A-245-16, 2017 FCA 207, 2017 CAF 207 – Webb J.A. (Pelletier and Near JJ.A. concurring) – 17/10/13 – Tax – Income tax – Non-residents – Withholding tax – Miscellaneous – Tax avoidance – General Anti-Avoidance Rule (GAAR) – Abuse or misuse – CVC acquired Netherlands public corporation, indirectly acquiring Canadian subsidiary – CVC indirectly stripped surplus from Canadian subsidiary without paying withholding tax, using taxpayer, as holding company, to facilitate outcome – Transaction took advantage of relieving exemption in s. 212.1(4) of Income Tax Act – Minister assessed taxpayer, finding that transaction violated General Anti-Avoidance Rule (GAAR) and attracted withholding tax – Tax Court judge dismissed taxpayer's appeal – Judge compared s. 212.1 of Act to s. 84.1 of Act, reviewed notes released by Department of Finance, and considered proposed amendments, and determined that avoidance transaction was abuse of Act – Judge held that proposed amendments changed wording of s. 212.1(4) of Act applicable in respect of dispositions that occurred after specific date, with result that exception in s. 212.1(4) of Act would no longer be available in circumstances of this case – Judge dismissed taxpayer's argument that if transactions would have been structured differently, taxpayer could have achieved same result – Judge noted that taxpayer did not implement alternative structure and that form mattered in tax law – Taxpayer appealed – APPEAL ALLOWED – Matter remitted to Minister for reconsideration on basis that GAAR did not apply to these transactions – There was alternative means by which same result could have been achieved without triggering any tax if shares of Canadian subsidiary would have been sold to arm's length purchaser – It was difficult to determine how GAAR would have applied to alternative transactions – Purpose of s. 212.1 of Act was not to prevent removal from Canada, by arm's length purchaser of Canadian corporation, of any surplus that such Canadian corporation had accumulated prior to acquisition of control – In this case, overall effect of transactions was to allow purchaser of Netherlands company to remove from Canada surplus that had accumulated in Canadian subsidiary prior to acquisition of control of that company – Avoidance transaction were part of series of transactions by which control of Canadian subsidiary was indirectly acquired in arm's length transaction – Whether surplus of Canadian subsidiary was removed by completing alternative transactions or by completing transactions as done in this case, same surplus was removed from Canada – These transactions did not frustrate purpose of s. 212.1 of Act – Technical notes and budget information only addressed non-arm's length sales of shares – Transactions did not frustrate object, spirit and purpose of s. 212.1 of Act as it was written at time of transaction, so amendments, enacted nine years after transactions, could not be used to make finding that avoidance transaction was abusive – Comparison between ss. 84.1 and 212.1 of Act was of little assistance because both applied only if sale of shares was to non-arm's length purchaser – Minister did not clearly demonstrate that avoidance transaction was abusive.

Univar Holdco Canada ULC v. The Queen

UNIVAR HOLDCO CANADA ULC (Appellant) and HER MAJESTY THE QUEEN (Respondent)

Citation: 2017 CarswellNat 5539, 2017 FCA 207
Federal Court of Appeal
J.D. Denis Pelletier J.A., Wyman W. Webb J.A., D.G. Near J.A.
Heard: May 10, 2017
Judgment: October 13, 2017
Year: 2017
Docket: A-245-16

Proceedings: reversing *Univar Holdco Canada ULC v. R.* (2016), 2016 CarswellNat 11075, 2016 CCI 159, 2016 CarswellNat 2472, 2016 TCC 159, [2017] 1 C.T.C. 2214, (sub nom. *Univar Holdco Canada ULC v. The Queen*) 2016 D.T.C. 1133 (T.C.C. [General Procedure])

Counsel: Matthew G. Williams, Michael W. Colborne, for Appellant
Ronald MacPhee, Vincent Bourgeois, for Respondent

Subject:
Corporate and Commercial; Income Tax (Federal)

Table of Authorities

Cases considered by *Wyman W. Webb J.A.*:

