Docket: 2011-1810(IT)G

BETWEEN:

HENCO INDUSTRIES LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 31, April 1 to 4 and April 7 and 9, 2014, at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Geoffrey Shaw and Eric Mayzel
Counsel for the Respondent:	Samantha Hurst and Christian Cheong

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JUDGMENT

The Appeal from the reassessment made under the *Income Tax Act* for the 2007 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

a) the $15,800,000 received by Henco from Ontario was a non-taxable capital receipt;
b) the $650,000 received by Henco from Ontario was a non-taxable windfall;
c) the fair market value of the Seneca property was $800,000 and the payment was on income account; and
d) the fair market value of the Morrison property was, as assessed, $1,400,000.

If the Parties wish to address costs they should do so in written submissions to the Court filed within 30 days of the date of this Judgment, failing which costs are awarded to the Appellant in accordance with the Court's tariff.

Signed at Ottawa, Canada, this 9th day of June 2014.

"Campbell J. Miller"

C. Miller J.

Citation: 2014 TCC 192
Date: 20140609
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BETWEEN:

HENCO INDUSTRIES LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

C. Miller J.

[1] This is a story of a developer, Henco Industries Limited ("Henco"), who could not develop – through no fault of its own. Thwarted by a volatile situation in Caledonia, Ontario in 2006, including blockades by protesters from Six Nations (the "Occupation"), the Ontario Provincial Police ("OPP") reluctance to remove the blockades and the Government of Ontario's action rezoning certain Henco property, Henco was precluded from developing that property known as Douglas Creek Estates ("DCE"). Henco ultimately accepted $15,800,000 from the Government of Ontario to dispose of all its right and interest in the DCE property. It is the taxation of that amount that is primarily in dispute.

[2] The Respondent says the $15,800,000 was consideration either for Henco's interest in the DCE property which was inventory, or for the business of Henco, and is in either case fully taxable as income. Henco says the DCE land was worthless and the $15,800,000 was a payment by the Government of Ontario to relieve a potentially catastrophic situation by eliminating lawlessness occasioned by the Occupation: a payment on capital account to compensate Henco for the destruction of its business. The payment being on capital account, the Appellant then argues that it could only be caught by the eligible capital property rules in section 14 of the *Income Tax Act* (the "*Act*"). Yet, the application of that section does not capture the amount and consequently it is a taxable nothing. The major issue is the characterization of the $15,800,000 payment as income or capital, and if it is capital, as an eligible capital amount or a non-taxable capital receipt.

[3] There are three other issues between the Parties:

i. whether a payment by the Government of Ontario to Henco of $650,000 is income pursuant to s. 12(1)(x) of the *Act* or a non-taxable windfall;

ii. the nature of a payment as capital or income on the disposition by Henco to a related company of property known as the Seneca property, which was close to the DCE property, and further, whether the fair market value of that property at the time was $800,000 or $850,000;

iii. the fair market value of another nearby property, the Morrison property, on its disposition by Henco, again to a related company. Henco says the fair market value was $1,000,000 while the Minister of National Revenue (the "Minister") says the fair market value was $1,400,000.

I. Facts

[4] Having received my ruling on certain evidentiary and procedural motions, which I address in paragraphs 79 to 117 of these Reasons, the Parties were able to prepare an Agreed Statement of Facts, making it clear, however, that additional evidence would be necessary to supplement the Agreed Statement of Facts. I saw video recordings of events during the Occupation, as well as read news releases from the OPP, the Ontario Government, the Federal Government and Haldimand County. I heard testimony from Mr. Don Henning, Inspector Haggith of the OPP, Michael Bruder, Henco's lawyer during the relevant period, Doug Carr, Assistant Deputy of Negotiations and Reconciliation in the Ontario Ministry and Reconciliation of Aboriginal Affairs, and Tiffany Ivey, a Canada Revenue Agency ("CRA") auditor.

[5] I intend to go through events chronologically, indicating what has been agreed to through the Agreed Statement of Facts and then expanding through the evidence of the above. I will address the Seneca and Morrison properties separately.

Prior to February 2006

[6] Agreed Statement of Facts

2. Henco Industries Limited ("Henco") is a taxable Canadian corporation for the purposes of the *Income Tax Act*, RSC 1985, c 1, with a taxation year end of April 29 in each year.

3. The principals of Henco are Donald ("Don") and John Henning.

4. For many years prior to February 2006, Henco carried on the business of land development exclusively in the area of Caledonia, Ontario.

5. As of the beginning of February 2006, Henco owned three parcels of land in the Caledonia Area, known as: (i) the Douglas Creek Estates ("DCE"), (ii) the Seneca property ("Seneca"), and (iii) the Morrison property ("Morrison").

6. At all relevant times, Henco was the legal and beneficial owner of title to the DCE property.

7. The DCE property was originally acquired by a predecessor of Henco in 1991 for the purpose of development.

8. By the beginning of 2006, Henco had performed all relevant procedures for development of the DCE property, including zoning, plan of subdivision, engineering, obtaining approvals, installation of municipal services and the construction of a model home.

9. Prior to the Occupation (defined below), Henco entered into agreements of purchase and sale for some of the lots on the DCE property.

[7] With respect to the DCE property, Henco also obtained an archaeological assessment. As well as having taken all steps necessary for the development of the property, Henco had entered purchase and sale agreements with several builders. The DCE property was ready for development. Henco also had a model home built on one lot of the first phase of 65 lots (there were 600 lots in total), and it had started to frame on another lot. Henco had incurred costs of approximately $6,000,000 and had received deposits from builders of over $1,000,000. The Six Nations were aware of the plans and to that point there had been no objections.

[8] Henco anticipated revenues of $45,000,000 from the DCE development, with profits of $30,000,000, but as of February 2006 Henco's financial position was, as Don Henning put it, vulnerable, with little cash and considerable debt.

February 28, 2006

[9] Agreed Statement of Facts

> 11. On February 28, 2006, certain individuals who were members of, or affiliated with, First Nations groups in the Caledonia area (the "Protestors") occupied the DCE property (the "Occupation").
>
> 12. The Protestors held the Occupation "to try to stop, or at least disrupt, further development of the subdivision".
>
> 13. The Occupation included the placement of barricades on roadway entrances to the DCE property.
>
> 14. The Occupation and the blockades were followed by acts of civil disobedience, vandalism, thefts and assaults in and around the DCE property.
>
> 15. The Occupation caused all development and construction activity on the DCE property to cease.

[10] Don Henning contacted the police to remove the blockades barring entry to Henco's property. Inspector Haggith spoke to the protestors, realized they were not going to leave and advised Mr. Henning to obtain an injunction. Mr. Henning contacted his lawyer, Mr. Bruder.

March 3, 2006

[11] Agreed Statement of Facts

> 16. On March 3, 2006, Justice Matheson, of the Ontario Superior Court of Justice, issued an interim injunction (the "Interim Injunction") requiring the Protestors to vacate the DCE property, remove the barricades, and cease from interfering with Henco's development of the DCE property.

March 9, 2006

[12] Agreed Statement of Facts

> 17. On March 9, 2006, Justice Marshall, of the Ontario Superior Court of Justice, issued an order making the Interim Injunction permanent (the "Permanent Injunction"). …
>
> 18. Following the granting of the Permanent Injunction, the number of Protestors occupying the DCE property increased and included natives and their supporters from communities outside of the Caledonia area.

[13] Inspector Haggith indicated that the OPP set up communications with the protestors, seeking a peaceful permanent resolution, though the OPP did not act until March 22, 2006.

March 13, 2006

[14] Henco received a notice of international commercial claim from trustees of the Mohawk Nation Grand River for $110,000,000. Mr. Henning was shocked. He was concerned for the safety of Henco's property.

March 17, 2006

[15] Agreed Statement of Facts

> 19. On March 17, 2006, Justice Marshall issued a contempt order against the Protestors occupying the DCE property and ordering that arrest warrants be executed on March 22, 2006. …
>
> 20. Justice Marshall amended his March 17, 2006 order on March 28, 2006 to specify that the Protestors occupying the DCE property were in civil and criminal contempt. …

March 22, 2006

[16] Inspector Haggith met with protestors and was advised they would leave if Henco stopped all work until the land claims issues had been resolved. The OPP made no arrests or attempts to enforce the injunctions.

April 12, 2006

[17] The Hennings, Mr. Bruder, two Haldimand County council members, two provincial representatives, including Mr. Carr, two federal representatives and about 100 protestors, including Mohawk Warriors, met at a Brantford hotel. Inspector Haggith advised the Hennings to stay calm as they could face accusations, which they did, to the point of threats against their well-being. Don Henning had never before heard that this situation was Henco's fault: he was angry and afraid. He suggested to the provincial representatives they should get their cheque book ready.

[18] Mr. Bruder described April 12, 2006 as when the tone changed from the Government as enemy to animosity towards the Hennings and Henco.

April 15, 2006

[19] Doug Carr wrote to Henco indicating that Ontario would appoint a representative to "discuss with you the provision of grant monies to assist in offsetting the impacts of the Occupation". Mr. Carr testified that he felt that at that time interim relief would be fair. Mr. Chadwick, from the Goodman law firm, was appointed as the Ontario representative.

April 17, 2006

[20] Doug Carr again writes to Henco: "The Government will name a representative on Wednesday, April 17, 2006 to discuss the question of the financial circumstances you currently face, with a view to engaging in discussions this week. Any information, documentation or assessments of such circumstances you have ready will assist us in expeditiously undertaking these discussions with you and the builders. I recognize that your current access to documents is limited."

[21] Henco provided what it could, being bank statements and an inventory list, but could not get access to its office to provide more.

April 20, 2006

[22] Agreed Statement of Facts

> 22. On April 20, 2006, the Ontario Provincial Police (the "OPP") moved onto the DCE property to enforce the Court orders (the "OPP Raid").
>
> 23. During the OPP Raid, Protestors occupied the DCE property; the occupation expanded to include the surrounding roads; an OPP officer was hit by a bag of rocks; the Sterling Street bridge was burned to the ground; fires were set near railway tracks at Sixth Line; and supporters of Six Nations protestors blocked railway tracks at Marysville.
>
> 24. As a result, the OPP withdrew from the DCE.
>
> 25. Following the OPP Raid, Henco's model home and office on the DCE Property was looted. The identity of the persons who looted the model home and office is unknown.

[23] Inspector Haggith testified that although the OPP attempted to execute the warrants, they were anxious not to have a repeat of Ipperwash. The OPP deployed 100 officers plus a tactical team and helicopter. There were 15 to 20 protestors arrested. Inspector Haggith described the situation as sickening as hundreds of protestors with bats and clubs confronted his officers. His view was that if the OPP remained there would be serious injuries. He acknowledged there was huge concern in the community. The OPP was demoralized.

[24] Mr. Henning felt intimidated by these events, including protestors driving down his dead-end street, especially as, unlike on other days, the OPP were not there to offer protection. He felt he had to get his family away from Caledonia. He described the situation as anarchy, with his town under siege and the reputation of his community destroyed.

April 21, 2006

[25] On behalf of Ontario, Mr. Carr signed a "Points of Agreement Reached Between Haudenosaunee Six Nations, Canada and Ontario" which called for a detailed work plan to address "the various outstanding issues".

[26] Mr. Henning was invited to a meeting in Burlington to meet with Six Nations. He felt threatened so declined. Mr. Carr advised Mr. Henning by phone that Ontario was looking into financial help.

April 24, 2006

[27] The community of Caledonia organized a meeting at Caledonia's Fairgrounds: between 1,500 and 2,000 people attended. While Inspector Haggith attempted to maintain calm, he agreed that he was not successful. Many, he believed, wanted to vent. Some marched to the Occupation site, which concerned Inspector Haggith. He sent officers to intercept them, issuing several breach of peace arrests.

April 26, 2006

[28] A "Joint Statement of Accomplishments by Haudenosaunee Six Nations, Canada and Ontario" was issued, indicating a "main table" had been established to resolve the DCE issues. Mr. Carr acknowledged Henco was not part of such process.

April 27, 2006

[29] Mr. Chadwick writes to Henco offering financial assistance on a without prejudice basis. A Schedule A is attached to Mr. Chadwick's letter. It indicates the funding assistance as being $650,000 "to mitigate impact of continued occupation of DCE". It also states: "The Douglas Creek Estates Funding Assistance is in respect of development, building and other related costs and expenses that have been incurred by Henco in connection with the Douglas Creek Estates because of the occupation".

[30] Mr. Henning testified these terms were not negotiated nor agreed to by Henco. Nothing was signed.

April 29, 2006

[31] Agreed Statement of Facts

> 36. Henco claimed a write-down in the value of its land inventory, in respect of the DCE property, to seven dollars on its T2 return for the taxation year ended April 29, 2006.
>
> 37. The Minister of National Revenue issued a notice of assessment for 2006 on May 18, 2006, recognizing the write-down in the value of the DCE property.

