Docket: 2017-4387(IT)G

BETWEEN:

HARVARD PROPERTIES INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on November 14-17, 21-24 and 28, 2022 and December 5-6, 2023 at Toronto, Ontario

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Al Meghji Theodore Stathakos David Jacyk
Counsel for the Respondent:	Justine Malone Rosemary Fincham Ian Moffat

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JUDGMENT

This Court orders that the appeal is to be dismissed in accordance with the attached Reasons to the extent of any liability of NH Properties described in section 160 once that amount is determined.

The respondent is entitled to costs in accordance with the Reasons.

Signed at Ottawa, Canada, this 28th day of October 2024.

"Patrick Boyle"

Boyle J.

Citation: 2024 TCC 139
Date: 20241028
Docket: 2017-4387(IT)G

BETWEEN:

HARVARD PROPERTIES INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

I. Introduction

[1] The appellant Harvard Properties Inc. ("Harvard Properties") held a 50 percent undivided interest in Calgary's North Hill Shopping Centre. The other 50 percent undivided interest was held by a bare trustee numbered company for the equal benefit of Harvard Properties' four co-owners of the shopping centre, which were not related to it. That numbered company also held Harvard Properties' interest as bare trustee.

[2] In 2005 the co-owners were approached directly by a broker representing a potential purchaser of the shopping centre. Neither Harvard Properties nor any of the other co-owners had been interested in selling the shopping centre prior to that approach. The interested potential purchaser turned out to be an entity, Abacus, that

was virtually unknown to the co-owners[1]. The sale was to be structured as a share sale, however, the share purchase price was to be a function of a calculated Purchase Value of the assets of the shopping centre had it been sold in an asset sale. The transactions essentially closed as initially outlined and as set out in the negotiated Share Purchase Agreement ("SPA"). They included a rollover of the co-owners' shopping centre interests to new corporations (the "Newcos") at the assets' adjusted cost base, and the sale of those Newcos to Abacus or its designate which would then sell the shopping centre assets to a third party.

[3] Money received from the third party purchaser of the shopping centre was used by Abacus to pay for the Newco shares. The co-owners did not know or inquire how Abacus would pay, shelter, avoid or eliminate the tax liability on the taxable income triggered by that sale of their shopping centre to the third party, nor did they make inquiries. The co-owners had been advised by their tax accountant to make appropriate inquiries of this nature. There are documented concerns by the co-owners from the outset with Abacus's credibility and whether it would honour its obligations under its proposed purchase arrangement.

[4] The Canada Revenue Agency ("CRA") reassessed the Abacus side of the structured series of interdependent and related corporate reorganization and sale steps. Abacus is disputing its reassessments, but at this time that dispute is unresolved and the tax has not been paid on the Abacus side.

[5] CRA has assessed Harvard Properties and the other co-owners of the shopping centre under the non-arm's length joint and several liability provisions in section 160 of the *Income Tax Act* (the "Act") for an amount that CRA maintains the co-owners directly or indirectly received upon the sale of the shares through which they held their interests in the shopping centre. The amount is approximately $6.5 million.

[6] The respondent maintains that, if it is concluded that section 160 does not apply, the general anti-avoidance rule ("GAAR") in section 245 does apply.

[7] Justice MacPhee of this Court issued a bifurcation order in 2021 removing the issue of the Abacus tax liability, if any, from the hearing that I am now deciding. While both parties agreed to a bifurcation, they could not agree to its terms and a contested motion resulted. The effect of the bifurcation order is that the amount of Abacus' unpaid tax liability, if any, which is the cap on any section 160 assessment of a transferee, is not being determined at this stage and time in this appeal. Abacus'

[1] References to Abacus in these Reasons are to the Abacus group of controlled entities.

own tax plan and its tax liability from the sale of the shopping centre as part of these interrelated and interdependent transactions involving the shopping centre are not relevant to this decision. No evidence was heard concerning Abacus' tax liabilities at the time of the transactions in issue in this proceeding on the bifurcated issues.[2] [3]

[8] The legal issues in this trial on the bifurcated issues are very similar to those in the tax appeal known as *Damis Properties Inc. v. The Queen,* 2021 TCC 24 in this Court and as *Canada v. Microbjo Properties Inc*., 2023 FCA 157 in the Federal Court of Appeal (FCA). Of course the transactions and the other facts and evidence herein differ from those in *Damis*/*Microbjo*. The hearing dates in this trial preceded the release of the FCA decision in *Microbjo*. Following the close of evidence, it was agreed that oral argument would be rescheduled following the release of *Microbjo* by the FCA and that supplemental written argument could be filed addressing it.

[9] As explained in detail below, I have concluded that section 160 is triggered by these transactions as the co-owners, including Harvard Properties, and the Abacus group were not dealing at arm's length, and the co-owners, including Harvard Properties, received amounts exceeding the fair market value of their shares through which they held their interests in the shopping centre.

[10] If the application of section 160 was successfully avoided by these transactions, I have concluded that the GAAR would apply as the series of transactions involved avoidance transactions that gave rise to and resulted in the abuse of section 160.

[11] This proceeding was heard over eleven days. The pleadings comprised a Notice of Appeal, Reply, Answer, Amended Reply, Answer to Amended Reply, Amended Answer to Amended Reply and a Further Amended Reply. Another amendment to the Further Amended Reply was allowed on a contested motion at the opening of the first hearing week. The contents of both the Books of Documents and Books of Authorities are measured in feet. Written Argument was 2 inches thick.

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[2] The appellant did enter a CRA memorandum into evidence dealing with Harvard Properties' section 160 assessment that includes two introductory sentences stating CRA denied Abacus' claimed foreign currency trading losses on the basis they were fictitious.

[3] This hearing was assigned to me not very long before the scheduled trial dates. The parties were aware that in 2005 I was a partner of one of the law firms that represented Abacus in these transactions and that Abacus' tax lawyer had been one of my partners. This was raised at our first Trial Management Conference. There was no actual conflict and both parties were content to proceed and did not have concerns if I remained as presiding judge on these bifurcated issues. The appellant called a lawyer from that firm to testify to the real estate, corporate, and commercial closing documents and to the flow of funds in and out of that firm's trust account on closing.

[12] The evidence in this trial included a limited Partial Agreed Statement of Facts. Harvard Properties' Chief Operating Officer, who had previously been its Senior Vice President Real Estate (Maurice Bundon) testified. The Chief Executive Officer of the Hill family-owned parent holding company, who was also the Vice President of Investments for Harvard Developments[4] which was the Harvard company responsible for acquisitions and divestitures and the parent of Harvard Properties, and previously Controller of the Harvard group's property management company that was responsible for managing North Hill Shopping Centre (Tina Svedahl) testified. Harvard Properties also called the external tax advisor who was a chartered professional accountant ("CPA") from a major accounting firm whom the co-owners had consulted regarding the tax consequences of the shopping centre sale as it was being negotiated to Abacus (Dennis Auger of the accounting firm KPMG). The appellant also called both its commercial real estate lawyer and Abacus' commercial real estate lawyer to testify to the closing documents, steps and flow of funds (Scott Exner of MLT Aikins and Don Kowalenko of Dentons).

[13] The appellant also called a CPA from another accounting firm as a valuation expert (Mark Weston of Davidson & Co.) to provide his opinion on the values of the shares of the Newco that Harvard Properties disposed of ("HP Newco") that had been both issued and disposed of in the closing. His report and his testimony were of very little probative value, if any, principally because (i) he accepted the information that he had been provided by Harvard Properties as facts to be assumed that HP Newco's cash and near cash assets had a fair market value equal to their face amount, (ii) he did not attempt to corroborate the information he was given or to reconcile it with the documents made available to him, and (iii) he did not discount or otherwise address the fair market value of those assets to reflect the fact that the obligor's sole assets were cash or near cash virtually all of which was restricted by agreement, by irrevocable directions and by the escrowed closing arrangements and trust accounts and could not be used for purposes other than to go to the co-owners to fund Abacus' purchase of the shares of the Newcos. The failure to corroborate the information provided by Harvard Properties left him opining that a $16.5 million alleged and recorded intercompany loan from Abacus to HP Newco was worth the stated amount, yet there is no evidence that there was ever such an intercompany loan. These are the hallmarks of a made as instructed report.

[14] No witness unrelated to the co-owners was called to testify regarding the range of capitalization rates on arm's length direct sales of comparable shopping centres, or regarding how indirect sales of shopping centres by selling shares of the company

[4] The CEO referred to Harvard Developments. Ms. Svedahl referred to Harvard Diversified. It matters not.

owning it are valued in the market. The statements in the Harvard memo on credibility of Abacus do not address shopping centres in Alberta and, in any event, are at least double hearsay that is attributed to someone whose knowledge and experience is not known to the Court. The Court has no reliable evidence of the fair market value of the shopping centre.

[15] Harvard Properties' position is that it and the other co-owners dealt at arm's length with the Abacus entities involved, and that the amount in the Abacus/Bentall asset purchase transaction was the arm's length fair market value of the shopping centre. The appellant knew that the value of the shopping centre was in issue. The appellant did not call anyone from Abacus or its broker who approached the co-owners, or anyone from Bentall, the purchaser who owned the shopping centre at the end of the integrated, simultaneous closing. The Court is left with only the co-owners' version and their documents in evidence.

[16] While not evidence, Harvard's counsel, a tax litigator, provided the Court with a "visual aid" that purported to show that the net proceeds to Harvard Properties and the other co-owners that they received on their tax planned, stepped sale transaction as completed was the same as they would have had they sold the shopping centre assets. That is, it purported to show that Harvard and the other co-owners did not receive what they were offered and was agreed to - a share sale at an asset price which included a premium above their shares' value computed otherwise. I did not find this visual aid to be helpful as its reliability was not established. It was assembled and presented by counsel. I accept that counsel used the appropriate amounts stated in the closing documents for each receipt, distribution and other amount. However, that still leaves the valuation issue described above. Further, appellant's counsel did not walk through any part of this document with the appellant's real estate or commercial lawyers who testified, nor with their tax accountant witness, nor even with their Harvard Properties' witnesses who were very experienced in real estate transactions, nor with anyone else who testified. The Court has no idea if everything that should be considered or accounted for in making such a comparative analysis and should appear on that visual aid is there, nor whether anything that should not be considered or accounted for is not on that list. Given the facts and circumstances of this proceeding, I might have expected a proper expert opinion and report of some sort addressing this, such as a forensic accounting exercise (which might also have addressed the relevant legal restrictions on cash assets described above as well as their impact on valuations). That would have allowed the Court to address these questions based on evidence. It would also would have allowed the respondent to introduce its own evidence in response, whether through the appellant's expert, or by calling its own witnesses. (That would still have

left unaddressed whether the calculated "Purchase Value" Abacus offered and was accepted reflected the fair market value.)

[17] The respondent did not call any witnesses in this proceeding.

II. The Evidence

A. Maurice Bundon

[18] Harvard Properties is part of the Hill Companies Group of private companies held by Regina's Hill family. It is a diversified family business involved in real estate, utilities, media, radio broadcasting, insurance and other financial services, and manufacturing. It operates in Western Canada, principally Alberta, Manitoba, and Saskatchewan, as well as in the US state of Arizona. Harvard Properties is the company in Hill Companies Group that owns the group's Alberta properties. It owned other real estate than the North Hill Shopping Centre including residential and office buildings.

[19] In 2005 Mr. Bundon was the Chief Operating Officer ("COO") and Senior Vice President of Harvard Properties. He had previously been Senior Vice President Real Estate. He has been with Hill Companies Group for more than 40 years.

[20] Harvard Properties' policy was not to sell assets and, with two very limited exceptions, it held onto its properties. North Hill Shopping Centre was a large part of its portfolio. In addition to Harvard Properties' 50 percent of the shopping centre, another Harvard company in the Hill Companies Group provided all of the property management services for the shopping centre which generated additional revenues.

[21] In early March 2005 Mr. Bundon and the other co-owners received a copy of an unsolicited letter of intent (the "Abacus LOI") from a broker who had sent it to one of the co-owners. He said that Harvard Properties had not mentioned the property to brokers, nor was it otherwise looking for purchasers. None of the other co-owners were otherwise looking to sell either to any of the witnesses' knowledge. Mr. Bundon spoke to Paul Hill and Tina Svedahl; Mr. Hill told him that they were not selling because they generally do not sell.

[22] Mr. Bundon said that he understood that Abacus was behind the offer in the Abacus LOI and expected it to be the purchaser.

[23] Mr. Bundon said that he did not know that the SPA was for the sale of shares not assets; he said that he did not know the difference between asset sales and share sales. He acknowledged that he understood the plan was for Harvard Properties and the co-owners to use newly incorporated companies to sell the shopping centre in the agreed series of transactions. He said this did not involve any tax plan. Given his experience, the documents in evidence and the testimony of others, I do not find these statements to be credible.

[24] Mr. Bundon said he would not have reviewed the SPA in any detail but would have relied on their in-house counsel. Notably their in-house counsel did not testify. Mr. Bundon also said that Tina Svedahl was closer to the deal than he was and that she reported to him, and that all of the key decisions in Harvard Properties were made collaboratively among him, Ms. Svedahl and Mr. Hill. He described Ms. Svedahl as having extensive knowledge in the purchase of properties and said he trusted her.

[25] The price offered by Abacus was discussed only among him, Ms. Svedahl and Mr. Hill. They did not try to negotiate the price in the LOI prepared by the co-owners in response to the Abacus LOI to his knowledge. Mr. Bundon said that, if there were any conversations between Abacus and Harvard Properties, they would have been Ms. Svedahl's conversations. The second LOI, prepared by Harvard Properties and the co-owners, (the "Co-owners' LOI") did not change the offered "Purchase Value" in the initial LOI received from Abacus, nor did it change the offered ROI return on investment or the offered capitalization rate to be used to calculate the Purchase Value. This was in late March. Mr. Bundon did not know anything more about Abacus when the Co-owners' LOI was sent or when it was signed by all parties. The two LOIs are Appendix A hereto.

[26] Mr. Bundon said that Harvard Properties had decided to sell certainly by early June when it signed the SPA, but he did not recall how much earlier that decision had been made. Clearly Harvard Properties intended to sell by late March when it signed the Co-owners' LOI. Once the SPA was signed, they were legally committed to it.

[27] The co-owners learned in August that Bentall, not Abacus, would be acquiring the shopping centre. Until then Harvard Properties never thought someone other than Abacus would be the buyer according to Mr. Bundon. Absent Harvard Properties in-house counsel's testimony, and given the totality of the evidence I do have, I am not at all prepared to reach any such conclusion on a balance of probabilities.

[28] August is also when Harvard Properties found out that it would not be permitted to hold a 20 percent interest in the new ownership of the shopping centre, and that Harvard's property management services would not be continuing.

[29] Mr. Bundon said that he was not involved with Mr. Auger's tax memo or advice. He said he did not know if KPMG was giving assistance or advice to the co-owners, that Harvard Properties had not used KPMG for tax previously, and that he did not know if Harvard Properties even had a tax person they went to. This, even though both LOIs specify that upon execution of the LOI "the parties shall work in good faith towards structuring a tax efficient transaction that shall ensure the vendor financial results that are at least equivalent to the financial results received from a direct asset sale of the property for a value of $90 million". Mr. Bundon testified that he was not involved in any conversation "if there was one" concerning tax structuring, and that he thought it unlikely that Ms. Svedahl discussed it with Mr. Hill without him either. It can be noted that Mr. Hill was also not called to testify.

[30] Mr. Bundon testified that Ms. Svedahl and legal counsel attended to settling the SPA, and that he does not remember being told why it was structured as a share sale. He did not know if his in-house counsel drafted the SPA or who had the lead on drafting it. He does not know if Ms. Svedahl negotiated with Abacus directly or through the other 50 percent co-owners' entity – RonMoor Group. However, he understood Ms. Svedahl/RonMoor negotiated the SPA with Abacus. The SPA was not discussed within Harvard Properties to his knowledge. He did not engage in any negotiations about the $90 million price and does not recall any discussions about it.

[31] When pressed in cross-examination with Ms. Svedahl's sworn answers on discovery in which she said Mr. Bundon was responsible for negotiating the deal, and was responsible for negotiating the value of the shares sold in the series of transactions, he explained that he did sign off on the $90 million purchase value but that he did not negotiate, he only signed off on the number. He added that he did not have the knowledge to allocate or split that value among the different steps in their series of transactions, quipping "I did not pay any attention to these numbers."

[32] Mr. Bundon said that he did not read the SPA and that he did not consult with anyone on tax advice, nor did anyone else at Harvard Properties to his knowledge. He did not know who was instructing their legal counsel at MLT on this transaction, including on the tax issues but he believed that it was their in-house counsel.

[33] Mr. Bundon does not know who asked that a tax indemnity be obtained from Abacus, has no knowledge of that, and does not recall ever discussing it with Ms. Svedahl or Mr. Hill.

[34] When asked how he could adamantly maintain that this was not a tax plan, his answer was "I don't know, I am just that kind of guy, I feel comfortable".

[35] Mr. Bundon frequently could not recall things and qualified his answers to say that was all that he could recall. This raises some concerns with the reliability, and perhaps credibility, of his testimony. His answers on key high level management issues such as whether he was overseeing or negotiating this deal or Ms. Svedahl was, and the extent to which she kept him informed of key aspects, differ from Ms. Svedahl's testimony and her answers on discovery. Mr. Bundon repeatedly responded with answers that distanced himself from being able to answer the questions asked of him. That compounds these concerns and raises questions about the reliability, and perhaps credibility, of Ms. Svedahl as well. All of this is even further compounded by the fact that neither Paul Hill nor Harvard Properties' in-house counsel was called by the appellant to help the Court try to reconcile these concerns.

B. Tina Svedahl

[36] Ms. Svedahl is the Chief Executive Officer of Harvard Diversified Enterprises Inc., the holding company that holds the Hill family's varied businesses. She is a CPA and has been with Hill Companies Group since 1999 when the property management company she had been a part of for years was merged into the Harvard group. In 2005 she was Harvard Developments' Vice President Investments, responsible for acquisitions and divestitures of real estate and using her financing and mergers and acquisition expertise for the Hill Companies Group.

[37] Ms. Svedahl described how the senior leadership in Hill Companies Group work collaboratively in an informal, flat manner. She said she would meet regularly and talk informally with Mr. Bundon whose office was on the same floor as hers.

[38] She testified that as VP Investments, she was responsible for divestitures so she would have been responsible for taking lead on the sale of the sale of North Hill Shopping Centre. Mr. Bundon gave her a copy of the Abacus LOI and she reviewed it at the time. She made handwritten notes on it. Her understanding was that another co-owner, Mr. Paperny, provided it to Mr. Bundon. She did not know Mr. Bob Young at Colliers International, the broker. She did not know who Abacus

was. She searched Abacus, pulled up a couple of pages of names and concluded that it appeared to be an investment company of some sort. She made no other meaningful inquiries.

[39] She described a one-page Harvard memo from Paul Hill to her and Mr. Bundon headed "Credibility of Abacus" dated in March. Mr. Hill spoke to one of his contacts at Kingston Capital about this unknown Abacus. Mr. Hill's memo reports that his contact did not know Abacus either, but his partner did and that partner "knows the person who runs Abacus and thinks highly of him." Mr. Hill's memo reports that his contact was to speak with their partner "Monday and send me an email as to whether they [Abacus] are likely to do what they say they will do."

[40] I infer from this memo that Mr. Hill, Mr. Bundon and Ms. Svedahl shared concerns about Abacus' credibility and whether it had the ability and/or integrity to honour its commitments. According to Ms. Svedahl, Mr. Hill would not generally make such inquiries or write memos about them. Mr. Bundon testified that Mr. Hill's memo was in response to Mr. Bundon's concerns about not knowing who Abacus was.

[41] I did not hear from Mr. Hill at all, no follow up memo from Mr. Hill nor email from his contact at Kingston Capital was put in evidence, and none was described, nor was any other explanation given by Mr. Bundon, Ms. Svedahl or anyone else. I therefore infer from this that, if any further information was received by Mr. Hill, it did not allay Harvard Properties' concerns with Abacus' credibility and that it may not do what it says it will. Harvard Properties proceeded forward to negotiate and close with Abacus nonetheless.

[42] Ms. Svedahl said Mr. Bundon was primarily dealing with the Abacus LOI and the Co-owners' LOI and with Harvard Properties' negotiations for a continuing 20 percent interest in, and property management contract for, the shopping centre, along with some other aspects of the deal. She said she only had the lead in closing the deal after the LOI was signed by the parties, and that she kept Mr. Bundon aware of the deal's progress throughout her lead.

[43] In her examination for discovery Ms. Svedahl clearly stated that Mr. Bundon was responsible for negotiations and that no one else was, including her. In cross-examination when this was put to her, she said she understood the question on discovery to pertain only to negotiating the LOI. Nothing in those parts of her discovery transcript that are in evidence support her now stated view by reference to either any particular time frame or to the signing by the parties of the Co-owners'

LOI as amended, or otherwise. Her explanation at trial of her conflicting answers serves to heighten the Court's concern with conflicting testimony from the same witness on the same point.

[44] Ms. Svedahl explained that the two-and-a-half page April memo from the co-owners' outside tax accountant, Mr. Auger, was obtained "because Abacus was proposing a share sale." This Auger tax memo is Appendix B hereto. She said that Harvard Properties and its co-owners and their advisers did not make any inquiries as a result of the final paragraph of Mr. Auger's advice that Harvard Properties and the other co-owners should consider "to what extent do the [co-owners] want to know how Abacus is sheltering/eliminating the recapture and federal capital gain income", and "but you still may wish to understand enough to satisfy yourselves that there is not an undue amount of risk or exposure". Ms. Svedahl said she shared the memo with Mr. Bundon and briefed him on its contents. Harvard Properties' only action in that regard was to require the secured tax indemnity agreement from Abacus.