Canada Trustco Mortgage Co. v. R. (2005), 2005 SCC 54, 2005 CarswellNat 3212, 2005 CarswellNat 3213, (sub nom. *Canada Trustco Mortgage Co. v. Canada*) 2005 D.T.C. 5523 (Eng.), (sub nom. *Hypothèques Trustco Canada v. Canada*) 2005 D.T.C. 5547 (Fr.), [2005] 5 C.T.C. 215, (sub nom. *Minister of National Revenue v. Canada Trustco Mortgage Co.*) 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] S.C.J. No. 56, [2005] 2 S.C.R. 601 (S.C.C.) — referred to

Copthorne Holdings Ltd. v. R. (2011), 2011 SCC 63, 2011 CarswellNat 5201, 2011 CarswellNat 5202, 339 D.L.R. (4th) 385, [2012] 2 C.T.C. 29, 2012 D.T.C. 5006 (Fr.), 2012 D.T.C. 5007 (Eng.), (sub nom. *Copthorne Holdings Ltd. v. Minister of National Revenue*) 424 N.R. 132, (sub nom. *Copthorne Holdings Ltd. v. Canada*) [2011] 3 S.C.R. 721, [2011] S.C.J. No. 63 (S.C.C.) — considered

Duncan v. R. (2002), 2002 FCA 291, 2002 CarswellNat 1621, (sub nom. *Water's Edge Village Estates (Phase II) Ltd. v. R.*) 2002 D.T.C. 7172, [2002] 4 C.T.C. 1, (sub nom. *Water's Edge Village Estates (Phase II) Ltd. v. Minister of National Revenue*) 292 N.R. 98, [2002] F.C.J. No. 1031, (sub nom. *Water's Edge Village Estates (Phase II) Ltd. v. R.*) [2003] 2 F.C. 25, 2002 CarswellNat 4557 (Fed. C.A.) — considered

Friedberg v. R. (1991), 92 D.T.C. 6031, (sub nom. *Friedberg v. Canada*) [1992] 1 C.T.C. 1, (sub nom. *Friedberg v. Minister of National Revenue*) 135 N.R. 61, [1991] F.C.J. No. 1255, 1991 CarswellNat 669 (Fed. C.A.) — considered

Statutes considered:

Can. *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to
Pt. I — referred to
Pt. XIII — referred to
s. 82 — referred to
s. 84(4) — referred to
s. 84.1 — referred to
s. 87 — referred to
s. 88 — referred to
s. 112 — referred to
s. 212(2) — considered
ss. 212-218.1 — referred to
s. 212.1 — considered
s. 212.1(1) — considered
s. 212.1(4) — considered
s. 245(3) — referred to
s. 245(4) — referred to

Treaties considered:

Treaties *Canada-United States Tax Convention*, 1980
Article XIII — referred to

APPEAL by taxpayer from judgment reported at *Univar Holdco Canada ULC v. R.* (2016), 2016 TCC 159, 2016 CarswellNat 2472, [2017] 1 C.T.C. 2214, 2016 D.T.C. 1133, 2016 CCI 159, 2016 CarswellNat 11075 (T.C.C. [General Procedure]), dismissing taxpayer's appeal from assessment finding that transactions violated general anti-avoidance rule.

***Wyman W. Webb J.A.*:**

1 This appeal arises as a result of the application of the general anti-avoidance rule (GAAR) under the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1 (ITA) to certain transactions completed in 2007 that would otherwise allow a non-resident person, immediately following an arm's length acquisition of control of a Canadian corporation, to extract surplus from that corporation (which had accumulated prior to the acquisition of control of that corporation) without triggering a dividend under section 212.1 of the ITA. The Tax Court judge dismissed the appeal of Univar Holdco Canada ULC from the reassessment that applied GAAR (2016 TCC 159 (T.C.C. [General Procedure])).