38. A real estate appraisal prepared by Ron Duda for the Canada Revenue Agency (the "Duda Appraisal") determined that the Occupation had rendered the DCE land undevelopable and concluded that the DCE property had no value as at May 1, 2006.

[32] Henco also obtained an evaluation from Re/Max to support its write-down of the land. Re/Max verified the DCE property had no market value.

May 3, 2006

[33] Agreed Statement of Facts

26. On May 3, 2006, Ontario made a payment of $650,000 to Henco.

27. Ontario did not require Henco to take any particular action or do any particular thing in respect of Henco's use of the $650,000.

28. Ontario did not seek anything in return from Henco in exchange for the payment of $650,000.

May 8, 2006

[34] Zoning regulations were made on May 8, 2006 under the Ontario *Planning Act*. Mr. Carr acknowledged there had been discussions leading up to this, but Henco had not been involved in such discussions.

[35] The zoning regulations were in connection with the DCE property and stipulated:

2(1) Every use of land and the erection, location and use of any building or structure is prohibited on land described in section 1.

(2) Additions to any building or structure or the extension or enlargement of any building or structure is prohibited.

May 16, 17 and 18, 2006

[36] Agreed Statement of Facts

> 34. On May 16, 2006, representatives of the Protestors, Ontario and Canada reached a three-party agreement immediately halting any development on the DCE property for an undetermined period of time (the "Moratorium").
>
> 35. On May 17, 2006, Ontario Regulation 2006/06 under the *Planning Act*, RSO 1990, c P. 13, entitled "Zoning Area – Haldimand County" (the "Zoning Order") came into force.

[37] Mr. Bruder found out about the moratorium through the Six Nations website. He also found out that Ontario had agreed with Six Nations that it would fund an archaeological assessment, notwithstanding Henco had already previously obtained one. Ontario did not provide a copy of the zoning order to Henco until June 7, 2006.

[38] Mr. Bruder claims to have contacted Mr. Carr, when he discovered the moratorium, to ask if the Government of Ontario would ever consider such an action without Henco's input. According to Mr. Bruder, Mr. Carr denied the Government would do that. While Mr. Carr recalled the conversation with Mr. Bruder, he did not recall that detail.

[39] On May 18, 2006 Mr. Bruder and the Hennings met with Ontario officials, indicating that the Hennings wanted to be bought out. The Hennings and Mr. Bruder felt that Ontario had gone behind Henco's back. To that point, Henco had been lying low, but it now perceived that Ontario was not acting in good faith. After the meeting, Mr. Bruder wrote to Mr. Carr, Mr. John Burke with the Ministry of Municipal Affairs, Mr. Neil Smith with the Ministry of Economic Development and Trade, Mr. Chadwick with Goodmans and Brian Dominique with Cassels Brock and Blackwell:

> At a meeting earlier this morning between John Burke, Neil Smith, John Henning, Don Henning and myself, Don Henning advised the Government officials that he expected to receive a written commitment from Minister Ramsay confirming the Government's intention to purchase the Douglas Creek Estates at fair market value.
>
> …

> We are not interested in receiving "without prejudice" correspondence and require a firm and binding written commitment from the Province, to purchase the lands at fair market value, no later than noon on Friday, May 19, 2006.
>
> The Governments' actions have placed Henco in an untenable position. …
>
> …
>
> Our clients have been patient and respectful of the process up until now. Our clients have clear title to the land yet, for whatever reasons, a Minister has unilaterally elected to impose this moratorium on them.
>
> My clients advise that unless the Government begins to negotiate in good faith, they will use all of their resources to address this matter.

[40] Mr. Henning explained that reference to fair market value was really the starting point for what Henco had lost, being its right to do business. Mr. Bruder described his position as simply trying to get the most for his clients: the only tangible was the land.

May 19, 2006

[41] Mr. Bruder conducted a media blitz sending out a release with respect to the moratorium and doing several radio interviews. He quickly received a call from Mr. Burke with the Ontario Ministry of Municipal Affairs suggesting that he stop, and that they should get together to discuss buying Henco out.

May 20, 2006

[42] The Hennings and Mr. Bruder met with Mr. Burke and Mr. Smith. It was clear to Mr. Bruder that Ontario was now considering buying Henco out. Mr. Bruder suggested that Ontario buy the shares of Henco, but Ontario was not interested. Mr. Bruder believed Ontario wanted to control the injunction process. It was agreed the land would be appraised to determine its value at a time prior to the Occupation: there was discussion regarding appraisers.

May 22 and 23, 2006

[43] Agreed Statement of Facts

> 29. In the months following the failed OPP Raid, numerous confrontations occurred between the Protestors, on the one side, and other residents of Caledonia and individuals opposed to the Occupation, on the other side.
>
> 30. On May 22, 2006, the Caledonia electrical transfer station was damaged resulting in a major power outage in parts of Norfolk and Haldimand Counties.
>
> 31. Damage to the transfer station was estimated at approximately $300,000, while collateral damage to Hydro One customers was estimated in the millions of dollars. The final figures of damages are not known. …
>
> 32. On May 22, 2006, Haldimand County declared a state of emergency. …

[44] More unrest in Caledonia. Ontario offered a $50,000 reward for any information leading to an arrest in connection with the transformer damage.

May 26, 2006

[45] Henco sells its equipment to a related company, 819820 Ontario Inc., for $187,360. Mr. Henning indicates he was concerned about more lawsuits.

May 29, 2006

[46] According to Mr. Bruder, Justice Marshall of the Ontario Superior Court sought an explanation, including from the OPP, why court orders were not being enforced, and why the community was exploding.

June 5, 2006

[47] OPP officers inadvertently go on reserve land and are swarmed and charged by First Nations police. More fires are reported.

June 6 and 7, 2006

[48] There are emails between Mr. Henning and Mr. Burke to set up a meeting of appraisers. Mr. Henning was left with the impression from his communications with Ontario representatives that one minute they were serious and the next minute

not so much. The more tense the Occupation situation became, the more interested the Government of Ontario appeared to be in dealing with Mr. Henning and Henco.

June 9, 2006

[49] Inspector Haggith refers to June 9, 2006 as the day of lawlessness. There are numerous clashes with protestors, injuries to member of the news media and a car theft. Inspector Haggith realized the injunctions were still in effect and that Justice Marshall's inquiries would stir up the protestors. To handle the situation generally, Inspector Haggith required assistance of hundreds of officers from across Ontario as well as from the RCMP.

[50] Mr. Carr acknowledged he was made aware of the events on the day of lawlessness.

June 10, 2006

[51] Mr. Carr received an email from Jane Stewart, negotiator for Ontario with First Nations, emphasizing how critical de-escalation was. She also emphasized how much easier it would be for the "important work at the table" without the barricades. She also indicated the moratorium would remain.

[52] Mr. Carr explained that Six Nations remained concerned about the possible enforcement of the injunctions. He described the injunctions as constant irritants. He connected buying the DCE land with getting rid of the injunctions. He believed having Ontario buy the land would relieve the infringement on a private property owner's right to property as well as simplify a complex situation, leaving the dispute between Six Nations and the Crown.

June 11 and 12, 2006

[53] John Burke reaffirms in an email to Henco the Government of Ontario's desire to complete a deal as soon as possible. Don Henning confirms the process should be that their respective appraisers meet to come up with a number representing the property's worth as being"at least this much". A balance would be determined by consultants.

June 13 to 16, 2006

[54] Mr. Chadwick sends a "framework outline" of an agreement to Henco. The Hennings sign off on it on June 15, 2006, though Mr. Bruder described there not being a lot of give and take. Some key elements of the framework are:

- Henco is to transfer all DCE land and all related rights and interests in the land to Ontario (or a trust) and Ontario agrees to pay Henco the fair market value as at February 27, 2006 with respect to Henco's rights, title and interest in the property rights.
- There will be an initial payment of $12,300,000 but with a reservation to negotiate a final compensation amount.
- Henco agrees to cease all actions regarding the development of the DCE land, including the construction and improvements of buildings or structures on such land pending the completion of the transfer of the DCE land and the payment of the initial payment amount ($12,300,000).
- Upon the final determination and payment of any final compensation amount, Henco shall have no further rights or claims as against the DCE purchaser, the province or its agents relating to the DCE land or the circumstances or events relating to the DCE land except as may be set out in the Agreement between the Parties.
- The province shall agree to pay the reasonable costs of the developer with respect to the final compensation amount relating to the retention of consultants, legal advisers, appraisers, experts, advisers or other third parties, subject to a maximum amount of $300,000.

June 23, 2006

[55] Mr. Henning indicated there were drafts of a final agreement going back and forth for the last two weeks of June, though it did not start well as Ontario had hired a real estate lawyer to draft the first attempt at an agreement. Mr. Henning's response to such early draft was addressed to Mr. Burke, for the Government of Ontario, in a June 23, 2006 email:

> John, I've read this and it's very apparent that whoever wrote this had no idea what is going on in our situation. Half of what is written doesn't apply. We'll go through it but it's going to take a lot of work. It's too bad Rob's firm didn't do it as he's familiar with what's going on.

Clearly he expected the Agreement to reflect the framework – it did not. Mr. Burke agreed.

June 30, 2006

[56] Ultimately an agreement dated June 30, 2006 was signed, covering the disposition of "Purchase Assets", defined to include the Henco land, the buildings, the contracts, the warranties and the chattels. Attached as Schedule "A" are some excerpts from the Agreement.

[57] Mr. Carr, though not involved directly in the negotiation of the Agreement, testified that the Government's decision to acquire the DCE property was made by elected officials and was based on a number of considerations including:

a) Fairness to the developers, who are unable to complete their development project within the foreseeable future;
b) Public safety concerns if ongoing attempts to develop the property were made;
c) A commitment on the part of the Government to effect a peaceful resolution of the issues between the local community and Six Nations' interests; and
d) An assertion by Six Nations that a burial ground existed on the DCE site.

[58] There were several closing documents as well, one of which was a Bill of Sale for the chattels which read:

> In consideration of other good and valuable consideration and the sum of Two Dollars ($2.00), the receipt and sufficiency of which is hereby acknowledged, the Vendor does hereby sell, transfer and convey to the Purchaser the Chattels.

There is no clear indication what constitutes the chattels, other than the definition stated in the definition section of the Agreement. (see Schedule "A").

[59] Henco signed a release which read in part as follows:

> AND WHEREAS it is intended that, in exchange for the payment by the Purchaser to the Vendor of the Final Compensation Amount, the Vendor would release the Purchaser (including Ontario Realty Corporation and the Provincial Crown or its agents) from all actions and claims whatsoever in respect of the Property, the Purchase Assets and the Purchase Agreement;
>
> …
>
> 3. The Vendor further releases, remises and forever discharges the Purchaser from all actions, causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, claims or demands whatsoever which the Vendor

> ever had or now has or may hereafter have against the Purchaser (including Ontario Realty Corporation and the Provincial Crown or its agents), for or by reason of, or in any way arising out of any cause, matter or thing relating to, or arising directly or indirectly by reason of, or as a consequence of circumstances or events relating to the Property, the Purchase Assets or the Purchase Agreement, save and except for any liability of the Purchaser that might arise out of sections 9.11 and 9.12 of the Purchase Agreement.
>
> 4. The Vendor further agrees that it will not make any claim or commence any proceeding against any third party, including without limitation the Purchaser (including Ontario Realty Corporation and the Provincial Crown or its agents) for compensation or recovery in respect of the Purchase Assets and/or the Property.

[60] A Statement of Adjustments provided for three adjustments, one for the $300,000 contribution for Henco's costs from Ontario, another of approximately $256,000 for Henco's costs for oversizing (water, sanitary and storm systems) and a third adjustment of a $109,000 credit to Ontario for grade elevation deposits from the builders.

[61] There was no non-compete provision in the Agreement.

July 4, 2006

[62] The DCE land was conveyed to Ontario, the transfer value shown being of $12,300,000.

[63] Henco passed Directors' Resolutions to pay out most of the funds to the shareholders.

[64] Henco went to court to get an order setting aside the injunction; Justice Marshall reserved.

July 26, 2006

[65] Mr. Chadwick from Goodmans writes to Mr. Bruder confirming agreement on the final compensation amount of $3,500,000 and enclosing the release "to be executed at the time of the Final Compensation Amount being paid to Henco." There was little evidence of how Henco and Ontario came to this $3,500,000 amount. Mr. Bruder suggested that in discussing compensation his starting point was the $45,000,000 in revenue that Henco might have anticipated from the DCE development.

August 8, 2006

[66] Justice Marshall released his ruling on the application to have the injunctions removed. Emphasizing the import of the rule of law in his decision, Justice Marshall dissolved the injunction effective only once "the court's order for criminal contempt has been disposed of." He also stated that "negotiations should cease until the Rule of Law returns and the barricades come down." In his Reasons he also stated:

> However, it is common knowledge that the people of Caledonia, after five months of occupation, have seen security in their town replaced by lawlessness; protestors in battle fatigues, police officers in riot gear and uncertainty of their future. Their property values reduced, racial relations with the neighbouring native people destroyed after many years of peaceful coexistence.
>
> It is a sad, sad result on both sides but one that might be avoided in future by proactive, quick settlement of land claims and, as well, by the Crown and the police responding quickly to this court's reasoned orders.