[45] Ms. Svedahl said Harvard Properties was aware in early September that the Bentall companies would be the third party purchaser of the North Hill Shopping Centre. In the March LOIs the purchaser is described as "Abacus Capital Corporation or its assignee". The April memo Mr. Auger wrote shortly after ascertaining the steps from Abacus refers to the shopping centre being sold to "an affiliate of Abacus or a third party". The August closing documents simply refer to the "purchaser" of the shopping centre. I accept that Harvard Properties and the other co-owners may not have been aware that Bentall would be the third party purchaser of the North Hill Shopping Centre until August or September. However, I am not able to conclude on a balance of probabilities that they believed until then that Abacus or an affiliate of Abacus, and not some third party, would be the purchaser of North Hill Shopping Centre. It was clear that (i) both LOIs contemplated an assignee, not an affiliate; and (ii) none of the co-owners knew anything about Abacus and had no thought that they otherwise owned and/or operated shopping centres.

[46] I infer from the totality of the evidence the fact that it had been contemplated since the Abacus LOI was received in March that the North Hill Shopping Centre itself would likely be bought by an existing shopping centre developer, owner and/or operator. Indeed, Mr. Hill's March memo about Abacus' credibility says his contact at Kingston Capital was to be finding out more information about Abacus' recent involvement in a retail asset redevelopment project and sharing what he learned with him of Abacus' involvement in that transaction. There is no suggestion in the

evidence that Abacus bought or operated that shopping centre or any other, or had any resources, including financial resources, with which to do so.

[47] When asked in direct questioning, Ms. Svedahl said that she was not aware that Abacus was essentially selling a tax plan and that there was no reason that she was aware that anyone at Harvard should think this. This appears to be at least somewhat at odds with the co-owners seeking and obtaining Mr. Auger's tax advice on the "Abacus proposal" promptly following receipt of the Abacus LOI, which advice begins with "in general terms the Abacus proposal converts a sale of the underlying property into a share sale for the vendors." It does not address the tax considerations of a sale of the shopping centre, nor the differing results or considerations of a share sale versus a sale of the shopping centre itself. By its terms, it only goes through each of the steps in the Abacus proposal to convert a sale of the underlying property into a share sale and specifically how those tax considerations allow Abacus to pay the co-owners a premium that he goes on to describe.

[48] In cross-examination, Ms. Svedahl said her involvement in negotiations did not involve any of the steps taken to close their sale of the shopping centre but was limited to the adjustments and calculations involved in completing the steps. While she reviewed the steps, she does not recall how the steps came about and does not know how the steps were determined as their advisers worked on it. In response to my question, she could not recall if the legal and tax advisers ever sought any instruction from her with respect to, how to, or whether to, negotiate any of these steps, or to propose they ask for these steps on behalf Harvard Properties and or the other co-owners.

[49] Ms. Svedahl said that the allocation of the consideration between the Newcos' Class A voting shares and the Class B non-voting shares was determined on their behalf by Mr. Auger. In her examination for discovery, she again said Mr. Bundon was responsible for negotiating the deal in response to a question about this very allocation between the two classes of shares. She no longer recalls her conversation with Mr. Bundon in 2019 to satisfy her undertaking on discovery. Her earlier answer did not refresh her memory, was not acknowledged by her to be presumed correct, nor did she change her answer that it was only Mr. Auger.

[50] Ms. Svedahl's repeated inability to recall things when asked in cross-examination stands in contrast to her almost never being unable to recall things clearly when asked in chief.

[51] Ms. Svedahl could not recall if she participated in negotiating the tax indemnity required by the vendors to deal with the tax risks to them of the Abacus proposal, nor who at Harvard Properties said they required the tax indemnity. She said she did not even know what the specific tax risks were that required the indemnity. She appeared uncomfortably awkward at this stage of her cross-examination trying to explain her prior inconsistent statements on discovery, and differing recollections in chief and in cross.

[52] Ms. Svedahl did not recall if the tax lawyer at MLT or the CPA Mr. Auger was responsible for the reference to the section 160 risk as an indemnified assessment in the tax indemnity agreement. She was uncertain of the context in which the section 160 risk became part of the tax indemnity. Nor could she recall any such thing regarding the references to section 83(2.1) and GAAR in the definition of indemnified assessment in that indemnity. She did not know how the amount of the letter of credit was determined that secured the indemnity. She could not recall who was involved with or negotiated the tax indemnity document. She did understand that the tax indemnity was secured by amounts received from Bentall after the step in which Abacus controlled the shares of the Newcos. While she described the amounts as having been received for the shopping centre after Abacus controlled the Newcos, when asked the significance of that change of control occurring when it did, Ms. Svedahl would not agree that the timing of that change of control was of any importance. When asked again about its importance, she said she had no recollection and no understanding but had relied on their advisers.

[53] It can be noted that Harvard Properties did make a claim under the tax indemnity agreement in respect of the section 160 assessment in issue in this proceeding. That was done only after it was agreed the letter of credit securing the indemnity could be released. Abacus denied the claim under the indemnity, and has not paid it. No steps have been taken by Harvard Properties to sue or otherwise enforce its claim against Abacus under this indemnity.

[54] With respect to the SPA closing, Ms. Svedahl said she followed what the transactions were, but not why they were set out and agreed to. She acknowledged that the SPA specifies a sale of the shopping centre assets by the Newcos to a third party purchaser, that this was to occur after Abacus bought the voting shares of the Newcos, and that those Bentall purchase monies were used in part to pay Harvard Properties and the other co-owners. She explained “I don’t understand the tax piece of the transaction.” Section 2 of the SPA listing the transactions in their series is Appendix C hereto.

[55] Ms. Svedahl confirmed that she understood that, had Abacus not sold the shopping centre to the third party, Harvard Properties and the other co-owners could not get paid. The co-owners needed the shopping centre to be sold to the third party to get paid for their indirect interests in the shopping centre.

[56] With respect to the last sentence of paragraph 2 of both LOIs, Ms. Svedahl was not aware of any tax efficiencies offered or considered by Harvard Properties.

[57] Mr. Auger was involved in determining the co-owners' proceeds on the transaction as between voting and non-voting shares, the amounts of the capital adjustments and dividends etc. Ms. Svedahl said she got the Harvard Properties numbers that Mr. Auger needed to crunch the needed numbers and that he then gave her the allocation numbers needed for the SPA. She said she would have looked through his calculated amounts but not necessarily understood them.

[58] With respect to Mr. Auger's April memo to the co-owners discussing the Abacus proposal, Ms. Svedahl said she did not know where he learned what Abacus' proposed steps in its LOI were, and did not know why Mr. Auger refers to a premium being paid by Abacus to the co-owners to do this deal, but did not ask him where these came from. She could not recall if drafts of the SPA may have been exchanged by the time of Mr. Auger's April 11th memo.

[59] Ms. Svedahl's inability to recall so many important aspects of this transaction, including her own role, raises reliability concerns about the Court's ability to rely on her testimony that is not consistent with and corroborated by others and/or the documents in evidence. Her changing answers between her answers on discovery and her answers in the witness box raise questions of a further erosion of her reliability and/or heightened concerns about her credibility. Her inconsistencies with Mr. Bundon's testimony raise concerns with respect to the reliability and credibility of both Mr. Bundon and Ms. Svedahl. The concerns that Ms. Svedahl and Mr. Bundon have created with respect to their reliability and their credibility lead me to conclude that it would be wrong to accept their evidence that is not consistent with, and/or corroborated by, other reliable and credible evidence or testimony, and that any such uncorroborated or unsupported testimony from Mr. Bundon and/or Ms. Svedahl should be given little weight when weighing the evidence to determine matters on a balance of probabilities.

[60] Since Mr. Bundon and Ms. Svedahl were the most senior officers at Harvard and jointly responsible for this transaction, and since no one else from Harvard Properties or Hill Companies Group testified, there is little subjective

information or evidence from the appellant to consider and weigh in determining the appellant's objective purpose and reasons for doing this deal in the manner it was done in response to an unsolicited offer from an entity they had never heard of and made little if any inquiries about.

[61] I do not find it credible that senior management responsible for real estate investments at Harvard Properties were unaware of the significant tax and cash flow difference between share purchases and asset purchases for real estate companies. It is simply not credible that Harvard Properties' senior management, or the other co-owners (at least those who had officers, shareholders or principals testify) were unaware of the great significance to Canadian real estate companies of the contribution of capital cost allowance/tax depreciation on their owned assets to their tax shield and ultimately their overall success. This was spelled out in even greater detail in Mr. Auger's two-and-a-half page memo which describes this as the very reason that Abacus could pay a premium to the co-owners for a share deal that followed the Abacus proposal.

[62] It is reasonable to assume from this the fact that this difference, and it being the *sine quo non* of the premium, was also discussed with Harvard Properties and the co-owners from the outset by and with Abacus and/or its advisers, and by Mr. Auger and the co-owners' other advisers. It is very hard to see how Ms. Svedahl and Harvard Properties' in-house counsel could have attended to the review and negotiating of the SPA and all of the other closing documents and arrangements without understanding this difference - and Ms. Svedahl has assured the Court she kept Mr. Bundon up to date throughout her involvement.

[63] It appears that Mr. Bundon and Ms. Svedahl read the final paragraph of the Auger tax memo and, at that time, made an informed decision to be willfully blind to how Abacus was planning to deal with its tax liability on the income arising from their series of transactions with the co-owners, apart from worrying about their own tax risks, including section 160, capital dividend treatment, and the GAAR.

C. Dennis Auger

[64] During the period in question, Mr. Auger was a CPA and tax partner at the accounting firm KPMG in its Calgary office. He retired from KPMG in 2021.

[65] Mr. Auger described that in early April 2005 he received a copy of the Co-owners' LOI signed by the parties from Lorne Paperny, a principal of one of the co-owners.

[66] He was aware of its contents before that as he had discussed the Co-owners' LOI with Mr. Paperny shortly before that date. He became aware that, while not specified in the LOI, this was to be a share sale. He was not involved in drafting the LOIs and said he does not think he had received any copy of either LOI until after he first spoke with Abacus in very late March or very early April.

[67] At the request of Mr. Paperny, Mr. Auger had a telephone conversation with Michael Doner, a principal at Abacus, to find out what steps were to be undertaken for the share sale as these are not described in the LOIs. He said Mr. Doner walked him through the steps. He understood what was proposed – describing it as simple enough in his world. He said he understood what the tax aspects of the transaction were as Mr. Doner described the steps to him since they were obvious, plain and evident.

[68] Mr. Auger said that the first thing that he did was to calculate what the co-owners' net after tax proceeds on an asset sale would be if it sold the shopping centre for $90 million[5], calculating the tax payable based on his knowledge of the tax costs of the shopping centre assets for at least one of the co-owners.

[69] Once he understood from Mr. Doner what the steps were to be in the series of transactions Abacus proposed, he had a call with all or most of the co-owners including Ms. Svedahl, Mr. Paperny and Mark Zivot to walk them through and discuss the steps involved. The co-owners then asked him to prepare a written memo walking them through the transaction and its tax considerations so that they could take their time and go through it. He prepared his April memo to the co-owners addressing the Abacus proposal generally, setting out the steps to be in the share sale agreement that he learned from his conversation with Mr. Doner, and the tax consequences, considerations and risks to the Abacus proposal. Mr. Auger said that he was satisfied that his clients, including Ms. Svedahl and Mr. Paperny, all understood the tax implications – "they got it" – after his conversation and memo.

[70] Mr. Auger's April tax memo is written clearly and concisely. It is clear from this memo and his testimony that Harvard Properties and the other co-owners knew and understood that the "Abacus proposal":

Allowed Abacus to "pay a premium" for the shopping centre, and could do so "because they have some form of shelter/deduction" that allows them to not pay any tax on their sale of the shopping centre assets by "sheltering" or "eliminating" tax,

[5] Ignoring a $1.7 million mortgage break fee and a $500,000 broker fee.

and that this premium was reflected in the choice of the capitalization rate resulting in the "calculated value" (approximately $90 million) of the property. This was described as the "Purchase Value" in the LOIs. He said that his reference to Abacus paying a premium was also used in his conversation with the co-owners that preceded the memo.

a) Required that the transaction "must be a share sale" and the share sale be accomplished by the shopping centre assets first being transferred by the co-owners' holding companies to the Newcos on a tax-deferred section 80 rollover basis electing at tax cost (approximately $50 million).[6]

b) The Newco shares received by the co-owners on the rollover step would be of two classes, voting and non-voting which were to be sold at separate points in the series of transactions.

c) The co-owners would next sell their Newco voting shares to Abacus and realize capital gains on that step. After this step, Abacus would control each Newco and the Newcos would sell the shopping centre to an Abacus affiliate or a third party for the calculated value.

d) The Newcos' recapture and capital gain upon selling the low tax basis shopping centre "would be sheltered/eliminated by Abacus transferring in some form of shelter/deduction before the new purchaser corporation's taxation year-end that includes the sale. We are not aware of the particulars of how they intend to accomplish this."

e) "One point to consider is to what extent the North Hill co-owners want to know how Abacus is sheltering/eliminating the recapture and taxable capital gain income. When you look at the transaction the North Hill co-owners are shareholders of this new corporation before, during and immediately after the recapture and taxable capital gain is sheltered/eliminated. Granted Abacus is the controlling shareholder at the point the recapture and taxable capital gain are sheltered/eliminated; but you still may wish to understand enough to satisfy yourselves that there is not an undue amount of risk or exposure."

[6] The Auger tax memo describes all of the co-owners rolling these shares into a single Newco, rather than using a separate Newco for each co-owner. I assume this was for simplicity in the memo, as a draft of the SPA was also circulating at that time and the SPA specifies separate Newcos. It may be that Mr. Doner had referred Mr. Auger to a single Newco in their telephone conversation. In any event, nothing turns on this.

f) In testifying about his final paragraph, Mr. Auger said that this was his way of saying "Notwithstanding everything sort of holds together, we don't know what Abacus is doing" and asking "Do we want to look inside their box?"

g) The Newcos' sale of the shopping centre giving rise to the recapture and capital gain created a significant capital dividend account in the Newcos. This would be used for the co-owners' benefit by next having Abacus electing to increase the stated capital of the co-owners' non-voting shares. Following this, they then sold their non-voting Newco shares to Abacus.

[71] Mr. Auger, his memo and his advice made it clear that the sale of the Newcos' voting shares was inserted in the series for the purpose of ensuring the co-owners did not control their Newcos when the shopping centre was transferred by them to Bentall so they could maintain a tax position that they dealt at arm's length with their Newco and Abacus when they received Bentall's cash. He testified that Abacus bought the voting shares first so that the co-owners were no longer the controlling shareholders, and that it had to be done this way for the Abacus proposal to work.

[72] It was similarly clear from Mr. Auger that the second class of non-voting shares was also created in order to increase the paid up capital on those shares and qualify for capital dividend treatment.

[73] Mr. Auger, the co-owners' tax accountant, like his counterpart the co-owners' tax lawyer from MLT Aikins, appear from the evidence to have been professional, thorough and sound in their advice and their actions, and beyond reproach, in acting for their clients in connection with the structuring and closing of the sale of North Hill Shopping Centre. There was no evidence to the contrary. They did what they should do and were asked to do. Mr. Auger's tax memo did exactly what was asked in a very clear, understandable fashion and left the decisions on how to proceed with the identified risks and concerns, and his recommendations and suggestions, to the clients. It is what Harvard Properties and the other co-owners did with their professional advice that is telling in this case.

[74] In his testimony answering questions in chief, Mr. Auger sought to equate his reference to Abacus paying a premium for the shopping centre transaction if its proposed share sale structure was followed to the "best price", "a high quality offer", "a very good cap rate" etc. I do not accept that downplaying of what he wrote. His memo written at the time, based on his discussion with Mr. Doner, refers more than once to paying a premium for the transaction, and doing so by the selection of a cap rate that gives them their chosen calculated value, and that this premium is funded

by Abacus not paying tax on the resulting income from its sale of the shopping centre to another party. I find that Mr. Auger, Harvard Properties and the other co-owners understood clearly from the outset that Abacus was offering a premium beyond fair market value to do its transaction for the North Hill Shopping Centre, which premium was able to be paid because Abacus would not be paying the tax the co-owners would have to pay if they sold the shopping centre itself.

[75] I infer from his memo's references to a premium being paid the fact that Mr. Auger was told by at least one of the co-owners and/or Mr. Doner that a premium was being paid to follow the Abacus proposal, and that all of the co-owners understood this to be the case after receiving Mr. Auger's advice.

[76] In answering questions in cross-examination, Mr. Auger tried to downplay his role as advisor – "I'm the tax guy", "I was asked to run the numbers." His April tax memo speaks for itself and clearly records and evidences that he did more than that.

[77] Mr. Auger said he was unaware of Abacus prior to these transactions, and that his first conversation with Abacus was with Mr. Doner before the Co-owners' LOI. He confirmed in chief that he recognized this proposal as a tax plan and that he expected it involved Joel Nitikman – who was the only Abacus person he discussed it with other than Mr. Doner.

[78] In addition to advising the co-owners in his memo and their conversation of the tax considerations of the Abacus proposal as described above, Mr. Auger was also engaged in the months leading to closing in obtaining the co-owners' tax values to ascertain the amounts to be elected for the rollover of the transaction, the allocation of value between voting and non-voting shares, and the other tax-driven numbers needed to close the series of transactions and ensure that the aggregate amount received by the co-owners for their indirect interests was the same net amount as had they instead sold the shopping centre directly for the "Purchase Value" calculated price and distributed these proceeds. This was mostly with Ms. Svedahl and the MLT tax partner. He was also involved with Abacus' counsel Fraser Milner Casgrain ("FMC" and now Dentons) and MLT, and engaged directly and indirectly with MLT's tax lawyer and with Abacus' FMC tax counsel, Mr. Nitikman, in settling the tax indemnity the co-owners insisted upon.

[79] Mr. Auger confirmed that, as co-owners' adviser, he prepared and filed the capital dividend elections even though they were only triggered after Abacus purchased the voting shares and sold the shopping centre to Bentall. He also prepared

the Newcos' financial statements and corporate tax returns for Abacus to sign and file following the closing for the Newcos' fiscal years after Abacus controlled them.

D. Lorne Paperny

[80] Mr. Paperny is a lawyer and a principal with one of the members of the co-owners' group, Madacalau Investments, a Calgary-based family-owned investment company focused on real estate in Alberta, Saskatchewan and British Columbia. Madacalau's affiliate, Myrah Holdings, owned a 12.5 percent-undivided interest in North Hill Shopping Centre. Myrah Holdings and the other three co-owners known as RonMoor Group had a history of making joint real estate investments, at times with Harvard Properties, as they did with their 50 percent undivided interest in this shopping centre. The other three families in RonMoor Group were the Belzbergs, the Libins and the Zivots.

[81] The approach to the co-owners for the North Hill Shopping Centre was first made to Mr. Paperny by Abacus' broker Bob Young at Colliers. He described the broker as someone he knew from at least a couple of transactions, who was considered the best in Calgary, and was his "go to" real estate broker.

[82] Mr. Paperny received the Abacus LOI from the broker. He said he and the other co-owners reacted positively to the capitalization rate and the calculated price. He described all of the co-owners being "excited by the price". Harvard Properties was more hesitant or reticent to sell because of its property management of the shopping centre notwithstanding the exciting price. He recalled the co-owners were happy with the offered price and did not even consider a counteroffer on price. He understood from the outset that the Abacus proposal needed to be a share sale. He knew later from the SPA that was negotiated and that he signed that the co-owners' sale was to involve Newcos, a rollover, and a sale of the shopping centre itself.

[83] Mr. Paperny recalled discussing the LOIs with Mr. Bundan and Ms. Svedahl as well as with the other co-owners.

[84] Mr. Paperny said he knew absolutely nothing about Abacus when he received the Abacus LOI. He acknowledged he did not know anymore about Abacus or Mr. Doner when he signed the Co-owners' LOI. He said he knew nothing about Abacus at the LOI stage and does not recall ever knowing anything about Abacus.

[85] Mr. Paperny does not recall if he spoke to Abacus after the parties signed the Co-owners' LOI in March up to when they signed the SPA in June.

[86] Mr. Paperny sent a copy of the Abacus LOI to Mr. Auger on behalf of the co-owners. He had used KPMG for tax advice for 10 years. He had never sold an asset without using a tax adviser. When questioned about the tax memo requested by the co-owners of Mr. Auger, and about the LOIs:

a) Mr. Paperny does not recall reading the tax memo but is sure he would have read its last paragraph. This is the paragraph that their lack of knowledge of Abacus' plan to shelter or eliminate the resulting recapture capital and capital gains income means that there may be an undue risk or exposure to the co-owners.

b) To the best of his recollection, the co-owners did not try to, or ask their advisers to, find out more about Abacus' plan to shelter or eliminate the tax liability created by its proposal. He is not aware of the co-owners knowing anything, or making any inquiries about, tax efficiencies in the post-LOI settling of the final structure, the SPA and the other closing details.

c) Mr. Paperny said that he had no clue and did not wonder why Abacus would pay an asset-based price on a share sale. He said he was not curious about the tax. It can be noted that this is entirely inconsistent with Mr. Auger explaining more than once in his memo how Abacus was able to do that. I infer as a fact that at least one of the co-owners engaged with Mr. Auger on behalf of the co-owners asking how Abacus could pay such an amount and asked what that meant to them.

d) Mr. Paperny does not recall whether he asked Mr. Auger why he twice referred to a premium being paid in his memo. He does not recall whether he or any other co-owner asked about Mr. Auger's references to Abacus' ability to shelter or eliminate the tax on the sale of the shopping centre.

e) He said that the co-owners weren't sure what an underlying sale to a third party or an affiliate meant. I find this to be evasive at best, and disingenuous in any event. Further, the evidence leads me to conclude they did not ask Mr. Auger or anyone else to further explain what was meant by it.

f) Mr. Paperny does not recall if the Auger memo and subsequent conversations with the co-owners led to the tax indemnity.

[87] When asked about the SPA that he signed, he said he does not recall if he did or did not understand how the transactions were structured.

E. Mark Zivot

[88] Mr. Zivot is a podiatrist at the University of Saskatchewan. He is a principal of RonMoor Group via a family holding company, which owns, operates and develops real estate.

[89] Mr. Zivot confirmed that the co-owners knew nothing about Abacus and that RonMoor Group did not make inquiries on their own. He recalls the Abacus LOI being discussed amongst all the co-owners and learning of the limited results of Paul Hill's inquiry about Abacus.

