman Motors*, which were subsequently accepted as authoritative by the Federal Court of Appeal in *Amiante Spec Inc v. R.*[140] at paragraph 15 and *House* at paragraphs 30 and 31.[141] I reach this conclusion notwithstanding that on January 14, 2021, the Supreme Court of Canada refused leave to appeal in *V. Ross Morrison v. R.* (SCC Docket No. 39359).

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addresses only the assessment of a penalty: *R. v. Taylor* (1984), [1985] 1 FC 331, [1984] CTC 436, 84 DTC 6459 (FCTD) at page 441 (CTC) and *Pompa (G.) v. Canada* (1994), [1995] 1 CTC 466, 94 DTC 6630 (FCAD) at page 470 (CTC).

[135] Since the taxpayer has the burden of proof and since that burden of proof is in substance directed at the assumptions of fact, it makes no sense for the Minister to assert at the end of the taxpayer's case that the taxpayer has not satisfied their evidential burden, which is a lower standard than a burden of proof (see SLB at paragraph 3.7). The Minister can simply choose to present no evidence and in argument state that the taxpayer has not met the burden of proof. See, also, *Barkwill v. R.*, 2013 FCA 34, in which the Minister brought a motion of non-suit but on appeal the Court decided the case on the basis that the taxpayer had not demolished the Minister's assumptions of fact (i.e., had not met the burden of proof).

[136] The law of Canada recognizes only two burdens: the burden of proof and the evidential burden: *R. v. Fontaine*, 2004 SCC 27. Each has its own distinct legal characteristics: SLB at paragraphs 3.2 to 3.25. For example, a burden of proof can never be an "initial onus" because it is applied at the conclusion of the case to determine the outcome where a determinate decision cannot be made based on the assumptions of fact and the evidence.

[137] The document can be found at http://studymaterial.unipune.ac.in:8080/jspui/bitstream/123456789/5338/1/topic%2016.pdf at page 1.

[138] 2020 FCA 93 ("Eisbrenner").

[139] See also my analysis in *Morrison v. R.*, 2018 TCC 220 at paragraphs 91 through 97.

[140] 2009 FCA 139.

[141] *Canada v. Craig*, 2012 SCC 43 ("*Craig*") at paragraph 18 and *Agracity Ltd. v. R.*, 2020 TCC 91 at paragraph 105.

[256] With respect, I do not agree with the various propositions in *Eisbrenner* that are contrary to the dictum of the majority in *Johnston*, of L'Heureux-Dubé J. in *Hickman Motors* and of the unanimous Court in *Placer Dome*[142]—in particular, the propositions in *Eisbrenner* that suggest a different role for the taxpayer's pleadings than stated in *Johnston* and adopted in other decisions of the Federal Court of Appeal[143] and the propositions that shift the focus of the burden of proof away from the Minister's assumptions of fact toward the facts pleaded by the taxpayer.[144]

[257] I provide the foregoing analysis not only to address the issues in these appeals but also in the hope that—for the benefit of all taxpayers as well as the Minister—the Supreme Court of Canada will (in the not-too-distant future) revisit and clarify the roles of the burden of proof and assumptions of fact in tax appeals.[145]

[258] With respect to the assessment of the Appellants under subsection 160(2), the foregoing analysis establishes that since the Appellants are appealing the correctness of assessments under subsection 160(2), the burden of proof falls on the Appellants.

[259] However, that finding does not address the separate issue of whether the Minister can rely on assumptions of fact to establish the income tax liability of the subsidiaries. In *Transocean Offshore Ltd. v. The Queen*, 2005 FCA 104 ("Transocean"), the Court stated:

> 34 The Judge in *Redash Trading Inc.* also said this about the factual assumptions that were not within the knowledge of the appellant (at paragraph 31):
>
> > [. . .] Perceptions of fact based upon facts which lie within the peculiar knowledge of the Respondent [the Crown] which are paraded as assumptions in the Reply to the Notice of Appeal, which are beyond the knowledge of the Appellant [Redash] and which are not easily or practicably deniable by the Appellant without extraordinary effort and expenditure, should not be deemed to be facts simply because they are not specifically negated by the Appellant's evidence. Assumptions of fact in such circumstances cannot displace the need of the Respondent to produce evidence to substantiate or support that which may be relevant to counter or affect the Appellant's factual presentation.

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[142] *Ibid.*
[143] For example, *Zelinski* and *Beima*.
[144] In *R. v. 984274 Alberta Inc.*, 2020 FCA 125 at paragraph 55, Noël C.J. stated that a decision of the Federal Court of Appeal that "manifestly overlooked" an established line of cases was not authoritative.
[145] See, generally, Kroft and Pelletier, "Onus of Proof in Canadian Tax Litigation: Is There Uncertainty and Confusion in the Law?", January 2021, Tax Disputes and Resolution Centre on Taxnet Pro.

> 35 This statement recognizes the general principle that, in a tax appeal, the Crown's factual assumptions are taken as true unless they are rebutted (see *Pollock*, cited above). It also recognizes that this general principle, like all general principles, may have exceptions. The justification for the general principle is that the taxpayer knows or has the means of knowing all of the facts relevant to an income tax assessment. … **However, there may be situations where fairness would require that no onus be placed on a taxpayer to rebut a specific factual assumption made by the Crown**. **One example might be a fact that is solely within the knowledge of the Crown**. However, I do not see this as such a case.
>
> [Emphasis added.]

[260] Unlike in *Transocean*, in my view, it would be patently unfair to the Appellants if the Minister could assume facts in support of the post-sale tax liability of the subsidiaries when the Appellants cannot reasonably be expected to know those facts.

[261] The Respondent submits that the Appellants could have asked for the 2006 T2 tax returns of the subsidiaries. While it is the case that under the terms of the share put agreement the Appellants could request a copy of the 2006 T2 income tax returns of the subsidiaries, the tax returns would not have provided any information to the Appellants about the transactions that gave rise to the capital cost allowance claimed in those tax returns and the Appellants had no right or reason to obtain that information. Consequently, this is a case in which fairness dictates that the Minister not be allowed to rely on assumptions of fact to prove the post-sale tax liability of the subsidiaries. Accordingly, I will assess that tax liability of the subsidiaries based solely on the evidence on the record.

[262] Mr. Nerland displayed a striking lack of knowledge and/or memory regarding the transactions in the subsidiaries following their purchase by WTC. However, Mr. Nerland did make several statements that when combined with the documentary evidence seriously call into question the efficacy of the tax strategy of the subsidiaries following their sale to WTC.

[263] With respect to the purported purchase by MCI and by 471 of computer software for an $8 million promissory note, Mr. Nerland testified in chief that "I don't recall there ever being any payments made. Any interest charged was accrued, but not remitted."[146] Mr. Nerland also stated that there were never any payments in cash, that MCI never had a bank account and that if there were any payments in any

[146] Lines 27 and 28 of page 337 of the Transcript.

of the entities they would have been paid by cheque on the lawyer's bank account.[147] In cross-examination, Mr. Nerland stated that "I just don't think earnest money ever changed hands"[148] with the vendor of the software.

[264] Mr. Nerland also agreed with counsel for the Respondent that from 2007 to 2012 MCI and 471 each reported no revenue[149] and that to his knowledge and recollection no marketing reports were ever prepared by the entity purportedly marketing the software for MCI and 471.[150]

[265] Finally, Mr. Nerland testified in cross-examination that he was not provided with any books and records of the subsidiaries[151] and that he repeatedly confirmed with Robert MacRae that the subsidiaries had no employees and no liability for GST.[152]

[266] In my view, the only reasonable inference to be drawn from Mr. Nerland's testimony and the relevant exhibits is that the purported purchase of computer software by the subsidiaries was not in furtherance of a *bona fide* business venture undertaken by the subsidiaries but was solely to allow the subsidiaries to claim capital cost allowance in their T2 tax returns to reduce the tax liability of the subsidiaries resulting from the sale of the farmland. Accordingly, I find that the computer software was not acquired for the purpose of gaining or producing income as required by paragraph 1102(1)(c) of the ITR and therefore no capital cost allowance can be claimed by the subsidiaries in respect of the computer software.

[267] I also find that the debt purportedly evidenced by the $8 million promissory notes was not incurred by the subsidiaries for the purpose of gaining or producing income from the computer software as required by subparagraph 20(1)(c)(ii) of the

[147] Lines 3 to 10 of page 338 of the Transcript.
[148] Lines 13 and 14 of page 388 of the Transcript.
[149] The income statements of MCI and 471 are at tab 32 of Exhibit AR-1 and tab 24 of Exhibit AR-2, respectively.
[150] Lines 5 to 8 of page 393 of the Transcript.
[151] Lines 12 to 13 of page 380 of the Transcript.
[152] Lines 26 to 28 of page 370 and lines 1 to 8 of page 371 of the Transcript. [152] Lines 27 and 28 of page 337 of the Transcript.
[152] Lines 3 to 10 of page 338 of the Transcript.
[152] Lines 13 and 14 of page 388 of the Transcript.
[152] The income statements of MCI and 471 are at tab 32 of Exhibit AR-1 and tab 24 of Exhibit AR-2, respectively.
[152] Lines 5 to 8 of page 393 of the Transcript.
[152] Lines 12 to 13 of page 380 of the Transcript.
[152] Lines 26 to 28 of page 370 and lines 1 to 8 of page 371 of the Transcript.