[67] Mr. Carr confirmed that Ontario took over the appeal of this decision, indicating the decision frustrated the intent of the decision to acquire the DCE property.

October 31, 2006

[68] Agreed Statement of Facts

> 39. As at October 31, 2006, Ontario had incurred approximately $15.0 million in policing costs in respect of the occupation.

March 2007

[69] Agreed Statement of Facts

40. In March 2007, the federal government made an *ex gratia* payment to Ontario in the amount of $26.4 million dollars, of which $10.6 million was specifically designated to reimburse Ontario for the policing costs it incurred due to the Occupation and $15.8 million toward Ontario's acquisition of the Douglas Creek Estates.

SENECA PROPERTY

[70] Agreed Statement of Facts

41. The previous owner of the Seneca property ("Old Henco"), had carried out preliminary planning for the construction of a golf course.

42. This primary purpose was maintained by Old Henco, through Jack Henning, its shareholder.

43. On October 27, 1997, the Corporation of the Town of Haldimand passed by-law number 42-H-97 to amend zoning by-law 1-H-86 to permit a golf course.

44. The purpose and effect of by law number 42-H-97 was to rezone the Seneca property to permit the development of a public golf course.

45. Further progress on the development of the golf course on the Seneca property was halted following the death of Jack Henning.

46. According to the official plan for the County of Haldimand, as approved by Municipal Council on June 26, 2006, the Seneca property is "part of a larger land assembly that has been approved for golf course development".

47. As at June 15, 2006, the zone classification of the Seneca property permitted the property to be used as a golf course and a golf driving range.

48. As at June 15, 2006, the Seneca property was not zoned for residential use. Rezoning of the Seneca property would have been necessary prior to any development for residential use.

49. As at June 15, 2006, the Seneca property was un-serviced for residential development.

> 50. At all relevant times, Henco's internal general ledgers have recorded the Seneca property as "Seneca Golf".

[71] Mr. Don Henning testified that, after his father's death in 2000, Henco focused on the DCE and Morrison properties, effectively parking the Seneca golf course project. He also indicated the Seneca property was unsuitable for residential development for a number of reasons.

[72] Until the transfer of the Seneca property to its related company, 819820 Ontario Inc., in 2006, Henco had made no effort to attempt to sell the property, though in November 2005 it had received an offer out of the blue from Camplor Property Inc. ("Camplor") of $3,200,000 for the Seneca property. The deal was to close in July 2006, conditional though, until April 28, 2006, upon Camplor assuring itself the lands could be developed according to its expectation. The deal never closed.

[73] Based on the proximity of the Seneca property to the DCE property, and given all the circumstances surrounding the DCE property, Henco established a value of $800,000 for the purposes of the non-arm's length transfer to 819820 Ontario Inc. Mr. Henning stated he felt even the $800,000 was too high as the property values in Caledonia had been devastated.

[74] Due to the CRA reassessment, Henco got an appraisal of the Seneca property from Jacob Ellens & Associates, Real Estate Appraisers, which concluded: "the market value estimate range for the subject was between $786,590 and $898,960, rounded to: $850,000."

MORRISON PROPERTY

[75] The Morrison property was listed as inventory on Henco's books with a book value of $1,000,000. The Morrison property was closer to the DCE property than the Seneca property. Mr. Henning felt even the $1,000,000 was too high in the circumstances.

[76] Mr. Henning described his view of the property value in this manner:

> … I may not be an appraiser, but as a developer, when I look at something I'm looking at it that I have to put my money into it. So I'm not looking at it as a professional that's putting a value on something. I'm looking at it as somebody that's going to put their money in there and is taking the risk.

> And when I see on TV every day fires, people fighting, and day after day after day, I'm not going to go in there and ask for a discount. I'm going to go in there – I'm not going to go there at all. I'm going to walk away. I want nothing to do with it. And that's my opinion of what our property was like. …

[77] Due to the CRA assessment, Henco obtained an appraisal from Jacob Ellens & Associates Inc., which appraised the property at $1,400,000.

Returns and Assessments

[78] Agreed Statement of Facts

52. On October 26, 2007, Henco filed an election to defer application of changes to variable "E" of the definition of "cumulative eligible capital" under subsection 14(5) of the *Income Tax Act*.

53. On its income tax return for the year ending April 29, 2007, Henco treated:

    a. the $15,800,000 received from the Province of Ontario pursuant to the DCE agreement as proceeds of disposition of eligible capital property;

    b. proceeds from the transfer of the Morrison property as inventory;

    c. proceeds from the transfer of the Seneca property as capital; and

    d. the $650,000 received from the Province of Ontario as a non-taxable receipt.

54. The Minister initially assessed Henco as filed for the taxation year ending April 29, 2007, notice thereof dated September 17, 2007. The Minister reassessed Henco by notice thereof dated September 10, 2010 and made the following adjustments:

    a. the $15,800,000 received from the Province of Ontario pursuant to the DCE Agreement was treated as net profit;

    b. the fair market value of the Morrison property was increased from $1,000,000 to $1,400,000 at the time of transfer;

c. the fair market value of the Seneca property was increased from $800,000 to $850,000 at the time of transfer;

d. proceeds from the transfer of the Seneca property was treated as income; and

e. the $650,000 received from the Province of Ontario was treated as income.

II. Motions

[79] At the outset of the trial the Respondent brought a Motion for a direction from the Court:

a) Ruling that the written Agreement of Purchase and Sale (the "Agreement") between Henco and Her Majesty the Queen in Right of Ontario ("Ontario"), with respect to the DCE property, is unambiguous and that no parol evidence may be admitted to interpret that contract;
b) Excluding any evidence of an inflammatory or prejudicial nature regarding the Crown's involvement in the Occupation of Henco's property;
c) And if the Court does not issue such a direction, that it be without prejudice to the right of the Respondent to make a further motion for the same relief, if necessary, during the trial.

[80] I dismissed the Motion at the hearing with brief reasons and now wish to expand on those reasons.

[81] The Respondent identified the extrinsic evidence that it anticipated Henco intended to call as follows:[1]

> As is abundantly clear from paragraph 67 of its Notice of Appeal, the appellant intends to introduce extrinsic evidence. The respondent states the voluminous documentary evidence and *viva voce* evidence is unnecessary to resolve the issues in this appeal. The extrinsic documentary evidence generally falls into one of six categories: (1) documents relating to the Superior Court Orders; (2) news/media clippings and editorials, (3) press releases by the various levels of government (municipal, provincial and federal), (4) internal e-mails from [the] province of Ontario, (5) opinion letter to the various levels of government and, (6) internal documents from the Department of Indian and Northern Affairs Canada.

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[1] Taken from paragraphs 9 and 10 of the Respondent's Written Submissions.

(I will have more to say on some of these documents in my ruling with respect to the public documents exception.)

> The appellant has stated that it intends to call Mr. Mike Katrycz, Vice-President, CHCH news, Mr. Brian Haggith of the Ontario Provincial Police and Mr. Les Edwards, from Edwards Custom Homes. Lately, the appellant also served notice that it intends to call evidence from the Haldimand County Clerk, the Province of Ontario's negotiators and even Hansard transcripts. All such evidence is either admitted or irrelevant. None of these individuals was involved in the valuation of the appellant's properties, the determination of the funding assistance, and the formulation and implementation of the Agreement.

As it turns out, Henco did not call Mr. Mike Katrycz or Mr. Les Edwards.

[82] The Respondent moved to exclude the extrinsic evidence, relying on the parol evidence rule, which she describes as follows:[2]

> By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the instrument was made, or during the time that it was in a state of preparation, so as to add to, or subtract from, or in any manner to vary or qualify the written contract.

[83] The Respondent argues that parol evidence may only be admitted if there is either a patent or a latent ambiguity in the contract, acknowledging that extrinsic evidence may be introduced to explain a latent ambiguity. The Respondent relied on the Tax Court of Canada case of *On-Line Financing & Leasing Corp. v The Queen*. [3] In *On-Line*, counsel for the Department of Justice was asked to address the timing of the parol evidence objection, as well as whether or not the contract was ambiguous. This presupposed that the parol evidence rule was in play. Justice Campbell relied on the Federal Court of Appeal's decision in *General Motors of Canada v The Queen*[4] where Justice Nadon quoted from Justice Saunders in *Gilchrist v Western Star Trucks Inc.*:[5]

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2 Taken from S.M. Waddams, e., *The Law of Contracts*, 6th ed (Toronto: Canada Law Book, 2010) at para. 320, note 10.

3 2010 TCC 117.

4 2008 FCA 142.

5 (2000) 73 B.C.L.R. (3d) 102.

> The goal in interpreting an agreement is to discover, objectively, the parties' intentions at the time the contract was made. The most significant tool is the language of the agreement itself. The language must be read in the context of the surrounding circumstances prevalent at the time of contracting. Only when the words, viewed objectively, bear two or more reasonable interpretations may the Court consider other matters such as the post-contracting conduct of the parties.

[84] The Respondent did go on to acknowledge that courts have accepted extrinsic evidence to establish what has come to be called the "factual matrix" underpinning a contract. The Respondent referred me to the 2012 Alberta case of *Nexxtep Resources Ltd. v Talisman Energy Inc.*,[6] which provides a good summary in this regard:

> 5. The objective of contractual interpretation is to ascertain what the parties objectively intended by their bargain, when they made it. Primacy is given to the parties' words, particularly in a written contract, because it is presumed that the parties chose words that embodied their intentions.
>
> 6. However, the objective remains the determination of the parties' intention, not the meaning of words in a document. Thus, the authorities give guidelines for the consideration of the "factual matrix" or "surrounding circumstances" to help determine the parties' contractual intention as would be determined by a reasonable person so situated. In other words, extra-textual evidence is used to help understand what the parties meant by the words they used.
>
> 7. The concern here is only with determining the parties' intention, objectively understood. If after that process it is found that there is ambiguity about what was intended, parol evidence may be considered. That is a different stage of analysis, and the facts to be considered when resolving ambiguity about the parties' intention may be different from those admissible on the question of interpreting their words.
>
> 8. Finally, where the evidence clearly demonstrates that the parties' objective contractual intention is not correctly embodied in their words, the court may use its equitable jurisdiction to correct or "rectify" the words of the contract. A plea of rectification involves yet another stage of analysis and different categories of evidence and standards of proof.

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6 [2012] A.J. No. 85 (QL), 2012 ABQB 62.

[85] The Appellant takes this factual matrix approach further, relying on the recent Tax Court of Canada case of *River Hills Ranch Ltd. v R.*[7] in which Justice Hogan in turn refers to the Ontario Court of Appeal decision in *Dumbrell v Regional Group of Companies Inc.* where it is stated:[8]

> 53. The text of the written agreement must be read as a whole and in the context of the circumstances as they existed when the agreement was created. The circumstances include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement:
>
> 54. A consideration of the context in which the written agreement was made is an integral part of the interpretative process and is not something that is resorted to only where the words viewed in isolation suggest some ambiguity. To find ambiguity, one must come to certain conclusions as to the meaning of the words used. A conclusion as to the meaning of words used in a written contract can only be properly reached if the contract is considered in the context in which it was made: see McCamus, The Law of Contracts (Toronto: Irwin Law, 2005) at 710-11.
>
> 55. There is some controversy as to how expansively context should be examined for the purposes of contractual interpretation: see Geoff R. Hall, "A Curious Incident in the Law of Contract: The Impact of 22 Words from the House of Lords" (2004) 40 Can. Bus. L.J. 20. Insofar as written agreements are concerned, the context, or as it is sometimes called the "factual matrix", clearly extends to the genesis of the agreement, its purpose, and the commercial context in which the agreement was made: Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc., [1998] O.J. No. 4368, 114 O.A.C. 357 (C.A.), at p. 363 O.A.C.
>
> 56. I would adopt the description of the interpretative process provided by Lord Justice Steyn, "The Intractable Problem of the Interpretation of Legal Texts", supra, at 8:
>
> > In sharp contrast with civil legal systems the common law adopts a largely objective theory to the interpretation of contracts. The purpose of the interpretation of a contract is not to discover how the parties understood the language of the text, which they adopted. The aim is to determine the meaning of the contract against its objective contextual scene. By and large the objective

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7 2013 TCC 248, 2013 CarswellNat 2858.

8 2007 ONCA 59.

> approach to the question of construction serves the needs of commerce.