2 For the reasons that follow, I would allow the appeal.

I. Background

3 In 2007 Univar NV was a Netherlands public company that carried on a global business of acquiring chemicals in bulk and then processing, blending and repackaging them to sell to its customers. It carried on business in several countries, including Canada. CVC Capital Properties (CVC) made an offer to acquire the shares of Univar NV. The offer was conditional on CVC acquiring at least 95% of the outstanding shares of Univar NV and CVC receiving the necessary regulatory approvals. CVC received the required approvals and ultimately acquired 99.4% of the shares of Univar NV.

4 Univar Canada Ltd. (Univar Canada) was one of the corporations that formed part of the Univar NV corporate group. Univar Canada was of particular interest to the purchaser because it had accumulated a significant surplus. When CVC acquired Univar NV, all of the shares of Univar Canada were held by Univar North American Corporation, an American company (UNAC (US)). The adjusted cost base (ACB) of the shares of Univar Canada was $10,000, the paid-up capital (PUC) of these shares was approximately $911,729 and the fair market value of these shares was approximately $889,000,000.

5 When the shares of Univar NV were acquired by CVC, the PUC and ACB of the shares of Univar Canada remained as noted above. A number of transactions were undertaken, as set out in paragraphs 27 to 41 of the reasons of the Tax Court judge. The result of these transactions was that Univar Canada was acquired by Univar Holdco Canada ULC, which was incorporated as part of these transactions. The American parent of Univar Holdco Canada ULC held a note payable by Univar Holdco Canada ULC in the amount of $589,262,400. The PUC of the shares of Univar Holdco Canada ULC was $302,436,000 and therefore the total of the PUC of the shares and the note held by the American parent of Univar Holdco Canada ULC was equal to the fair market value of the shares of Univar Canada.

6 The amount of the note payable by the Canadian company to its American parent company and the PUC of the shares of the Canadian company held by the American company before and after the transactions were:

	Before	After
Note Payable:	$0	$589,262,400

	Before	After
PUC:	$911,729	$302,436,000
Total:	$911,729	$891,698,400

7 Prior to the transactions the amount that could be extracted by the American parent company without incurring Part XIII tax in Canada was $911,729 and after the transaction it was significantly more ($891,698,400).

8 The parties to the transactions relied on Article XIII of the *Canada-United States Tax Convention (1980)* to exempt from taxation in Canada any capital gain arising as part of the transactions and on the exception contained in subsection 212.1(4) of the ITA to avoid the deemed dividend that would otherwise arise under subsection 212.1(1) of the ITA when the shares of Univar Canada were transferred by its American shareholder to Univar Holdco Canada ULC. As part of the transactions, the corporate group was reorganized so that the conditions of subsection 212.1(4) of the ITA were satisfied in that the American shareholder of Univar Canada was owned by Univar Holdco Canada ULC, immediately before the shares of Univar Canada were transferred to Univar Canada Holdco ULC. The issue related to GAAR was the structuring of the transactions to satisfy the conditions of subsection 212.1(4) of the ITA.

9 The taxpayer acknowledged that there was a tax benefit in avoiding the Part XIII tax which would have been applicable if the exception in subsection 212.1(4) did not apply and that there was an avoidance transaction as defined in subsection 245(3) of the ITA. The only issue was whether the avoidance transaction was abusive (subsection 245(4) of the ITA; *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63 (S.C.C.) , at para. 33 [*Copthorne*]).

10 The Tax Court judge, in examining the context and purpose of section 212.1 of the ITA, compared section 212.1 to section 84.1; reviewed the notes released by the Department of Finance; and considered the amendments proposed in the 2016 Budget (that have since been implemented) and determined that, in her view, the avoidance transaction was an abuse of the ITA. The 2016 amendments changed the wording of subsection 212.1(4) of the ITA applicable in respect of dispositions that occur after March 21, 2016. The result of these amendments is that the exception in subsection 212.1(4) of the ITA would no longer be available in the circumstances of this case.