ITA and therefore the interest on the notes was not deductible in computing the income of the subsidiaries.

[268] Although there are other relevant facts such as MCI not having a bank account even after purportedly commencing the software business, in my view, the absence of any revenue over 6 years (2007 to 2012), the absence of any marketing reports from the purported marketer of the software, the absence of any employees of the subsidiaries and the existence of an agreement[153] by MCI purportedly selling the software to a numbered company in 2007 that Mr. Nerland could not explain provide more than adequate support for both of the above conclusions.

[269] The final issue is whether the GAAR applies to redetermine the tax consequences of the series of transactions in order to deny a tax benefit that would otherwise result, directly or indirectly, from the series.

[270] The Appellants and the Respondent agree that the relevant series of transactions commences with the incorporation of the subsidiaries and ends with the closing of the sale of the shares in the subsidiaries by the Appellants to WTC (the "series"). On the basis of the PASFs and the evidence, the transactions comprising the series are as follows:

A. The incorporation of the subsidiaries.

B. The transfer of the Appellants' interests in the general partnerships to the subsidiaries and the associated elections by the Appellants and their subsidiaries under subsection 85(1) of the ITA.

C. The increase of the stated capital of the shares held by the Appellants in the subsidiaries.

D. The entering into by the Appellants and WTC of the share put agreements on December 29, 2006.

E. The exercise of the puts by the Appellants on December 31, 2006.

F. The assignment and/or transfer of the Property by the subsidiaries to WTC.

G. The assignment and transfer by the Appellants to WTC of the shares in the subsidiaries.

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[153] Exhibit R-12.

H. The assignment and/or transfer by WTC of approximately 80% of the Property to the Appellants in satisfaction of the purchase price of the shares in the subsidiaries.

[271] The interpretation and application of the GAAR is informed and governed by the dictum of the Supreme Court of Canada in three cases: *Canada Trustco*, *Lipson v. Canada*, 2009 SCC 1 ("*Lipson*") and *Copthorne*.[154] The following principles are taken from these three cases.

[272] The GAAR was enacted as a provision of last resort in order to address abusive tax avoidance.[155] The GAAR was not intended to introduce uncertainty in tax planning.[156]

[273] The use of words like "misuse" and "abuse" in the GAAR does not imply that the actions of a taxpayer in utilizing the provisions of the ITA in a creative way is morally offensive.[157] Taxpayers are entitled to select courses of action or enter into transactions that will minimize their tax liability.[158] A GAAR decision must therefore be approached cautiously keeping in mind that "Parliament must . . . be taken to seek consistency, predictability and fairness in tax law".[159]

[274] A GAAR analysis requires me to answer three questions:[160]

A. Was there a tax benefit?

B. Was the transaction giving rise to the tax benefit[161] an avoidance transaction?

C. Was the avoidance transaction giving rise to the tax benefit abusive?

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[154] A fourth case decided by the Supreme Court of Canada applies the approach adopted in *Canada Trustco*.
[155] Canada *Trustco* at paragraph 21 and *Copthorne* at paragraph 66.
[156] *Canada Trustco* at paragraph 21.
[157] *Copthorne* at paragraph 65.
[158] Copthorne at paragraph 65.
[159] *Copthorne* at paragraph 67. See, also, *Canada Trustco* at paragraphs 41 and 42.
[160] *Copthorne* at paragraph 33.
[161] The transaction, or the series of which the transaction is a part, may give rise to the tax benefit: *Canada Trustco* at paragraph 18 and *Copthorne* at paragraph 39.

[275] The existence or non-existence of a tax benefit is a question of fact.[162] The burden of proof is on the taxpayer to refute the existence of a tax benefit.[163] The burden of proof functions in the same way as it does in the appeal of any assessment of tax.[164]

[276] The definition of tax benefit requires me to determine whether the taxpayer reduced, avoided or deferred tax or another amount payable under the ITA, or increased a refund of tax or other amount payable under the ITA.[165] The magnitude of a tax benefit is not relevant to the existence of a tax benefit.[166]

[277] In some cases, the tax benefit will be clear, such as where the taxpayer claims a deduction against taxable income.[167] In other cases, the determination may require a comparison of the taxpayer's situation with an alternative arrangement.[168] If a comparison is used, the alternative arrangement must be one that might reasonably have been carried out but for the existence of the tax benefit.[169]

[278] The definition of "avoidance transaction" includes reference to legal tests such as the meaning of "series of transactions" and "primarily for bona fide purposes other than to obtain the tax benefit" and requires facts to assess whether the legal tests are met.[170] These legal tests were explained in *Canada Trustco* and, in the case

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[162] Canada *Trustco* at paragraphs 19 and 63, *Copthorne* at paragraph 34 and *Lipson* at paragraph 22. In my view, the reference by the Court to a question of fact is simply emphasizing that the existence of a tax benefit is a fact-intensive determination. However, since there is a mandatory statutory definition of "tax benefit" and the facts will determine whether that definition is satisfied, technically the issue is a question of mixed fact and law: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748 ("Southam") at paragraph 35. As a result, the Minister cannot assume that there is a tax benefit without identifying the fact or facts that give rise to that tax benefit (e.g., a reduction of tax or an increase in a refund). Similarly, if a court misapplies the definition, for example by failing to consider a reasonable alternative arrangement, that would be an error of law since it goes to the legal test imposed by the definition of tax benefit.

[163] Canada *Trustco* at paragraph 63, *Lipson* at paragraph 21 and *Copthorne* at paragraph 34.

[164] Canada *Trustco* at paragraph 63.

[165] Canada *Trustco* at paragraph 19. See, also, the analysis of Justice Sommerfeldt in *Rogers Enterprises (2015) Inc. v. R.*, 2020 TCC 92 at paragraphs 28 to 37, with which I agree.

[166] Canada *Trustco* at paragraph 19.

[167] Canada *Trustco* at paragraph 20.

[168] *Canada* Trustco at paragraph 20 and *Copthorne* at paragraph 35.

[169] *Copthorne* at paragraph 35.

[170] In paragraph 63 of *Canada Trustco*, the Court states:

> The initial obligation is on the taxpayer to "refute" or challenge the Minister's factual assumptions by contesting the existence of a tax benefit or by showing that a *bona fide* non-tax purpose primarily drove the transaction [a fact relevant to the determination of the existence or non-existence of an avoidance transaction under the legal meaning of that phrase].

of "series of transactions", in *Copthorne*. Consequently, the existence or non-existence of an avoidance transaction is a question of mixed fact and law.[171]

[279] The burden of proof is on the taxpayer to refute the assumptions of fact on which the existence of an avoidance transaction is premised.[172] The burden of proof functions in the same way as it does in the appeal of any assessment of tax.[173]

[280] A transaction includes an arrangement or event.[174] A transaction will be an avoidance transaction if the transaction, or the series of transactions of which the transaction is a part, results in a tax benefit and the transaction is not undertaken primarily for a non-tax purpose.[175]

[281] If a transaction has both a tax purpose and a *bona fide* non-tax purpose, then I must objectively assess the relative importance of the driving forces of the transaction to determine the primary purpose of the transaction.[176] This in turn requires me to weigh the evidence to determine whether it is reasonable to conclude that the transaction was not undertaken or arranged primarily for a *bona fide* non-tax purpose.[177] In particular, I must examine the relationships between the parties and the actual transactions that were executed between them.[178] Subsection 245(3) does not permit the recharacterization of a transaction for the purpose of determining whether or not it is an avoidance transaction.[179]

[282] The "primarily for a non-tax purpose" standard is not a business purpose test; the expression "non-tax purpose" has a broader scope than the expression "business purpose".[180] For example, transactions undertaken or arranged primarily for (*bona fide*) family or investment purposes are not avoidance transactions.[181]

[283] For each avoidance transaction, I must consider whether the transaction would result in abusive tax avoidance when viewed, where appropriate, in the context of the series of transactions of which the transaction is a part.[182] This analysis requires

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[171] Southam at paragraph 35.
[172] *Canada Trustco* at paragraphs 63 and 66 (items 1(2) and 2) and *Lipson* at paragraph 21.
[173] *Canada* Trustco at paragraph 63.
[174] *Canada Trustco* at paragraph 22.
[175] *Canada* Trustco at paragraphs 21 and 22 and *Copthorne* at paragraph 39.
[176] *Canada Trustco* at paragraph 28 and *Copthorne* at paragraph 59.
[177] *Canada* Trustco at paragraph 29.
[178] *Canada* Trustco at paragraph 30.
[179] *Canada Trustco* at paragraphs 30 and 31.
[180] *Canada Trustco* at paragraphs 32 and 33.
[181] *Canada Trustco* at paragraph 33.
[182] *Canada Trustco* at paragraph 43, *Lipson* at paragraph 34 and *Copthorne* at paragraph 71.

a single, unified approach to the textual, contextual and purposive interpretation of the provisions of the ITA in issue[183] in order to determine whether there was abusive tax avoidance.[184] The GAAR may only be applied to deny a tax benefit when the abusive nature of the transaction is clear.[185]

[284] The heart of the analysis lies in a contextual and purposive interpretation of the provision(s) of the ITA in issue and the application of the properly interpreted provision(s) to the facts of the case.[186] The central question is, having regard to the text, context and purpose of these provision(s), whether the transaction frustrates or defeats the object, spirit or purpose of those provision(s).[187]

[285] The Minister is required to identify the object, spirit or purpose of the provisions that are claimed to have been frustrated or defeated.[188] As well, the Minister must clearly demonstrate that the avoidance transaction is an abuse of the ITA and the benefit of the doubt is given to the taxpayer.[189]

[286] To perform the analysis required by subsection 245(4), the first step is to identify the object, spirit and purpose of the provision or provisions giving rise to the tax benefit.[190] The second step is to determine whether the transaction falls within or frustrates that purpose.[191] The first step is a question of law[192] while the second step is a question of fact.[193] The overall inquiry is a mixed question of fact and law.[194]

[287] The object, spirit and purpose of a provision, or of interrelated provisions, is the rationale that underlies that provision or those provisions.[195] This rationale is determined by applying the same textual, contextual and purposive approach used to interpret all statutory provisions but with particular focus on the object, spirit and purpose (rationale) of the provision(s).