[86] In the *River Hills* case, Justice Hogan stated:

> 42. More recent court decisions have clarified the relevancy of "surrounding circumstances" and suggested an approach different than that outlined in *GM*. For instance, in *Dumbrell v. Regional Group of Companies Inc.* ("*Dumbrell*"), Doherty J.A. of the Ontario Court of Appeal, having referred to Lord Hoffmann's opinion in *Investors Compensation Scheme Ltd v. West Bromwich Building Society*, noted that the "meaning of [a] written agreement must be distinguished from the dictionary and syntactical meaning of the words used in the agreement". According to Doherty J.A., while the plain meaning of the words "will be important and often decisive in determining the meaning of the document", a "consideration of the ["objective contextual scene"] in which the written agreement was made is an integral part of the interpretative process and is not something that is resorted to only where the words viewed in isolation suggest some ambiguity.
>
> 43. Prior to *Dumbrell*, Goudge J.A. of the Ontario Court of Appeal had also noted that courts can use extrinsic evidence in taking into account the "factual matrix" of an agreement in cases where there is no ambiguity. He indicated that the factual matrix of an agreement includes the genesis of the agreement, its purpose, and the commercial context in which it was made. In so doing, he relied on the following observations by Lord Wilberforce of the House of Lords in Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen:[16]
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> 44. These two decisions (*Dumbrell* and *KFC*) suggest that a distinction must be made between the case where extrinsic evidence is admissible for the purpose of resolving an ambiguity - a notable exception to the parol evidence rule - and the case in which such evidence is considered for the purpose of giving meaning to the terms and conditions of an agreement in light of the "surrounding circumstances" or the factual matrix of the agreement. In the latter case, no ambiguity need exist. …

[87] With respect to extrinsic evidence of subjective intention, the Appellant also brought to my attention the following statement by the Ontario Superior Court in the case of *Misfud v Owens Corning Canada Inc.*:[9]

> 14. I must conclude, therefore, that the position of the Respondent is correct, that the only exception to the well established principle that evidence of subjective intention of the parties to a written contract is not admissible is where the contract is not ambiguous on its face but, when the court considers the surrounding circumstances or factual matrix, it becomes apparent that there is a latent ambiguity and accordingly, the court may admit evidence of the parties' intention as to which of two or more alternative subjects the parties intended to refer to. …

[88] As I indicated at trial, there is no discernible bright line between evidence establishing a factual matrix (clearly admissible) and evidence of subjective attention (perhaps inadmissible). I believe that, in the context of a Tax Court of Canada case where the Court is not faced with the two parties to the contract arguing about possible unwritten contractual rights or obligations, but is faced with making a determination of the correctness of the characterization of the nature of a payment by a third party (Government of Canada), the factual matrix is essential in helping the Court. The Court is not being asked to alter the contract vis-à-vis the respective rights and obligations between the parties. It is for the Court to determine, for the purposes of tax liability, the true nature of the payment. It is impossible, I would suggest, to do so without knowledge of the surrounding circumstances, especially where those surrounding circumstances so clearly play into the ultimate agreement.

[89] I have some reservations about the universal application of the parol evidence rule in this Court, where the objective of contract interpretation is to determine a taxpayer's liability for tax. To make that determination this Court often has to resolve the capital versus income dilemma. It is the very nature of the deal at issue, presumably represented by the words of the contract; but often those words are inexact and, indeed, the Parties may have chosen them mistakenly, inappropriately, poorly, at times even misleadingly and often without due thought to the tax implications.

[90] An obvious example where this Court is called upon to look past the words of an agreement is the independent contractor versus employee issue. The Supreme

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[9] 2003 CarswellOnt 3823, 38 C.C.P.B. 110.

Court of Canada has mandated that the Court consider the parties' actions more so than their words. This only makes sense considering the objective of this Court – the correctness of the CRA's assessment of the taxpayer's tax liability.

[91] Another example where the Court is invited to look past the words of a contract is section 68 of the *Act*, a section that empowers the Court to look beyond what parties may have explicitly allocated as consideration in a sale of assets to determine what is reasonable. How does one possibly determine reasonableness in a vacuum? The *Act* is replete with such "reasonableness" inquiries.

[92] In this case, the Respondent argues that the OPP, the journalists and the negotiators can shed no more material light on the exceptional circumstances that could in any way help me determine the nature of the payment Ontario made to Henco. I disagree. There were not market forces at work here, where two arm's-length parties, driven by a land development market, reached a reasonable commercial decision and put it in writing. Far from it. It would be putting blinders on to ignore the exceptional circumstances. It is imperative to delve into how those surrounding circumstances or factual matrix impacted on the Agreement, and ultimately on the determination of the nature of the payment.

[93] I need to know what drove this deal to know exactly what the deal is to enable me to determine the tax consequences.

[94] I concluded at trial that the evidence intended to be called by Henco was in the nature of a factual matrix. While I recognize that such evidence may spill into the subjective intention of the Parties, if the purpose of that evidence is to establish a latent ambiguity in the contract, that too is admissible. I did leave the door open for the Respondent to object at the time evidence was going in, if the Respondent believed it went beyond the scope of my ruling. It was also open to the Respondent to argue that little or no weight should be attached to such extrinsic evidence on whatever basis the Respondent would deem appropriate.

[95] I am reinforced in my view that extrinsic evidence is admissible by reviewing the contract itself. Even in the preamble of the contract it is stated:

> Whereas based on circumstances relating to the use and development of the property.

[96] This invites scrutiny. What were those circumstances?

[97] I will not invoke the parol evidence rule against one party to a contract where it is clear there are exceptional circumstances beyond that party's control that drove that very contract with a third party, the third party not being a party to this action. As I said at trial, that would handcuff me as trial judge in determining the true nature of the payment. I accept that the Appellant can call extrinsic evidence.

[98] I made this ruling before I heard the evidence. Having heard the evidence, I can now address some elements of the parol evidence arguments that were not as apparent at the time I originally made my ruling. Subsequent evidence has confirmed my initial view that extrinsic evidence is not only admissible, it is critical to the proper characterization of the $15,800,000 payment. What is clear to me now, after completion of the trial, is that even if I accepted the parol evidence rule comes into play, the exception to address ambiguity in the Agreement also comes into play. The Agreement needs to be interpreted such that I can determine, for tax purposes, the character of the payment. The Agreement could have explicitly indicated an allocation amongst the assets being sold. It did not do that. Without making possibly unfounded assumptions about the value of the land, the character of the land (inventory or capital), the value of the right to the injunctions (which, as was clear from the evidence, did not simply disappear on transfer), and what "intangibles" were being sold, it would be impossible to make a reasoned, sensible determination of the true nature of the payment. The Agreement simply was not sufficiently clear. It included provisions (for example paragraphs 3.1 and 4.1(w) – see Schedule "A") that invited further scrutiny. To impose the parol evidence rule in these circumstances would thwart the goal of determining the correctness of the assessment.

[99] While I have concluded the Agreement is not sufficiently clear, opening the door to admitting extrinsic evidence, I am not convinced that ambiguity is even necessary in certain cases before our Court in order for such evidence to be admitted. The evidence is necessary to achieve a correct, just result. This is one of these cases.

[100] The Parties raised another preliminary matter, the admissibility of certain documentary evidence. For completeness of the record, I will repeat here my ruling on that issue.

[101] The Appellant asked the Court to admit into evidence certain documents which it described as follows:

a) Certain affidavits sworn by public officials, such as the Deputy Minister of the Ontario Secretariat for Aboriginal Affairs, in relation to events that are directly related and relevant to the issues in the Appeal;
b) Certain press releases issued by Ministries of the Provincial and Federal Governments that are also directly related and relevant to the issues in this Appeal, including the factual matrix surrounding the Agreement in question. The authenticity of the press releases in question has been accepted by the Respondent.

[102] The Appellant relied on the public documents exception to the hearsay rule for the admission of the affidavits. That exception was described as follows: a statement made out of court by a public official in the discharge of a public duty that is intended to serve as a permanent record ought to be accepted as truthful without calling the public official as a witness.

[103] The affidavits of Doug Carr, the Assistant Deputy Minister of the Ontario Secretariat for Aboriginal Affairs, Jane Stewart, the Chief Negotiator for Ontario with respect to the Occupation of the DCE property, Ronald Doering, Senior Negotiator for Canada, and John Cain, Director of Operations, Western Region, of the OPP, were filed with the Ontario Court of Appeal in support of a motion to stay a decision of the Ontario Superior Court of Justice, which refused to set aside the injunctions against the Occupation. I was advised by Appellant's counsel that this type of motion for an interlocutory order at the Court of Appeal is heard on affidavit evidence. There is no dispute that the actual Court of Appeal decision can be, and has been, provided to me.

[104] The press releases in issue were released by the Ontario Secretariat for Aboriginal Affairs, the OPP and Haldimand County. Relying on the 1996 Ontario Court of Appeal case of *R. v P.(A.)*,[10] the Appellant identified four criteria to be met for the public documents exception to apply:

1) The document must have been made by a public official;
2) The public official must have made the document in the discharge of a public duty or function;
3) The document was made with the intention that it be a permanent record; and
4) The document must be available for public inspection.

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[10] 1996 CarswellOnt 3150 (CA).

[105] The Respondent relied on *Sopinka, Lederman & Bryant*: *The Law of Evidence In Canada*[11] to describe the four-pronged test somewhat differently, requiring:

1) The subject matter of the statement must be of a public nature;
2) The statement was prepared with a view to being retained as a public record;
3) It was made for a public purpose and available for inspection by the public at all times; and
4) It was prepared by the public officer in pursuance of his duty.

[106] The Appellant also addressed the principled approach to hearsay evidence, requiring a determination of reliability and necessity. Mr. Shaw quoted *Sopinka* in addressing a principled approach to the public documents exception:

> As with some of the other exceptions to the hearsay rule, necessity is a further justification for admissibility of public documents, but it is necessity of a different kind. It has never been a precondition to admissibility that the maker of the public document be dead. The special necessity, therefore, for this type of hearsay evidence is not so much the unavailability of alternative modes of proof; rather, it is based upon expediency, for, without such an exception, many public officials would have to be taken away from necessary governmental tasks in order to testify in court. Therefore, the work of the Government and the needs of the public are given priority, and the law, accordingly, has not insisted upon court attendance of public officials. Moreover, little would be accomplished by demanding the *viva voce* testimony of the public officer, since he or she probably would possess no recollection of the event independent of the document itself.

[107] The Respondent relied on *Robb v St. Joseph's Health Centre*,[12] in which it was determined that the Krever Report, looking into the tainted blood issue, was not admissible in the class action by families affected by the tainted blood. The trial judge in that case wrote([1998] O.J. No. 5394(QL)):

> 19. The Krever Report contains the opinion of Commissioner Krever based on a record that is not before this court. The report contains Commissioner Krever's conclusions and opinions based upon what he observed as having occurred, upon what he found to have been done correctly and incorrectly, and upon what he found should have been

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[11] Alan W. Bryantm Sidney N. Lederman and Michelle K. Fuerst, eds, *The Law of Evidence in Canada*, 3d ed (Markham, ON: LexisNexis, 2009 (*Sopinka*).

[12] [2001] O.J. No. 4605.

> done but was not done. Commissioner Krever did not apply the standards of proof of evidence which are applicable to the conduct of a civil trial. I accept the submission of Mr. Morrison that Commissioner Krever's conclusions and opinions are based on evidence and opinions given at the hearings, much of which would not be admissible in a civil or criminal trial. …

[108] I find the *Robb* case is distinguishable as in that case it was the final product of the Inquiry, the Report, at issue. Before me, it is not the final product, the decision of the Court of Appeal, but the evidence produced on the motion in the Court of Appeal motion at issue. In *Robb*, the court found the Report was based on evidence and opinions much of which would not be admissible in a civil trial. Here, the affidavit evidence was acceptable in the Court of Appeal, though, notably, that proceeding was not a trial, and different rules regarding evidence appear to have been applicable.

[109] So, with respect to the public documents exception, it is elementary that the document must be a public document. I do not accept the Appellant's view that, because the affidavits were made by public officers for use in a court matter, it follows they are public documents subject to the public documents' exception to the hearsay rule. The contents of the affidavits are presumably the affiants' recollection of events in connection with the Occupation. The contents are not, as suggested in *Sopinka*, contents of which the affiants would otherwise have no recollection. The affidavits were made by public officials, but as witnesses of events, not recorders of public records. Their providing evidence of events requiring their recollection is no different from the providing of evidence by any other witness. The contents of such affidavits do not become public documents subject to the hearsay exception simply by the filing of them in a motion before the Ontario Court of Appeal.

[110] The Respondent points out that Rule 144 of the *Tax Court of Canada Rules (General Procedure)* requires oral testimony. This does not override a principled approach to the hearsay rule whereby necessity and reliability may render hearsay evidence admissible, left then to the judge's discretion to assign weight. But it does create a starting point. Witnesses' evidence that constitutes their recollection of events is best provided orally, thus permitting cross-examination to ensure the veracity of the testimony. Affidavits, the contents of which I find do not constitute public documents, should therefore be subjected to the normal tests of necessity and reliability. Here reliability is not an issue; necessity is. The description of the special test of necessity that Mr. Shaw provided from *Sopinka* related to public documents. These affidavits, I find, are not public documents to which the

exception applies, so the usual approach to necessity is applicable. Why, in fact, can these four people not appear before me? I heard nothing to convince me it is necessary to have their evidence by affidavit. These four people's credibility has not been tested; they are not testifying on matters for which they have a public duty to maintain a document. They simply are in no different position than any other witness.