[90] Mr. Zivot described Harvard Properties as reluctant to sell at first because of its property management fees, but that Harvard Properties moved forward with the other co-owners.

[91] Mr. Zivot testified that the tax memo was obtained from Mr. Auger because the co-owners understood that Abacus had a tax loss to capitalize and was concerned that it not affect them.

[92] With respect to the Auger tax memo, he said he thought the caution in the final paragraph would be covered by the lawyers. However, when asked, he does not know if the Auger tax memo was given to the co-owners' lawyers.

[93] He said that at that stage the difference between selling the assets and selling the shares did not make much of a difference to the co-owners. It can be noted that is correct only because, as per the Abacus LOI, the Co-owners' LOI and the Auger tax memo, the calculated price for the share sale was to be determined by the reference to a hypothetical asset sale by the co-owners for a "Purchase Value" "calculated price". That is, they are intended to be the same. He confirmed in cross-examination that he clearly understood they were selling shares at a price equivalent to them doing a $90 million asset sale and that is why they had Mr. Auger review and advise on it.

[94] Overall, Mr. Zivot said "at the time I didn't really fully understand the process", even though they had Mr. Auger's tax advice explained to them orally and in writing and the co-owners responded to Abacus with their own Co-owners' LOI which all the parties signed and agreed to. That he did not "really, fully understand the process" is not inconsistent with him understanding both the steps involved and the tax considerations as Mr. Auger was satisfied all of the co-owners did, nor is it

inconsistent with him understanding the financial aspects including the premium intended to be paid and the tax risks Mr. Auger described.

F. Don Kowalenko

[95] Mr. Kowalenko is a commercial real estate lawyer in the Calgary office of Fraser Milner Casgrain (now Dentons) and has been a partner since 1995. He described the Calgary office being involved "on the transactional side in terms of closing", that his partner Mr. Nitikman in Vancouver was involved on the tax side of the transaction, and that one of his partners in Toronto was involved on the corporate commercial side. Mr. Kowalenko said that the Calgary real estate matter was handed off to him in August 2005 by one of his Calgary real estate partners. Mr. Kowalenko had no involvement in the share sale structure series of transactions. Mr. Kowalenko was clear that FMC represented Abacus with respect to the SPA and Abacus' NH Properties in the asset sale agreement with Bentall, and that FMC did not represent anyone else. He did clarify that FMC did represent the Newcos in the SPA after Abacus bought the shares but he did not know if that was immediately following that step on closing, immediately upon completing all steps, or at some other time. In later questioning in cross-examination, Mr. Kowalenko stated that he believed all of the Newcos were FMC clients after the step of Abacus acquiring the Newcos' shares.

[96] Mr. Kowalenko addressed FMC's trust ledger accounts for the Abacus entities. He could not fully break them down or answer questions on particular entries as the individual trust receipts and trust cheque requisitions were no longer available. He could not explain at all how at least one of the Abacus entities involved (Hillcore Financial) fit in to the Abacus group or why its trust account ledger identifies it as subject to a "CONE OF SILENCE" within his firm. He did acknowledge that the entity identified as "Client" in their trust accounts is not necessarily the beneficiary of any particular trust account. He did not know for certain whether any of his firm's trust accounts were held in trust for the Newcos but assumes not.

[97] Mr. Kowalenko said that there were not separate accounts set up for each entity, which raises some further doubt in my mind of the correctness of the appellant's assertion that this was a series of partial closings and that one of the middle closings was Abacus' acquisition of control of the Newcos. I accept Mr. Exner's description of the single closing described below instead.

[98] Mr. Kowalenko acknowledged that $2.25 million of Bentall's cash was received by FMC in trust for Abacus if and once the Bentall purchase closed.

[99] He thinks that there may be a trust letter, and that it may be that Bentall's counsel Blakes sent the money to the former co-owners.

[100] Mr. Kowalenko did not know if or how the holdback securing the tax indemnity was ever transferred from FMC.

G. Scott Exner

[101] Scott Exner is a partner at MLT Aikins specializing in commercial real estate and corporate commercial acquisitions since his 1992 call to the Alberta bar. He had been advising Harvard Properties for about ten years prior to this 2005 transaction.

[102] Mr. Exner confirmed that MLT incorporated the five Newcos for the co-owners. MLT was engaged by the co-owners for this deal and the SPA on April 11th, which it can be noted is after the parties agreed to the Co-owners' LOI and is the date of the Auger tax memo. He received a draft of the SPA at that time. He had never heard of Abacus before that date. He said that he always knew that there would be a sale of the underlying shopping centre assets to a third party, which need not be an Abacus affiliate. He never asked who the ultimate purchaser would be. He became aware on September 2nd that Bentall would be buying the shopping centre in a telephone conversation from Blakes but he may have learned of this two weeks earlier. He said that by late September and early October some FMC emails on the co-owners' Abacus series of transactions included Blakes and that Blakes replied to them.

[103] Mr. Exner confirmed that the draft SPA had come from Abacus and that all of the core steps of the transactions were in that first draft.

[104] The notification under the *Competition Act* by FMC on behalf of Abacus to the Commissioner of the Competition Bureau describing the transaction says that "Abacus does not intend to hold the majority interest in the shopping centre itself for more than a point in time"[7]. While this draft is dated September, it may have been prepared in August. Given the evidence of the co-owners' complete absence of

[7] In these reasons, as in the notification letter, references to points in time during the closing are meant literally, that is a point in a timeline, the point being of no duration, as distinct from any measurable period of time. This is the result of a single escrowed closing only becoming legally effective upon closing the final step in the series of interdependent transactions scheduled to close.

knowledge that Abacus or any of its affiliates ever owned, operated, or developed any shopping centres or commercial real estate, and the virtual absence of any attempt to find that out, I infer that this sentence in the September draft reflects what was always intended by Abacus since it gave its LOI to the co-owners in March, and that it is what the co-owners reasonably expected would happen, but did not want to know more about from the outset.

[105] Mr. Exner described his concern early on that all of the steps may not be completed, that it might be possible for someone to intercept funds or register on title. Because of this concern, he made sure to insist that the various steps occur one right after another on a single day and with a single escrow – "all steps would take place or none of them would take place", with the documents already agreed upon and signed, and "documents not treated as binding until coming out of escrow". He said these escrow terms were even more important than the tax indemnity agreement. This did not stop him from maintaining that MLT ceased to act for the Newcos when control of the Newcos moved to Abacus.

[106] The co-owners were aware that Abacus had been represented by McMillan Binch in March and April 2005. They were advised in late April that FMC had been retained to represent Abacus, although they may have expected it for a period of time.

[107] Mr. Exner confirmed that Bentall's counsel, Blakes, was present for the closing at FMC's office. At least one Blakes lawyer was there before he arrived. The closing required a letter from Blakes that irrevocably confirmed that upon receipt of the executed transfer of the shopping centre from the Newcos/NH Properties to Bentall, Blakes would immediately release from its trust account to co-owners' counsel MLT the almost $36,000,000 pursuant to irrevocable directions it had received.

[108] When asked if NH Properties was an empty shell after it was acquired by Abacus, Mr. Exner said he had no insight as to what the financial status of NH Properties was.

[109] Mr. Exner confirmed that his understanding was that the co-owners received promissory notes for their sale of their voting shares because the Abacus purchaser, NH Properties, would not have the funds to pay for them. It can be noted that this was also true of the non-voting shares for which no promissory note was issued. I infer from this, the series of transactions and the other evidence, that the promissory

note was given in order to attempt to defer the transfer of the cash until after the shopping centre was sold.

[110] Mr. Exner confirmed that the tax indemnity agreement was drafted by MLT following MLT's discussions with Abacus and FMC that led to the agreement. Mr. Exner recalled that his tax partner at MLT raised the indemnified risks following the April draft of the SPA. The tax risks were discussed with Abacus and its tax partner and its then counsel McMillan Binch by mid-April. Mr. Exner believed that the section 160 risk was the lesser of the two indemnified risks (being the subsection 183(2.1) specific anti-avoidance rule regarding capital dividend account and the section 160 joint and several liability). He explained that this was his view because section 160 would only apply to non-arm's length parties.

[111] Mr. Exner said he did not know if Abacus' purchaser company, NH Properties, had the financial ability to pay an indemnified tax assessment, and that he had no information as to its financial status. He said that he did not ask or find out, but instead, on the co-owners' instructions, insisted that the principal Abacus company they dealt with also be a party to the secured tax indemnification agreement.

[112] Mr. Exner confirmed that, while MLT discussed the tax issues described above, they never discussed or asked FMC about any tax efficiencies referred to in paragraph 2 of both LOIs referring to the structuring efforts of both parties to be reflected in the closing documents.

[113] He confirmed that while FMC proposed structuring options to avoid the section 160 risk (which the co-owners did not find acceptable), to his knowledge the co-owners never focused on trying to address the steps giving rise to the section 160 risk, but were content to rely on obtaining their secured tax indemnity agreement.

[114] Mr. Exner said he was not generally aware of a basic premise that an arm's length sale of shares and an arm's length sale of assets could be expected to be at different prices.

[115] He said no one at MLT sought to ensure compliance with the closing language of paragraph 2 of the LOIs specifying a calculated price for the shares of an after-tax asset sale at $90,000,000. He said he relied on his tax partner for the analysis and did not rely on Mr. Auger.

[116] Mr. Exner made it very clear in his testimony that his driving interest throughout, from his firm's retainer through closing, was just to ensure his clients got paid.

H. Mark Weston

[117] Mark Weston is a CPA who testified as an expert and provided opinions on the valuations of the voting and non-voting classes of shares of Harvard Properties' Newco as at the October 11, 2005 closing of the Abacus transaction. His valuation report is in evidence and the paragraphs valuing the shares are Appendix D hereto.

[118] Mr. Weston was provided a Statement of Assumed Facts by Harvard Properties' counsel in this proceeding. His report says he performed limited corroboration. He did not give any example of performing any in his report or in his testimony. His testimony included his acknowledgement that he had accepted the facts to be assumed without any independent corroboration. He said he did not perform or obtain any corroboration as he was satisfied with the information he had received from Osler. He did not seek to obtain or review any other material because he felt he had a sufficient understanding of the material to provide his valuation opinion. He said the information he was given internally corroborated itself. He did not ask Osler or Harvard Properties if any of HP Newco's cash or near cash was restricted, pledged, secured, in trust for any specific purpose, subject to a direction etc. He was not aware of the irrevocable directions, the movement of money between the parties and Bentall through the various trust accounts, or the terms of the escrow governing the closing of the series of transactions. He essentially acknowledged that his failure to do any corroboration did not satisfy the Practice Standards of the Canadian Institute of Chartered Business Valuators applicable to valuation reports. Mr. Weston was repeatedly evading, deflecting and avoiding answering in cross-examination what limited corroboration he did. It required multiple interjections by me before he admitted he had done none.

[119] He was very clear that he was not asked to value the $16 million intercompany loan from Abacus' NH Properties to HP Newco as recorded in what he was given, but was told that its fair market value was its face amount. Much more concerning is that the Court was never given any evidence that such multi-million dollar intercompany loan ever existed. The co-owners' testimony, and that of their counsel, is that they were unaware of any such loan. I am unable to find on the evidence that this intercompany loan existed at the relevant time of Mr. Weston's report, or at all. The amount of this intercompany receivable purportedly owing to HP Newco by NH

Properties valued at face by Mr. Weston in valuing the non-voting shares is recorded as $6,920,098.[8]

[120] Given these limitations, what Mr. Weston was instructed to prepare might better be described as a computation report than a valuation report.

[121] Mr. Weston acknowledged that he relied on the intercompany debt being worth its stated amount. He also acknowledged that the valuation of the shares of HP Newco would be different if the intercompany loan was not worth the amount that he was instructed to assume was its fair market value.

[122] The Weston valuation report, and some information concerning the amount Bentall is said to have paid to Abacus for the shopping centre, is insufficient to even estimate a value for the HP Newco voting shares or non-voting shares, for the co-owners' interests in the shopping centre before the closing date or North Hill Shopping Centre itself.

III. Factual Analysis and Findings

[123] After hearing, considering and reviewing all of the evidence, the principal factual findings made on the basis of a balance of probabilities in this case that lead to the conclusion that this appeal should be dismissed include:

a) Harvard Properties, and seemingly the other co-owners, were at best willfully blind to the identified issue of how the Abacus group was going to address the tax liability to it that clearly arose as a result of the series of transactions in question.

b) They were also at best wilfully blind to the fact that tax liability was parked at the end of their series of transactions in a company that did not have any assets with which to pay it. The only assets that Abacus' company, NH Properties, ever had during and at the end of the closing of the series of transactions were the shares of the Newcos whose only assets were held for at best the brief moment in time it owned them during the closing, and were fully committed throughout to being delivered to the co-owners, Abacus or Bentall.

c) The tax-related risks, including the fact that the series contemplated the use of voting and non-voting shares to be disposed of at different points in the closing

[8] It can be noted that this is the same amount as the NH Properties' promissory note owing to Harvard Properties for its purchase of the HP Newco voting shares a couple of steps earlier.

agenda, and including not knowing how the Abacus group would avoid or eliminate its tax liability triggered by the series, were identified and described to Harvard Properties and the co-owners in writing by a tax expert at the very outset during the letter of intent phase. Their tax accountant and their tax lawyer made them well aware of the risk of a section 160 liability. The co-owners obtained a secured tax indemnity from Abacus that specifically addressed this section 160 risk.

d) The co-owners did not follow up with their tax expert or make inquiries of or about Abacus. Harvard Properties and the other co-owners renegotiated the structure of, and ordering of, the steps in the series to minimize their potential tax liability should the capital dividend account aspect of the series of transactions not work because they were still controlled by the co-owners, or should they be considered non-arm's length to Abacus throughout all of the relevant parts of the closing and section 160 applied. They rejected changes proposed by Mr. Nitikman and insisted that a secured tax indemnity be added to the structure.

e) Harvard Properties and the other co-owners renegotiated steps and terms with Abacus over which of the two of them would bear what amount of exposure and risk for the tax payable to another party, the respondent, under the Act resulting from the series of transactions they were to close. Harvard Properties and the other co-owners insisted on and obtained a section 160 indemnity from the Abacus group, secured by a multi-million dollar line of credit. That indemnity agreement states that the parties agreed it was in the interests of Abacus and the co-owners to expressly allocate between themselves responsibility in respect of certain possible tax assessments of the co-owners resulting from following the Abacus proposal.

f) The co-owners, including Mr. Bundon and Ms. Svedahl, knew and understood that Abacus was proposing a tax plan to them that involved Abacus and the co-owners ensuring that the steps left the tax liability on the contemporaneous sale to the third party with NH Properties, a subsidiary of a company they chose to know nothing about. The co-owners understood this from their information from Abacus, Mr. Doner and Mr. Auger's memo and conversations. The appellant's witnesses are not credible or reliable to the extent they did not acknowledge this; they understood this at the time even if they can no longer recall.

g) The Abacus proposal's tax plan only worked to get a premium to the co-owners if Abacus didn't actually pay tax on the income generated. The co-

owners knew this from Mr. Auger's advice but were content to proceed with a section 160 indemnity secured by a letter of credit.

h) It was clear from the advice and information given to the co-owners that the premium they were to receive was to be funded by Abacus not paying the tax liability created and to which the co-owners chose to be wilfully blind as long as they also enjoyed the irrevocable, secured tax indemnity covering section 160 and other tax risks dependent on the parties' relationships.

i) The interdependent and related transactions in question were intended to be, and were, a single staged and stepped series of transactions, each of which had to occur immediately after the previous step, locked in with irrevocable directions, specific escrow arrangements and trust monies held by counsel. Once the closing commenced, no party or entity involved could walk away at any stage prior to the completion of the closing of all of the planned steps to which they had committed. Nothing was able to be negotiated or renegotiated. The documents, including the many directions, were all fully prepared and signed off on before closing began in all material respects. The SPA required these directions to be agreed to prior to execution.

j) This series of interdependent and related transactions included Abacus' NH Properties' sale of the shopping centre to Bentall at least to the extent that Bentall's cash went directly to the co-owners and the Newcos transferred title to the shopping centre to Bentall at a point in time when the co-owners owned Newcos' non-voting shares and had not yet been paid for the voting shares they transferred to NH Properties a moment in time earlier.

k) Virtually all of the sources of the consideration received by Harvard Properties and the other co-owners on these transactions were funded by Abacus' contemporaneous sale of the shopping centre to third party Bentall, represented by Blakes. Bentall participated in at least some of the closing, including ensuring its cash and near cash was irrevocably available to Abacus to satisfy the co-owners, and was locked in escrow and trust accounts during closing for the benefit of the co-owners.

l) Bentall's purchase of the shopping centre closed the same day at the same law firm. Bentall's money that was used to pay the co-owners on their share sale was irrevocably in Blakes' trust account before the point in time of the co-owners' SPA closing to be received by the co-owners upon receipt by Bentall of the transfer of title to the shopping centre. Blakes was present for the SPA closing.

m) Essentially Abacus did not bring anything to the table for its transactions with the co-owners apart from its tax plan given it needed a true unaffiliated third party *bona fide* purchaser to close. Abacus could not otherwise do the transactions it committed to work towards in the signed Co-owners' LOI. Abacus either had, or had to find, a true buyer for the co-owners' shopping centre. I do not know what Abacus' relationship with Bentall was or when it started. The Court does not know that Abacus wasn't always scouting for shopping centres for Bentall and/or other developers for first class properties that were not otherwise for sale. Regardless, Abacus appears to have functioned essentially as more of a listing broker with a tax plan than a *bona fide* purchaser hoping for a quick flip, although the Court has not heard Abacus' or Bentall's version of events.

n) Once the series of predetermined steps closed, the Abacus entity had no new apparent sources of cash or remaining assets to pay any tax liability owing to the respondent on the capital gains and recapture that had been triggered and parked with it by design in the series negotiated between the co-owners and Abacus.

o) There was no evidence to suggest that any of the co-owners or their advisors in structuring this series of transactions believed that Abacus was in the same or similar business to that of the co-owners. Although the co-owners maintained that throughout most of the core structuring of the series of transactions they believed Abacus or an affiliated Abacus entity would be their counter-party acquiring the shopping centre, I find that, if that was the case, it was due to their wilful blindness in choosing not to make any inquiries after their own tax expert recommended that they do, and notwithstanding their concerns about Abacus' credibility and its integrity and/or ability to do what it says it will do.

p) The consideration received directly or indirectly by Harvard Properties and the co-owners upon transfer of the shopping centre included a premium in excess of the fair market value of their interests in the shopping centre. Abacus' offer and the transactions negotiated between the parties contemplated and used a calculated value of the shopping centre assets that the parties described as a "Purchase Value", and not the value of the co-owners' shopping centre interests as the basis for determining the amounts to be received by each of the co-owners upon closing of the series of transactions. This premium was designed to further reward and enrich the co-owners. Upon weighing the totality of the evidence, key parts of which are inconsistent with their testimony, the attempts by the appellant's witnesses to

explain this differently do not collectively or individually allow me to conclude differently. The attempt by Abacus and the co-owners to disguise or bury this premium in their LOIs is telling.

q) After reviewing all of the evidence, the testimony of the co-owners' tax expert and, in particular, the tax memo he prepared for the co-owners, I find on a balance of probabilities that the 90 plus million dollar "calculated price" or "Purchase Value" was intended and agreed to be manipulated to include a premium above the fair market value of the shopping centre assets, which premium was payable via the stipulated capitalization rate chosen and agreed to. There is virtually no evidence of much, if any, probative value to support that capitalization rate being a market rate to apply to the shopping centre's net operating income ("NOI") in computing the calculated price. The co-owners' tax expert's memo is clear that this premium is reflected in the capitalization rate and is payable because Abacus will not be paying tax when it sells the shopping centre assets.

r) NH Properties would never have the assets or financial ability to honour the promissory notes for the Newco voting shares given that its only assets were the Newcos all of whose assets and activities were restricted or otherwise committed. A notional informed and knowledgeable arm's length third party purchaser of the promissory notes during closing would know that the Newcos' interests in the shopping centre and its proceeds were already fully committed to Bentall and the co-owners respectively.

s) Not having heard evidence from either Abacus or Bentall, and given the appellant's professed ignorance of the arrangements and transactions between them concerning North Hill Shopping Centre or otherwise, and given the Court's other concerns as to the reliability and credibility of Harvard Properties' evidence, and given the co-owners' concerns with Abacus, the Court cannot simply accept the amount said to be paid by Bentall as the fair market value of the shopping centre. The appellant chose what evidence it wanted the Court to have knowing that it would materially help their case if it could be established that the calculated Purchase Value was within the range of fair market value and did not include an imbedded premium. The Court is left without any reliable understanding whether and how other money and/or consideration moved between Bentall and Abacus upon Bentall's purchase of this shopping centre or in other transactions they may have been doing together. There was no other material evidence of the value of the shopping

centre provided to the Court. The Court heard no evidence whether or not Bentall was privy to, or was unaware of, Abacus' tax plans.

t) Credible evidence sufficient to prove the fair market value of the co-owners' interests in the shopping centre by a valuation of the shopping centre itself and/or the indirect corporate holdings of their interests, before they committed to sell their interests, could have fully absolved them of any potential section 160 liability, whether or not they dealt at arm's length with the buyer. This would have been a straightforward and reasonable way to demonstrate they did not receive a premium from Abacus above the fair market value of their interests. Without that evidence, the appellant's arguments to that effect were a distraction. This absent evidence is consistent with, and further supports, my finding that that there was such a premium knowingly imbedded in the calculated Purchase Value by manipulating the capitalization rate used to calculate the Purchase Value.

u) Given the co-owners' choices to make no inquiry and to remain wilfully blind to the scope of their tax risk of Abacus eliminating the taxable income generated under its proposal, and the co-owners' choice to instead simply accept the premium and insist upon their irrevocable, secured tax indemnity, the Court is wholly unable to find that the co-owners held a genuine or *bona fide* belief that Abacus would be implementing an effective tax elimination method after closing to deal with the tax liability.

v) The capital structure of the Newcos created as part of the series of transactions was to allow the voting shares to be sold by the co-owners to Abacus separately from the sale of their non-voting shares. The only apparent or offered reason for this was to ensure that voting control had already passed from the co-owners to Abacus before Abacus transferred cash to them for the non-voting shares and the voting share promissory notes. Clearly this was primarily for two tax purposes, (i) no longer *de jure* controlling the corporation whose shares they sold at the point in time their shopping centre was sold to Bentall giving rise to the capital gain and recapture on the shopping centre, in order to better try to avoid the application of section 160 to the co-owners for the cash transfers by being better able to argue they were dealing at arm's length at the time of the non-voting share sale and the payment respecting the promissory notes, and (ii) for the co-owners to qualify for capital dividend account (CDA) treatment.