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[183] I have avoided the use of the phrase "relied upon" since a tax strategy may involve reliance on one or more provisions or it may involve circumvention of one or more provisions, or both.
[184] *Canada Trustco* at paragraph 43 and *Copthorne* at paragraph 73.
[185] *Canada* Trustco at paragraph 50 and *Copthorne* at paragraph 68.
[186] *Canada Trustco* at paragraph 44 and *Lipson* at paragraph 25.
[187] *Canada Trustco* at paragraph 49.
[188] *Canada Trustco* at paragraph 65.
[189] *Copthorne* at paragraph 72.
[190] *Canada Trustco* at paragraph 44.
[191] *Canada Trustco* at paragraph 44.
[192] *Canada Trustco* at paragraph 44.
[193] *Canada Trustco* at paragraph 46.
[194] *Canada Trustco* at paragraph 44.
[195] *Canada Trustco* at paragraph 45 and *Copthorne* at paragraph 69.

[288] The statutory language must be respected and should be interpreted according to its well-established legal meaning (assuming there is one) although the contextual and purposive analysis may add nuance to that meaning.[196] Subsection 245(4) does not rewrite the provisions of the ITA.[197]

[289] The search is for the rationale that underlies the text of the provision(s) recognizing that the rationale may not be captured by the bare meaning of the text.[198] The determination of the rationale of a provision, or of interrelated provisions, must not be conflated with a value judgment of what is right or wrong nor with theories of what tax law ought to be or ought not to do.[199] As well, it must be recognized that where a provision confers a tax benefit, the conferring of that tax benefit may serve a variety of independent and interlocking purposes.[200]

[290] The second step requires close examination of the factual context in which the avoidance transaction occurs to determine whether the transaction defeated or frustrated the object, spirit or purpose (rationale) of the provision(s) in issue.[201] Whether a provision requires a particular circumstance to apply (such as the existence of "economic substance") is determined by reference to the proper interpretation of the provision.[202] Consequently, a finding that there is an absence of a particular circumstance (such as "economic substance" or an economic or commercial purpose to a transaction) is merely part of the factual context and does not in and of itself lead to a conclusion that an avoidance transaction results in abusive tax avoidance.[203]

[291] On the other hand, "abusive tax avoidance may be found where the relationships and transactions as expressed in the relevant documentation lack a proper basis relative to the object, spirit or purpose of the provisions that are purported to confer the tax benefit, or where they are wholly dissimilar to the relationships or transactions that are contemplated by the provisions".[204]

[292] More generally, abusive tax avoidance will be found (1) where the transaction achieves an outcome the statutory provision was intended to prevent; (2) where the

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[196] *Canada Trustco* at paragraph 54.
[197] *Canada Trustco* at paragraph 54.
[198] *Copthorne* at paragraph 70.
[199] *Copthorne* at paragraph 70.
[200] *Canada Trustco* at paragraph 53.
[201] *Canada Trustco* at paragraphs 55 and 59.
[202] *Canada Trustco* at paragraph 57.
[203] *Canada Trustco* at paragraphs 57 to 60.
[204] *Canada Trustco* at paragraph 60.

transaction defeats the underlying rationale of the provision; or (3) where the transaction circumvents the provision in a manner that frustrates or defeats its object, spirit or purpose.[205]

[293] With these principles in mind, I will address the application of the GAAR to the transactions comprising the series.

[294] The first question that must be addressed is whether there is a tax benefit. The Respondent's position in the replies is as follows:

> The series of transactions was undertaken in order to obtain a tax benefit, namely avoiding joint and several liability under subsection 160(1) ITA for the tax debt of [the subsidiary] and therefore, of an amount payable under the ITA.

[295] The written submission of the Respondent states:

> Were it not for the tax benefit in this case, there would have been no reason to leave more cash in the Subsidiaries than an amount corresponding to 54% of their accrued tax liability for the purposes of the transaction contemplated with Wilshire. The purchase price received by the Appellants for the Subsidiaries did not have to transit through Wilshire as it was paid with assets indirectly in their possession throughout the 2006 taxation year. The indirect transfer of such assets through Wilshire, was made on paper and only for a fraction of a second. The arrangement which might reasonably have been carried out but for the existence of the tax benefit would have involved a distribution of the funds to the Appellants by way of dividend, a transfer for no consideration for subsection 160(1) purposes.[206]

[296] The premise of the Respondent's position is that if the property in the subsidiaries had been paid as a dividend to the Appellants, section 160 would have applied to the Appellants because a dividend is a transfer of property without consideration. This hypothetical necessarily assumes that the Appellants retained ownership of the subsidiaries and that the subsidiaries did not pay their taxes when due (or ever).

[297] The series included the incorporation of the subsidiaries so they could be sold to WTC. The possibility of an intercorporate dividend existed only if the subsidiaries existed and the subsidiaries existed only so they could be sold to WTC.

[298] The role of the subsidiaries as single purpose corporations created to be sold to WTC precluded a dividend of any kind as that would be offside the terms of the

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[205] *Canada Trustco* at paragraph 45, *Lipson* at paragraph 40 and *Copthorne* at paragraph 72.
[206] Paragraph 110 of the Respondent's Written Representations.

sale for which the subsidiaries were expressly created. Similarly, if there was no proposal to create and sell the subsidiaries to WTC, then there would be no subsidiaries and no possibility of an intercorporate dividend that attracts section 160. Rather, the income and cash in the partnerships would be allocated and distributed directly to the Appellants.

[299] The subsidiaries were either created and sold to WTC, or they were not created. These two circumstances are not alternatives but are mutually exclusive. Consequently, the intercorporate dividend arrangement posited by the Respondent is not a reasonable alternative to what in fact happened.

[300] By way of contrast, in *Copthorne*, the taxpayer could have undertaken the desired reorganization in at least two different ways. The Court observed:

> An amalgamation was necessary for Copthorne to achieve the outcomes it sought in 1993 when it undertook the transactions between VHHC Holdings, Copthorne I and Big City—a simplification of the corporate structure, and the ability to shelter anticipated gains with losses within the four amalgamating corporations. The only question was whether the amalgamation would be horizontal or vertical. As the Tax Court judge pointed out, the vertical amalgamation would have been the simpler course of action. It was only the cancellation of PUC that would arise upon a vertical amalgamation that led to the sale by Copthorne I of its shares in VHHC Holdings to Big City. To use the words of Professor Duff, "but for" the difference in how PUC was treated, a vertical amalgamation was reasonable.[207]

[301] I conclude based on the assumptions of fact and all the evidence that the tax benefit identified by the Respondent does not exist.

[302] Although this dispenses with the GAAR, for the sake of completeness, I will address whether there is an avoidance transaction and whether there is abusive tax avoidance. I do this in part because the series did give rise to at least one identifiable tax benefit—the increase in the adjusted cost base in the shares of the subsidiaries and the resultant reduction in the capital gain on the sale of those shares—and transactions in the series were undertaken to obtain that tax benefit.

[303] A transaction is an avoidance transaction if a tax benefit results directly or indirectly from the transaction or from a series of transactions of which the transaction is a part. A transaction is excepted from the definition if the transaction

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[207] At paragraph 37.

may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.

[304] The Appellants submit that they undertook or arranged the transactions in the series (the "Transactions") in order to sell the subsidiaries to WTC to make an economic gain. Although I accept that the overall objective was economic gain, the series does include transactions the sole purpose of which was to obtain a tax benefit.

[305] For example, the special resolutions dated December 28, 2006 effecting an increase in the stated capital of the shares in the subsidiaries[208] were for the sole purpose of increasing the adjusted cost base to the Appellants of their shares in the subsidiaries.[209] This increase in turn eliminated the capital gain that would otherwise have been realized by the Appellants on the sale of their shares in the subsidiaries.[210]

[306] The Respondent's position is essentially that because almost ten years after the series the Minister assessed the Appellants rather than WTC under section 160, the purpose of the Transactions was to obtain the benefit of section 160 not applying to the Appellants.

[307] However, the evidence does not support the conclusion that a Transaction or the series itself, was undertaken or arranged to avoid section 160, which is "the tax benefit" identified by the Respondent. The Respondent acknowledges that "the primary purpose that must be determined is the primary purpose at the time the transactions were undertaken" determined without the benefit of hindsight.[211]

[308] The evidence amply supports the conclusion that the Appellants undertook the Transactions to effect the sale of their shares in the subsidiaries to WTC on a tax efficient basis. There is no evidence to suggest that in 2006 the Appellants considered the application of section 160 and took steps to avoid the application of that provision.