[111] If the Appellant wants this Court to accept the evidence of these four potential witnesses about the events surrounding the Occupation that lead to the Agreement between Ontario and Henco, then the Appellant is going to have to call them.

[112] I do not view the affidavits either as a public documents exception to the hearsay rule or as being admissible on the principled approach to the hearsay rule. The best evidence from these four witnesses is their oral testimony.

[113] Is the Appellant's position saved by the *Canada Evidence Act*, sections 23 and 24? No. Under section 23, I do not read "evidence of any proceeding" to imply evidence from any proceeding. For this Court to accept affidavit evidence holus-bolus in a proceeding that only accepts affidavit evidence is too broad an interpretation of the *Canada Evidence Act* provisions. If the parties in the Ontario Court of Appeal had been the same as those before me, and if there had been an opportunity to cross-examine the affiants in that proceeding then, perhaps, the *Canada Evidence Act* would come into play and such evidence would be acceptable in this Court.

[114] I turn now to the Press Releases. I rely on the authority of *R. v McCormack*[13] which dealt directly with police press releases, as well as the case of *P.I.P.S.C. v. Canada*,[14] in which the court stated:

> 70. As to the criterion of reliability, it is evident that these documents were prepared by senior or knowledgeable officials within departments or agencies of the federal government. They describe or explain the operation of the Superannuation Plans and these accounts. In many cases, they were for the purpose of conveying information to Ministers and senior government officials or other departments or government. In my view, it is reasonable to expect that a

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13 2009 CarswellOnt 7019 (SCJ).

14 [2005] O.J. No 5775 (SCJ).

> high premium would be placed on their accuracy. There is also the expectation of candor, given the circumstances and the fact that there was no litigation existing at the time. This evidence has the "circumstantial guarantee of trustworthiness."

[115] I accept the Appellant's position that calling a witness to attest to these press releases would be a waste of time. They fall within the four criteria mentioned earlier. I reject the Respondent's position that accepting police press releases would obviate the need for criminal trials: some common sense needs to be injected into these considerations. A press release is certainly public and therefore accessible and could remain a permanent record of an event.

[116] The press releases are in. The affidavits are out.

III. Analysis

$650,000 issue: income or windfall?

[117] The Respondent argues that the $650,000 payment made on May 3, 2006 falls squarely within the parameters of paragraph 12(1)(*x*) of the *Act* which reads:

> 12(1) There shall be included in computing the income of a taxpayer for a taxation year as income from a business or property such of the following amounts as are applicable:
>
> …
>
> *(x)* any particular amount (other than a prescribed amount) received by the taxpayer in the year, in the course of earning income from a business or property, from
>
> …
>
> (ii) a government, municipality or other public authority,
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> where the particular amount can reasonably be considered to have been received
>
> …
>
> (iv) as a refund, reimbursement, contribution or allowance or as assistance, whether as a grant, subsidy, forgivable loan, deduction from tax, allowance or any other form of assistance, in respect of

> (A) an amount included in, or deducted as, the cost of property, or
>
> (B) an outlay or expense,
>
> to the extent that the particular amount
>
> …
>
> (viii) may not reasonably be considered to be a payment made in respect of the acquisition by the payer or the public authority of an interest in the taxpayer, an interest in, or for civil law a right in, the taxpayer's business or an interest in, or for civil law a real right in, the taxpayer's property;

[118] The Appellant argues that the payment does not fall within paragraph 12(1)(*x*) of the *Act*, but that the $650,000 was a windfall, citing the requirements for a finding of a windfall set out in the case of *R. v Cranswick*.[15] I see no need to address the many factors in *Cranswick* or to go into a detailed analysis of windfall. The question is – is the $650,000 payment caught by paragraph 12(1)(*x*) of the *Act*? If it is, it is income. If it is not, it is not taxable as income. The Respondent has not presented any alternative to paragraph 12(1)(*x*) of the *Act* for bringing such a payment into income – for good reason.

[119] So what conditions must be met for paragraph 12(1)(*x*) of the *Act* to apply:

1) The $650,000 must have been received by Henco "in the course of earning income from a business or property";
2) The payment must have been from a government;
3) The payment can reasonably be considered to have been received as assistance in respect of an outlay or expense;
4) The payment was not for the acquisition of Henco's business or property.

The Appellant argues that conditions 1 and 3 have not been met, or in the alternative, that the payment was for the acquisition of the DCE property.

[120] Was the payment received in the course of earning income from a business?

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[15] 1982 CarswellNat 162, 1 F.C. 813 (F.C.A.).

[121] The payment was received in early May. At that stage, was Henco in the course of earning income from a business? The Appellant points out that this wording is unlike the wording in paragraph 12(1)(*a*) of the *Act*, for example, which simply says "in the course of a business". Could Henco have still been in business yet not in the course of earning income from a business? I believe it could have been. There certainly came a point when Henco was no longer able to conduct the business it was in – land development. There was no business and consequently no possible earning income from a business: at some point there was no carrying on of a business, simply a salvage strategy. But was that point in early May, at the time of the receipt of the payment?

[122] The Respondent argues that paragraph 12(1)(*x*) of the *Act* does not imply any particular moment in time, but that I must consider more broadly the time spectrum to determine whether the amount was received in the course of earning income from a business. These were exceptional and unfortunate circumstances. There is no question Henco in 2005 and into 2006 was in business, and certainly in the course of earning income from a business, but the $650,000 clearly does not relate to that time period, the time period before the Occupation. That is not the time period that should be considered in answering the question of whether Henco received the $650,000 "in the course of earning income from a business." The time period is the time period to which the payment relates: late February to early May.

[123] I agree with the Respondent that it would make no sense, when considering government financial assistance to a struggling business, to say that the struggling business was not receiving the payment in the course of earning business income simply because it was, at the time it received the payment, operating at a loss. But that is not the situation before me. At some point, Henco was not simply operating at a loss, but was out of business altogether and was no longer in the course of earning income from a business.

[124] I find that until Henco found out about the moratorium, and ultimately the imposition of a rezoning by-law precluding further development, Henco was still in business. That did not happen until later in May, after the $650,000 payment had been received. But from late February to the time of the $650,000 payment, though still in business, was Henco in the course of earning income from a business? I believe not. Though this may seem a fine distinction, it is clearly a distinction that the legislation itself makes.

[125] The evidence was clear that after February 28, 2006, Henco could not access the DCE property. It could not carry on a business earning income. As the

Appellant's counsel put it, it had been materially crippled or sterilized. That sterilization became permanent later in May, ending the business. But from February 28 what Henco did was not in the course of earning income from a business. What it did was attempt to preserve the business itself, with an expectation, that clearly grew weaker as the Occupation went on, that blockades would be lifted and it might return to earning income from the business. It did this by taking the only step it could take, an attempt to legally have the blockades removed. Throughout the period from February 28 to May 3 it was physically impossible for Henco to do anything other than that. I conclude it did not receive the payment in the course of earning income from a business. It was not, for example, in the restart-up phase of a business after a catastrophic event such as a flood or an earthquake.

[126] If I am wrong in my conclusion that the amount was not received "in the course of earning income from a business", I find the third condition has also not been met. Can the payment reasonably be considered to have been received as assistance in respect of an outlay or expense? There is no evidence from Henco as to what the $650,000 was used for. There is evidence from Ontario in its letter of April 27 and the enclosed Schedule A that the payment was to assist in respect of costs and expenses incurred because of the Occupation, but that was Ontario's view, not Henco's. There was no requirement for payment. There was no requirement for an accounting.

[127] What is clear, however, is that $300,000 was paid by Ontario as part of the Agreement and that, according to the Agreement, the $300,000 was intended to cover "the reasonable costs of the Vendor incurred since February 28, 2006 relating to the occupation of the DCE lands, including all of the Vendor's costs relating to the retention of consultants, legal advisors, appraisers, experts and other third party advisors."

[128] Mr. Henning testified that the $300,000 had nothing to do with the $650,000. He confirmed that Henco did incur costs for those types of services and expenses that were slightly in excess of $300,000. So what outlay or expense was the $650,000 meant to assist with? It is not reasonable, without evidence of other "outlays or expenses", to conclude the payment was in respect of some conjectured expenses. As Mr. Carr suggested, it was simply the fair thing to do.

[129] I conclude the $650,000 was effectively a no-strings-attached, to use common vernacular, "freebie", not swept into income by the application of paragraph 12(1)(*x*) of the *Act*.

Seneca Property: $800,000 or $850,000 - income or capital?

[130] There are two issues with respect to the Seneca property: was the payment on income or capital account, and was the value $800,000 or $850,000?

[131] I can quickly dispose of the second issue. The appraiser's valuation of $850,000, relied upon by the Respondent, fell within an indicated range of $786,590 to $898,960. Anything, I would suggest, within that range would be a reasonable fair market value determination. Real estate appraisals, especially where there are exceptional non-market forces at work, cannot be precise. A range of value makes eminent sense. And, where a taxpayer has designated a value that ultimately is found to fall within the range of reasonable fair market value, I see no reason to disturb that figure. $800,000 it is.

[132] Turning to the capital versus income issue, the case of *Canada Safeway Ltd. v R.*[16] offers a good summary of what factors need to be addressed:

> 61. A number of principles emerge from these decisions which I believe can be summarized as follows. First, the boundary between income and capital gains cannot easily be drawn and, as a consequence, consideration of various factors, including the taxpayer's intent at the time of acquiring the property at issue, becomes necessary for a proper determination. Second, for the transaction to constitute an adventure in the nature of trade, the possibility of resale, as an operating motivation for the purchase, must have been in the mind of the taxpayer. In order to make that determination, inferences will have to be drawn from all of the circumstances. In other words, the taxpayer's whole course of conduct has to be assessed. Third, with respect to "secondary intention", it also must also have existed at the time of acquisition of the property and it must have been an operating motivation in the acquisition of the property. Fourth, the fact that the taxpayer contemplated the possibility of resale of his or her property is not, in itself, sufficient to conclude in the existence of an adventure in the nature of trade. In *Principles of Canadian Income Tax Law*, supra, the learned authors, in discussing the applicable test in relation to the existence of a "secondary intention", opine that "the secondary intention doctrine will not be satisfied unless the prospect of resale at a profit was an important consideration in the decision to acquire the property" (see page 337). I agree entirely with that proposition. Fifth, the *viva voce* evidence of the taxpayer with respect to his or her intention is not conclusive and has to be tested in the light of all the surrounding circumstances.

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[16] 2008 CarswellNat 115, 2008 FCA 24.

[133] I do not view this as a secondary intention analysis. The Respondent argues the Seneca property was never intended by Henco to be developed by them so that Henco could own and operate a golf course. It was always Henco's intention to hold the property as inventory for purposes of resale, either to a golf course operator or for residential development. Henco argues that its only intention at the time of acquisition of the property was to develop a golf course. Indeed, the Agreed Statement of Facts stipulates:

> 41. The previous owner of the Seneca property ("Old Henco"), had carried out preliminary planning for the construction of a golf course.
>
> 42. This primary purpose was maintained by Old Henco, through Jack Henning, its shareholder.

[134] But was Henco going to construct the course and then sell it to a golf course operator, or construct it to operate it itself? That is the question. I accept Mr. Henning's evidence that the property was unsuitable for residential development: it was not zoned for such; it consisted of some land designated as hazard land; it would be difficult to service; and it had possible First Nations' issues. That, however, as I have indicated, is not the issue. The question is what evidence proves an intention to own and operate a golf course versus an intention to develop the land for sale as a golf course: capital versus income.

[135] Both Parties referred me to the books of Henco which, frankly, could be interpreted either way. The Seneca property was shown in the books often with a reference to "golf" yet did not appear as a capital asset as such. Nothing can be drawn from the books.

[136] Both sides raised the Camplor offer. The Appellant suggested that as it was an unsolicited offer it is no indication of an intention on the part of Henco one way or the other. The Respondent suggested that although the Camplor deal did not go ahead, Henco had accepted the offer and, indeed, did eventually sell to another developer. With respect, none of these facts, long after the acquisition of the property, go to prove an intention that at the time of acquisition the property was inventory or capital.

[137] Also, the donation of part of the Seneca property to the County is no indication one way or the other as Mr. Henning testified there was still room for an 18-hole golf course.

[138] I am left with no evidence that favours one intention over the other: developed for sale as a golf course versus developed to be owned and operated by Henco as a golf course. One of the Minister's assumptions was that "the Appellant made efforts to bring the property into a more marketable condition in order to sell it at a profit by carrying out preliminary planning to develop the Seneca property into a golf course". The onus is on the Appellant to demolish that assumption. I find there has been no evidence presented to me that does so. All the evidence is just as consistent with an intention to develop the property for sale as a golf course as it is with an intention to develop the property to own and operate it as a golf course. The Appellant has not met the onus. The $800,000 is on income account.

Morrison Property – Fair Market Value?