IV. The Bifurcated Issues

[124] As set out in the Bifurcation Order of Justice MacPhee, the Bifurcated Issues are:

A. The section 160 Liability Issues:

1. Whether there was a transfer of property to Harvard Properties by Abacus;

2. Whether the fair market value of the property transferred exceeded the consideration given by Harvard Properties; and

3. Whether the transferor and Harvard Properties were not dealing at arm's length.

B. The alternative GAAR issue, whether GAAR applies to the avoidance of section 160 by Harvard Properties.

V. Section 160 Transferee Liability - Law and Analysis

[125] Three of the pre-conditions for the application of section 160 are raised in the Bifurcated Issues to be decided. These are:

1. Did a taxpayer transfer property directly or indirectly by way of trust or any means whatever?

2. Did the transferor and the transferee of the property not deal at arm's length at the time of transfer?

3. Did the fair market value of the transferred property at the time it was transferred exceed the fair market value at that time of the consideration given for the property by the transferee?

[126] Section 160 has been amended since the taxation year in question. These amendments are not retroactive, they have not changed these three pre-conditions, and, as set out below, the FCA in *Microbjo* confirmed that the later amendments do not impact the courts in any way from considering all relevant facts in determining whether the parties were non-arm's length at the time of the transfer. The case law says the courts are required to consider all relevant facts.

The Purpose of Section 160 - The Livingston Decision

[127] In *Her Majesty the Queen v. Livingston*, 2008 FCA 89 Justice Sexton of the FCA addressed the purpose of section 160:

> [1] The power to tax means little without the power to collect. As a result, the *Income Tax Act* R.S.C. 1985, c. 1 (5th Supp.) (the "Act") provides for a myriad of powers to collect taxes owed that would otherwise not be obtainable when taxpayers attempt to evade their creditors. These powers must be interpreted in light of their intended purpose and within the contexts of the factual situations to which they are applied.
>
> [17] In light of the clear meaning of the words of subsection 160(1), the criteria to apply when considering subsection 160(1) are self-evident:
>
> 1) The transferor must be liable to pay tax under the Act at the time of transfer;
>
> 2) There must be a transfer of property, either directly or indirectly, by means of a trust or by any other means whatever;
>
> 3) The transferee must either be:
>
> i. The transferor's spouse or common-law partner at the time of transfer or a person who has since become the person's spouse or common-law partner;
>
> ii. A person who was under 18 years of age at the time of transfer; or
>
> iii. A person with whom the transferor was not dealing at arm's length.
>
> 4) The fair market value of the property transferred must exceed the fair market value of the consideration given by the transferee.
>
> [18] The purpose of subsection 160(1) of the Act is especially crucial to inform the application of these criteria. In *Medland v. Canada* 98 DTC 6358 (F.C.A) ("*Medland*") this Court concluded that "the object and spirit of subsection 160(1), is to prevent a taxpayer from transferring his property to his spouse [or to a minor or non-arm's length individual] in order to thwart the Minister's efforts to collect the money which is owned to him." See also *Heavyside v. Canada* [1996] F.C.J. No. 1608 (C.A.) (QL) ("*Heavyside*") at paragraph 10. More apposite to this case, the Tax Court of Canada has held that the purpose of subsection 160(1) would be defeated where a transferor allows a transferee to use the money to pay the debts of the transferor for the purpose of preferring certain creditors over the CRA (*Raphael v. Canada* 2000 D.T.C. 2434 (T.C.C.) at paragraph 19).
>
> [19] As will be explained below, given the purpose of subsection 160(1), the intention of the parties to defraud the CRA as a creditor can be of relevance in gauging the adequacy of the consideration given. However, I do not wish to be taken as

> suggesting as there must be an intention to defraud the CRA in order for subsection 160(1) to apply. The provision can apply to a transferee of property who has no intention to assist the primary tax debtor to avoid the payment of tax: see *Wannan v. Canada* 2003 FCA 423 at paragraph 3.
>
> [27] Under subsection 160(1), a transferee of property will be liable to the CRA to the extent that the fair market value of the consideration given for the property falls short of the fair market value of that property. The very purpose of subsection 160(1) is to preserve the value of the existing assets in the taxpayer for collection by the CRA. Where those assets are entirely divested, subsection 160(1) provides that the CRA's rights to those assets can be exercised against the transferee of the property. However, subsection 160(1) will not apply where an amount equivalent in value to the original property transferred was given to the transferor at the time of transfer: that is, fair market value consideration.

[128] In *Canada v. 9101-2310 Quebec Inc.* 2013 FCA 241, former Chief Justice Noël of the FCA wrote:

> [2] The purpose of this provision is to facilitate the collection of outstanding taxes by making the transferee in a property transfer made by a tax debtor solidarily liable for the latter's tax debt up to the value of the transferred property. In the present case, the assessment at issue holds 2310 solidarily liable for the tax debt of Alain-Guy Garneau (Mr. Garneau or the tax debtor) after the sum of $305,441.32 belonging to the tax debtor was deposited in 2310's bank account in the year 2002.
>
> [60] I believe it useful to add that the sole purpose of subsection 160(1) is to protect the integrity of the tax debtor's patrimony. This provision has been described as a draconian measure because it applies even if the transfer is made in good faith – *i.e.* not for tax reasons – and because it allows tax to be collected from a person other than the primary debtor, without any time limitation and without regard to what may have happened to the property transferred or its value since the transfer. In short, subsection 160(1) protects the tax authorities against any vulnerability that may result from a transfer of property between non-arm's length persons for a consideration that is less than fair market value regardless of the circumstances which give rise to the transfer.
>
> [61] Given the intended purpose, there is no basis for applying subsection 160(1) where the tax debtor's patrimony remains intact…

[129] Similarly in *Wannan v. Canada* 2003 FCA 423 Justice Sharlow of the FCA wrote:

> [3] Section 160 of the *Income Tax Act* is an important tax collection tool, because it thwarts attempts to move money or other property beyond the tax collector's reach by placing it in presumably friendly hands. It is, however, a draconian provision. While not every use of section 160 is unwarranted or unfair, there is always some

> potential for an unjust result. There is no due diligence defence to the application of section 160. It may apply to a transferee of property who has no intention to assist the primary tax debtor to avoid the payment of tax. Indeed, it may apply to a transferee who has no knowledge of the tax affairs of the primary tax debtor. However, section 160 has been validly enacted as part of the law of Canada. If the Crown seeks to rely on section 160 in a particular case, it must be permitted to do so if the statutory conditions are met.

[130] Former Chief Justice Noël of the FCA similarly wrote in *Eyeball Networks Inc. v. Canada* 2021 FCA 17 at paragraph 39:

> [39] The law is clear that an intent to avoid the payment of outstanding taxes is not a prerequisite for the application of subsection 160(1), but an improper motive, if present, can inform the way in which the Court views the transactions and assesses their impact …

[131] Ms. Livingston and the tax debtor were friends. Ms. Livingston was aware of her friend's tax liability. Ms. Livingston opened a bank account of which she was the sole account holder and signatory. She provided her friend with a debit card that allowed her friend to make withdrawals and sign blank cheques that she gave to her friend. The friend deposited their own funds into this account which constituted a transfer of property to Ms. Livingston the account holder. This allowed her friend to spend their own money as they wished and to fully avoid satisfying their tax liability by depleting the assets to virtually nil in their estate. Ms. Livingston did not obtain any material benefit from doing this. Ms. Livingston facilitated her friend's avoidance of this tax liability. *Livingston* demonstrates the scope of the circumstances which can satisfy both the purpose and the requirements of section 160, including considerations relevant to determining whether or not the transferor and the transferee are dealing at non-arm's length.

Microbjo/Damis Properties

[132] In *Microbjo* former Chief Justice Noël described the issues before the FCA as:

> [3] At issue is whether the participation by the respondents in transactions with a third party aimed at relieving them from a tax liability that ultimately went unpaid gave rise to a transfer for purposes of subsection 160(1) and, if so, whether or not they were dealing at arm's length with this other party at the time of the transfer. In the event that subsection 160(1) does not allow for the full recovery of the assessed amounts, the Court will have to determine whether the assessments can nevertheless be upheld as issued pursuant to section 245 of the Act.

[133] The Court noted (paragraph 16) that:

> […] These assessments were issued on the basis that a transfer took place when the cash belonging to the subsidiaries ended up in the hands of the respondents and that the consideration given by the respondents in return—i.e., the shares of the subsidiaries—had no value.

[134] The Court noted (paragraph 5) that the trial judge had found that an intercompany receivable that was part of the consideration for the transfer had a value equal to its face amount. That is not the case here. Both courts then included that receivable within their use of the word cash in describing the transactions involving the subsidiaries' assets.

[135] The Court described the *Microbjo* transactions as follows (parenthetical source references omitted):

> [7] The five respondents are holding corporations that indirectly owned—each through a 99.99% interest in five respective partnerships—a parcel of a farmland in Brampton, Ontario. In December 2005, the respondents each agreed to dispose of their undivided interest in the farmland to an arm's length purchaser, with the closure of the sale set for January 16, 2006. The portion of the agreed upon proceeds of disposition was slated to generate total income approximating $17 million for the respondents.
>
> [8] Shortly after the agreement was executed, but before the date of the closure, Wilshire Technology Corporation (WTC), an independent third party, approached the respondents and proposed a package deal from which it and the respondents (the parties) could mutually benefit by sharing the amount that was otherwise destined to pay the respondents' income tax liability arising from the disposition of the farmland. It was revealed during the course of the trial before the Tax Court that WTC implemented this type of package deal with as many as 50 other corporations.
>
> [9] The plan required that the respondents rearrange their affairs by moving their partnership interests to a newly formed single-purpose subsidiary and then having the partnerships dispose of the farmland, with the result that the cash received in exchange of the farmland be isolated in the subsidiaries, together with the tax liability. WTC would then purchase the shares of the subsidiaries for a price substantially in excess of their after-tax value. The respondents proceeded on the basis that the tax liability of the subsidiaries, once assumed by WTC, would no longer be theirs, but their expectation was that WTC had the intent and the means to shelter this liability.
>
> [10] All the steps underlying the plan were dictated by WTC and presented to the respondents on a "take-it-or-leave-it basis". The respondents did not ask questions and the only discussions that took place pertained to the time of implementation.

> The steps, which occurred between January 2006 and December 2006, were, in sequence, the incorporation of the subsidiaries, the tax-free rollover of the partnership interest, the sale of the farmland, the allocation of the partnership income to the subsidiaries, the increase of the stated capital of the shares, the execution a share put option agreement whereby the respondents could compel WTC to buy the shares of the subsidiaries for the agreed upon price, the resignation of the respondents' designates as directors and officers of the subsidiaries and their replacement by a WTC designate and, finally, the sale of the shares, this last step occurring on December 31, 2006, following the exercise of the share put option by the respondents.
>
> [11] WTC insisted on a period of two days between the time when it took control of the subsidiaries and the time at which the share sale would occur, and appointed its designate as their sole director and officer in the interim. The respondents had no knowledge of what WTC would do with the subsidiaries during that period. Based on the evidence adduced at trial, the actions taken by WTC in the interim period included the purported purchase of a class 12 computer software by way of an $8.1 million promissory note and the signature of a marketing services agreement through which the software was purportedly to be exploited.

[136] The Court pointed out (paragraphs 12 to 15) that when the shares of the subsidiaries in that case were sold, each subsidiary held cash of about $4 million and carried a tax liability of about $1.3 million resulting from the transactions, and that the parties nonetheless agreed on a price that did not fully account for the payment of that tax liability. Instead, the purchaser of the appellants' shares in that case had the subsidiaries claim capital cost allowance (CCA) deductions on some computer software sufficient to offset the tax liability. The CCA claims were not allowed and the subsidiaries did not pursue appeals to this court resulting in the tax liabilities being unpaid tax debt as the remaining cash of the subsidiaries had promptly ended up in a Cayman bank account.

[137] The FCA disagreed with the trial judge's decision that the parties in *Microbjo* dealt at arm's length. It stated (paragraph 61) that, while the parties must be dealing at arm's length at the time of the relevant transfer for section 160 to apply, "all the facts that bear on the relationship at that time, including those that relate to pre-sale transactions must be taken into account."

[138] The Court stresses that "the parties' state of mind is essential to the arm's length component of the analysis." (paragraph 75). In the case before this court, the state of mind of Harvard Properties and the other co-owners includes their choice to remain willfully blind to the tax liability created by following the Abacus proposal and to instead insist upon changes to the series of transactions that might better shield them from liability including the irrevocable secured tax indemnity.

[139] The co-owners and their advisers were content with Abacus's chosen proposed structure so long as they were paid, and so long as they received a secured tax indemnity for the section 160 risk they recognized throughout was present. The co-owners were told at the outset by Mr. Auger that they may want to learn more about Abacus's plan to eliminate the tax debt created by their transactions and they chose not to. Abacus and FMC proposed changes or alternatives to the structure that they said addressed the co-owners' section 160 risk concerns, but the co-owners insisted on proceeding as planned and originally proposed by Abacus along with their required secured tax indemnity from Abacus.

[140] The FCA wrote as follows on the purpose of section 160 and the purpose of its arm's length test:

> [78] The purpose of the arm's length test is to verify whether the relationship between transacting parties is such that courts can have the assurance that the terms of the deal "will reflect ordinary commercial dealing[s] between parties acting in their separate interests" (Swiss Bank (SCC), p. 1152; McLarty, para. 43; Remai, para. 34). Such assurances cannot be found unless parties not only seek a profit, but also transact with their own property or money with the result that what is at stake is their own patrimony or property. Human behaviour being what it is, this combination allows for the presence of the tension that drives each party to "seek[] to get the best possible terms for himself" (Minister of National Revenue v. Kirby Maurice Company Limited., 58 D.T.C. 1033, [1958] C.T.C. 41 (Ex. Ct.), p. 1037). It is the existence of this tension that provides the assurance that the terms of the deal reflect ordinary commercial dealings.
>
> [79] A cogent demonstration can be found in the Supreme Court's decision in Swiss Bank (SCC), where the issue was whether non-resident lenders were dealing at arm's length with a Canadian borrower, pursuant to then clause 106(1)(*b*)(iii)(A) of the Income Tax Act, R.S.C. 1952, c. 148 (now clause 212(1)(*b*)(i)(A) of the Act). The Supreme Court asked whether the lender-borrower relationship presented "the assurance that the interest rate will reflect ordinary commercial dealing between parties acting in their separate interests" (Swiss Bank (SCC), p. 1152) and found that it did not because the borrower was "captive to the interests" of the lenders and, therefore, no tension was in play (Swiss Bank (SCC), p. 1151). Subsequent rulings have reiterated the need for this tension to exist by insisting on the presence of "ordinary market forces" (Canada v. GlaxoSmithKline Inc., 2012 SCC 52, [2012] 3 S.C.R. 3, para. 1) or "commercial safeguard[s]" (Petro-Canada v. Canada, 2004 FCA 158, 58 D.T.C. 6329 [Petro-Canada], para. 59) before a factual arm's length relationship can be found to exist.
>
> [80] Whether and the extent to which this tension exists in any given case is an issue that must be addressed in light of the relevant facts (McLarty, para. 62) and the particular provision of the Act pursuant to which the issue arises (Keybrand Foods Inc. v. Canada, 2020 FCA 201 [Keybrand Foods], paras. 35; see also para.

> 46). Just as the applicable provision in Swiss Bank (SCC) was concerned with interest rate manipulations, subsection 160(1) is concerned with price manipulations in the context of non-arm's length property transfers. As affirmed by this Court, subsection 160(1) was enacted to "protect the tax authorities against any vulnerability that may result from a transfer of property between non-arm's length persons for a consideration that is less than the fair market value of the transferred property" (Eyeball Networks, para. 44, citing *Canada v. 9101-2310 Québec Inc.*, 2013 FCA 241, [2013] D.T.C. 5170, para. 60; see also Canada v. 594710 British Columbia Ltd., 2018 FCA 166, [2019] 5 C.T.C. 1, para. 3).

[141] In *Microbjo* the FCA found this tension did not exist in the quite similar situation to that of Harvard Properties in this proceeding:

> [81] Turning to the facts of this case, it is true that WTC and the respondents each sought to enrich themselves and that they were, in theory at least, at odds as to how to split the payout. However, because they were splitting amounts earmarked to pay a tax liability that was bound to become a tax debt rather than their own money, the resulting split does not provide the assurance that it reflects an ordinary commercial dealing between parties acting in their separate interests. Specifically, the tension that provides that assurance did not exist to the extent that it would had the parties been dealing with their own money.
>
> [82] Perhaps the best illustration of this significantly abated tension is provided by the Tax Court's own "risks and rewards" analysis. The Tax Court correctly posited that, by assuming ownership of the subsidiaries, WTC assumed the totality of the tax risk that they bore … and yet, WTC determined that the rewards would be shared on a close to 50/50 basis. As a matter of first impression, no arm's length party assuming all the risks and acting in the belief that its own money is at stake would have agreed to such a split, let alone impose it (compare Keybrand Foods at para. 66, citing Petro-Canada, para. 55).
>
> [83] The Tax Court did not confront this price anomaly. It recognized that WTC, "[f]or its own reasons", undervalued the tax liability of the subsidiaries …but did not ask why; it simply held, based on its prior conclusion that the parties were at arm's length, that the price at which they transacted was "by definition" reflective of fair market value ... In the face of the Tax Court's own analysis, this price was out of whack.

[142] The Court commented that the price paid was "out of whack", and that:

> [84] A transaction that takes place at a price far removed from the price that one would expect based on the risks assumed and the rewards sought can provide a strong indication that the parties are not dealing at arm's length (Keybrand Foods, para. 68; Remai, para. 34). To be clear, the fact that the adequacy of the price is addressed in the "second part" of subsection 160(1) rather than in the "first part", as the Tax Court points out, is not a reason for ignoring significant price anomalies

> in conducting a factual arm's length analysis. After all, price manipulation is the very concern that the arm's length test seeks to curtail under that provision.
>
> [85] Although there are circumstances that can explain price anomalies, for instance when one party plainly outsmarts the other contracting party, nothing of the sort can explain the lopsided price in the present case. Quite clearly, the fact that the parties were splitting money that was not theirs and believed that they could profit without putting at risk their own patrimony or property took away one of the fundamental safeguards that is inherent in an arm's length relationship.
>
> [86] Further, once the respondents were swayed to buy into WTC's plan by the thought of turning an unexpected profit out of their crystallized tax liability through what they viewed as a risk-free exercise, they became the instruments through which WTC, acting as the sole mastermind, would lay its hands on the $1.3 million, isolate it with the remaining cash in the subsidiaries and share it with the respondents in the proportion that it imposed. Contrary to what the Tax Court asserts, no part of the contractual arrangement lessened the respondents' state of subservience.
>
> [87] In this respect, the Tax Court held that the share put agreement shows that the respondents acted in their own independent interests throughout, but it evidences the exact opposite. Like all the other terms of the deal, this agreement was imposed by WTC—it was "always" inserted as part of WTC's scheme—because no one, including the respondents, would have agreed to transfer control of the subsidiaries to WTC while remaining the controlling shareholders without such an agreement being in place. Indeed, proceeding without it would be no different than leaving the keys to one's home to a total stranger with no way of ensuring that the furniture would remain. With respect, the share put agreement was incorporated into the plan by WTC simply because its scheme could not have been sold without it. If anything, it is a further manifestation of the respondents' total state of subservience.
>
> [89] Finally, although I agree with the Tax Court that "[t]he fact that the economic return [is] determined with reference to a tax liability" is not necessarily indicative of a non-arm's length relationship, questions necessarily arise about the arm's length nature of the bargain when the added value contemplated by the proponents of the deal is derived from the non-payment of a tax debt and the transaction price is clearly off the mark when assessed in the light of normal financial considerations.

[143] It can be noted that in this proceeding, Abacus was paying a premium for the shopping centre even though it would become liable for the taxable recapture and taxable capital gain income. With respect to paragraph 87 of *Microbjo*, the Court's comments reflect precisely the significant concern of Mr. Exner at MLT with Abacus' initial proposed SPA and closing steps though he came up with different methods to protect his clients, insisting on the single escrowed closing to avoid a two-day delay between split closings.

[144] Given the evidence and findings in this case, it is apparent that the needed arm's length tension was not present in this case as the premium received by Harvard Properties and the co-owners is anomalous, lopsided, off-the-mark, intentionally removed from, and clearly out of whack with, a fair market value price. But for the co-owners' choice to not make any inquiry, they would have been aware to some extent that this premium was to be funded out of another Abacus tax plan to not actually pay the tax on the Newcos' taxable income from the sale of their interests in the shopping centre. Note that I am not saying that Abacus' own tax plan was questionable, ineffective, did not work or anything else at this stage. The answers to these bifurcated issues on section 160 liability can only be decided on the assumption that there is that outstanding tax liability.[9]

[145] In cases involving the avoidance of tax, willful blindness is equated to intentionally participating in an unsuccessful tax avoidance venture. In *Wynter v. Canada*, 2017 FCA 195, Justice Rennie of the FCA wrote:

> [13] A taxpayer is wilfully blind in circumstances where the taxpayer becomes aware of the need for inquiry but declines to make the inquiry because the taxpayer does not want to know, or studiously avoids, the truth. The concept is one of deliberate ignorance: *R. v. Briscoe*, 2010 SCC 13 at paras. 23-24, [2010] 1 S.C.R. 411 (*Briscoe*); *Sansregret* at para. 24. In these circumstances, the doctrine of wilful blindness imputes knowledge to a taxpayer: *Briscoe* at para. 21. Wilful blindness is the doctrine or mechanism by which the knowledge requirement under subsection 163(2) is met.
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> …
>
> [16] In sum, the law will impute knowledge to a taxpayer who, in circumstances that suggest inquiry should be made, chooses not to do so. The knowledge requirement is satisfied through the choice of the taxpayer not to inquire, not through a positive finding of an intention to cheat.