[309] The evidence does suggest that the Transactions were undertaken by the Appellants so that the Appellants could sell the subsidiaries for an economic gain.

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[208] Tab 16 of Exhibit AR-1 and tab 12 of Exhibit AR-2.
[209] Subsection 84(1) and paragraph 53(1)(b) of the ITA.
[210] The decision of the Federal Court of Appeal in *626468 New Brunswick Inc. v. R.*, 2019 FCA 306, which held in addressing almost identical transactions that safe income does not include a tax liability that exists immediately prior to the payment of the first dividend, has an impact on the efficacy of this planning. For amounts received after November 8, 2006, this decision also has an impact on the cost of a share received as a stock dividend under subparagraph 52(3)(a)(ii) of the ITA.
[211] Paragraph 114 of the Respondent's Written Representations.

For reasons known only to the Minister, in 2016 the Minister chose to assess the Appellants rather than WTC under section 160. This unilateral action by the Minister provides no basis for concluding that in 2006 the Appellants undertook the Transactions to avoid section 160.

[310] The language of subsection 245(3) focusses on the purposes of a transaction and expressly excludes a transaction where the transaction was undertaken primarily for *bona fide* purposes other than to obtain the tax benefit. The tax benefit can only be the tax benefit alleged by the Minister as the taxpayer cannot defend against a GAAR assessment without knowing the tax benefit that is in issue.

[311] Since none of the Transactions were undertaken or arranged to avoid section 160—the tax benefit alleged by the Minister—and since there is no basis in fact to conclude that the transactions in the series were not *bona fide* transactions, it is reasonable to conclude that the Transactions were undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit alleged by the Minister. This is so even if the Transactions obtained other tax benefits that are not alleged by the Minister.

[312] Even if tax benefits that are not alleged by the Minister did give rise to a finding of one or more avoidance transactions, the required analysis under subsection 245(4) is resolved easily because—as one would expect given the focus of the Minister's GAAR challenge—the Minister has not identified any basis for concluding that an avoidance transaction undertaken or arranged to obtain a tax benefit other than the tax benefit alleged by the Minister constitutes abusive tax avoidance.

[313] Returning to the analysis of the GAAR in the context of the tax benefit identified by the Minister, the last step in the analysis is to consider whether the Transactions—which the Respondent asserts are all avoidance transactions because they were undertaken to avoid the application of section 160—result in abusive tax avoidance. Notwithstanding that I have found that the tax benefit identified by the Minister did not exist and that none of the Transactions is an avoidance transaction even if that tax benefit did exist, I will consider the third stage of the GAAR analysis.

[314] The Respondent submits that the object, spirit and purpose of section 160 is "to protect the Minister's ability to collect tax debts by preventing taxpayers from transferring their property to a related person in order to thwart the Minister's ability

to collect a tax debt".[212] The Respondent cites several judgments of the Federal Court of Appeal to support this proposition and goes on to review other judgments to the same effect. However, only one of these judgments—*594710*—addressed the application of the GAAR.

[315] In *594710*, the Court states:

> It is first necessary to determine the object, spirit or purpose of section 160 by conducting a textual, contextual and purposive interpretation of the Act.
>
> By its terms, the purpose of section 160 is to impose joint and several liability where a transfer of property occurs in the same taxation year that a tax liability arises or a later taxation year.[213]

[316] This statement of purpose was sufficient for the circumstances of that case because section 160 was circumvented by the triggering of a year-end to place the tax liability in a different (future) year from the transfer of property in issue. I do not believe that the Court of Appeal intended this to be an exhaustive and exclusive statement regarding the rationale of section 160.

[317] In *Eyeball Networks*, Noël C.J. identifies the purpose of subsection 160(1) as follows:

> . . . the purpose of subsection 160(1) is to protect the tax authorities against any vulnerability that may result from a transfer of property between non-arm's length persons for a consideration that is less than the fair market value of the transferred property. . . .[214]

[318] Unlike the purpose suggested by the Respondent, Noël C.J. adopts a statement of purpose that reflects not only the inclusionary language in part one but also the limitations included in the rules in part two.

[319] The Respondent alleges that all the Transactions were undertaken to circumvent section 160. Given the variety of transactions undertaken by the Appellants and the fact that those transactions avoid subsection 160(1) for various reasons (arm's length, consideration, etc.), and notwithstanding the helpful statement of purpose in *Eyeball Networks*, because the purpose of subsection 160(1) is a material component of the GAAR analysis, I must consider in detail the purpose

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[212] Paragraph 136 of the Respondent's Written Representations.
[213] Paragraphs 119 and 120.
[214] *Eyeball Networks* at paragraph 44.

of subsection 160(1) to ensure that the facts in issue are judged against an appropriate understanding of the purpose of the section. As stated in *Copthorne*, because the abusive nature of the transaction must be clear, the court, in carrying out an abuse analysis, must:

> . . . conduct an objective, thorough and step-by-step analysis and explain the reasons for its conclusion.[215]

[320] In determining the rationale of a provision, the Supreme Court did not mandate that the text of a provision be ignored. Quite the contrary, the Supreme Court stated that “the statutory language must be respected and should be interpreted according to its well-established legal meaning”.[216] While the Supreme Court did observe that a textual, contextual and purposive analysis may add nuance to an established legal meaning, it also stated that subsection 245(4) does not rewrite the ITA; it only requires that a tax benefit be consistent with the object, spirit and purpose of the provisions that are relied upon.[217]

[321] The Respondent’s description of purpose focusses only on the collection aspect of the subsection. The Respondent’s description of purpose implies that any transfer of property should be considered abusive if the transfer thwarts the Minister’s ability to collect a tax debt. However, this position does not take into consideration the broad inclusionary language in part one or the rules in part two.

[322] Part one includes two broad tests that determine whether the rules in part two apply.

[323] The first test in part one requires a transfer of property directly or indirectly in any manner whatever. I have found that the movement of approximately 82% of the Property from the subsidiaries to the Appellants constitutes a transfer of that property from the subsidiaries to the Appellants within the meaning of part one.

[324] The second test in part one requires that the transferee of the property be a current or future spouse or common-law partner, a non-arm’s length person or a person under 18 years of age.

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[215] Paragraph 68.
[216] *Canada Trustco* at paragraph 54.
[217] *Ibid.* The potential importance of the text of a provision is demonstrated by the Court’s analysis of subsection 87(3) in paragraphs 79 to 82 of *Copthorne*.

[325] The question of whether two persons deal at arm's length raises the application of further broad rules in the ITA including the residual rule that in any case where the specific rules do not apply, it is a question of fact whether two persons deal at arm's length.

[326] The Supreme Court has stated that the "provisions of the Income Tax Act pertaining to parties not dealing at arm's length are intended to preclude artificial transactions from conferring tax benefits on one or more of the parties".[218]

[327] The specific reason for using an arm's length test is determined by reference to the statutory context in which it is found. For example, in *Swiss Bank*, the Court observed that the arm's length test in a withholding tax provision that applied to interest provided "the assurance that the interest rate will reflect ordinary commercial dealing between parties acting in their separate interests".[219]

[328] The factual arm's length standard requires consideration of all the relevant circumstances to determine whether two persons deal at arm's length.[220] The standard often employs the "useful criteria that have been developed and accepted by the courts" but other considerations may come into play.[221]

[329] The arm's length standard is a flexible standard that seeks to determine the true nature of the relationship between two or more persons. The flexible nature of the arm's length standard is such that the manipulation of, or artificiality of, circumstances can be taken into consideration when applying the standard.

[330] The arm's length test in part one defines a group of persons who are potentially subject to the rules in part two. The purpose of the arm's length test can be described from two different perspectives.[222]

[331] First, subject to a transferee being one of the other persons described in part one, the arm's length test excludes from the scope of subsection 160(1) transfers of property between persons where there is assurance that market forces drive the terms

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[218] *McLarty* at paragraph 43.
[219] Page 1152 of *Swiss Bank*. See, also, *McLarty* at paragraph 43.
[220] *McLarty* at paragraph 61.
[221] *McLarty* at paragraph 62.
[222] Part one also explicitly captures transfers between current or future spouses and common-law partners and transfers to a person under 18. The identification of these individuals in part one addresses the same concerns as the arm's length test in part one.

and conditions of the transfer because those parties are not related and act in their separate interests.

[332] Second, the arm’s length test includes in the scope of subsection 160(1) transfers of property between persons where there is no assurance that market forces drive the terms and conditions of the transfer because those parties are related or do not act in their separate interests.

[333] Under part two, transfers that are captured by part one are tested to ensure that the consideration given for the property that is transferred is at least equal to the fair market value of that property. If the transferee does give fair market value consideration then, notwithstanding being caught by part one, the transferee is not subject to liability under subsection 160(1).

[334] In addition to vetting the consideration given by the transferee for the transferred property, consistent with the collection function of subsection 160(1), part two provides an absolute limit to the liability of a transferee. This limitation ensures that where the consideration given by the transferee is less than the fair market value of the transferred property (a “shortfall”), subsection 160(1) applies to the shortfall but only to the extent that there is an amount owing by the transferor under the ITA (a “liability”). The transferee can never be liable for more than the lesser of the shortfall and the liability.

[335] The shortfall represents an enrichment of the transferee because the transferee has given consideration that is less than the fair market value of the transferred property. Consequently, subsection 160(1) allows the Minister to collect amounts owed by a transferor under the ITA but only to the extent that the transferee is enriched by the transfer.