[139] The only issue with respect to the Morrison property is the correctness of the Minister's reliance on the fair market value of $1,400,000, as opposed to Henco's determination of the value of $1,000,000. Henco relies on the fact that the Minister accepted its write-down of the property to $1,000,000, as well as relying on Mr. Henning's personal view of its value, given the circumstances at the time. The Minister relies on the retrospective appraisal obtained by Henco from Jacob Ellens & Associates Inc. that appraised the Morrison property at $1,400,000. The appraisal report, while included in the Appellant's Book of Documents, was not put to Mr. Henning or any of the witnesses. The appraiser was not called.

[140] Has Henco rebutted the Minister's assumption of a fair market value of $1,400,000?

[141] In the case of *Gough Estate v Canada*,[17] Justice Campbell had this to say about rebutting an expert report:

> 19. In many cases where the taxpayer does not produce an expert report to rebut the Minister's assessment respecting the fair market value, this Court is forced to dismiss the appeal because the taxpayer has not met the onus which is upon him. However, there are those few cases where a taxpayer has been able to meet the onus where no expert is produced. The question of determining fair market value where only one side presents an expert was considered by Bowman, A.C.J.T.C. in Klotz v. Canada, [2004] T.C.J. No. 52 at para. 33 where he states:
>
> ...To call no expert witnesses in a valuation case can be a risky manoeuvre. Nonetheless, the court is not bound to accept any expert's opinion and ultimately the court must make its own determination of value based on all of the evidence.
>
> 20. In the present case, the Appellant did not engage an expert and chose to rely on Dr. Gough's own valuations of the properties. Dr. Gough's primary expertise is in the field of medicine, although he has had extensive real estate holdings. He valued the properties primarily by reference to his experience with his own rentals and to the assistance he provided his father with his seven rental units over the years. Although recognition is given to the substantial participation of Dr. Gough in the real estate market, I must reject his approach to the valuation of these properties. The method to be employed in determining fair market value

[17] 2004 TCC 756.

> of a property may vary with the circumstances of a case, but the general practice is to evaluate using one or more of the three recognized valuation methods. In initially filing the estate return, Dr. Gough simply relied on his own knowledge and experience in the real estate field to compile the valuations. After the assessment, he compiled data obtained from the Registry office respecting other sales in this period and he also drafted a graph-analysis. However, the graph does not represent a recognized method of valuation. Even if I did accept the graph, the rates of appreciation were not substantiated in any way and it was these rates upon which the graph was based.
>
> …
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> 24. The Appellant has failed to discharge the onus which is upon him. He did not employ objective data, use a recognized method of evaluation, offer an expert report or opinion, or provide evidence as to how the discrepancies in the age and location of the comparables could potentially affect the valuation conclusions provided in the expert report. The best evidence before me is Mr. Bennett's report and his testimony.

[142] I am faced with a similar situation. First though, I do not find that, simply because the Minister did not reassess Henco in connection with the write-down to $1,000,000, the Minister is somehow estopped from now maintaining the value is $1,400,000. It is the correctness of this particular assessment that is before me, and it is for me to determine the value, notwithstanding what the CRA may or may not have previously found acceptable in a different context.

[143] Has Mr. Henning provided sufficient evidence to rebut the $1,400,000 value assessed by the Respondent? No, he has not.

[144] Knowing the Minister's assumption was based on an appraisal that Henco itself obtained, Mr. Henning has provided no evidence to attack or in any way contradict that expert appraisal. He is simply suggesting in his oral testimony that the Occupation and the damage to the Caledonia "brand" support the value he determined at the time and nothing more. Indeed, he suggested at trial that the $1,000,000 was too high. Mr. Henning acknowledged that he based the value on what the Morrison property was on the books at.

[145] Mr. Henning has not provided a valuation based on any valuation method. His valuation is in effect Henco's book value. He acknowledged he is not an appraiser, but said he was intimately familiar with the situation at the time. That familiarity, however, does not translate into a reasoned, methodical valuation.

[146] The explanation Mr. Henning gave (see paragraph 76 of these Reasons) is just not enough to rebut a value based on an expert appraisal, especially where that appraisal has not been subjected to any detailed review by another appraiser or even by Mr. Henning.

[147] I conclude that the Minister's assessment of a value of $1,400,000 is correct.

$15,800,000 issue: income or capital; if capital, taxable or non-taxable?

[148] I will analyze this issue by addressing the following questions:

1) Did Henco receive the $15,800,000 for the DCE land?
2) If the $15,800,000 was for the DCE land, was the receipt on account of income, pursuant to sections 9 and 23 of the *Act* or on account of capital?
3) If the $15,800,000 was for something other than land, was the receipt of the $15,800,000 on account of income or capital, and if on capital account did it result in a capital gain or was it an eligible capital amount or a non-taxable capital receipt?

(1) Did Henco receive the $15,800,000 for land?

[149] In answering this question, I will first consider the Agreement itself and then consider the factual matrix.

[150] The starting point, and according to the Respondent the determinative point, is the Agreement itself, and by Agreement I include all documents required to close the transaction. The Respondent maintains the Agreement is unequivocal in that it was for the sale of the DCE land for $15,800,000. The Appellant maintains the Agreement is not reflective of the true nature of the deal between the Parties, which was $15,800,000 for the vaporisation of Henco's business.

[151] What does the Agreement stipulate? First, and most significantly, it does not explicitly state that the DCE land is being sold for a consideration of $15,800,000. I note the Agreement does not talk in terms of consideration but compensation (subparagraph 3.1(a) of the Agreement), a term commonly associated with payment for services or payment for damages. The compensation is to be determined according to the fair market value of the purchased assets at February 27, 2006, that is, before the Occupation: an indication, I would suggest, that it was considered difficult to value whatever was being sold as at the time of sale. It implies this was solely a mechanism for the determination of the compensation, a mechanism based on the only tangible asset but, by necessity, at a time when that asset had value.

[152] The Agreement lists several assets in the sale including the land, the contracts and the chattels, which in turn include intangibles.

[153] At the outset of the Agreement it is highlighted in the preamble that there are circumstances relating to the use and development of the property. Then, looking at the representations and warranties, we find a clue as to what those circumstances are and how they might be affecting the deal. Subparagraph 4.1(d) of the Agreement is an explicit reference to what is driving the deal, as it requires Henco to "immediately obtain an order setting aside the order of Justice Marshall …". A further explicit clue is found in subparagraph (w) of the representations and warranties, which requires a cessation of the business of Henco. It is clear from the document itself this is not a simple land deal – something else is going on.

[154] The closing documents included a statement of adjustments which did indicate that the adjustments were income-related adjustments. The Respondent argues this suggests that the $15,800,000 was therefore on income account. It does

not prove, though, how much was paid for the land. Obviously, the disposition of the land was part of this deal. It is not at all clear on the face of the Agreement, though, that the $15,800,000 was paid for the land, notwithstanding the adjustments. The adjustments would be made regardless of the consideration attributable to land.

[155] The other document subsequent to the Agreement, which forms part of the closing, was the full and final release. The preamble of the release states that the vendor will release the purchaser from all actions in exchange for the payment of $15,800,000. Am I to assume that the whole $15,800,000 was for the release and not for the land?

[156] I conclude that, even before turning to the factual matrix, there is support for a finding that this Agreement, while effecting a sale of land, is doing something more. Why must Henco cease business? Why must Henco have an order of Justice Marshall set aside? What is that order? Why was there no current valuation of the purchased assets not valued currently? What is going on? I reject outright that the Agreement reflects a clear-cut sale of land for $15,800,000: there is clearly something else at play. I also find it is impossible to discern the true nature of the agreement for the purposes of assessing Henco's tax liability without an understanding of all the circumstances, the factual matrix.

[157] So what are those surrounding circumstances that might help me to determine exactly what the $15,800,000 was paid for?

[158] Looking outside the Agreement for the purpose of proving that the $15,800,000, or a good part of it, was paid for the DCE land, the only surrounding circumstance that supports this proposition is the actual transfer of title showing a transfer value of $12,300,000.

[159] Looking outside the agreement for the purpose of proving the $15,800,000 was not for the land, I find the following surrounding circumstances leading up to the Agreement:

- Based on both Parties' appraisals, the land had no value: it was worthless;
- There was no commercial market for the land;
- Ontario was not motivated by commercial needs;

- Ontario faced lawlessness, civil unrest and significant policing costs.

[160] I could go through a litany of the events demonstrating this fact, but I have intentionally outlined in considerable detail such facts earlier in these Reasons. They point overwhelmingly to an increasingly and alarmingly dangerous situation in Caledonia demanding action from Ontario.

- Ontario could not resolve the Occupation nor could any treaty negotiations proceed as long as the Six Nations were in fear of enforcement of the injunction: it was imperative the injunction be removed and only then would the barricades come down.

- The OPP would not risk greater violence and possible deaths. They were particularly concerned about a repeat of Ipperwash, the inquiry into which was ongoing at this time. Justice Marshall would not tolerate an abandonment of the rule of law.

- Elected officials were involved in finding a resolution.

- Media coverage was extensive.

- With the rezoning by Ontario of the land to prevent development, Henco's business was effectively over.

- The moratorium and rezoning were not sufficient to end the Occupation.

- According to Mr. Henning, Ontario was more active in dealing with Henco to buy them out in times of greater violence, when there was an upcoming court hearing or when there was media coverage.

- Mr. Carr, as a representative of Ontario, acknowledged "removing the barricades and ending the occupation was central to all the discussions we were having".

- Mr. Carr further indicated removing Henco would leave the dispute between Ontario and Canada on the one hand and Six Nations on the other.

- Mr. Henning was afraid for his and his family's personal safety as Six Nations targeted Henco as a source of their problems, even to the extent of accusing the Hennings of starting a war.

[161] Subsequent to the Agreement there was an event that also supports the view that Ontario was paying for something other than the land. That event was Henco's immediate attempt to have the injunction removed; that attempt was unsuccessful. Justice Marshall did not remove the injunction. Ontario immediately took over the handling of the matter which ultimately resulted in the Court of Appeal decision lifting the injunction.

[162] There was an extremely dangerous situation evolving in Caledonia. Ontario had to do something. Henco was caught in the middle and ultimately paid a price. Ontario removed Henco as a stumbling block. The only conclusion that can be drawn is that Ontario paid Henco to go away and in doing so enable Ontario to get rid of the injunction, acquire control of the volatile situation and restore peace. The effect was to destroy Henco's business.

[163] Given the extraordinary surrounding circumstances, I cannot conclude Henco received $15,800,000 for the sale of worthless land. That captures neither the essence of the Agreement itself nor the intent of the Parties; from Henco's perspective, to salvage what it could from the destruction of its business, and from Ontario's perspective, to defuse a volatile situation and perhaps do the right thing by Henco. Although land was transferred as part of the deal, this was not a land deal.

(2) If the $15,800,000 was for the DCE land, was the receipt thereof on account of income or capital?

[164] Although I have determined that the receipt by Henco of the $15,800,000 was not for the DCE land, I still wish to address the Respondent's argument that if it was for the land, the amount is income by virtue of section 23 of the *Act*.

Section 23 of the *Act* reads as follows:

> (1) Where, on or after disposing of or ceasing to carry on a business or a part of a business, a taxpayer has sold all or any part of the property that was included in the inventory of the business, the property so sold shall, for the purposes of this Part, be deemed to have been sold by the taxpayer in the course of carrying on the business.

> (2) [Repealed under former Act]
>
> (3) A reference in this section to property that was included in the inventory of a business shall be deemed to include a reference to property that would have been so included if the income from the business had not been computed in accordance with the method authorized by subsection 28(1) or paragraph 34(*a*).

[165] The Appellant argues that the land was effectively moved from inventory to capital before its disposition to Ontario and therefore section 23 of the *Act* is not applicable. The Respondent argues that only if there has been a clear and unequivocal positive act converting a property from inventory to capital, property held as inventory remains inventory and, upon disposition of the business or upon the cessation of the carrying on of a business, it is sold as inventory and brought into income. In the recent Tax Court of Canada case of *Peluso v The Queen*,[18] Justice Jorré, while acknowledging it is possible to convert vacant land from inventory to a use which will give rise to a capital gain, found that there was not enough done to show such conversion: at best there was a change of plan. He quoted the Federal Court of Appeal in the *Edmund Peachey Ltd. v The Queen*[19] decision, which in turn affirmed a statement by President Jackett in *Les Entreprises Chelsea Limitée v MNR*:[20]

> In my view, where one finds such a business, as long as there continues to be land of the original inventory of the business in the ownership of the company, it is reasonable to assume that the business has not been brought to an end in the absence of some evidence that something has been done to bring the business to an end, as, for example, where the corporation takes the land out of the business and dedicates it to the creation of some structure to be used as the capital asset of another business.

[166] The Respondent suggests that Henco did nothing to demonstrate a shift of use from inventory to capital. Yes, it wrote the DCE land down to zero in its books, but that, the Respondent suggests, was simply a write-down of inventory. It did nothing else. I asked Respondent's counsel what positive steps Henco should have taken to prove it no longer held the DCE land as inventory: not surprisingly,

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18 2012 TCC 153.