[146] The Court makes a distinction between gross negligence and wilful blindness:

> [18] Gross negligence is distinct from wilful blindness. It arises where the taxpayer's conduct is found to fall markedly below what would be expected of a reasonable taxpayer. Simply put, if the wilfully blind taxpayer knew better, the grossly negligent taxpayer ought to have known better.

[9] Nor am I saying that the co-owners should have actually known that Abacus' tax plan was ineffective or even questionable, although such a conclusion might be open to the trial judge when the proceeding resumes on the issue of whether Abacus had an outstanding tax liability at the time of the transfer.

…

> [20] There is no question that, while conceptually different, gross negligence and wilful blindness may merge to some extent in their application. A taxpayer who turns a blind eye to the truth and accuracy of statements made in their income tax return is wilfully blind, and is also grossly negligent. The converse is not, however, necessarily true. A grossly negligent taxpayer is not necessarily wilfully blind. The possibility of this dual characterization of the same conduct may, on occasion, give rise to imprecision in the jurisprudence in the description of the alternative ways in which the Crown may meet its burden.

[147] The FCA in *Microbjo* then addressed the issue of the value of the consideration given. The Court referred expressly to "the case law which unequivocally holds that an arm's length purchaser of shares would discount any existing tax liability of the underlying corporation in determining their value."

[148] As mentioned above, in *Microbjo* "cash" held by the subsidiary whose shares were sold included cash and an intercompany receivable that the trial judge had found was worth its stated amount. In this case there is no evidence there was an intercompany debt in the Newcos at closing.

[149] Finally, it should be noted that in *Foix v. Canada* 2023 FCA 38, a case involving a different specific anti-avoidance rule, then Chief Justice Noël wrote that (i) the words "in any manner whatever" are far reaching words, and (ii) anti-avoidance measures, specific or general, will necessarily raise questions and uncertainties in the minds of those who choose to test their limits:

> [68] In devising this interpretation, this Court stressed the wording of subsection 84(2), which targets distributions or appropriations made "in any manner whatever" (*MacDonald* (FCA), para. 28). These far-reaching words are anchored in history as they have always been part of this provision, and they faithfully reflect its anti-avoidance purpose. *MacDonald* (FCA) gives effect to the legislative intent that emerges from the text, context and purpose of subsection 84(2) and is consistent with *Merritt*, *Smythe* and *RMM Equilease* (*MacDonald* (FCA), paras. 22–24 and 26–27).
>
> [82] Lastly, the appellants argue that the trial judge's broad interpretation of subsection 84(2) makes the application of this provision unpredictable, uncertain and unfair, and that it should be rejected on that account. … However, an anti-avoidance measure will necessarily raise question marks in the minds of those who choose to test its limits.

The Transferred Property in Issue

[150] The three transfers of property to Harvard Properties in issue in this proceeding relate to NH Properties' purchase of the HP Newco shares from Harvard Properties. They are:

1. The transfer by NH Properties (Abacus' assignee of its rights under the SPA) via HP Newco and MLT of $6,920,098 to Harvard Properties in satisfaction of NH Properties' Promissory Note given to Harvard Properties on the purchase by it of the HP Newco voting shares from Harvard Properties;

2. The $700,000 transferred by NH Properties to Harvard Properties via HP Newco and MLT for the purchase of those voting shares of HP Newco; and

3. The transfer by NH Properties via HP Newco and MLT of $7,978,734 to Harvard Properties in respect of the purchase of the HP Newco non-voting shares from Harvard Properties by NH Properties.

[151] These payments were made via the Newcos and MLT at NH Properties' direction from escrowed trust accounts funded with the money NH Properties received from Bentall on the sale of North Hill Shopping Centre by NH Properties (via the Newcos) to Bentall that gave rise to NH Properties' tax liability on recaptured capital cost allowance and taxable capital gain income. Regardless of the flow of funds (which involved NH Properties causing HP Newco to sign directions to Bentall and its counsel to transfer the cash to MLT), these transfers were from NH Properties for purposes of section 160 of the Act. As described above NH Properties is presumed to be a tax debtor at the time of these transfers for purposes of dealing with the bifurcated issues.[10] Like the Newcos, the only activity of NH Properties, was to be able to allow Abacus and the co-owners to execute the Abacus proposal on the sale of North Hill Shopping Centre.

[152] In accordance with the SPA, these voting and non-voting shares and NH Properties' Promissory Note arose in the following steps of the series of transactions described in article 2 of the SPA:

1. Each co-owner incorporated its Newco and transferred their interest in the shopping centre to their Newco in a section 85 rollover transaction. Each co-owner received as part of its consideration voting and non-

[10] It appears there was a tax liability created under the terms of the Act when NH Properties sold the shopping centre to Bentall unless NH Properties had other tax losses or deductions or credits already available to it, given subsection 152(3) of the Act and the deemed year-end occurring immediately before the closing. The remaining question is whether Abacus' post-closing transactions and claimed deductions removed that liability.

voting shares of its Newco. That is, Harvard Properties received voting shares and non-voting shares of its HP Newco.

2. Each co-owner transferred its voting shares of its Newco to NH Properties and received a Promissory Note from NH Properties as part of its consideration (the "Promissory Notes"). That is, NH Properties transferred a Promissory Note of approximately $7 million to Harvard Properties for its HP Newco voting shares. The other consideration received by each co-owner was its share of the Deposits. Harvard Properties received $700,000 of the Deposits.

3. The Newcos' transferred their interests in the shopping centre to Bentall.

4. NH Properties "repaid" its voting share Promissory Notes in full by causing the Newcos to direct the release of cash from Bentall to MLT for the co-owners. That is, NH Properties transferred about $7 million to settle the voting share Promissory Note of Harvard Properties.

5. The stated capital increase of each Newco's capital was done by resolution, and capital dividend treatment was elected for the resulting deemed dividend.

6. Each co-owner transferred its non-voting shares of its Newco to NH Properties for the balance of the total calculated price that Abacus agreed to pay for the co-owners' interests in the shopping centre. That is, NH Properties caused HP Newco to transfer via MLT $8.7 million of the cash received from Bentall to Harvard Properties for its HP Newco non-voting shares. At this time the security for the tax indemnity was also required to be provided.

[153] A proper interpretation of the relationships and interests created by the documents is that the transfer of the cash in respect of the promissory notes constituted payment by NH Properties of its promissory notes. This is clear from sections 2(b) and 2(c) of the SPA.

[154] These are clearly the sources of cash received by Harvard Properties and the other co-owners from the cash that Bentall paid for its purchase from Abacus of the shopping centre that Harvard Properties and the other co-owners owned when the series of transactions on the closing day started to close. It is through one or more of these transfers of cash that the premium agreed to between Abacus and the co-owners included in the Purchase Value calculated by reference to the NOI and

chosen capitalization rate was channeled to Harvard Properties. These are direct transfers of property from NH Properties to Harvard Properties, that are arguably indirect given the directions, escrows and trust accounts by which they were made. That matters not given the wording of section 160.

The Non–Arm's Length Relationship Between the Co-owners and NH Properties

[155] Given the agreement for Abacus to pay a premium to the co-owners to purchase the co-owners' interests in the shopping centre using the Abacus proposal for the transactions as described above, the steps and the amounts in the series of transactions cannot be considered to reflect ordinary commercial dealings.

[156] Clearly NH Properties was part of Abacus' non-arm's length group of companies throughout. Its only role and activity was to give effect to the Abacus proposal upon the sale by the co-owners of their interests in this shopping centre.

[157] The co-owners committed to incorporate their Newcos for the rollover and obliged themselves to cause their Newco to be committed from inception to complete all of the transactions in the series at the amounts and in the manner agreed to by the co-owners and Abacus. That is, the co-owners controlled their Newco and committed to have their Newco complete the transactions the co-owners and Abacus had agreed to. The co-owners jointly dictated the bargaining on behalf of and in respect of the Newco and themselves. The Newcos had no input into the SPA or their roles. The Newcos were never free to pursue their own interests during the closing anymore than they were pre-closing or post-closing. The Newcos could never deal with their own assets as they wished. They had no independent interests and their roles were entirely dictated by the co-owners represented by MLT throughout the closing. The Newcos continued to be represented by MLT, co-owners' counsel, until the single overall closing was complete. The co-owners continued to control the Newcos throughout the closing to the same extent that they controlled it before closing.

[158] Even if one looks only at the point in time during the closing that NH Properties caused the shopping centre to be sold to Bentall, the only material thing that had changed at that point in time was Harvard Properties had exchanged its Newco voting shares for a promissory note, but the SPA entitled them to continue to contractually control HP Newco's right to the cash received on the sale to Bentall and ensure that they continued to be destined to receive the proceeds for their

interests in the shopping centre and the directions, escrow and trust accounts enforced that right.

[159] The nature of the relationship between Harvard Properties and HP Newco in respect of the series of transactions is clearly non-arm's length prior to and throughout the closing.

[160] For very similar reasons, the Newcos were not dealing with Abacus' NH Properties (or Abacus) during the closing of the series of transactions involving the sale of the shopping centre. Abacus also dictated the actions of the Newcos and directed the bargaining on behalf of the Newcos and themselves once closing of the SPA series of transactions began via the SPA and via their purchase of the Newcos' shares.

[161] Harvard Properties, Abacus and NH Properties clearly acted together to dictate HP Newcos' actions from their inception and throughout the closing of this series of transactions. The *Swiss Bank Corp. et al.*[11] decision supports a finding that (i) HP Newco did not deal at arm's length with Harvard Properties; and (ii) HP Newco did not deal at arm's length with NH Properties throughout the period from its inception and insertion into the transactions through until the series of transactions had closed.

[162] I conclude that this, combined with the evidence of how Abacus and the co-owners dealt with each other with respect to the Newcos since the co-owners first received the Abacus LOI, results in Harvard Properties, NH Properties, HP Newco, and Abacus not dealing at arm's length with respect to the calculated Purchase Value of the shopping centre or with respect to NH Properties' purchase of the HP Newco shares from Harvard Properties.

[163] In *Swiss Bank* Justice Thurlow in the Exchequer Court wrote:

> In my view, the basic premise on which this analysis is based is that, where the "mind" by which the bargaining is directed on behalf of one party to a contract is the same "mind" that directs the bargaining on behalf of the other party, it cannot be said that the parties are dealing at arm's length. In other words where the evidence reveals that the same person was "dictating" the "terms of the bargain" on behalf of both parties, it cannot be said that the parties were dealing at arm's length.
>
> To this I would add that where several parties—whether natural persons or corporations or a, combination of the two— act in concert, and in the same interest,

[11] [1974] SCR 1144 and 71 DTC 5235(Ex. Ct.)

> to direct or dictate the conduct of another, in my opinion the "mind" that directs may be that of the combination as a whole acting in concert or that of any one of them in carrying out particular parts or functions of what the common object involves. Moreover as I see it no distinction is to be made for this purpose between persons who act for themselves in exercising control over another and those who, however numerous, act through a representative. On the other hand if one of several parties involved in a transaction acts in or represents a different interest from the others the fact that the common purpose may be to so direct the acts of another as to achieve a' particular result will not by itself serve to dis-qualify the transaction as one between parties dealing at arm's length.

[164] To similar effect, Justice Sharlow writing for the FCA in *Petro-Canada v. Her Majesty the Queen*, 2004 FCA 158 said:

> [55] The Judge addressed these questions implicitly rather than expressly, and concluded that the joint exploration corporations did not deal with each other at arm's length when entering into the agreement for the purchase and sale of the seismic data. In my view, the evidence justifies that conclusion. The terms of the transactions did not reflect ordinary commercial dealings between vendors and purchasers acting in their own interests. The joint exploration corporations, for example, did not attempt to negotiate a volume discount, as the evidence indicated would be normal for such large acquisitions of seismic data. Neither joint exploration corporation acted independently and in its own interest in entering into the transactions…
>
> [56] In my view, this case cannot be distinguished from *Swiss Bank Corporation v. Minister of National Revenue*, 1972 CanLII 191 (SCC), [1974] S.C.R. 1144, [1972] C.T.C. 614, 72 D.T.C. 6470. The question in *Swiss Bank* was whether interest payments made by a Canadian corporation on loans made by investors in Switzerland were paid at arm's length. The investors were not related to each other. They became involved in the transaction as the result of the promotional activities of Swiss Bank Corporation and Swiss Credit Bank. The two Swiss banks each owned 40% of the shares of another Swiss corporation, referred to as S.I.P., which acted as a trustee or agent for the investors. S.I.P. was the sole shareholder of the Canadian corporation to which the investors' funds were lent. Thus, the Canadian borrower was completely captive to the common interests of the lenders, who effectively acted in concert (through S.I.P) in dictating the terms of the loans. Similarly, in this case, the joint exploration corporations were captive to the common interests of their respective shareholders, who acted jointly in dictating the terms upon which the seismic data would be purchased. In my view, the Judge was correct to conclude that the joint exploration corporations did not deal at arm's length with the vendors of the seismic data.

[165] The overall circumstances of this case are that there was more to the transaction than Abacus' NH Properties and Harvard Properties jointly directing and

dictating HP Newco's role in closing a commercial transaction. That is common in commercial transactions and should not on its own make otherwise arm's length persons non-arm's length. The source of the co-owners' premium and Abacus' anticipated profit was generated by the transactions giving rise to a tax liability that would not be paid – and Canada on behalf of the Canadian public was not represented or participating in any way in the structuring of the plans of Abacus and the co-owners, or the division of the amount of this tax liability between them, or the allocation of the risks of one or both of them becoming or remaining liable for it after it arose and remained unpaid and was stranded in an empty NH Properties. When otherwise arm's length parties negotiate a tax efficient transaction structure, that alone does not make them non-arm's length. Similarly otherwise arm's length parties do not have a duty to verify their counterparty's tax planning or compliance to remain arm's length. In this case it is the co-owners' willful blindness that equates to intentional or knowledgeable participation and action that drives a conclusion that the parties were not dealing at arm's length as defined in and for purposes of the Act.

The Value of the Newco Shares

[166] Harvard Properties has failed to establish any amount as the value that a reasonable and informed third party purchaser would pay for the HP Newco shares on the closing date or on the date the SPA was signed. These are the shares that Harvard Properties transferred in order to receive the amounts transferred to it from NH Properties via HP Newco.

[167] Mr. Weston's valuation of the voting shares and the non-voting shares is of no help for the reasons set out above.

[168] The inter-company loan Mr. Weston was told was an HP Newco asset at the relevant time has not been established to have existed based on the evidence before the court.

[169] There is also an unexplained management fee invoiced by Abacus to the Newcos for approximately $5 million on the originally scheduled closing date a few days prior to the actual closing. There is no evidence to suggest there was a reason or opportunity for Abacus to provide any management sources to HP Newco. None of the witnesses were aware of any such management services. The only service Abacus provided was to Harvard Properties and the other co-owners, and that was the opportunity to use the Abacus proposal' tax plan to sell their interests in North Hill Shopping Centre as long as there was a third party buyer other than Abacus for it. However, when asked by the respondent, each witness said Abacus wasn't

providing the co-owners with a tax plan to sell its shopping centre, Abacus was genuinely buying it from them. This purported management fee is concerning. It raises concerns that further contribute to the non-arm's length analysis finding. It raises additional doubts about the value of the Newcos' shares. The appellant did not call anyone from Abacus to explain it, nor did the appellant explain it away as an irrelevant distraction with other evidence.

[170] There was no evidence of the value of the Promissory Note delivered by NH Properties for the HP Newco voting shares. All of NH Properties' assets and cash derived from the series of transactions was irrevocably already dedicated to Abacus and the co-owners. An informed and reasonable third party purchaser of the Promissory Note at closing would be buying a promissory note of a company about to be stripped empty and facing a crystallized tax liability that it had no resources to pay or with which to create shelter. The Promissory Note was not itself directly secured against the proceeds of the shopping centre sale to Bentall or the shopping centre. That money would always find its way to the co-owners given the directions, escrow and trust accounts. It was never intended that the Promissory Note could be paid by the obligor. The promissory note was not worth its face amount as the agreed series of transactions which everyone was committed to ensured that the issuer/obligor of the promissory note would never be able to pay it to any third party purchaser of the note at the point in time of the cash transfers to Harvard Properties. There is no apparent non-tax reason for the Promissory Note to have been delivered for the voting shares and they could have simply deferred payment for the voting shares to the end of closing as was done with the non-voting shares. The Promissory Note only had value to a person if that person also benefitted from the directions, escrow and trust accounts through which Bentall's cash was channelled by agreement of the co-owners and Abacus. Those persons would always be the co-owners and could not be the notional third party purchaser of that Promissory Note at closing.

[171] The existence of this Promissory Note through the steps in the closing in which NH Properties sells the shopping centre interests and creates its tax liability also factors into the relevant facts and circumstances to consider in determining whether the parties were in a non-arm's length relationship. A promissory note for the great majority of the unpaid purchase price for the voting shares does weigh against the relationship between Harvard Properties and HP Newco satisfying an arm's length test at the point in time of the sale of the shopping centre to Bentall.

[172] It is obvious from the transaction documents that, once the closing of this series of transactions started, the Newcos and NH Properties were irreversibly destined to be stripped and NH Properties unable to pay its tax liability.

[173] If the overall closing did not conclude for any reason, the pre-closing *status quo ante* simply continued. This means a notional purchaser of the Promissory Note at any point in time during the closing would be left with nothing even if the series of transactions did not close. This is also a relevant consideration to be weighed when determining if the parties were in an arm's length relationship during the closing.

[174] There appears to be little to no chance that any arm's length party unrelated to these transactions would agree to accept, much less pay for, the HP Newco shares at the relevant time as the Newcos would moments in time later have no assets, no business, and the possibility of a significant liability for their roles in these transactions similar to what Harvard Properties and its other co-owners are now contending with in this proceeding.

[175] I have found above that a premium was paid by Abacus through the calculated purchase value of the notional asset sale of the shopping centre by manipulating the capitalization rate. The amount of this premium could not be included in the fair market value of the Newcos' interests in the shopping centre as it was only to be paid to the Newco shareholders for their shares using Abacus' structured share sale. An arm's length third party purchaser of the Newco shares would not make such a payment in excess of the shopping centre's after-tax value. This premium enriched Harvard Properties and the other co-owners as intended.

[176] The respondent pleaded as an assumption of fact in assessing Harvard Properties in its Further Amended Reply that i) the HP Newco shares received by Harvard Properties had a fair market value of $0 at the time of the closing of the transactions (paragraph 6.93), and ii) the transfer of the cash proceeds to the appellant was made for no consideration (paragraph 6.94).

[177] In *Jefferson v. Her Majesty the Queen* 2022 FCA 81 Justice Monaghan wrote:

> [19] Finally, the appellant submits that he successfully demolished the respondent's assumption that he "provided no consideration for the cheques" so the burden shifted to the respondent. Because the respondent led no evidence, the appellant

claims he is entitled to succeed. In advancing this argument, the appellant points to the following passage from Hickman Motors Ltd. *v*. Canada, …

[20] The appellant asserts all he needs do is demolish the "exact" assumption made by the Minister and no more. Here, says the appellant, the exact assumption was that he provided no consideration for the cheques. The Tax Court's finding there was some consideration for the cheques demonstrates he demolished the exact assumption.

[21] I disagree. The appellant places far too much emphasis on the word "exact" and gives insufficient weight to the word "demolish" in the passage from Hickman.

[22] The appellant's argument is similar to that advanced by the taxpayer in Laliberté *v*. Canada, 2020 FCA 97, 2020 D.T.C. 5052 [Laliberté]. There, the taxpayer was assessed a significant shareholder benefit because a corporation of which he was a controlling shareholder paid for a trip he took to space. In assessing the taxpayer, the Minister assumed, among other things, that the corporation paid all of the expenses on behalf and for the benefit of the taxpayer, that the space flight was not undertaken to promote the reputation, image, name, trademarks, brands or activities of the corporation, and that the expenses were not incurred for the purposes of earning business income or for any bona fide business purpose. Although the Tax Court found the expenses were largely for the personal benefit of the taxpayer, it decided that there were some business purposes and promotional benefits to the corporation. The Tax Court determined that 10% of the expenses were related to the corporation's business, notwithstanding that only the taxpayer led evidence concerning the value of the trip to the corporation.

[23] On appeal to this Court, the taxpayer in Laliberté asserted that because he had demolished the Minister's factual assumptions, the onus shifted to the Crown to lead sufficient evidence to establish the proportion of the expenses that were personal rather than business-related. As the Crown called no evidence, the taxpayer claimed the Tax Court was obliged to allow his appeal.

[24] This Court did not agree that the taxpayer had demolished the Minister's assumptions; to demolish them the taxpayer "was required to show that the space trip was a bona fide business venture in its entirety": Laliberté at para 54. In other words, establishing some business purpose was not sufficient. Similarly, in this appeal, establishing some consideration for the cheques is not sufficient to demolish the Minister's assumption.

[25] The purpose of pleading the assumption is to provide the appellant with notice of the case the appellant has to meet: Paletta International Corporation *v*. Canada, 2021 FCA 182, 2021 D.T.C. 5109, at para. 20. The appellant knew the case he had to meet—the only issue under section 160 was whether the appellant provided consideration for the payments Global made to him

> by cheque, which, in the context of section 160, means fair market value consideration, not merely some consideration.
>
> [26] It is clear the appellant understood this. Under the Reasons section of his Notice of Appeal before the Tax Court, the appellant submitted "there was no transfer of property to him for less than fair market value consideration". He did not limit his evidence to establishing that Global had reimbursed his expenses pursuant to a legally enforceable agreement by describing the agreement and providing some examples of reimbursed expenses and the rationale for them. Rather, he adduced significant evidence about the expenses themselves: what they were, where they were incurred, and why they were incurred. He placed all of the expense claims he submitted to Global for reimbursement in 2003, including the associated receipts and credit card statements, before the Tax Court. He testified about the various expenses and called three witnesses to testify for him. Thus, the Tax Court had substantial evidence about the expenses the appellant submitted to Global for reimbursement.
>
> [27] The respondent is not required to call witnesses or tender its own evidence to make its case. A similar argument was rejected by this Court in Laliberté; it was open to the Tax Court in that case to determine the value of the shareholder benefit received "based on all the evidence tendered, including the Crown's cross-examination of the [taxpayer's] witnesses": Laliberté at para 56. Similarly, it was open to the Tax Court to determine the value of the consideration the appellant gave for the cheques based on all the evidence tendered.