[336] The focus of the collection mechanism in subsection 160(1) is not the amount owing by the transferor but the terms of the transfer and whether those terms result in the enrichment of the transferee. Consistent with the collection function of the subsection, the amount owing by the transferor is simply a limit to the amount that may be recouped from the transferee.

[337] From this I conclude that the purpose or rationale of subsection 160(1) is to vet transfers of property between non-arm’s length (and certain other) persons and to collect from transferees the lesser of the amount owed by the transferor under the ITA and the amount by which the transferee is enriched by the transfer. The purpose

of subsection 160(1) is not, as suggested by the Respondent, to collect amounts owing by transferors so the Minister's collection actions are not thwarted.

[338] My statement of purpose is drawn from the text of subsection 160(1) read in its entire context and with regard to other indicators of legislative purpose (such as the intent suggested by the breadth of the phrases used in part one). The fact that the purpose that I have identified accords with the general mechanics of the subsection is not indicative that the purpose is based only on the text of the provision but is merely a reflection of the nature of the provision as a detailed rule with specified conditions.

[339] In this regard, it is important to recall that the Supreme Court of Canada has repeatedly recognized that the ITA is a particularly detailed statute and that while the GAAR may attenuate the focus on a textual interpretation,[223] the objective is not to ignore the text (or the features of a statutory provision that the text reveals) but to "determine the intent of the legislator having regard to the text, its context, and other indicators of legislative purpose."[224]

[340] In particular, the purpose of a provision must not be based on supposition or a belief that Parliament could not have intended a particular result.[225] Rather, purpose must be based on a unified, textual, contextual, and purposive approach to interpreting the specific provisions that give rise to the tax benefit. As stated in *Copthorne*:

> . . . It is necessary to remember that "Parliament must . . . be taken to seek consistency, predictability and fairness in tax law". . . .
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> . . .
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> . . . determining the rationale of the relevant provisions of the Act should not be conflated with a value judgment of what is right or wrong nor with theories about what tax law ought to be or ought to do.[226]

[341] In any event, the purpose (or rationale) of subsection 160(1) that I have identified is consistent with the purpose identified by Noël C.J. in *Eyeball Networks*

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[223] *Canada Trustco* at paragraph 13.
[224] *Canada Trustco* at paragraph 40.
[225] In *Remai Estate*, the Federal Court of Appeal rejected the Minister's statement of purpose because "[n]othing in the text of the provision supports this purpose" (at paragraph 58). Similarly, a finding of purpose cannot simply disregard material conditions imposed by the text.
[226] *Copthorne* at paragraph 67(quoting from *Canada Trustco* at paragraph 42) and at paragraph 70.

and with a description of subsection 160(1) found in a 1987 technical note issued by the Department of Finance:

> Subsection 160(1) provides that the non-arm's length transferee of property is jointly and severally liable to pay the taxes of the transferor in respect of the taxation year in which the property is transferred or any preceding year up to the excess of the fair market value of the property over the consideration given for the property.

[342] The next step in the analysis is to consider whether the avoidance transaction falls within or frustrates the purpose of subsection 160(1).

[343] Subsection 160(1) does not apply to the transactions in issue for two reasons. First, the subsidiaries and the Appellants were dealing at arm's length at the time of the transfer of the Property. Second, the consideration paid by the Appellants for the Property was at least equal to the fair market value of that property.

[344] The first reason is a result of the fact that on December 31, 2006 the Appellants exercised their put option and sold their shares in the subsidiaries to WTC, a person that dealt at arm's length with the Appellants. As a result, the ITA deemed WTC to acquire control of the subsidiaries at the beginning of December 31, 2006. The purchase by WTC of the shares in the subsidiaries was not contrived or artificial.

[345] WTC also had control in fact of the subsidiaries at the time it was deemed to acquire legal control of the subsidiaries under the ITA because Mr. Nerland was the sole officer and director of the subsidiaries at that time. The election/appointment of Mr. Nerland prior to the closing was agreed to by the Appellants and WTC—that is, by arm's length persons with separate interests in the arrangements. The election/appointment of Mr. Nerland was not to avoid the application of subsection 160(1) but to facilitate the execution of transactions in the subsidiaries that were in furtherance of WTC's separate interests as purchaser of the subsidiaries.

[346] The use of a share put option to undertake the sale of the shares in the subsidiaries may not be as common as the use of a share sale agreement. However, the put option served the purpose of giving WTC the opportunity to take actions in the subsidiaries while protecting the interests of the Appellants. There is nothing unusual or untoward about arm's length persons agreeing to transaction steps that further the separate interests of each of those persons. Nor is there anything unusual or untoward about one party to a transaction accommodating the requirements of the

other party to the transaction to achieve a result that satisfies the separate interests of each of those parties.

[347] In any event, the share put agreement did not affect the application of subsection 160(1). The arm's length relationship between the subsidiaries and the Appellants at the time the Property was transferred resulted from the sale of the shares in the subsidiaries to WTC and not from the use of a share put agreement. Once the Appellants exercised the puts on December 31, 2006, the commercial effect of the share put agreements was exactly the same as a share sale agreement.

[348] WTC used the Property in the subsidiaries to pay the purchase price of the shares to the Appellants. This resulted in there being an indirect transfer of property from the subsidiaries to the Appellants within the meaning of part one of subsection 160(1). However, this transfer was under the control of WTC and had no impact on the relationship between the subsidiaries and the Appellants at the time of the transfer (i.e., it did not circumvent the arm's length test in part one). The transfer did however satisfy one of the two tests in part one vis-à-vis the Appellants <u>and</u> vis-à-vis WTC.

[349] The transfer from the subsidiaries to WTC occurred at a point in time when WTC was not dealing at arm's length with the subsidiaries. Consequently, both conditions in part one were satisfied vis-à-vis the transfers of the Property from the subsidiaries to WTC and the rules in part two applied to that transfer.

[350] In the circumstances, subsection 160(1) was not frustrated or circumvented. The subsection applied exactly as intended. The transfer from the subsidiaries to the Appellants was not caught by part one but the transfer from the subsidiaries to WTC was caught by part one. Since at the time of the latter transfer WTC owned and controlled the subsidiaries and as such had taken on the full risk associated with the tax liabilities in the subsidiaries, the application of subsection 160(1) to WTC is entirely consistent with the purpose of subsection 160(1).

[351] Similarly, since at the time of the latter transfer the Appellants no longer owned or controlled the subsidiaries and had relinquished the risk of the tax liabilities in the subsidiaries because they had been sold to an arm's length person, the non-application of subsection 160(1) is also entirely appropriate.

[352] The appropriateness of these results in the circumstances is reinforced by the fact that the deal regarding the exchange of consideration for the transferred property was struck by two clearly arm's length parties—the Appellants and WTC. On the

other hand, WTC dictated the consideration that was paid by WTC to the subsidiaries for the transferred property, which points to that transfer as the appropriate transfer to challenge under subsection 160(1).

[353] The price offered for the shares in the subsidiaries by WTC on its face reflected WTC's assessment of the value of the subsidiaries with a tax strategy in place. The agreed upon price was based on the assets and liabilities of the subsidiaries and a particular assumption by WTC regarding the liabilities. There is nothing unusual about a purchaser making assumptions about the assets and liabilities of a target and striking a deal based on those assumptions. The correctness of such assumptions is not relevant, particularly when "correctness" can be determined only with the benefit of hindsight.

[354] Finally, I note that the application of the GAAR in this case could potentially have serious adverse implications for other arm's length share sale transactions where assets in the target are used in whole or in part to fund the purchase price of the shares. As stated in *Copthorne*:

> . . . Because of the potential to affect so many transactions, the court must approach a GAAR decision cautiously. . . .
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> . . .
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> For this reason, "the GAAR can only be applied to deny a tax benefit when the abusive nature of the transaction is clear". . . .[227]

[355] I therefore conclude that the GAAR does not apply to any of the Transactions.

[356] For the foregoing reasons, the appeals are allowed and the assessments of the Appellants under section 160 are vacated. The Appellants have 30 days from the date of judgment to make a single submission regarding costs and the Respondent has 15 days to respond to that submission. The submissions on costs shall not exceed ten pages for the Appellants and ten pages for the Respondent.

Signed at Ottawa, Canada, this 24th day of March 2021.

"J.R. Owen"

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[227] Paragraphs 67 and 68 of *Copthorne*.

Owen J.

APPENDIX A

2016-4783(IT)G

TAX COURT OF CANADA

BETWEEN:

DAMIS PROPERTIES INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

PARTIAL AGREED STATEMENT OF FACTS

The Appellant and the Respondent agree on the following facts and admit the authenticity of the documents in support thereof.[1] The parties are permitted to adduce additional evidence which is not contrary to these agreed facts.

1) Background

a) The Appellant is a corporation incorporated under the *Business Corporations Act* (Ontario). Its activities are the holding and management of real estate rental properties, as well as other real estate related activities.[2]

b) Before the transactions described herein, the Damis II Partnership (the "**Partnership**") was a partnership holding a 16 2/3% undivided interest in the Chinguacousy farm land in Brampton, Ontario (the "**Farm Land**"). Its partners were the Appellant (as to a 99.99% interest) and Damis Investments II-B Limited (as to a 0.01% interest).[3]

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1 References to *Tabs* represent references to the various tabs of the Joint Book of Documents prepared in support to the present Partial Agreed Statement of Facts.