19 [1979] C.T.C. 51.

20 [1970] C.T.C. 598, 70 DTC 6379.

there was no suggestion. This is not the same situation as in *Peluso*. It cannot be assumed that Henco was still in business simply because it continued to hold the DCE land. Nothing could be further from the truth. By Ontario's actions, Henco was out of business. It had been in the land development business: it held land to develop. The Occupation made that physically impossible, and the Ontario Government, by rezoning the property, made it legally impossible. This is abundant evidence, using President Jackett's words, that something was done to bring the business to an end.

[167] But, the Respondent argues, if it was not inventory, the land was not held either as an investment or on capital account of a business, the disposition of either yielding a capital gain. That, I suggest, is too narrow a view of capital. I agree that at the time the land could no longer be developed it was neither an investment (it was worthless) nor a capital asset of a business (there was no business), but it certainly was not inventory. It was a useless, worthless piece of land that had no market. It could not even be said that it was held as an adventure in the nature of trade: there was no adventure and its ultimate disposition to the Government of Ontario in such unusual circumstances can in no way be viewed as being in the nature of trade in any commercial sense.

[168] It is a misnomer to say there was a change of use, as the land went from use as a trading asset to no use at all. There was a conversion, certainly: a conversion in which the DCE land completely lost its character as inventory. To be clear, the land did not lose its character as inventory because Henco went out of business and the land was sold while Henco was no longer carrying on a business (the very situation section 23 of the *Act* was put in place to address). The land lost its character as inventory by being made legally useless for development. It is something of a chicken and egg scenario, but section 23 of the *Act* covers cessation of business and attempts to change inventory to capital, while here the nature of the inventory changed and then Henco went out of business, not the type of situation section 23 of the *Act* was designed to address.

[169] What then do we have as far as characterizing the DCE land; it seems it is neither fish nor fowl. Is a tangible asset that is worth nothing a taxable nothing, even if someone (Ontario) is prepared to pay something for it? Or is an asset, such as land, which is found not to be a trading asset, by default a capital asset? This becomes something of a circuitous debate, leading to support for my earlier finding that in fact and in law Ontario could not have paid and did not pay $15,800,000 for the land. However, if the $15,800,000 does attach to the land, and I conclude the

land is not inventory, I then also conclude it has to be on capital account and taxed as a capital gain.

> *(3) If the $15,800,000 was not for the land, was the receipt of the $15,800,000 on account of income or capital, and if on capital account, did it result in a capital gain or was it an eligible capital amount or a non-taxable capital receipt?*

[170] I have concluded the $15,800,000 received by Henco was primarily for something other than the land. It was either to compensate Henco for the whole loss of its business, or was paid as consideration for certain rights, or more accurately the extinction of certain rights: the right to sue Ontario and the right to takes steps to enforce the injunction it obtained. Henco argues it was for the former and that compensation for such total loss can only be on capital account and could only fall into eligible capital property, yet goes on to argue that by electing to have the former rules under subsection 14(5) of the *Act* apply (the mirror imaging test) it falls out of eligible capital property and is simply therefore a taxable nothing.

[171] I will first address the Appellant's argument that the $15,800,000 was on capital account. The Federal Court of Appeal in *T. Eaton Co. v R.*[21] discussed the income versus capital determination in the following way:

> 24. As Justice Strayer so aptly noted in Canadian National Railway, there is considerable jurisprudence on the question of whether compensation paid pursuant to the termination of a trade contract is capital or income and, to a large extent, each case turns on its own facts. I acknowledge that it would be much simpler to adopt an inflexible rule deeming any compensation received for breach or termination of any trade contract, or even a right thereunder, as business income. But that is not the path chosen by the common law. Nor am I prepared to jettison the existing jurisprudence solely to promote certainty in the law at the expense of flexibility and rationality. This is an appropriate time to turn to the taxpayer's alternative submission and the Minister's arguments.

[172] In the *Eaton* case, the famous retailer received a lump sum payment to cancel a contract that afforded Eaton's a share of the landlord's profits from all tenants in a particular shopping centre, in which Eaton's was the anchor. The court also stated that:

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[21] 1999 CarswellNat 449, 99 D.T.C. 5178 (FCA).

> 17. … if an income-producing asset is partially damaged, then compensation for lost profits is treated as a trading receipt. However, if the asset is completely destroyed, then the entire compensation payment qualifies as a capital receipt since an asset's profitability is one element to be considered in assessing the asset's capital value. This latter point supports my view that the compensation in question is on capital account. Finally, the Court of Appeal went on to clarify that the entire business of the taxpayer did not have to be lost before compensation for lost profits would be regarded as having been received on capital account. It was deemed sufficient if the losses related to part of a taxpayer's business, such as occurs with the loss of an income-producing asset.
>
> 18. In summary, *London and Thames Haven* stands for the proposition that compensation paid for the destruction of a capital asset will be on capital account even if some of the compensation relates to lost profits. If compensation flows from the partial destruction of that capital asset, then any amount received in regard to lost profits is taxable as a trading receipt, while compensation relating solely to the damaged property is a capital receipt. At the end of the day, however, none of this is dispositive of the present appeal.

[173] The difference between Eaton's and Henco is that Eaton's lost one identifiable asset – the participation contract. Henco lost everything, including all contracts. I see no difference in the application of the principles.

[174] The Federal Court of Appeal went on to address the case of *Pe Ben Industries Co. v R.*,[22] again a situation involving the cancellation of a contract that resulted in the destruction of a distinct part of Pe Ben's business. This was held to be on capital account.

[175] Associate Chief Judge Bowman (as he then was) had an opportunity to address the capital versus income debate in the case of *BP Canada Energy Resources Co. v. R.*,[23] also in the context of a termination of certain contracts: "decontracting" was the unusual term used. The amount in issue was determined by Associate Chief Judge Bowman as arbitrary. He did not accept that the payment was simply compensation for the cancellation of a contract. It was not for the loss of a stream of income. Associate Chief Judge Bowman explored in some detail the leading cases with respect to the income versus capital issue and cautioned, as only he could, to:

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[22] 1988 CarswellNat 365, [1988] 2 C.T.C. 120 (F.C.T.D.).

[23] 2002 CarswellNat 2784, 2002 DTC 2110.

> 54. … avoid the temptation to pluck felicitous phrases from the cases which can support almost any conclusion, and thereby to lose sight of the real purpose of the enquiry, that of determining whether the payment is made for the termination, disposition or sterilization of a capital asset or is one of the ordinary incidents of an ongoing business so that the receipt properly forms part of the normal receipts of the trade.

[176] I pluck from Associate Chief Judge Bowman's comment that at one end of the income versus capital spectrum is a payment arising from the ordinary incident of an ongoing business and at the other end is a payment for the sterilization of a capital asset. In Henco's case it is admittedly somewhat fuzzy as to exactly what the sterilized capital asset is (the contracts, the business' goodwill, the right to sue, the right to pursue injunctions…), but it is clear that the payment was not an ordinary incident of an ongoing business. In placing this payment on the income versus capital spectrum, I conclude it falls well into the capital end of the spectrum.

[177] Justice Hogan relied on Associate Chief Judge Bowman's sterilization of capital assets' analysis in concluding, in *River Hills Ranch Ltd. v R.*[24] that cancellation of agreements were exactly that, indicating: "the Appellants were forced out of business" and further, "…the payments were made to compensate the appellants for the loss of their PMU business occasioned by Wyeth's cancellation of the Collection Agreements."

[178] I find Henco is in a similar situation. The evidence is so clear that Henco, whether out of Ontario's sense of fairness or out of Ontario's motivation to end the Occupation, had its business destroyed. I conclude the $15,800,000 was on account of capital.

[179] Was it, however, payment for the disposition of eligible capital property?

[180] Both Parties agree that if I find the $15,800,000 is on account of capital, which I have found, then I go to section 14 of the *Act* to determine if it is an eligible capital amount, and if not, then it is not subject to tax.

[181] There were amendments to section 14 of the *Act* in 2006 that altered the definition of cumulative eligible capital, effectively eliminating what was previously referred to as the mirror-imaging test. There was a window within

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[24] *Supra*, note 7.

which a taxpayer could elect to have the old provisions of section 14 of the *Act* apply. Henco made such an election and, therefore, the application of section 14 of the *Act* is to be determined under the old rules.

[182] The relevant provision under the old rules for the determination of whether the $15,800,000 payment is an eligible capital amount is found in the definition of cumulative eligible capital, specifically item E, which read at the time:

> E is the total of all amounts each of which is ¾ of the amount, if any, by which
>
> > (*a*) an amount which, as a result of a disposition occurring after the taxpayer's adjustment time and before that time, the taxpayer has or may become entitled to receive, in respect of the business carried on or formerly carried on by the taxpayer where the consideration given by the taxpayer therefor was such that, if any payment had been made by the taxpayer after 1971 for that consideration, the payment would have been an eligible capital expenditure of the taxpayer in respect of the business
>
> exceeds
>
> > (*b*) all outlays and expenses to the extent that they were not otherwise deductible in computing the taxpayer's income and were made or incurred by the taxpayer for the purpose of giving that consideration, and
>
> ...

[183] This provision, as I indicated earlier, is the mirror-imaging test. I am not surprised in trying to work through this oblique provision, that it has been amended.

[184] It must be determined whether, if Henco made the $15,800,000 payment it would have been an eligible capital expenditure. Eligible capital expenditure is defined in subsection 14(5) of the *Act* as:

> "eligible capital expenditure" of a taxpayer in respect of a business means the portion of any outlay or expense made or incurred by the taxpayer, as a result of a transaction occurring after 1971, on account of capital for the purpose of gaining or producing income from the business, other than any such outlay or expense
>
> > (*a*) in respect of which any amount is or would be, but for any provision of this Act limiting the quantum of any deduction, deductible (otherwise than under paragraph 20(1)(*b*)) in computing the taxpayer's income from the business, or in respect of which any amount is, by virtue of any provision

> of this Act other than paragraph 18(1)(*b*), not deductible in computing that income,
>
> (*b*) made or incurred for the purpose of gaining or producing income that is exempt income, or
>
> (*c*) that is the cost of, or any part of the cost of,
>
> > (i) tangible property, or for civil law corporeal property, of the taxpayer,
> >
> > (ii) intangible property, or for civil law incorporeal property, that is depreciable property of the taxpayer,
> >
> > (iii) property in respect of which any deduction (otherwise than under paragraph 20(1)(*b*)) is permitted in computing the taxpayer's income from the business or would be so permitted if the taxpayer's income from the business were sufficient for the purpose, or
> >
> > (iv) an interest in, or for civil law a right in, or a right to acquire any property described in any of subparagraphs (i) to (iii) …

[185] The Appellant relies on *Toronto Refiners & Smelters Ltd. v R*[25] ("*Toronto Refiners*") for the proposition that a payment made for a civic, non-commercial purpose would not be an eligible capital amount, as it could not meet the requirement for a purpose of gaining income when the mirror-imaging test is applied. The Federal Court of Appeal asked four questions in *Toronto Refiners* determining whether an amount is an eligible capital amount:

i. Was the amount received as a result of a disposition?
ii. Was the amount received in respect of the business carried on by the recipient of the payment?
iii. What consideration did the recipient give for the payment?
iv. If the recipient had made the payment for the same consideration that it had given to the payor (the mirror-imaging test), would that have been an eligible capital expenditure of the recipient?

[186] In *Toronto Refiners*, the payment from the City of Toronto of $9 million was damages for the inability of the company to relocate its business, and was specifically identified as representing goodwill.

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[25] 2002 FCA 476.

[187] The Federal Court of Appeal answered yes to questions 1 and 2 in *Toronto Refiners* and answered question 3 as follows:

> 14. In the context of this case, it seems to me appropriate to extend this answer by one further step. The statutory context of subsection 19(2) of the *Expropriations Act* indicates that its objective is to authorize compensation for the destruction of the goodwill of a business that is terminated as the result of an expropriation and cannot be relocated. If that is so, then the consideration given by Toronto Refiners for the $9 million payment is the release of any claim of Toronto Refiners for compensation for the destruction of the goodwill of its business.

[188] With respect to question 4 the Federal Court of Appeal stated:

> 22. I return now to the hypothetical facts, to consider where they lead. The question at this stage of the analysis is whether the hypothetical $9 million payment by Toronto Refiners meets the definition of "eligible capital expenditure" in paragraph 14(5)(*b*) (as it read in 1992).
>
> 23. There are a number of conditions that must be met under that definition. The first condition, found in the opening words of paragraph 14(5)(*b*), is that the payment must have been an outlay or expense made or incurred on account of capital for the purpose of gaining or producing income from a business. In my view, that condition is not met. The hypothetical expropriation, like the real expropriation, had a civic purpose. It had no income earning purpose, and certainly no purpose of gaining or producing income from a business.