[178] Paragraphs 24 and 25 of *Jefferson*, and the *Laliberté* paragraphs it quotes from, make it clear that to demolish an assumption, it is not sufficient to establish that there is some business purpose to an expense, or there was some consideration paid for a transfer. Rather, to borrow a phrase from the palpable and overriding error context – the whole tree must fall. There must have been *prima facie* evidence that the whole denied expense was for business purposes or that the amount of consideration was not less than the transferred properties' fair market value.

[179] Given the shortness and the shortcomings of the appellant's evidence as to the value of the HP Newco's voting and non-voting shares and NH Properties' Promissory Note, described above, the Minister's assumptions have not been demolished and, notwithstanding that the respondent did not call any fact or expert witnesses to give evidence, the Court needs to proceed to make the best decision it can on the fair market value of the consideration Harvard Properties gave in respect of the three cash transfers from NH Properties to it totalling $16 million notwithstanding that the Court has insufficient information and less than the best evidence that should have been available to do so, as in *Laliberté* and *Jefferson*.

[180] I can only work with the information I have that is considered relevant, credible and reliable, and of probative value to this issue, including my findings on particular aspects of all relevant evidence.

[181] In this case the co-owners disposed of their interest in North Hill Shopping Centre and Bentall acquired that shopping centre. It was a very valuable asset. It was not fully mortgaged. I have already found that the co-owners' series of transactions with Abacus anticipated:

1. Harvard Properties receiving for its Newco shares the net after-tax amount that it would have received had the co-owners caused the shopping centre to be sold by their Newcos for fair market value and those proceeds then distributed to the co-owners; and

2. A premium above the shopping centre's fair market value paid for agreeing to structure of the transaction using Abacus' proposal instead. This premium was imbedded into the calculated Purchase Value transaction price by manipulating the capitalization rate to be applied to the shopping centre's net operating income.

[182] Mr. Auger's calculation of share sale and asset sale equivalents of June 2005 are not helpful in determining the fair market value of the Newco shares or the shopping centre as it is tautological, and was intentionally so. In accordance with the LOIs, his calculations begin with an asset sale at the agreed calculated Purchase Value and aim to identify the corresponding amounts payable for the voting shares and non-voting shares of the Newcos needed under the share sale to ensure an equivalent number net after tax. He could do the identical calculations starting with any amount for the shopping centre to come up with the equivalent numbers for a share sale. That was literally his mandate.

[183] I have found that the non-voting shares of the Newcos had no value when they were sold to NH Properties by the co-owners. Section 160 is to be applied strictly to each of the transfers made by a tax debtor to a non-arm's length party on a transaction-by-transaction basis. The respondent identified this payment as one of the transfers in issue. Based on the transactions that Abacus and the co-owners agreed to and completed, no valuable consideration was transferred by Harvard Properties to NH Properties for this almost $8.7 million cash transferred by NH Properties to Harvard Properties.

[184] As a result, the maximum amount of NH Properties' tax liability, if any, for which Harvard Properties can be assessed and potentially liable by virtue of section 160 is at least almost $8.7 million in respect of the sale of the non-voting shares.

[185] I have also found that the appellant has not established any amount as a value of the Promissory Note or as a value of the voting shares at the time of the transfers by NH Properties of cash to Harvard Properties on even a *prima facie* basis given the paucity of evidence introduced on this point. Given that the appellant's section 160 liability in respect of the non-voting shares transaction exceeds the amount of the assessment in dispute, I do not need to go on to try to arrive at the value of the voting shares at the relevant time.

[186] This is not to say that I have found that the amount of the premium paid is this amount (or a greater amount up to the aggregate of the three cash transfers). I am unable to determine the amount of the premium. It is not possible to do so on the evidence presented as a result of Harvard Properties and the co-owners maintaining that there wasn't one without giving the Court evidence as to an arm's length fair market value of the shopping centre or their indirect interest in it prior to the closing of those transactions, nor evidence of an arm's length market capitalization rate for such a property. The amount of the premium, or the absence of one per the appellant, would then have been a very straightforward exercise. However, that was not the appellant's chosen litigation strategy. It is not the trial judge's job to undertake a forensic accounting autopsy or post-mortem in such circumstances.

[187] For that reason, the Court is only able to apply the provisions of section 160 as written to the three cash transfers identified and relied upon by the respondent. This may well result in a greater section 160 potential exposure and liability than might arguably be warranted looking on a big picture basis at the value of the appellant's interest in the shopping centre and focusing on the premium paid in excess of that value. The FCA has been clear that section 160 applies on a transfer-by-transfer basis, and that its results can in some circumstances be draconian, unwanted, unfair and/or unjust – but the respondent must nonetheless be permitted to rely on it if the statutory conditions are met. Justice Sharlow said that in *Wannan*, and her paragraph from *Wannan* was relied on by Justice Sexton in *Livingston* and by former Chief Justice Noël in *Microbjo*.

Directly or Indirectly

[188] It can be noted that the findings, conclusions, amounts and results would be the same for Harvard Properties whether HP Newco or NH Properties sold the shopping centre to Bentall, and/or transferred the cash to the co-owners, as section 160 refers to the transfers of property directly or indirectly by any means whatever.

[189] The appellant focused its argument on NH Properties being the transferor causing HP Newco to give the direction to transfer the money that HP Newco was entitled to from Bentall, and as set out above, section 160 applies to Harvard Properties on that basis.

[190] The respondent, having regard to the asset sale agreement for the shopping centre between NH Properties and Bentall, focused on HP Newco having owned Harvard Properties' interest in the shopping centre, and HP Newco then transferring it to Bentall. HP Newco then directed Bentall to transfer the cash to which it was entitled to MLT who held it in trust for HP Newco, and MLT then transferred it to Harvard Properties.

[191] Viewed as a direct transfer from HP Newco of its cash asset entitlement to Harvard Properties, this is a direct transfer for purposes of section 160 of that cash to Harvard Properties. It was done by HP Newco at the direction of NH Properties, thus it was an indirect transfer to Harvard Properties, the tax debtor for purposes of section 160. Given that the NH Properties/Bentall asset purchase agreement for the shopping centre was the source of the funds moving to the co-owners, and was the contract by which the shopping centre moved from the Newcos to Bentall for that money, this is an alternate analytical route – but it makes no substantive difference to the amount transferred to Harvard Properties described above, to the non-arm's length relationship throughout closing of Harvard Properties, HP Newco and NH Properties as described above, or the consideration given by Harvard Properties for the cash transferred to it. Section 160 applies just the same and to the same extent.

VI. The General Anti-Avoidance Rule, GAAR - Law and Analysis

[192] In the event that the appellant's series of transactions allowed it to avoid the application of section 160, which I have found on the facts in evidence that it did not, it would need to be determined whether the respondent's alternate assessing position would prevail, that GAAR applies and supports the section 160 reassessment under appeal.

The SCC Trilogy's Analytical Matrix

[193] The Supreme Court of Canada's (SCC) trilogy of GAAR cases, *Canada Trustco*[12], *Copthorne Holdings Ltd.*[13], and *Lipson*[14] clearly established the analytical framework and matrix to be followed in reviewing GAAR assessments. These three decisions are discussed at length in *Spruce Credit Union v. The Queen* 2014 TCC 42 at paragraphs 55 to 88.

[194] The SCC's analytical framework and matrix set out in the trilogy of *Trustco*, *Copthorne* and *Lipson* applicable to the review of GAAR assessments by the courts continue to govern the approach and analysis required. That Court's more recent GAAR decisions, *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 and *Deans Knight Income Corp. v. Canada*, 2023 SCC 16 do not materially change that. Neither decision purports to, or does, change the SCC's mandated approach set out in the trilogy. This is clear from paragraphs 29 to 33 of the majority reasons in *Alta Energy*, which reminds us in paragraph 30 that in *Copthorne* the Court wrote that GAAR will apply even where "the tax arrangements are consistent with a literal interpretation of the relevant provisions". This is also clear from paragraphs 51 to 73 of *Deans Knight*, and it reminds us that in *Copthorne* the object, spirit and purpose of provisions of the Act are referred to as the "legislative rationale that underlie specific or interrelated provisions". The *Deans Knight* majority then reminds readers that it is critical to distinguish the rationale behind a provision from the means chosen to give it effect in the provision, as these may or may not differ. This distinction was already part of the trilogy.

[195] After writing about the background to the GAAR and its relationship with the Duke of Westminster principle and uncertainty, the majority in *Deans Knight* wrote about the trilogy's analytical framework as follows:

> [57] The object, spirit and purpose reflects the rationale of the provision. The provision's text, context and purpose help to shed light on this rationale. Once the object, spirit and purpose has been ascertained, the abuse analysis focuses on whether the result of the transactions frustrates the provision's rationale. I provide guidance on these aspects below.
>
> (a) *The Object, Spirit and Purpose Reflects the Rationale of the Provision*
>
> [58] To determine whether a transaction is abusive, courts must identify the object, spirit and purpose of the provisions alleged to have been abused, with reference to the provisions themselves, the scheme of the Act and permissible

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A. [12] *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54
[13] *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63
B. [14] *Lipson v. Canada*, 2009 SCC 1

extrinsic aids (*Trustco*, at para. 55). The object, spirit and purpose of the provisions has been referred to as the "legislative rationale that underlies specific or interrelated provisions of the Act" (*Copthorne*, at para. 69, citing V. Krishna, *The Fundamentals of Income Tax Law* (2009), at p. 818).

[59] At this juncture, it is critical to distinguish the *rationale* behind a provision from the *means* chosen to give that rationale effect within the provision. The drafting process reflects the task of translating government aims into legislative form in order to create intelligible, legally effective rules (see, e.g., Canada, Privy Council Office, *Guide to Making Federal Acts and Regulations* (2nd ed. 2001), at pp. 122-29). The means selected by drafters and adopted by Parliament are relevant indicia within the broader text, context and purpose analysis, since they may shed light on the rationale underlying the provision. However, the means do not necessarily provide a full answer as to *why* the provision was adopted (*Canada v. Oxford Properties Group Inc.*, 2018 FCA 30, [2018] 4 F.C.R. 3, at para. 101). This is not to imply that Parliament cannot translate its aims into effective legislation — quite the opposite: when drafting legal tests, Parliament is seeking to establish a general standard that is most faithful to its objectives from the options which are available and practicable. But even the most carefully drafted provision can be abused, which is why the GAAR exists to protect the provision's underlying rationale.

[60] The object, spirit and purpose of a provision must be worded as a description of its rationale (*Copthorne*, at para. 69). When articulating the object, spirit and purpose of a provision, a court is not repeating the test for the provision, nor is it crafting a new, secondary test that will apply to avoidance transactions. Discerning the object, spirit and purpose does not rewrite the provision; rather, the court merely takes a step back to formulate a concise description of the rationale underlying the provision, against which a textually compliant transaction must be scrutinized (*Trustco*, at para. 57; *Copthorne*, at para. 69).

[61] For example, for a provision conferring a tax benefit, the rationale might relate to the basis for providing relief to taxpayers in such circumstances or, for targeted relief, the conduct that Parliament sought to encourage. Conversely, for a specific anti-avoidance rule, the rationale might relate to the specific result, or mischief, that Parliament sought to prevent.

(b) *The Provision's Text, Context and Purpose Are Used to Determine Its Rationale*

[62] Although the GAAR analysis involves a consideration of the provision's text, context and purpose, the use of these elements differs from "traditional" statutory interpretation (*Copthorne*, at para. 70; *Alta Energy*, at para. 30, per Côté J., and at para. 116, per Rowe and Martin JJ., dissenting but not on this point; *Oxford Properties Group*, at paras. 40-44). It must be recalled that the GAAR is a provision of last resort (*Trustco*, at para. 21; *Copthorne*, at para. 66). There is a distinction between the application of a provision in general and the

application of the GAAR to a transaction motivated by tax avoidance. If a court is performing a GAAR analysis, the impugned transactions necessarily comply with the provisions of the Act, properly interpreted and applied (see *Copthorne*, at para. 88; D. G. Duff, "The Interpretive Exercise Under the General Anti-Avoidance Rule", in B. J. Arnold, ed., *The General Anti-Avoidance Rule — Past, Present, and Future* (2021), 383, at p. 391). This is self-evident: if there is a specific provision with which the taxpayer has not complied, the Minister need not resort to the GAAR.

[63] In traditional statutory interpretation, the court considers a provision's text, context and purpose to determine what the words of the statute mean. In the GAAR analysis, however, "[t]he search is for the rationale that underlies the words that may not be captured by the bare meaning of the words themselves" (*Copthorne*, at para. 70 (emphasis added); *Triad Gestco*, at para. 51). The object, spirit and purpose analysis has a precise function: to discern the underlying rationale of the provisions. A consideration of the text, context and purpose gives structure to this analysis. Indeed, the object, spirit and purpose analysis should not turn into a "value judgment of what is right or wrong nor . . . what tax law ought to be or ought to do" (*Copthorne*, at para. 70). Nor should it become a "search for an overriding policy of the Act" that is not founded in the text, context and purpose of the provisions (*Canada Trustco*, at para. 41; *Alta Energy*, at para. 49). Rather, a focus on the provision's text, context and purpose ensures that the intrinsic and extrinsic evidence used to discern a provision's rationale remains tied to the provision itself. To that end, a brief discussion on how to conduct this analysis is useful.

[64] The text of the provision is relevant to the analysis of a provision's object, spirit and purpose (*Alta Energy*, at para. 58). Bearing in mind the search for the provision's underlying rationale, courts may ask how the text sheds light on what the provision was designed to achieve. Put differently, what was the provision intended to do? (*Copthorne*, at para. 88). This includes considering what the text of the provision expressly permits or restricts. Similarly, the language and structure of the provision can sometimes be evocative of Parliament's underlying concerns. The text can also help to identify the nature (or "type") of provision at issue, which can be relevant to understanding the rationale underlying it.

[65] There may be circumstances where the provision's underlying rationale is no broader than its text because, having regard to its context and purpose, the provision's text "fully explains its underlying rationale" (*Copthorne*, at para. 110). A court, however, must not lose sight of the goal of the exercise — to discern the underlying rationale of the provision — and the reality that this rationale "may not be captured by the bare meaning of the words themselves" (*Copthorne*, at para. 70). As explained by Noël C.J. of the Federal Court of Appeal, "[w]hile one cannot rule out the possibility that the underlying rationale for a provision will be fully captured by the words, this must still be demonstrated by inquiring into the provision's reason for being" (*Oxford Properties Group*, at para. 88, citing *Copthorne*, at paras. 110-11).

[66] Beyond the provision's text, a court must consider the provision's context. The contextual analysis "involves an examination of other sections of the Act, as well as permissible extrinsic aids" (*Copthorne*, at para. 91; *Trustco*, at para. 55). Of course, this does not involve considering every other section of the Act. Rather, "relevant provisions are related 'because they are grouped together' or because they 'work together to give effect to a plausible and coherent plan'" (*Copthorne*, at para. 91, citing R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 361 and 364).

[67] The focus is on the relationship between the provision alleged to have been abused and the particular scheme within which it operates (*Triad Gestco*, at paras. 26 et seq.). Although the Act is lengthy and detailed, an understanding of its structure can help to identify the function of the provision at issue. For example, a specific restriction may shed light on the rationale of a general benefit-conferring rule, and vice versa.

[68] Finally, understanding the provision's purpose is central to the GAAR analysis. A purposive analysis permits courts to consider legislative history and extrinsic evidence (see R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 9.03, at paras. 7-8). These materials provide insight into the rationale for specific provisions. Of course, tax provisions can serve a variety of independent and interlocking purposes (*Trustco*, at para. 53). Nevertheless, such provisions are intended to promote particular aims, and courts must therefore determine *what outcome Parliament sought to achieve* through the specific provision or provisions (*Copthorne*, at para. 113).

(c) *The Abuse Analysis Focuses on Whether the Result of the Transactions Frustrates the Provision's Object, Spirit and Purpose*

[69] At the abuse stage, the avoidance transactions will be abusive where the outcome or result of the avoidance transaction "(a) is an outcome that the provisions relied on seek to prevent; (b) defeats the underlying rationale of the provisions relied on; or (c) circumvents certain provisions in a manner that frustrates the object, spirit and purpose of those provisions" (*Lipson*, at para. 40, citing *Trustco*, at para. 45). These considerations are not independent of one another and frequently overlap (*Copthorne*, at para. 72). Ultimately, the analysis remains squarely focused on abuse. Courts must go beyond the legal form and technical compliance of the transactions; they must compare the result of the transactions to the underlying rationale of the provision and determine whether that rationale has been frustrated. In coming to such a conclusion, the abusive nature of the transaction "must be clear" (*Trustco*, at paras. 62 and 66; *Copthorne*, at para. 68; *Alta Energy*, at para. 33).

[70] This Court's jurisprudence sheds light on the types of circumstances that rise to the level of abuse. For example, if the rationale underlying the provision is to encourage particular relationships or activities, abusive tax avoidance may be

found where the relationships and transactions are "wholly dissimilar to the relationships or transactions that are contemplated by the provisions", as was the case in *Mathew* (para. 57, citing *Trustco*, at para. 60). Similarly, where a specific anti-avoidance rule is flipped on its head to enable tax avoidance, there is likely to be a finding of abuse, as was the case in *Lipson* (para. 42; see also *Fiducie Financière Satoma v. The Queen*, 2018 FCA 74, 2018 D.T.C. 5052, at para. 52). An abuse may also be found in certain circumstances where a series of transactions "achieved a result the section was intended to prevent" while narrowly avoiding application of the provision, as in *Copthorne* (paras. 124-27). These examples are not exhaustive, but provide useful guidance on how the object, spirit and purpose of different types of tax provisions can be frustrated.

[71] Importantly, there is no bar to applying the GAAR in situations where the Act specifies precise conditions that must be met to achieve a particular result, as with a specific anti-avoidance rule. Thus, I do not agree with the appellant's submission that where Parliament has legislated with precision, as here, where loss carryovers are denied in specific instances, the GAAR is not meant to play a role. Of course, the GAAR will not apply in all circumstances — the analysis is inherently case specific. Further, the way a provision has been drafted is important within the text, context and purpose analysis, since it may shed light on the conduct that Parliament sought to target and how it went about doing so. But the proposition that the GAAR can have almost no role where Parliament has legislated a specific anti-avoidance rule is to read a restriction into s. 245 without a basis for doing so. It ignores the fact that the GAAR was enacted in the first place partly because specific anti-avoidance rules were being circumvented through abusive tax planning, and that such rules are among those most commonly found to have been abused in GAAR decisions (J. Li, "The Misuse or Abuse Exception: The Role of Economic Substance", in Arnold, *The General Anti-Avoidance Rule*, 295, at pp. 299, fn. 25, and p. 316).

[72] The appellant's position also runs contrary to this Court's jurisprudence. **As the majority recognized in *Alta Energy*, "[**a]busive tax avoidance can also occur when an arrangement 'circumvents the application of certain provisions, such as specific anti-avoidance rules, in a manner that frustrates or defeats the object, spirit or purpose of those provisions'" (para. 32 (emphasis added), citing *Trustco*, at para. 45). Moreover, this Court in *Copthorne* largely rejected the argument that where Parliament has drafted detailed provisions, then a taxpayer that has technically complied with these provisions cannot frustrate their rationale (paras. 108-11). Simply put, specific and carefully drafted provisions are not immune from abuse. As with any other provision, the GAAR ensures that the rationale behind such provisions is not frustrated by abusive tax strategies.

(d) *Summary*

[73] In summary, at the third stage of the GAAR analysis:

> - The object, spirit and purpose is a description of the provision's underlying rationale. The means (the *how*) do not always provide a full answer as to the rationale underlying the provision (the *why*).
>
> - The text, context and purpose of a provision provide indicia of its rationale. The text can shed light on what the provision was designed to encourage or prevent based on what it expressly permits or restricts, how it is worded and structured, and the nature of the provision. Similarly, the context can serve to identify the function of the provision within a coherent scheme. Finally, the provision's purpose can help to discern the outcomes that Parliament sought to achieve or prevent.
>
> - Once the object, spirit and purpose has been ascertained, the abuse analysis goes beyond the legal form and technical compliance of the transactions to consider whether the result frustrates the provision's rationale.

[196] This is the approach to now be applied to the facts of this case in determining whether the respondent is correct that the GAAR would apply to the transactions at issue entered into by Harvard Properties and the other co-owners with Abacus.

[197] The alternative GAAR issue in this case arises if, contrary to the findings above, Harvard Properties and NH Properties and for the Newco did deal at arm's length at the time of the cash transfers. The GAAR question becomes whether the pre-condition that Abacus/NH Properties the transferor and Harvard Properties the transferee dealt at arm's length at the relevant time as a result of one or more steps in the series of transactions inserted primarily to obtain a tax benefit and not for *bona fide* non tax purposes. Steps inserted in a series of transactions primarily for tax purposes were the avoidance transaction, and the tax plan's downfall, in *Copthorne* and in *594710 British Columbia Ltd.* (2018 FCA 166, TCC 2016 288). If so, it must be determined whether such steps result directly or indirectly in a misuse or abuse of section 160.