2 *Tab 1*, Ontario Corporate Registry Documents related to the Appellant.

3 *Tab 2*, Financial Statements of the Partnership for its fiscal period ending May 31, 2006, p. 4 and 5.

2) Sale of the Farm Land

c) On January 11, 2006:

i. 1685471 Ontario Inc. ("**471**") was incorporated under the *Business Corporations Act* (Ontario) in contemplation of the sale of the Farm Land.[4]

ii. The Appellant subscribed for one Class B share of 471 for $1.00.[5]

iii. Howard Meyer was appointed as the sole director, president and secretary of 471.[6] He was also a director of the Appellant.

iv. 471 acquired, on a rollover basis pursuant to subsection 85(1) of the *Income Tax Act* (Canada) (the "**ITA**"), the Appellant's interest in the Partnership in exchange for 100 of its common shares. In light of the election filed, the Partnership interest had a fair market value of $4,000,000 and an adjusted cost base of $312,941, while the stated capital of the 100 common shares of 471 issued was in an amount of $312,941.[7]

d) On January 16, 2006, the Partnership disposed of its beneficial ownership of 16 2/3% in the Farm Land to an arm's length purchaser.[8] The proceeds of the sale, in an amount of $3,985,079, were deposited into the bank account of the Partnership.[9]

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[4] *Tab 3*, Ontario Corporate Registry Documents relating to 471's Incorporation and *Tab 4*, Resolutions Relating to the Incorporation of 471.

[5] *Tab 4*, Resolutions Relating to the Incorporation of 471.

[6] *Tab 3*, Ontario Corporate Registry Documents relating to 471's Incorporation, *Tab 4*, Resolutions Relating to the Incorporation of 471 and *Tab 5*, 471 Directors' and Officers' Registers.

[7] *Tab 6*, Corporate documents relating to the transfer of the Partnership to 471 and *Tab 7*, Form T2057 – Election on Disposition of Property by a Taxpayer to a Taxable Canadian Corporation.

[8] *Tab 8*, Agreement of Purchase and Sale relating to the Farm Land. The four files related to the present matters also involve a disposition of an undivided beneficial ownership interest in the Farm Land on January 16, 2006:
- *Sabel Investments II-A Limited* v. *HMQ*, 2016-4785(IT)G ("***Sabel***") – 16 2/3%;
- *Zagjo Holdings Limited* v. *HMQ*, 2016-4787(IT)G ("***Zagjo***") – 10%;
- *Devamm Investments II-A Limited* v. *HMQ*, 2016-4788(IT)G ("***Devamm***") – 10%; and
- *Microbjo Properties Inc.* v. *HMQ*, 2016-4789(IT)G ("***Microbjo***") – 16 2/3%.

[9] *Tab 9*, Worksheet showing the Partnership's banking transactions.

e) Following the disposition of the Farm Land, the Partnership reported net income of $3,701,853 for its fiscal period ending on May 31, 2006, calculated as follows:[10]

Gain on Sale of Farm Land	$3,650,880
Interest Income	$51,848
Bank Charges	($75)
Audit Fees	($800)
Net Income	$3,701,853

f) An amount of $3,701,332 (i.e. approximately 99.99% of $3,701,853) of the Partnership's income was allocated to 471 for its taxation year ending on December 31, 2006.[11]

3) Sale of 471 to Wilshire Technology Corporation

g) On December 22, 2006, Damis Holdings Limited deposited an amount of $4,132,886 with Goodman & Carr LLP ("**G&C**"), in trust for 471, in connection with the sale of 471's shares.[12]

h) On December 28, 2006, the stated capital of 471's common shares was increased by $3,079,000 (from $312,941 to $3,391,941) through a series of special resolutions by its sole shareholder, the Appellant.[13] A deemed dividend in the same amount resulted therefrom pursuant to subsection 84(1) ITA, and a like amount was added to the adjusted cost base of the shares of 471 by virtue of paragraph 53(1)(b) ITA.

i) On December 29, 2006, the Appellant and Wilshire Technology Corporation ("**Wilshire**"), a corporation incorporated under the laws of British Columbia, executed a Share Put Agreement whereby the Appellant had the right to require Wilshire to purchase the shares of 471 for $3,392,217 (the "**Put Option**").[14]

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10 *Tab 2*, Financial Statements of the Partnership for its fiscal period ending May 31, 2006, p. 2.

11 *Tab 10*, T2 Income Tax Return of 471 for its taxation year ending December 31, 2006.

12 *Tab 11*, Direction from Damis Holdings Limited and extract of the Partnership bank account statements.

13 *Tab 12*, Special Resolutions of the shareholders of 471 to increase its stated capital dated December 28, 2006.

14 *Tab 13*, Share Put Agreement between the Appellant and Wilshire dated December 29, 2006. Similar agreements were entered into with Wilshire in *Sabel*, *Zagjo*, *Devamm* and *Microbjo*. *Tab 14*, Email from Ruby Wong to Robert MacRae regarding the execution of the Share Put Agreement and requesting certain documentation from HTLN dated December 29, 2006.

j) Pursuant to paragraph 3.1(l) of the Share Put Agreement, the Appellant represented and warranted to Wilshire that the tax liability of 471 for its 2006 taxation year would not be more than $1,371,608.

k) Pursuant to paragraph 3.1(s) of the Share Put Agreement, the Appellant represented and warranted to Wilshire that 471 had no assets other than cash of at least $4,132,885.

l) On December 29, 2006, Howard Meyer also resigned as sole director, president and secretary of 471 and was replaced by Craig Nerland,[15] who also represented Wilshire for all relevant purposes in the present appeal.[16]

m) On December 31, 2006, the Appellant exercised its Put Option to cause Wilshire to purchase all of its shares of 471.[17]

n) On the same day, the Appellant assigned and transferred all of its shares in 471 to Wilshire.[18]

o) Immediately thereafter, 471 directed G&C to pay an amount of $3,392,217 to Wilshire.[19]

p) Immediately thereafter, in satisfaction of the 471 shares' purchase price, Wilshire directed G&C to pay an amount of $3,392,217 to the Appellant.[20]

q) Finally, still on December 31, 2006, 471 directed G&C to pay an amount corresponding approximately to the remainder of the funds deposited on December 22, 2006, ($740,668) to Hungerford Tomyn Lawrenson and Nichols (**"HTLN"**), in trust.[21] This amount was aggregated with payments relating to the transactions completed in *Sabel*, *Zagjo*, *Devamm* and *Microbjo* and further

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[15] Tab 15, Resolutions of 471 related to the resignation of Howard Meyer and the appointment of Craig Nerland as Director, President and Secretary of 471, Tab 16, Email from Linda Sterling to Ruby Wong attaching Form 1 – *Initial Return/Notice of Change* for 471 dated December 29, 2006 and Tab 5, 471 Directors' and Officers' Registers.

[16] See for example Tab 13, Share Put Agreement between the Appellant and Wilshire dated December 29, 2006, p. 15.

[17] Tab 17, Notice of Exercise of Put, Tab 18, Email from Ruby Wong regarding the exercise of put options dated December 31, 2006 and Tab 19, Email from Ruby Wong to counsel at HTLN confirming the completion of transactions related to the Share Put Agreement and requesting certain documentation dated December 31, 2006. Similar put options were also exercised to cause Wilshire to complete transactions in *Sabel*, *Zagjo*, *Devamm* and *Microbjo*.

[18] Tab 20, Transfer of shares of 471 from the Appellant to Wilshire.

[19] Tab 21, Direction from 471.

[20] Tab 22, Direction from Wilshire. In *Sabel*, *Zagjo*, *Devamm* and *Microbjo*, the purchase price of the corporations acquired by Wilshire was also exclusively satisfied through the assignment of the assets held by such corporations.

[21] Tab 21, Direction from 471.

transferred to a bank account at CIBC Bank & Trust Company (Cayman) Limited on January 8, 2007 (minus fees of $19,000 and a retainer of $25,000 charged by HTLN).[22]

r) From the disposition of the Farm Land to the time of conclusion of the Share Put Agreement, the sole assets held directly or indirectly by 471 were cash or short-term financial assets (in an amount of approximately $4,132,885, at the time of its sale).[23] 471 also had an accrued tax liability substantially all relating to the profit realized on the sale of the Farm Land (in an amount of approximately $1,371,608, as of December 29, 2006).[24]

s) On or around November 12, 2009, 471's T2 income tax return for its December 31, 2006 taxation year was filed.[25] An amount of $3,397,603, corresponding approximately to the amount assigned by 471 to Wilshire on December 31, 2006 (i.e., $3,392,217), was recorded as Accounts Receivable of 471 in Schedule 100 of its T2 income tax returns for its 2007 to 2012 taxation years.[26]

t) For its taxation year ending on December 31, 2006, 471 claimed a capital cost allowance ("**CCA**") deduction in the amount of $3,939,041 in respect of a class 12 software asset (the "**Software**"), thereby sheltering the entirety of its taxable income.

4) <u>Assessment Process</u>

u) On November 23, 2012, the Minister made a reassessment in respect of 471's taxation year ending on December 31, 2006, whereby it disallowed the CCA deduction claimed in respect of the Software.[27]

v) On June 3, 2016, the Minister assessed the Appellant pursuant to section 160 ITA in respect of 471's tax debt arising from its taxation year ending on December 31, 2006 (the "**160**

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[22] *Tab 23*, Documents, *en liasse*, showing amounts transferred to HTLN and to CIBC Bank & Trust Company (Cayman) Limited.