[189] This approach by the Federal Court of Appeal in *Toronto Refiners* was addressed in the subsequent Federal Court of Appeal case of *RCI Environnement Inc. v R.*[26] The *RCI* case did not deal with a payment from any Government authority, but with a commercial settlement with respect to the termination of a non-competition agreement. In commenting on *Toronto Refiners* the Federal Court of Appeal stated:

> 46. Contrary to the arguments of counsel for RCI (2006), I do not believe that that decision means that the analysis should be made from the perspective of the payer in all instances. In that case, the Court was dealing with an exceptional situation, the payment in question having been made by a public authority under an enactment, in a non-business context. In order to consider the actual context of the payment, the Court had to keep in mind that the payment was issued by a public authority, namely, the City of Toronto, exercising a power of expropriation

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[26] 2008 FCA 419.

> (*Toronto Refiners*, cited above (paragraph 18)). For all intents and purposes, this made the question underlying item E inapplicable, because no one would pay money to acquire the right to be expropriated.

[190] The Federal Court of Appeal went on to find that the hypothetical question 4 (the mirror-imaging test) should be analyzed from the perspective of the recipient and not the payor.

[191] I will address the four questions raised by the Federal Court of Appeal in *Toronto Refiners* in light of its clarifying comments in *RCI*.

(i) Was the amount received a result of a disposition?

[192] While there remains the thorny issue of how to exactly describe what was disposed of, it is clear that after the closing of the agreement Henco had nothing other than the monies it received from Ontario: before the Agreement Henco had something, whether or not that something had value. There was a disposition.

(ii) Was the amount received in respect of the business carried on by Henco?

[193] The Appellant maintains that the payment was to effectively make the business go away. While it may be argued that, at the time the deal was struck between Henco and Ontario, Henco was no longer carrying on business, I find that the payment, especially given a provision in the Agreement requiring that Henco cease its business, was nevertheless "in respect of" the business carried on by Henco. There was a strong connection between the Occupation, which arose as a result of Henco carrying on the land development business, and the urgent need for Ontario to remove the blockades by eviscerating the ability of Henco to carry on business. I conclude, notwithstanding the timing of Henco ceasing to carry on business, that the amount was received "in respect of" the business carried on by Henco.

(iii) What consideration did Henco give for the payment?

[194] The answer to this question is essential in figuring out how to resolve the fourth question – the mirror-imaging test. During argument it was clear the Respondent was of the view that the Appellant had not adequately addressed this matter, professing to be in quandary as to exactly what was disposed of, if not just the land. The Appellant would counter that the entire business was lost:

paraphrasing the wording from *Toronto Refiners*, the Appellant argues that the payment was for the destruction of all of Henco's goodwill. Justice Sharlow described the consideration in *Toronto Refiners* in the excerpt from paragraph 14 of her reasons, cited earlier. She also went on to state at paragraph 19:

> If goodwill were "capital property" as that term is used in the *Income Tax Act*, the $9 million payment could be characterized as proceeds of disposition of capital property giving rise to a capital gain. But goodwill is not capital property. Compensation for the loss of goodwill fits nowhere in the scheme of the *Income Tax Act* unless it fits within section 14. Specifically, such compensation cannot be treated as proceeds of disposition of capital property, or otherwise reflected in the computation of income for income tax purposes, except as set out in section 14.

[195] The Respondent suggests that the distinction between Toronto Refiners and Henco is that there was a finding in *Toronto Refiners* that the consideration for the $9,000,000 paid by the public authority was the release – that was the entire deal. I find that the release provided by Henco was a significant part of what Ontario paid for and that that can be viewed in the same way as the payment in *Toronto Refiners*. But in the circumstances before me, I find equally as important as the promise not to sue was Henco's promise to cease business and Henco's promise to get the injunctions removed. I find the provision requiring the cessation of business is no different than the release for purposes of categorizing the nature of the consideration, that nature being in the loss of goodwill. With respect to the promise to have the injunction removed, I find the Federal Court of Appeal's approach to goodwill in *TransAlta Corp. v R.*[27] helpful.

[196] The Court determined in *TransAlta* that goodwill is a residual concept. Any consideration beyond what is allocable to the identifiable assets, the plug if you will, must be goodwill, that intangible justifying the excess payment. In this case, I conclude the full amount is the residual. Where a company's assets have been rendered worthless, and a payment is made, albeit due to some exceptional circumstances, that payment can only be seen as the residual.

[197] In *TransAlta*, the Federal Court of Appeal approached the determination of goodwill for tax purposes in the following manner:

> 69. This is why the residual approach to valuing goodwill is preferred. Under that approach, the more easily valued assets (such as tangible assets) are first

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[27] 2012 FCA 20.

> given a fair market value, and any consideration paid in excess of this fair market value is assigned to goodwill. …
>
> 70. The fact that some intangible elements that do not constitute "goodwill" in the legal sense may be captured through such a valuation method – such as the potential tax allowance benefit – does not mean that the valuation method is wrong or improper. The method simply reflects the fact that these types of intangibles should be treated as goodwill for all practical purposes – including accounting and taxation purposes - even though they may not squarely fall under the legal concept of goodwill.
>
> 71. Consequently, in accordance with the unanimous opinion of the experts who testified in this case, goodwill should normally be valued as a residual whole. …

[198] Clearly, some rights one might not normally consider goodwill may get swept into that category due to the residual approach. I find a promise to lift injunctions falls into that catchall category.

[199] Where does all this lead? As Justice Sharlow stated in *Toronto Refiners*, compensation for the loss of goodwill fits nowhere in the scheme of the *Act* unless within section 14. Is that what Ontario paid for? Compensation for the loss of goodwill? I believe it is. Ontario had to make Henco go away: Henco could not own the land; it could not carry on business; Ontario needed to ensure Henco could not sue it; Henco could not enforce the injunction. With all assets of its former business rendered valueless, the only possible result, based on the residual approach with regard to goodwill as set out in *TransAlta*, is that the $15,800,000 was for the loss of Henco's goodwill. Viewing the situation in this manner, I see no need to try and distinguish between the whole loss of the business and disposition of particular rights: it falls into this residual category.

(iv) If Henco had paid $15,800,000 for the loss of goodwill, would that payment have been an eligible capital expenditure of Henco?

[200] By the very nature of the payment it could not possibly be for the purpose of earning income – just the opposite. Certainly that is how the Federal Court of Appeal rationalized the payment in *Toronto Refiners* (see paragraph 23 from that case cited earlier).

[201] In *RCI*, the Federal Court of Appeal took a pragmatic approach to the mirror-imaging test in the context of a public authority making a payment, writing this about the fourth question: "For all intents and purposes, this made the question

underlying item E inapplicable, because no one would pay money to acquire the right to be expropriated."

[202] This sensible view renders the discussion of whether one looks at the mirror-imaging test from the payor's or the recipient's perspective moot. There are some situations, such as this, where the rather technical process for the determination of consideration and the application of the mirror-imaging rule simply does not work. This allows me to step back from such a technical analysis to truly appreciate what has happened here. What has not happened is that Henco sold land as part of its land development business, as the Respondent would suggest. Nothing could be further from reality.

[203] Henco's business was destroyed. By the time it struck an arrangement with Ontario, Henco had no value as a business however one might try to slice the analysis: there could not be and there was not a source of income. The capital receipt was non-taxable.

IV. Summary

[204] I allow the Appeal and refer the matter back to the Minister for reassessment and reconsideration on the following basis:

a) the $15,800,000 received by Henco from Ontario was a non-taxable capital receipt;
b) the $650,000 received by Henco from Ontario was a non-taxable windfall;
c) the fair market value of the Seneca property was $800,000 and the payment was on income account; and
d) the fair market value of the Morrison property was, as assessed, $1,400,000.

If the Parties wish to address costs they should do so in written submissions to the Court filed within 30 days of the date of this Judgment, failing which costs are awarded to the Appellant in accordance with the Court's tariff.

Signed at Ottawa, Canada, this 9th day of June 2014.

"Campbell J. Miller"

C. Miller J.

SCHEDULE "A"
EXCERPTS FROM THE AGREEMENT OF PURCHASE AND SALE CALEDONIA, ONTARIO DATED JUNE 30, 2006

AND WHEREAS … based on circumstances relating to the use and development of the Property, the Parties have agreed to enter into this Agreement and the Vendor has agreed to the sale of all of its material assets, including without limitation, the Henco DCE Lands (as defined herein) and the Purchaser has agreed to purchase, acquire and assume the Purchased Assets from the vendor and to establish a trust, single purpose corporation or other legal entity to hold the Purchased Assets on the terms and conditions set forth in this Agreement.

…

"Buildings" means the buildings constructed on the Henco Lands and all other structures and fixed improvements located on, in or under the Henco Lands.

…

"Chattels" means the equipment, furnishings, chattels, inventory, supplies and all other tangible and intangible personal property owned by the Vendor and used exclusively in connection with the ownership, operation or maintenance of the Property, save for books, records, furniture and office equipment.

…

"Property" means the Henco Lands and the Buildings.

"Purchased Assets" means (a) the Henco Lands, (b) the Buildings, (c) the Contracts, (d) the Warranties, and (e) the Chattels.

…

Entire Agreement. This Agreement, together with any agreements, instruments, certificates and other documents contemplated to be executed and delivered pursuant to this Agreement, constitutes the entire agreement between the parties with respect to the subject matter of this Agreement …

…

2.1 The Vendor hereby agrees to sell, transfer, assign, set over and convey the Purchase Assets to the Purchaser and the Purchaser hereby agrees to purchase, acquire and assume the Purchase Assets from the Vendor for the Final

Compensation Amount, on and subject to the terms and conditions of this Agreement. The Purchase Assets are being purchased on an "as is" basis at Closing, …

…

3.1 Calculation of Final Compensation Amount

(a) The compensation for the Purchase Assets (the "Final Compensation Amount") shall be the fair market value determined as at February 27, 2006, as if the Purchase Assets were the only assets owned by the Vendor as at February 27, 2006. The Vendor and the Purchaser shall use their reasonable commercial efforts to agree on the fair market value for the Purchase Assets, as at February 27, 2006, within forty-five (45) days of Closing, …

…

(d) Upon payment by the Purchaser in full of the Final Compensation Amount the Vendor shall have no further rights or claims as against the Purchaser (including Ontario Realty Corporation and the Provincial Crown or its agents) relating to the Property or any circumstances or events in respect of the Property, except as may be set forth in this Agreement.

…

3.2 Payment of Final Compensation Amount

The Final Compensation Amount for the Purchase Assets shall be paid and satisfied by the Purchaser as follows:

(a) by the Purchaser delivering the sum of TWELVE MILLION, THREE HUNDRED THOUSAND DOLLARS ($12,300,000) (the "Initial Payment") by certified cheque or bank draft payable to the Vendor or as it may in writing direct on Closing.

(b) the balance of the Final Compensation Amount by certified cheque or bank draft payable to the Vendor or as it may in writing direct on the fifteen 15th Business Day following the final determination of the Final Compensation Amount in accordance with Section 3.1, subject to adjustment in accordance with Section 3.3, (the "Final Compensation Amount Payment Date").

…

4.1 Representations and Warranties of the Vendor

…

(d) No Litigation. There are no material actions, suits or proceedings commenced or, to the knowledge of the Vendor, pending against or affecting the vendor in relation to the Property or the occupancy or use of the Property by the Vendor or by the Tenants, save for the following:

(i) With respect to the application brought by Henco Industries Limited ("Henco") against Haudenosaunee Six Nations Confederacy Council et al. Cayuga, Ontario, bearing court file number 48/2006 (the "Application"), and in conjunction with the transfer of the property, the parties hereto agree that Henco shall immediately obtain an order setting aside the order of Mr. Justice Matheson dated March 3, 2006 and the order of Mr. Justice Marshall dated march 9, 2006 and dismissing the Application.

(ii) Notice of International Commercial Claim file no. 120393960002 filed in Texas by Trustee of Mohawk Nation, Grand River, Declarant.

…

(w) Corporation. Upon completion of this transaction provided for in this Agreement, there shall be a cessation of the business of the Vendor.

…

7.1 Operation Until Closing

Until Closing, the Vendor shall cease any further sale of portions of the Henco Lands and shall take all steps, to the extent it is able to do so in accordance with the terms and conditions of the respective agreements of purchase and sale, to terminate or not extend any existing agreements of purchase and sale that may apply to the Henco lands. Further the Vendor shall cease all actions regarding the development of the Henco lands including the construction of improvements, buildings or other structures on the Lands.

…

CITATION:	2014 TCC 192
COURT FILE NO.:	2011-1810(IT)G
STYLE OF CAUSE:	HENCO INDUSTRIES LIMITED AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 31, April 1 to 4 and April 7 and 9, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice Campbell J. Miller
DATE OF JUDGMENT:	June 9, 2014

APPEARANCES:

Counsel for the Appellant:	Geoffrey Shaw and Eric Mayzel
Counsel for the Respondent:	Samantha Hurst and Christian Cheong

COUNSEL OF RECORD:

For the Appellant:

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