Tax Benefits and Avoidance Transactions

[198] The first two issues to be addressed in this case are whether there was one or more steps inserted into the series of transactions involving the shopping centre primarily to obtain a tax benefit. It is clear that:

a) the creation of a second class of HP Newco shares for the rollover transaction;

b) the allocation of the sale prices of each class of shares;

c) the separation in the order of closing of the sale of the voting shares and the non-voting shares by doing them separately, and at different points in time before and after the sale of the shopping centre; and

d) the use of a promissory note for the purchase of the voting shares to be "repaid" several steps later in the series after Harvard Properties no longer had voting control of HP Newco.

were clearly done primarily, if not solely, for tax purposes, namely the tax benefits of:

i. Harvard Properties losing voting control of HP Newco to avoid being deemed to be related non-arm's length parties as controlling shareholder;

ii. Harvard Properties receiving the transferred money after it had transferred voting control to avoid being deemed to be non-arm's length HP Newco for purposes of section 160 at that particular point in time of the closing; and

iii. Harvard Properties enjoying capital dividend treatment on part of the money transferred (which is not in issue).

[199] Harvard Properties' total proceeds for the disposition of its interest in the shopping centre was increased and its total tax liability reduced by these inserted steps along with the transfers of cash to them in respect of the HP Newco voting shares and non-voting shares and the payment of the Promissory Note. These tax benefits resulted from these avoidance transactions being inserted into the series of transactions during closing. These were recognized by Mr. Auger and explained to Harvard Properties and the other co-owners at the outset.

[200] The FCA in *594710 British Columbia Ltd.* recognized (paragraph 109) that the avoidance of section 160 is a tax benefit and does not depend upon how a section 160 liability is avoided. The amount of the tax benefit is the section 160 amount that would have been payable but for the avoidance transactions.

Misuse and Abuse

[201] The remaining consideration in the trilogy's analytical matrix for GAAR is whether these avoidance transactions resulted directly or indirectly in a misuse or

abuse of section 160. (The respondent did not challenge the capital dividend treatment aspect under GAAR or otherwise.)

The Text, Context and Purpose of Section 160

[202] The text of subsection 160(1) makes its broad scope very clear. It expressly allows the transferee taxpayer to be assessed at any time, if property was transferred to them by any means whatever whether directly or indirectly, by any person with whom they did not deal at arm's length and who had any tax liability under any provision of Part I of the Act (Income Tax) for any taxation year to the extent the transferee taxpayer was transferred property the value of which exceeded the consideration given by the transferee taxpayer. It is worded as a specific anti-avoidance rule focused on income tax debtors' transfers of property to non-arm's length parties. It permits the assessment of the transferee taxpayer to the extent of the difference in the value of the transferred property and the consideration given. Subsection 160(2) specifies that the assessment of the transferee taxpayer is effectively an assessment of Part I income tax for purposes of the Act's administrative, enforcement, collection and objection provisions.

[203] The context within which section 160 is situate as essentially a stand alone provision is the entirety of the Part I income tax provisions in respect of which it can apply. It applies in respect of any tax debt of the transferor under Part I regardless of the nature, circumstances or other attributes of the taxable income giving rise to that tax liability. Collection of the permitted amount from the transferee is subject to the same provisions of the Act for collecting Part I income tax. The scheme within which section 160 operates is the entire Part I régime, as well as any other part of the Act that incorporates Division I of Part I by reference.

[204] The purpose of section 160 for purposes of a GAAR analysis is essentially as described by the Courts above in respect of the application of section 160. In *594710 British Columbia Ltd.* Justice Woods in the FCA wrote:

> [120] By its terms, the purpose of section 160 is to impose joint and several liability where a transfer of property occurs in the same taxation year that a tax liability arises or a later taxation year.

Abusive Tax Avoidance

[205] Having addressed the text, context and purpose of section 160 in order to determine the rationale of section 160 – which is fully captured by its text and

purpose and is as described by the Courts and jurisprudence above, next is to ask whether the outcome or result of these inserted avoidance transactions:

a) is an outcome section 160 seeks to prevent;

b) defeats the underlying rationale of section 160; or

c) circumvents the application of section 160 in a manner that frustrates its object, spirit and purpose.

[206] It is very clear that, if these avoidance transaction steps in the series succeeded in changing Harvard Properties' relationship to its controlled subsidiary, HP Newco, in the midst of the single closing into an arm's length relationship and instead of when the closing was complete, and that in turn led to Harvard Properties being arm's length with NH Properties, the results of these impugned avoidance transactions are a section 160 hat trick or trifecta of abuse. They accomplished what section 160 sought to prevent – its application, they defeated its underlying rationale, and they circumvented its application.

Determining the Reasonable Tax Consequences

[207] Harvard Properties' tax consequences resulting from the abusive transactions inserted into the series of transactions are to be determined as is reasonable in the circumstances to deny the tax benefit it intended would result. The intended result was the avoidance of section 160 making it liable to pay an amount, by causing HP Newco and NH Properties to be arm's length at the relevant time under section 160, being when it received its agreed-to share of Bentall's cash. Subsections 245(2) and (5) make it clear that there is no further restriction on how the denial of the tax benefit can best be accomplished as long as it is reasonable in the circumstances.

[208] Paragraph 245(5)(d) expressly authorizes the application of any section of the Act to be ignored as a permitted determined tax consequence. That does not by implication or otherwise preclude Harvard Properties' tax consequences being determined on the basis that the section it sought to avoid be determined to apply, and not be avoided, in order to deny the tax benefit. In my judgment, the reasonable way in the circumstances to deny the tax benefit is on the basis that the tax consequences to Harvard Properties of its series of transactions does result in the application of section 160 in respect of any unpaid tax liability of Abacus' NH Properties to the extent of the shortfall of consideration given by Harvard Properties. That is the most obvious, direct, efficient, and reasonable way to deny the tax benefit Harvard Properties sought to enjoy.

[209] Other methods of determining the same result could be simply to remove or ignore the inserted avoidance transaction steps from the series of transactions and any other steps upon which they in turn relied, or to simply determine that Harvard Properties' tax consequences will be determined on the basis that it did not deal at arm's length with any of Abacus, NH Properties, or HP Newco. However, these would have the identical tax consequences and liability for which it is potentially liable for NH Properties' unpaid tax liability if any, as the characterization I have determined. These would not be as straightforward and direct. There is no doubt that the determination of how much of the tax benefit should be denied as a result of the application of GAAR is the whole amount of the tax benefit, and that the whole amount of the shortfall of its consideration for the transferred cash be at risk to the extent of any NH Properties unpaid tax liability when that remaining issue is decided.

Is GAAR Statute-Barred?

[210] The appellant's position is that subsection 245(2) of the GAAR cannot apply to re-determine the tax consequences to it under the Act of its series of transactions because the assessment was made after the "normal reassessment period" notwithstanding that section 160 permits a transferee to be assessed "at any time" for amounts payable "because of" section 160.

[211] The text of section 245 makes it clear that GAAR is not a charging provision. The text of section 245 sets out a rule applicable to the entire Act that requires, with respect to abusive transactions, that the tax consequences under any of the other sections of the Act be determined in order to deny the tax benefit that would otherwise result from the abusive avoidance transaction. Those tax consequences can include any amount payable by the person under the Act, including any amount which, like section 160, can be assessed at any time. The only restriction on the determination of the tax consequences of abusive transactions is that it be reasonable in the circumstances in denying the tax benefit otherwise resulting under the Act. That can expressly include recharacterizing the nature of payments, ignoring the tax effects that would otherwise result from specific provisions, or allocating any amount involved in the transactions to any other persons.

[212] Neither the text of section 245 nor anything in Part XVI Tax Avoidance in which section 245 is located, refer to the assessment and appeal Divisions I and J of Part I being applicable to assessments involving GAAR. Parts of Divisions I and J are referred to and incorporated by reference for taxes imposed under other Parts of the Act than Part I, including notably Part XVI.I Transfer Pricing which immediately

follows Part XVI Tax Avoidance. That is, there is no "normal reassessment period" incorporated by reference into the GAAR.[15]

[213] When there is a reference to an assessment in section 245 it is to an "assessment involving" the GAAR – and in French « tenir compte » takes into account the GAAR.

[214] Subsection 245(7), which applies "notwithstanding any other section of the Act", sets outs out that the tax consequences of an avoidance transaction shall only be determined "through" a notice of assessment "involving [taking account of] the application of [GAAR]". Similarly, subsection 245(6) refers to assessments "involving the application of" GAAR and to assessments "applying" subsection 245(2). As described below, the FCA in *S.T.B. Holdings Ltd. v. Canada* 2002 FCA 386 has restricted the interpretation of subsection 245(7) and its application to only persons requesting adjustments based upon the GAAR being applied to another person relying on subsections 245(6) to (8).

[215] Finally, it can be noted that the title or heading of section 245 is General Anti-Avoidance Rule – it is a rule. Looked at in its context in the Act, section 245 GAAR is a rule that can apply and be relevant to all of the other provisions of the Act.

[216] The GAAR is in a Part of the Act dealing with Tax Avoidance, and the only other provision in Part XVI, section 246, addresses the avoidance of tax by way of conferral of a benefit directly or indirectly on another person which benefit would not otherwise be included in their income subject to Canadian tax. The amount of such a benefit is to be included in the recipient's income subject to Part I tax as if the amount had been paid directly and not by way of a conferral of a benefit. It is another recharecterization rule that applies for purposes of the Part I income inclusion provisions.

[217] It can also be noted that subsection 152(9) allows the Crown to advance a new basis or argument to support an assessment after an applicable reassessment period does expire.

[218] The final teleological consideration in interpreting section 245 itself is to look at its own object, spirit and purpose. The object, spirit and purpose of the GAAR does not support or suggest any reason for section 245 to be read as anything

[15]Note subsection (5.3) of GAAR which was not in force at the relevant time, does incorporate the normal reassessment period etc. in Divisions I and J with respect to assessments of the new penalty provision under GAAR in subsection (5.1).

different than a rule for determining the consequences of an avoidance transaction for purposes of the Act to deny tax benefits from otherwise effective transactions that are abusive. There is nothing to suggest it requires a limited assessment period to achieve its legislative rationale given its object, spirit and purpose, or that its application may be different depending upon the provisions being abused.

[219] The GAAR is a rule that applies to avoidance transactions that misuse or abuse other provisions of the Act. If the rule applies, those transactions are to be redetermined for purposes of the Act to be different than those that would result from the legally effective transactions undertaken had GAAR not been found to apply in order to deny the tax benefit that otherwise results from the abusive tax avoidance transactions. It does not levy a tax or impose one. GAAR determinations can include recharecterizations and reallocations etc. The tax consequences under the other provision of the Act are then those that result from the redetermined transaction and not from the application of the Act to the legally effective abusive transactions actually entered into and recognized under applicable provincial or federal non-tax law.

[220] I conclude that there is no "normal reassessment period" applicable to the application of the GAAR, the rule in section 245. The only requirement is that GAAR be involved or taken into account in a timely and otherwise validly issued assessment under the Act.

[221] This is consistent with Justice Monaghan's description of the GAAR in *Dow Chemical Canada ULC v. HMQ* 2020 TCC 139 at paragraphs 58 to 62. It is also consistent with former Chief Justice Rossiter's comments in *594710 British Columbia Ltd.* at paragraph 55.

[222] Most importantly this is also consistent with the FCA decision in *S.T.B. Holdings Ltd. v. Canada* 2002 FCA 386 in which that Court expressly limited the application of subsection 245(7) - and held that it did not apply to the taxpayer initially assessed involving GAAR. As our former Chief Justice Bowman wrote in *Lipson v. HMQ* 2006 TCC 148: "it is permissible to raise the GAAR at any level in light of [S.T.B.]."

[223] The application of the GAAR to Harvard Properties in respect of these transactions is not statute-barred.

VII. Conclusion and Disposition

[224] The Court has decided that, for the reasons set out above, the conclusions on the bifurcated issues are as follows. These are based on the evidence the parties chose to put in on these issues:

1. There were three transfers of property to Harvard Properties by NH Properties via HP Newco, namely the cash transfers described above in respect of the sale of its HP Newco shares.

2. The fair market value of the cash transferred exceeded the fair market value of the HP Newco shares given in consideration by at least the amount set out above.

3. Throughout the closing Harvard Properties, HP Newco, NH Properties and Abacus were not dealing at arm's length as described above.

[225] The only remaining issue to be decided in this appeal is whether Abacus' NH Properties, the transferor of the cash to the appellant (whether directly or indirectly), had a tax liability at the time of the transfers which is the only undecided requirement for the application of section 160, and for determining whether section 160 was actually avoided in circumstances to which the GAAR applies.

[226] The parties will not be able to re-litigate any aspect of the bifurcated issues when this trial resumes on either of these two undecided remaining issues of NH Properties' tax indebtedness (section 160 or GAAR). That would abuse the procedures of this Court.

[227] Harvard Properties' appeal is to be dismissed to the extent of any liability of NH Properties described in section 160 at the relevant time once the amount is determined.

[228] The respondent is entitled to its costs to date in this proceeding.

[229] The parties shall have 45 days from the date hereof to reach an agreement on costs, failing which the parties shall have a further 30 days to file written submissions on costs. Each party will have a further 15 days thereafter to file any responding submissions. Any such submissions shall not exceed 20 pages in length initially, and 10 pages for responding submissions. If the parties do not advise the Court that they have reached an agreement and no submissions are received from the respondent, costs shall be awarded in favour of the respondent in the amount set out in the Tariff to the Rules.

Signed at Ottawa, Canada, this 28th day of October 2024.

"Patrick Boyle"

Boyle J.

CITATION:	2024 TCC 139
COURT FILE NO.:	2017-4387(IT)G
STYLE OF CAUSE:	HARVARD PROPERTIES INC. v. HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 14-17, 21-24 and 28, 2022 and December 5-6, 2023
REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
DATE OF JUDGMENT:	October 28, 2024

APPEARANCES:

Counsel for the Appellant:	Al Meghji Theodore Stathakos David Jacyk
Counsel for the Respondent:	Justine Malone Rosemary Fincham Ian Moffat

COUNSEL OF RECORD:

For the Appellant:

Name:	Al Meghji Theodore Stathakos David Jacyk
Firm:	Osler, Hoskin & Harcourt L.L.P. Toronto, Ontario
For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada

APPENDIX A

(1) ABACUS LETTER OF INTENT

(403) = 606 = 4332

ABACUS CAPITAL CORPORATION
MERCHANT BANKING GROUP

North Hill Shopping Centre

March 15, 2005

Dear Sir:

Re: Letter of Intent for the Purchase of the
North Hill Shopping Centre, Calgary, Alberta
(the "Property")

Please consider this Letter of Intent as a proposal from Abacus Capital Corporation or its assignee, (the "Purchaser") to the beneficial owners of the Property (the "Vendor") to purchase the Property together with all improvements located thereon (the "Improvements"), the personal property of Vendor used in the operation of the Improvements (the "Personal Property") and the title holder of the Property (the "Bare Trustee").

This Letter of Intent in not intended to constitute a binding agreement, but rather is merely a statement of the parties' intent with respect to the proposed transaction (the "Transaction"). The existence of any such binding agreement would be subject to the parties' execution of a purchase and sale agreement and related documentation in forms that are mutually acceptable to both of the parties on the following terms and conditions:

1. Purchase Value and Terms:

Purchase Value - **$90,000,000**, subject to an adjustment based upon the In-Place Net Operating Income of the Property as at March 1, 2005 (the "Valuation Date NOI"). The Purchase Value is based on a Valuation Date NOI of **$6,000,000**, and shall be subject to an upward or downward adjustment at a capitalization rate of 6.7% for any difference between $6,000,000 and the Valuation Date NOI.

The Purchase Value shall be payable as follows:

Deposit on Signing of Lol?

Non Refundable Deposit??

(a) A deposit of **$1,000,000** by certified cheque upon execution of the Purchase Agreement within 24 hours.

(b) A further deposit of **$500,000** by certified cheque to be paid within 24 hours if the Inspection Date is extended under Section 3.

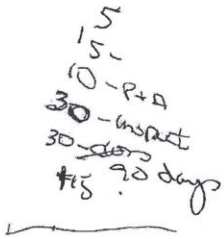
(c) A further deposit of $500,000 by certified cheque to be paid at the end of the Inspection Date within 24 hours.

(d) Balance by certified cheque or solicitor's trust cheque on closing, subject to closing adjustments.

Suite 2330, PO Box 834, Bay Wellington Tower, BCE Place, 181 Bay Street, Toronto, Ontario M5J 2T3
Telephone: (416) 861-8711 Facsimile: (416) 861-9979
TORONTO • MONTRÉAL

All deposits shall be forwarded to Vendor's solicitors to be deposited in trust in an interest bearing account with interest accruing to the benefit of Purchaser.

2. Purchase Agreement:



Vendor and Purchaser shall execute a formal written purchase and sale agreement for the transaction (the "Purchase Agreement"). The Purchase Agreement shall be prepared by Purchaser's solicitor and delivered to Vendor for review and comment by Vendor and Vendor's solicitor no later than fifteen (15) days following Purchaser's receipt of Vendor's acceptance of this Letter of Intent. The Purchase Agreement shall include the terms and conditions of this Letter of Intent (including such representations and warranties by Vendor as may be agreed upon by Purchaser and Vendor), but shall supersede this Letter of Intent entirely. Vendor and Purchaser shall have an additional ten (10) days from Vendor's receipt of Purchaser's prepared Purchase Agreement to agree to all of the terms and conditions of the said Purchase Agreement. If agreement is not so reached, this Letter of Intent shall be considered null and void. Upon execution of this Letter of Intent, the parties shall work in good faith toward structuring a tax efficient transaction that shall ensure the Vendor financial results that are at least equivalent to the financial results received from a direct asset sale of the Property for a value of $90,000,000.

PSA

3. Purchaser's Inspections, Review and Contingency:

Purchaser shall have until thirty (30) days after the execution of the Purchase Agreement and the receipt by the Purchaser of all materials prescribed in the Purchase Agreement (the "Inspection Date") to complete an inspection of the Property, and a review of leases and reports, and title for the Property and to satisfy itself that it wishes, in its sole discretion, to proceed to complete the acquisition of the Property. The Purchaser may, in its sole and absolute discretion, extend the Inspection Date an additional fifteen (15) days by increasing its initial deposit by $500,000. If Purchaser does not give written notice to Vendor on or before the expiry of the Inspection Date of its decision to proceed with the acquisition, the Purchase Agreement shall be deemed terminated and Purchaser shall be returned all deposit monies deposited by Purchaser together with any interest accrued thereon, following which neither Vendor nor Purchaser shall have any further rights or obligations under the Purchase Agreement.

(a) As soon as possible after the date the Purchase Agreement has been executed by both Vendor and Purchaser (the "Agreement Date"), Vendor shall deliver to Purchaser any plans and specifications, in the possession of Vendor, for the Improvements, together with environmental and engineering reports. Purchaser

shall be permitted to perform a physical and engineering inspection of the Property from time to time.

(b) During the inspection period, Purchaser shall have the right to inspect all other documents in Vendor's possession affecting the Property.

(c) Purchaser may obtain at its cost a Phase I environmental audit (and a Phase II or Phase III, if required) on the Property.

(d) Vendor shall provide Purchaser with the existing surveys of the Property.

(e) Vendor shall also provide such other documents and records as Purchaser may reasonably require and which are customary to be provided to prospective purchasers of similar property, if in the possession of Vendor.

4. Closing Date:

The date of closing shall be completed on a date to be selected by the Purchaser which is within thirty (30) days following the Inspection Date. The Purchaser shall provide the Vendors with at least one week written notice of the selected closing date.

5. Conditions to Closing:

Purchaser's obligation to close the purchase provided for herein will be subject to such reasonable conditions that are customary to transactions of this nature in the Province of Alberta.

6. Mortgage:

Assume mortgage 30 mo

Vendor acknowledges that the mortgages on the Property amount to **$51,500,000.** Vendor further acknowledges that the amount of Debt Discharge costs of the mortgages that would be payable on the Closing Date (whether or not they are actually paid out on the Closing Date) will be deducted from the Purchase Price.

7. Adjustments:

Adjustments shall be made on closing for such items that are customary to transactions of this nature in the Province of Alberta. Each party will be responsible for its own legal costs.

8. Property Maintenance:

Vendor shall maintain and operate the Property in the customary course of business from the date of this Letter of Intent until the Closing and shall

not make any material changes to the Property without Purchaser's prior consent which shall not be delayed or unreasonably withheld.

9. No Shop Clause:

Upon acceptance of the Letter of Intent and, prior to the signing of the Purchase Agreement, Vendor agrees that the Property cannot continue to be offered for sale and/or Vendor cannot accept any offers to purchase the Property and will withdraw from the market any offerings to sell the Property owned by Vendor, unless this Letter of Intent has been terminated by both parties or a period of thirty (30) days has elapsed from execution of this Letter of Intent and no Purchase Agreement has been signed.

10. Brokerage Fees:

This agreement has been submitted through Colliers International (the "Broker"). Any commissions payable on the transaction will be paid by Vendor.

11. Effect of Letter of Intent:

This letter is not intended to be a commitment or contract to lend, borrow, purchase or sell or any agreement or offer to enter into the Purchase Agreement or any other agreement with respect to the Property; but is merely a statement of the present intentions and understanding of the parties. With the exception of Section 9, no part of this Letter of Intent will be binding on the parties.

If the foregoing represents our mutual understanding, kindly so indicate by executing the enclosed copy of this letter and returning it to the undersigned by 5:00 p.m. on or before the fifth business day after the date hereof. This Letter of Intent shall be effective only if you sign it and return it by the foregoing deadline.

Yours truly,

Abacus Capital Corporation

Per: _____

ACCEPTED AND AGREED TO this _____ day of _____, 2005.

The undersigned hereby accepts the foregoing Letter of Intent and agrees to the terms and conditions set forth herein.

North Hill Shopping Centre

Per: _____

(2) CO-OWNERS LETTER OF INTENT

North Hill Shopping Centre

Abacus Capital Corporation
Merchant Banking Group

March 24, 2005

Dear Sir:

Re: Letter of Intent for the Purchase of the
North Hill Shopping Centre, Calgary, Alberta
(the "Property")

Please consider this Letter of Intent as a proposal from the beneficial owners of the Property (the "Vendor") to Abacus Capital Corporation or its assignee, (the "Purchaser") to sell the Property together with all improvements located thereon (the "Improvements"), the personal property of Vendor used in the operation of the Improvements (the "Personal Property") and the title holder of the Property (the "Bare Trustee").