[23] *Tab 2*, Financial Statements of the Partnership for its fiscal period ending May 31, 2006, p. 3 and *Tab 13*, Share Put Agreement between the Appellant and Wilshire dated December 29, 2006, p. 8.

[24] *Tab 13*, Share Put Agreement between the Appellant and Wilshire dated December 29, 2006, p. 7.

[25] *Tab 10*, T2 Income Tax Return of 471 for its taxation year ending December 31, 2006.

[26] *Tab 24*, T2 Cortax Income Statements and Balance Sheets of 471 for its taxation years ending December 31, 2006 to December 31, 2012.

[27] *Tab 25*, Notice of Reassessment issued to 471 for its taxation year ending December 31, 2006.

Assessment").[28] 471's federal tax debt at that time was as detailed below:

Tax	Dividend Refund	Penalty	Interest	Total
$853,411	($25,839)	$140,687	$664,013	$1,632,272

w) The Appellant filed a Notice of Objection in respect of the 160 Assessment on June 13, 2016.[29]

x) The Appellant filed a Notice of Appeal in respect of the 160 Assessment on November 7, 2016, more than 90 days after the Notice of Objection was filed but prior to the confirmation of the 160 Assessment.

Toronto, in the Province of Ontario, this ~~5th~~ 6th day of March, 2020

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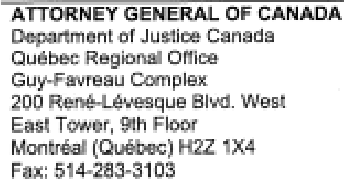
Solicitor for the Appellant

Montréal, in the Province of Quebec, this 5th day of March, 2020



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[28] Tab 26, Notice of 160 Assessment issued to the Appellant for 471's taxation year ending December 31, 2006.

[29] Tab 27, Notice of Objection of the Appellant.

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Tax Court of Canada
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APPENDIX B

2016-4789(IT)G

TAX COURT OF CANADA

BETWEEN:

MICROBJO PROPERTIES INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

PARTIAL AGREED STATEMENT OF FACTS

The Appellant and the Respondent agree on the following facts and admit the authenticity of the documents in support thereof.[1] The parties are permitted to adduce additional evidence which is not contrary to these agreed facts.

1) <u>Background</u>

a) The Appellant is a corporation incorporated under the *Business Corporations Act* (Ontario). Its activities are the holding and management of real estate rental properties.[2]

b) The Appellant's sole shareholder is Microbjo Holdings Inc. ("**MHI**").

c) Before the transactions described herein, the Irber II Partnership (the "**Partnership**") was a partnership holding a 16 2/3% undivided interest in the Chinguacousy farm land in Brampton, Ontario (the "**Farm Land**"). Its partners were the Appellant (as to a 99.99% interest) and Irber Investments II-B Limited (as to a 0.01% interest).[3]

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1 References to *Tabs* represent references to the various tabs of the Joint Book of Documents prepared in support to the present Partial Agreed Statement of Facts.

2 *Tab 1*, Ontario Corporate Registry Documents related to the Appellant.

3 *Tab 2*, Financial Statements of the Partnership for its fiscal period ending May 31, 2006, p. 6.

2) Sale of the Farm Land

d) On January 10, 2006:

i. Microbjo (Chinguacousy) Inc. ("**MCI**") was incorporated under the *Business Corporations Act* (Ontario) in contemplation of the sale of the Farm Land.[4]

ii. The Appellant subscribed for one Class B share of MCI for $1.00.[5]

iii. Michael Naiberg was appointed as the sole director, president and secretary of MCI.[6] He was also a director of MHI and the Appellant.

iv. MCI acquired, on a rollover basis pursuant to subsection 85(1) of the *Income Tax Act* (Canada) (the "**ITA**"), the Appellant's interest in the Partnership in exchange for 100 of its common shares. In light of the election filed, the Partnership interest had a fair market value of $4,000,000 and an adjusted cost base of $283,643, while the stated capital of the 100 common shares of MCI issued was in an amount of $283,643.[7]

e) On January 16, 2006, the Partnership disposed of its beneficial ownership of 16 2/3% in the Farm Land to an arm's length purchaser.[8] The proceeds of the sale, in an amount of $3,985,079, were deposited into the bank account of the Partnership.[9]

f) On April 28, 2006, the Partnership made a non-interest bearing loan in an amount of $3,254,012

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4 *Tab 3*, Ontario Corporate Registry Documents relating to MCI's incorporation and *Tab 4*, Resolutions Relating to the Incorporation of MCI.

5 *Tab 4*, Resolutions Relating to the Incorporation of MCI.

6 *Tab 3*, Ontario Corporate Registry Documents relating to MCI's incorporation, *Tab 4*, Resolutions Relating to the Incorporation of MCI and *Tab 5*, MCI Directors' and Officers' Registers.

7 *Tab 6*, Corporate documents relating to the transfer of the Partnership to MCI and *Tab 7*, Form T2057 – Election on Disposition of Property by a Taxpayer to a Taxable Canadian Corporation.

8 *Tab 8*, Agreement of Purchase and Sale relating to the Farm Land. The four files related to the present matters also involve a disposition of an undivided beneficial ownership interest in the Farm Land on January 16, 2006:
- *Damis Properties Inc.* v. *HMQ*, 2016-4783(IT)G ("***Damis***") – 16 2/3%;
- *Sabel Investments II-A Limited* v. *HMQ*, 2016-4785(IT)G ("***Sabel***") – 16 2/3%;
- *Zagjo Holdings Limited* v. *HMQ*, 2016-4787(IT)G ("***Zagjo***") – 10%; and
- *Devamm Investments II-A Limited* v. *HMQ*, 2016-4788(IT)G ("***Devamm***") – 10%.

9 *Tab 9*, Statement showing the calculation of the sales proceeds and evidence of deposit.

to MHI, with no specified terms of repayment, by issuing a cheque in the amount of $3,258,000.[10] Due to its 99.99% interest in the Partnership, a portion of $3,253,687 of the receivable belonged indirectly to MCI (the "**MHI Receivable**").

g) Following the disposition of the Farm Land, the Partnership reported net income of $3,617,565 for its fiscal period ending on May 31, 2006, calculated as follows:[11]

Gain on Sale of Farm Land	$3,581,002
Interest Income	$40,605
Interest and Bank Charges	($54)
Professional Fees	($3,988)
Net Income	$3,617,565

h) An amount of $3,617,203 (i.e. 99.99% of $3,617,565) of the Partnership's income was allocated to MCI for its taxation year ending on December 31, 2006.[12]

3) <u>Sale of MCI to Wilshire Technology Corporation</u>

i) On December 20, 2006, David Steinberg, the accountant of MCI,[13] exchanged emails with Paul Bleiwas, the Appellant's corporate counsel at Goodman & Carr LLP ("**G&C**"), regarding the purchase price computation in contemplation of the upcoming sale of MCI to Wilshire Technology Corporation ("**Wilshire**"), a corporation incorporated under the laws of British Columbia. The purchase price was based on the value of MCI's net assets, minus 54% of its accrued tax liability.[14]

j) Later on the same day, Paul Bleiwas confirmed to Michael Naiberg the closing mechanics in respect of the upcoming sale of the shares of MCI to Wilshire.[15]

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10 *Tab 10*, Extract from the Partnership bank account and copy of cheque issued by the Partnership. The difference between the amount of the loan and the cheque (i.e., $3,988 = $3,258,000 - $3,254,012) was recorded by the Partnership as a repayment of a loan.

11 *Tab 2*, Financial Statements of the Partnership for its fiscal period ending May 31, 2006, p. 4.

12 *Tab 11*, T2 Income Tax Return of MCI for its taxation year ending December 31, 2006. The aggregate amount of Partnership income declared by MCI is $3,646,893.

13 *Tab 12*, Resolution of MCI regarding the appointment of its accountant.

14 *Tab 13*, Email from David Steinberg to Paul Bleiwas regarding MCI's purchase price computation dated December 20, 2006.

15 *Tab 14*, Email from Paul Bleiwas to Michael Naiberg confirming the closing mechanics dated December 20, 2006.

k) On December 22, 2006, MCI deposited an amount of $785,737 with G&C, in trust for MCI, in connection with the sale of MCI's shares.[16]

l) On December 28, 2006, the stated capital of MCI's common shares was increased by $3,053,000 (from $283,643 to $3,336,643) through a series of special resolutions by its sole shareholder, the Appellant.[17] A deemed dividend in the same amount resulted therefrom pursuant to subsection 84(1) ITA, and a like amount was added to the adjusted cost base of the shares of MCI by virtue of paragraph 53(1)(b) ITA.

m) On December 29, 2006, the Appellant and Wilshire executed a Share Put Agreement whereby the Appellant had the right to require Wilshire to purchase the shares of MCI for $3,337,290 (the "**Put Option**").[18]

n) Pursuant to paragraph 3.1(l) of the Share Put Agreement, the Appellant represented and warranted to Wilshire that the tax liability of MCI for its 2006 taxation year would not be more than $1,302,731.

o) Pursuant to paragraph 3.1(s) of the Share Put Agreement, the Appellant represented and warranted to Wilshire that MCI had no assets other than cash and accounts receivable of at least $4,040,765.

p) On December 29, 2006, Michael Naiberg also resigned as sole director, president and secretary of MCI and was replaced by Craig Nerland,[19] who also represented Wilshire for all relevant purposes in the present appeal.[20]

q) On December 31, 2006, the Appellant exercised its Put Option to cause Wilshire to purchase all of

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16 *Tab 15*, Details of MCI's Trust Account at G&C.