This Letter of Intent is not intended to constitute a binding agreement, but rather is merely a statement of the parties' intent with respect to the proposed ~~transaction~~ transaction (the "Transaction"). The existence of any such binding agreement would be subject to the parties' execution of a purchase and sale agreement and related documentation in forms that are mutually acceptable to both of the parties on the following terms and conditions:

1. Purchase Value and Terms:

   Purchase Value - $90,000,000, subject to an adjustment based upon the In-Place Net Operating Income of the Property as at March 1, 2005 (the "Valuation Date NOI"). The Purchase Value is based on a Valuation Date NOI of $6,000,000 and shall be subject to an upward or downward adjustment of a capitalization rate of 6.7% for any difference between $6,000,000 and the Valuation Date NOI.

   The Purchase Value shall be payable as follows:

   a. A deposit of $1,000,000 by certified cheque upon execution of the Purchase Agreement within 24 hours.
   b. A further deposit of $500,000 by certified cheque to be paid within 24 hours if the Inspection Date is extended under Section 3.
   c. A further deposit of $500,000 by certified cheque to be paid at the end of the Inspection Date within 24 hours.
   d. Balance by certified cheque or solicitor's trust cheque on closing, subject to closing adjustments.

All deposits shall be forwarded to Vendor's solicitors to be deposited in trust in an interest bearing account with interest accruing to the benefit of Purchaser.

2. Purchase Agreement:

Vendor and Purchaser shall execute a formal written purchase and sale agreement for the transaction (the "Purchase Agreement"). The Purchase Agreement shall be prepared by Purchaser's solicitor and delivered to Vendor for review and comment by Vendor and Vendor's solicitor no later than fifteen (15) days following Purchaser's receipt of Vendor's acceptance of this Letter of Intent. The Purchase Agreement shall include the terms and conditions of this Letter of Intent (including such representations and warranties by Vendor and purchaser as may be agreed upon by Purchaser and Vendor), but shall supersede this Letter of Intent entirely. Vendor and Purchaser shall have an additional ten (10) days from Vendor's receipt of Purchaser's prepared Purchase Agreement to agree to all of the terms and conditions of the said Purchase Agreement. If agreement is not so reached, this Letter of Intent shall be considered null and void. Upon execution of this Letter of Intent, the parties shall work in good faith toward structuring a tax efficient transaction that shall ensure the Vendor financial results that are at least equivalent to the financial results received from a direct asset sale of the Property for a value of $90,000,000.

3. Purchaser's Inspections, Review and Contingency:

Purchaser shall have until thirty (30) days after the execution of the Purchase Agreement and the receipt by the Purchaser of all materials prescribed in the Purchase Agreement (the "Inspection Date") to complete an inspection of the Property, and a review of leases and reports, and title for the Property and to satisfy itself that it wishes, in its sole discretion, to proceed to complete the acquisition of the Property. The Purchaser may, in its sole and absolute discretion, extend the Inspection Date an additional fifteen (15) days by increasing its initial deposit by $500,000. If Purchaser does not give written notice to Vendor on or before the expiry of the Inspection Date of its decision to proceed with the acquisition, the Purchase Agreement shall be deemed terminated and together with any interest accrued thereon, following which neither Vendor nor Purchaser shall have any further rights or obligations under the Purchase Agreement.

Sole

a. As soon as possible after the date the Purchase Agreement has been executed by both Vendor and Purchaser (the "Agreement Date"), the Vendor shall deliver to the Purchaser any plans and specifications, in the possession of Vendor, for the improvements, together with environmental and engineering reports. Purchaser shall be permitted to perform a physical and engineering inspection of the Property from time to time.

b. During the inspection period, Purchaser shall have the right to inspect all other documents in Vendor's possession affecting the Property.

a. Purchaser may obtain at its cost a Phase I environmental audit (and a Phase II or Phase III, if required) on the Property.

d. Vendor shall provide Purchaser with the existing surveys of the Property.

e. Vendor shall also provide such other documents and records as Purchaser may reasonably require and which are customary to be provided to prospective purchasers of similar property, if in the possession of Vendor.

4. Closing Date:

The date of closing shall be completed on a date to be selected by the Purchaser which is within thirty (30) days following the Inspection Date. The Purchaser shall provide the Vendors with at least one week written notice of the selected closing date.

5. Conditions to Closing:

Purchaser's obligation to close the purchase provided for herein will be subject to such reasonable conditions that are customary to transactions of this nature in the Province of Alberta.

6. Mortgage:

Vendor acknowledges that the mortgages on the Property amount to $$1,500,000. Vendor further acknowledges that the amount of Debt Discharge costs of the mortgages that would be payable on the Closing Date (whether or not they are actually paid out on the Closing Date) will be to the account of the Purchaser with the Vendor contributing not greater than $1,700,000 which will be deducted from the Purchase Price.

7. Adjustments

Adjustments shall be made on closing for such items that are customary to transactions of this nature in the Province of Alberta. Each party will be responsible for its own legal costs.

8. Property Maintenance:

Vendor shall maintain and operate the Property in the customary course of business from the date of this Letter of Intent until the Closing and shall not make any material changes to the Property without Purchaser's prior consent which shall not be delayed or unreasonably withheld.

9. No Shop Clause:

and prior to executing CP

Upon acceptance of the Purchase Agreement, Vendor agrees that the Property cannot continue to be offered for sale and/or Vendor cannot accept any offers to purchase the

this letter of intent and until the earlier of; CP
(i) termination of this letter of intent by either party; or
(ii) thirty (30) days,

LP

Property and will withdraw from the market any offerings to sell the Property owned by Vendor.

10. Brokerage Fees:

This agreement has been submitted through Colliers International (the "Broker"). Any commissions payable on the transaction will be paid by Vendor.

11. The Purchaser and Harvard mutually agree that a letter agreement, separate from this Letter of Intent, will be executed by both parties and contain an option for Harvard to Purchase 20% of the new ownership entity. In addition, Harvard shall be granted a 5 year real estate management contract (for the Property), subject to mutually agreeable terms and conditions.

12. Effect of Letter of Intent

This letter is not intended to be a commitment or contract to lend, borrow, purchase or sell or any agreement or offer to enter into the Purchase Agreement or any other agreement with respect to the Property; but is merely a statement of the present intentions and understanding of the parties. ~~No~~ part of this Letter of Intent will be binding on the parties. (With the exception of Section 9, no)

If the foregoing represents our mutual understanding, kindly so indicate by executing the enclosed copy of this letter and returning it to the undersigned by 5:00 p.m. on or before the fifth business day after the date hereof. This Letter of Intent shall be effective only if you sign it and return it by the foregoing deadline.

Yours truly,

North Hill Shopping Centre

Per: _____

ACCEPTED AND AGREED TO this 24th day of March, 2005.

The undersigned hereby accepts the foregoing Letter of Intent and agrees to the terms and conditions set forth herein.

Abacus Capital Corporation

Per: _____

APPENDIX B – AUGER TAX MEMO

KPMG

KPMG LLP

PRIVATE_&_CONFIDENTIAL

To North Hill Shopping Centre – A Co-Ownership.

Date April 11, 2005

From Dennis J Auger
KPMG Calgary

Cc

Subject **Abacus Proposal.**

The purpose of this memo is to discuss in general terms the Abacus proposal.

In general terms the Abacus proposal converts a sale of the underlying property into a share sale for the vendors. The reason that Abacus is able to pay a premium is because they have some form of shelter/deduction such that Abacus would not pay any tax on an underlying sale of the property. Because of this ability they are prepared to pay a premium which is reflected in the capitalization rate of 6.7% and the resultant calculated value of the property.

What Abacus has done is calculated what the net cash proceeds to the vendors would be on an asset sale of $92,116,000. Then they have worked backwards to figure out what they would need to pay for shares in order for the vendors to net the same amount of money.

Because the sale to Abacus must be a share sale the series of transactions with them would be as follows:

1. The outstanding mortgage is reduced to $49,239,136, which should be a reduction of $2,260,864.
2. The estimated adjusted cost base of the land and the estimated remaining undepreciated capital cost of the building is $49,239,136 in total. This was estimated based upon the remaining amounts in Myra Holdings since the property is actually held by 5-6 different taxpayers. The actual amounts would have to be obtained in order to do the actual transfers.
3. The property would be transferred to a new corporation on a tax deferred basis pursuant to Section 85 of the Income Tax Act. The property would be sold for its estimated remaining tax cost of $49,239,136 so that no tax is payable on the transfer.

8062

KPMG

4. In consideration for the transfer the new corporation would assume the now reduced mortgage balance of $49,239,136 (this is the reason why it has to be reduced since it cannot be higher than the remaining tax cost) plus issue shares of the new corporation to the current owners of North Hill.

5. The cost of the shares issued would be Nil because the mortgage assumed would be equal to the remaining tax cost.

6. These shares would then be split into two different classes of shares. The cost of these two different classes of shares would of course also be Nil.

7. Abacus would then buy one class of the common shares for a fixed amount. Based upon the latest set of calculations this should be $19,000,000+.

8. Once Abacus buys these common shares they would control the new corporation.

9. The vendors would have a capital gain on the sale of these common shares, net of a portion of the debt discharge fee and the broker commission. One half of this net capital gain would be taxable.

10. Abacus would then cause the property to be sold to an affiliate of Abacus or a third party for proceeds of $92,116,000. This would result in a capital gain and recapture in the new corporation. The resultant taxable income, being 100% of the recapture and the one-half of the capital gain, would be sheltered/eliminated by Abacus transferring in some form of shelter/deduction before the new corporation's taxation year end that includes the sale. We are not aware of the particulars of how they intend to accomplish this.

11. The sale would also result in a capital dividend account in the new corporation equal to 50% of the capital gain on the sale. This capital dividend account can be paid to a shareholder on a non-taxable basis.

12. Rather than payout the capital dividend account in cash Abacus would cause the new corporation to increase the legal stated capital of the class of shares still held by the North Hill vendors. Increasing the legal stated capital is equal to paying a dividend for tax purposes – and Abacus would elect to treat this deemed dividend as a capital dividend so that there would be no tax on the dividend.

13. Because the North Hill vendors did not get cash on this increase in stated capital and deemed dividend the result would be that the cost of this class of shares still held by the North Hill vendors would increase by the amount of the capital dividend.

8063

KPMG

14. Abacus would then buy this class of shares for a given amount, based upon the latest figures ~ $17,000,000. Because the cost of these shares would have been increased by the capital dividend no capital gain would result on the sale of these shares.

15. The North Hill vendors get cash on the first class of shares sold which also results in a capital gain and cash on the second class of shares which does not result in a capital gain. After paying tax on the capital gain from the first class of shares sold the net cash retained would be equal to an asset sale of $92,116,000.

One point to consider is to what extent do the North Hill Co-Owners want to know how Abacus is sheltering/eliminating the recapture and taxable capital gain income. When you look at the transaction the North Hill Co-Owners are shareholders of this new corporation before, during and immediately after the recapture and taxable capital gain is sheltered/eliminated. Granted Abacus is the controlling shareholder at the point the recapture and taxable capital gain are sheltered/eliminated; but you still may wish to understand enough to satisfy yourselves that there is not an undue amount of risk or exposure.

8064

APPENDIX C – SECTION 2 SPA – TRANSACTIONS

2. **Transactions.** The parties hereto agree that the following transactions shall be completed on the Closing Date, in the order set out below:

(a) Each Vendor will incorporate a new corporation (each a "**Newco**") and, on the Closing Date, will enter into a Rollover Agreement pursuant to which each such Vendor will transfer to its respective Newco the beneficial interest held by it in the Target Assets and the Co-Ownership Agreement. The parties to each Rollover Agreement will elect jointly, and each Vendor shall file such election, in the prescribed form and manner and by the prescribed deadline under s. 85 of the ITA, such that each Vendor will not realize any gain or income on the subject transfer and such that each Vendor will receive as consideration for such transfer the assumption by its Newco of such Vendor's *pro rata* share of the obligations under the Material Agreements and the Mortgage, together with the Voting Shares and the Remaining Shares of such Newco, all as to be set out in the respective Rollover Agreements (the "**Rollover Transactions**");

(b) Immediately following completion of the Rollover Transactions each of the Vendors will sell, and the Purchaser will purchase, all of the issued and outstanding Voting Shares for the Voting Shares Price by delivery of the Deposits distributed pro-rata among the Vendors, and a Voting Shares Promissory Note representing each Vendors' respective portion of the balance of the Voting Shares Price according to each Vendor's co-ownership interest (the "**Voting Shares Purchase**");

(c) Immediately following completion of the Voting Shares Purchase:

(i) the Purchaser shall cause each of the Newcos to sell to a third party purchaser (the "**Third Party Purchaser**") the beneficial interest of each of the Newcos in the Target Assets for an adjusted purchase price not less than the Shares Purchase Price (the "**Third Party Sale Amount**");

(ii) the Purchaser shall direct each Newco to cause NHSC to deliver to the Third Party Purchaser in consideration of the sum of one Dollar ($1.00): (1) a registerable transfer of land for the transfer of legal title to the Project to the Third Party Purchaser (or as the Third Party Purchaser may direct) (the "**Transfer of Land**"); and (2) the Material Agreements Assignment Agreement (collectively the "**Third Party Purchase**"); and

(iii) the Newcos shall receive the Third Party Sale Amount from the Third Party Purchaser.

(d) Immediately following completion of the Third Party Purchase, the Purchaser shall repay in full each of the Voting Shares Promissory Notes.

(e) Immediately following completion of the Third Party Purchase and the repayment of the Voting Shares Promissory Notes, the Purchaser shall cause each Newco to,

and each Newco shall pass the PUC Resolutions. Thereafter, the Purchaser shall cause each Newco to elect to treat the deemed dividend arising from the PUC Resolutions as a capital dividend (as defined in the ITA) (collectively, the "**Stated Capital Increase**") and shall file such elections in accordance with the terms of this Agreement.

(f) Immediately following the completion of the Stated Capital Increase, each of the Vendors shall sell, and the Purchaser shall purchase the Remaining Shares of each Newco for an aggregate value equal to the Remaining Shares Price and pay to the Vendors the Remaining Shares Price pro rata among the Vendors according to their co-ownership interest and deliver to the Vendors the letters of credit or cash, as the case may be, required to be provided under Article 3 of the Indemnity Agreements (collectively, the "**Remaining Shares Acquisition**").

(g) The Purchaser and the Vendors agree to utilize the following procedure (collectively, the "**Closing Steps**"), on the Closing Date:

(i) All documents required to be executed to complete the Transactions and the Closing Steps including appropriate directions from the Newcos to the Third Party Purchaser or the lender to the Third Party Purchaser or such lender's solicitor or such other directions as may be required to effect the Transactions (collectively, the "**Documents**"), but excluding: (1) the Deposits and the bank drafts or solicitor's trust cheques representing the repayment of the Voting Shares Promissory Notes and the payment of the Remaining Shares Price (collectively, the "Payments") and (2) the letters of credit or cash, as the case may be, required to be provided under Article 3 of the Indemnity Agreements; shall be agreed upon prior to execution and upon execution, each one of such Documents and the Payments shall be deemed to be held in escrow (the "**Escrow**") until released from Escrow and distributed in accordance with subsection (iii) below or, in the case of the Deposits, as otherwise dealt with in accordance with Sections 8(b) and 12(a)(ii), as and if applicable;

(ii) Once all Documents have been executed, the Vendors' Solicitors shall immediately send to the solicitor for the Third Party Purchaser or the solicitor for the lender to the Third Party Purchaser, as directed by the Purchaser, the Transfer of Land executed by NHSC on the trust condition that upon receipt of the Transfer of Land such solicitor immediately, and in any event no later than 2:30 p.m. on the Closing Date, release to the Vendors' Solicitors: (1) amounts equal to the aggregate amount needed to repay the Voting Shares Promissory Notes and to pay the Remaining Shares Price by way of separate bank drafts or solicitors trust cheques payable (as directed by the Newcos) to the Vendors' Solicitors and (2) the letters of credit or cash (payable

through a bank draft or a solicitor's trust cheque), as the case may be, required under Article 3 of the Indemnity Agreements; and that the Transfer of Land not be delivered to any person unless such solicitor has in his/her possession, on similar trust conditions, instructions from the lender to the Third Party Purchaser to deliver to the Vendors' Solicitors immediately upon receipt of the Transfer of Land all amounts required to repay the Voting Shares Promissory Notes and to pay the Remaining Shares Price and to release the letters of credit or cash, as the case may be, required under Article 3 of the Indemnity Agreements. For greater certainty, until the conditions set forth in section (iii) below are met, the Transfer of Land and the Payments shall be subject to the Escrow, subject to the provisions of Sections 8(b) and 12(a)(ii) in the case of the Deposits;

(iii) Immediately upon receipt by the Vendors' Solicitors of amounts equal to the aggregate amount needed to repay the Voting Shares Promissory Notes and to pay the Remaining Shares Price, the Documents, the funds representing the repayment of Voting Shares Promissory Notes and funds representing the Remaining Shares Price and the Deposits shall be released from the Escrow and become effective in the following order:

(1) All of the Documents relating to the Rollover Transactions, including those referred to in section 14;

(2) All of the Documents relating to the Voting Share Purchase, including those referred to in section 15;

(3) All of the Documents relating to the Third Party Purchase, including those referred to in section 16;

(4) The funds representing the repayment of the Voting Share Promissory Notes;

(5) All of the Documents relating to the Stated Capital Increase, including those referred to in section 17; and

(6) All of the Documents relating to the Remaining Shares Acquisition, including those referred to in section 18, and the funds representing payment of the Remaining Shares Price.

For greater certainty, but subject to section 8, the Deposits shall be paid to the Vendors at the same time as any of the Documents

relating to the Voting Share Purchase are released from the Escrow.

APPENDIX D – WESTON SHARE VALUATION EXCERPTS

HARVARD PROPERTIES INC.
TAX COURT OF CANADA FILE NO. 2017- 4387(IT)G

ESTIMATED FAIR MARKET VALUE OF
THE CLASS A COMMON SHARES AND CLASS B PREFERRED SHARES OF
1192484 ALBERTA LTD. AS AT OCTOBER 11, 2005

Expert Report of Mark A. Weston CPA, CA, CBV
Report Date: August 12, 2022

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VALUATION ANALYSIS – VALUATION POINT #1

44) Valuation Point #1 is the time when Harvard Properties transferred its Class A common voting shares in 1192484 Alberta to NH Properties on October 11, 2005. My valuation analysis of the fair market value of the Shares of the Company at Valuation Point #1 is set out at Table 3.

Estimated Fair Market Value of 1192484 Alberta Ltd.
At October 11, 2005 - Valuation Point #1
CAD $ **Table 3**

	A	B	C	D	E
		Fair Market Value [1]	Adj.	Fair Market Value Low	Fair Market Value High
1	Prepaid property taxes	57,150	-	57,150	57,150
	Prepaid deposit for garbage can lease	358		358	358
2	Leasing commission receivable	10,000	-	10,000	10,000
3	GST receivable	2,100	-	2,100	2,100
4	Shopping centre	44,900,000	-	44,900,000	44,900,000
5		44,969,607	-	44,969,607	44,969,607
6	Accounts payable	25,319	-	25,319	25,319
7	Deferred revenue	355,127	-	355,127	355,127
8	Tenant deposits	30,027	-	30,027	30,027
9	Mortgage payable	25,524,363	-	25,524,363	25,524,363
10		25,934,836	-	25,934,836	25,934,836
11	Shareholders' equity	19,034,771			
12	Adjusted shareholders' equity			19,034,771	19,034,771
13	Less latent taxes [Sch 1] [2]			4,304,787	-
14	Less income tax shield foregone [Sch 2]				2,428,863
15	**Fair market value of en bloc equity (100%)**			**14,729,983**	**16,605,908**
16	**Allocated to**				
17	Class B preferred shares [3]			8,746,234	8,746,234
18	Residual allocated to Class A common shares			5,983,749	7,859,674
19				14,729,983	16,605,908

[1] Per Statement of Assumed Facts.
[2] Estimated latent tax on notional disposition, consisting of taxable capital gain and recapture.
[3] 8,746,234 preferred shares x $1 (redemption amount per share).

VALUATION ANALYSIS – VALUATION POINT #2

46) Valuation Point #2 is the time when Harvard Properties transferred its Class B non-voting shares in 1192484 Alberta to NH Properties on October 11, 2005. My valuation analysis of the fair market value of the Shares of the Company at Valuation Point #2 is set out at Table 4.

Estimated Fair Market Value of 1192484 Alberta Ltd.
At October 11, 2005 - Valuation Point #2
CAD $ **Table 4**

	A	B	C	D
		Fair Market Value [1]	Adj.	Fair Market Value
1	Cash (Bentall APA Deposit)	1,125,000	-	1,125,000
2	Cash (Paid by Bentall to close, net of loan to parent)	10,940,125		10,940,125
3	GST receivable	2,100	-	2,100
4	Receivable from third party sale	22,080	-	22,080
5	Inter-company loan (Receivable from NH Properties)	6,920,098		6,920,098
6	Total assets	19,009,402	-	19,009,402
7	Income tax payable [Sch 1] [2]	-	4,304,787	4,304,787
8	Shareholders' equity	19,009,402		
9	Adjusted shareholders' equity		4,304,787	14,704,615
10	**Fair market value of en bloc equity (100%)**			**14,704,615**
11	**Allocated to**			
12	Class B preferred shares [3]			8,746,234
13	Residual allocated to Class A common shares			5,958,381
14				14,704,615

[1] Per Statement of Assumed Facts.
[2] Estimated income tax payable subsequent to actual disposition, consisting of taxable capital gain and recapture.
[3] 8,746,234 preferred shares x $1 (redemption amount per share).

47) As presented above, in estimating the fair market value of the Shares I used an adjusted net asset method comprised of the following steps:

a. In Step 1 [Col B], I noted the fair market values of the assets and liabilities as at Valuation Point #2 based on information contained in the Statement of Assumed Facts.

b. In Step 2 [Col C, Row 7], I estimated the income tax payable of approximately $4.3 million (Schedule 1).

c. In Step 3 [Col D, Row 7], I estimated the fair market value of the Company's equity by subtracting the estimated income taxes payable from the total value of the net assets.