17 *Tab 16*, Special Resolutions of the shareholders of MCI to increase its stated capital dated December 28, 2006.

18 *Tab 17*, Share Put Agreement between the Appellant and Wilshire dated December 29, 2006. Similar agreements were entered into with Wilshire in *Damis*, *Sabel*, *Zagjo* and *Devamm*. *Tab 18*, Email from Ruby Wong to Robert MacRae regarding the execution of the Share Put Agreement and requesting certain documentation from HTLN dated December 29, 2006.

19 *Tab 19*, Resolutions of MCI related to the resignation of Michael Naiberg and the appointment of Craig Nerland as Director, President and Secretary of MCI, *Tab 20*, Email from Linda Sterling to Ruby Wong attaching Form 1 – *Initial Return/Notice of Change* for MCI dated December 29, 2006 and *Tab 5*, MCI Directors' and Officers' Registers.

20 See for example *Tab 17*, Share Put Agreement between the Appellant and Wilshire dated December 29, 2006, p. 15.

its shares of MCI.[21]

r) On the same day, the Appellant assigned and transferred all of its shares in MCI to Wilshire.[22]

s) Immediately thereafter, MCI (i) assigned the MHI Receivable to Wilshire[23] and (ii) directed G&C to pay an amount of $83,603 to Wilshire.[24]

t) Immediately thereafter, in satisfaction of the MCI shares' purchase price, Wilshire (i) assigned the MHI Receivable to the Appellant[25] and (ii) directed G&C to pay an amount of $83,603 to the Appellant.[26]

u) Finally, still on December 31, 2006, MCI directed G&C to pay an amount corresponding approximately to the remainder of the funds deposited on December 22, 2006, ($703,475) to Hungerford Tomyn Lawrenson and Nichols (**"HTLN"**), in trust.[27] This amount was aggregated with payments relating to the transactions completed in *Damis*, *Sabel*, *Zagjo* and *Devamm* and further transferred to a bank account at CIBC Bank & Trust Company (Cayman) Limited on January 8, 2007 (minus fees of $19,000 and a retainer of $25,000 charged by HTLN).[28]

v) From the disposition of the Farm Land to the time of conclusion of the Share Put Agreement, the sole assets held directly or indirectly by MCI were cash or short-term financial assets (in an amount of approximately $4,040,765, at the time of its sale).[29] MCI also had an accrued tax liability

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[21] *Tab 21*, Notice of Exercise of Put, *Tab 22*, Email from Ruby Wong regarding the exercise of put options dated December 31, 2006 and *Tab 23*, Email from Ruby Wong to counsel at HTLN confirming the completion of transactions related to the Share Put Agreement and requesting certain documentation dated December 31, 2006. Similar put options were also exercised to cause Wilshire to complete transactions in *Damis*, *Sabel*, *Zagjo* and *Devamm*.

[22] *Tab 24*, Transfer of shares of MCI from the Appellant to Wilshire.

[23] *Tab 25*, Assignment of Receivable to Wilshire.

[24] *Tab 26*, Direction to pay Wilshire.

[25] *Tab 27*, Assignment of Receivable to Appellant.

[26] *Tab 28*, Direction to pay the Appellant. In *Damis*, *Sabel*, *Zagjo* and *Devamm*, the purchase price of the corporations acquired by Wilshire was also exclusively satisfied through the assignment of the assets held by such corporations.

[27] *Tab 29*, Direction to G&C to transfer $703,475 to HTLN.

[28] *Tab 30*, Documents, *en liasse*, showing amounts transferred to HTLN and to CIBC Bank & Trust Company (Cayman) Limited.

[29] *Tab 2*, Financial Statements of the Partnership for its fiscal period ending May 31, 2006, p. 2 and *Tab 17*, Share Put Agreement between the Appellant and Wilshire dated December 29, 2006, p. 8.

substantially all relating to the profit realized on the sale of the Farm Land (in an amount of approximately $1,302,731, as of December 29, 2006).[30]

w) On May 17, 2007, Paul Bleiwas emailed Alexandra Spinner and David Steinberg in connection with the preparation of MCI's tax returns.[31]

x) On or around November 16, 2009, MCI's T2 income tax return for its December 31, 2006 taxation year was filed.[32] An amount of $3,337,723, corresponding approximately to the aggregate of (i) the MHI Receivable and (ii) $83,603 (i.e., $3,337,290), was recorded as Accounts Receivable of MCI in Schedule 100 of its T2 income tax returns for its 2007 to 2012 taxation years.[33]

y) For its taxation year ending on December 31, 2006, MCI claimed a capital cost allowance ("**CCA**") deduction in the amount of $3,950,137 in respect of a class 12 software asset (the "**Software**"), thereby sheltering the entirety of its taxable income.

4) Assessment Process

z) On November 27, 2012, the Minister made a reassessment in respect of MCI's taxation year ending on December 31, 2006, whereby it disallowed the CCA deduction claimed in respect of the Software.[34]

aa) On May 10, 2016, the Minister assessed the Appellant pursuant to section 160 ITA in respect of MCI's tax debt arising from its taxation year ending on December 31, 2006 (the "**160 Assessment**").[35] MCI's federal tax debt at that time was as detailed below:

Tax	Penalty	Interest	Total
$806,692	$137,138	$642,051	$1,585,881

[30] *Tab 17*, Share Put Agreement between the Appellant and Wilshire dated December 29, 2006, p. 7.

[31] *Tab 31*, Emails between David Steinberg, Alexandra Spinner and Paul Bleiwas regarding the preparation of MCI's tax return for its taxation year ending December 31, 2006 dated May 17, 2007.

[32] *Tab 11*, T2 Income Tax Return of MCI for its taxation year ending December 31, 2006.

[33] *Tab 32*, T2 Cortax Income Statements and Balance Sheets of MCI for its taxation years ending December 31, 2007, to December 31, 2012.

[34] *Tab 33*, Notice of Reassessment issued to MCI for its taxation year ending December 31, 2006.

[35] *Tab 34*, Notice of 160 Assessment issued to the Appellant for MCI's taxation year ending December 31, 2006.

bb) The Appellant filed a Notice of Objection in respect of the 160 Assessment on May 26, 2016.[36]

cc) The Appellant filed a Notice of Appeal in respect of the 160 Assessment on November 7, 2016, more than 90 days after the Notice of Objection was filed but prior to the confirmation of the 160 Assessment.

Toronto, in the Province of Ontario, this 4th day of March, 2020

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Solicitor for the Appellant

Montréal, in the Province of Quebec, this 4th day of March, 2020

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[36] *Tab 35*, Notice of Objection of the Appellant.

APPENDIX C

[1] Subsection 160(1) of the ITA states:

> Tax liability re property transferred not at arm's length
>
> 160(1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to
>
> > (a) the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner,
> >
> > (b) a person who was under 18 years of age, or
> >
> > (c) a person with whom the person was not dealing at arm's length,
>
> the following rules apply:
>
> > (d) the transferee and transferor are jointly and severally, or solidarily, liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted for it, and
> >
> > (e) the transferee and transferor are jointly and severally, or solidarily, liable to pay under this Act an amount equal to the lesser of
> >
> > > (i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and
> > >
> > > (ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) in or in respect of the taxation year in which the property was transferred or any preceding taxation year,
>
> but nothing in this subsection limits the liability of the transferor under any other provision of this Act or of the transferee for the interest that the transferee is liable to pay under this Act on an assessment in respect of the amount that the transferee is liable to pay because of this subsection.

[2] The salient provisions of section 245, which contains the general anti-avoidance rule (the GAAR), state:

> Definitions
>
> 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;
>
> "tax consequences" to a person means the amount of income, taxable income, or taxable income earned in Canada of, tax or other amount payable by or refundable to the person under this Act, or any other amount that is relevant for the purposes of computing that amount;
>
> "transaction" includes an arrangement or event.
>
> General anti-avoidance provision [GAAR]
>
> (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.
>
> Avoidance transaction
>
> (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.
>
> Application of subsection (2)
>
> (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) the *Income Tax Regulations*,

(iii) the *Income Tax Application Rules*,

(iv) a tax treaty, or

(v) any other enactment that is relevant in computing tax or any other amount payable by or refundable to a person under this Act or in determining any amount that is relevant for the purposes of that computation; or

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

CITATION:	2021 TCC 24
COURT FILE NOS.:	2016-4783(IT)G, 2016-4785(IT)G 2016-4787(IT)G, 2016-4788(IT)G and 2016-4789(IT)G
STYLES OF CAUSE:	DAMIS PROPERTIES INC.; SABEL INVESTMENTS II-A LIMITED; ZAGJO HOLDINGS LIMITED; DEVAMM INVESTMENTS II-A LIMITED AND MICROBJO PROPERTIES INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	March 11 to 12, 2020 September 21 to 23, 2020
REASONS FOR JUDGMENT BY:	The Honourable Justice John R. Owen
DATE OF JUDGMENTS:	March 24, 2021
DATE OF AMENDED JUDGMENTS:	March 26, 2021

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