11 The Tax Court judge also dismissed the taxpayer's argument that if the transactions would have been structured differently the taxpayer could have achieved the same result. The Tax Court judge, in relation to this argument, simply noted in paragraph 106 of her reasons that the taxpayer "did not implement this alternative structure and in tax law, form matters" (citing *Friedberg v. R.* (1991), [1992] 1 C.T.C. 1, 92 D.T.C. 6031 (Fed. C.A.) at paragraph 5 [*Friedberg*]).

II. Issue

12 The issue in this appeal is whether the avoidance transaction undertaken by the taxpayer was abusive.

III. Relevant Provisions of the ITA

13 As noted by the Tax Court judge in paragraph 56 of her reasons, the particular section that was alleged to have been misused is section 212.1 of the ITA. The relevant parts of section 212.1 are subsections (1) and (4) and in 2007, these read as follows:

> 212.1 (1) If a non-resident person, a designated partnership or a non-resident-owned investment corporation (in this section referred to as the "non-resident person") disposes of shares (in this section referred to as the "subject shares") of any class of the capital stock of a corporation resident in Canada (in this section referred to as the "subject corporation") to another corporation resident in Canada (in this section referred to as the "purchaser corporation") with which the non-resident person does not (otherwise than because of a right referred to in paragraph 251(5)(b)) deal at arm's

length and, immediately after the disposition, the subject corporation is connected (within the meaning that would be assigned by subsection 186(4) if the references in that subsection to "payer corporation" and "particular corporation" were read as "subject corporation" and "purchaser corporation", respectively) with the purchaser corporation,

> (a) the amount, if any, by which the fair market value of any consideration (other than any share of the capital stock of the purchaser corporation) received by the non-resident person from the purchaser corporation for the subject shares exceeds the paid-up capital in respect of the subject shares immediately before the disposition shall, for the purposes of this Act, be deemed to be a dividend paid at the time of the disposition by the purchaser corporation to the non-resident person and received at that time by the non-resident person from the purchaser corporation; and
>
> (b) in computing the paid-up capital at any particular time after March 31, 1977 of any particular class of shares of the capital stock of the purchaser corporation, there shall be deducted that proportion of the amount, if any, by which the increase, if any, by virtue of the disposition, in the paid-up capital, computed without reference to this section as it applies to the disposition, in respect of all of the shares of the capital stock of the purchaser corporation exceeds the amount, if any, by which
>
> > (i) the paid-up capital in respect of the subject shares immediately before the disposition exceeds
> >
> > (ii) the fair market value of the consideration described in paragraph 212.1(1)(*a*),
>
> that the increase, if any, by virtue of the disposition, in the paid-up capital, computed without reference to this section as it applies to the disposition, in respect of the particular class of shares is of the increase, if any, by virtue of the disposition, in the paid-up capital, computed without reference to this section as it applies to the disposition, in respect of all of the issued shares of the capital stock of the purchaser corporation.

…

(4) Notwithstanding subsection 212.1(1), this section does not apply in respect of a disposition by a non-resident corporation of shares of a subject corporation to a purchaser corporation that immediately before the disposition controlled the non-resident corporation.

(emphasis added)

212.1 (1) Si une personne non-résidente, une société de personnes désignée ou une société de placement appartenant à des non-résidents (appelées «non-résident» au présent article) dispose d'actions (appelées «actions en cause» au présent article) d'une catégorie du capital-actions d'une société résidant au Canada (appelée «société en cause» au présent article) en faveur d'une autre société résidant au Canada (appelée «acheteur» au présent article) avec laquelle le non-résident a un lien de dépendance—autrement qu'en vertu d'un droit visé à l'alinéa 251(5)b)—et si, immédiatement après la disposition, la société en cause est rattachée (au sens du paragraphe 186(4), à supposer que les termes «société payante» et «société donnée» y soient remplacés respectivement par «société en cause» et «acheteur») à l'acheteur, les règles suivantes s'appliquent:

> a) l'excédent éventuel de la juste valeur marchande de la contrepartie—sauf la contrepartie qui consiste en actions du capital-actions de l'acheteur—que le non-résident reçoit de

l'acheteur pour les actions en cause sur le capital versé au titre des actions en cause immédiatement avant la disposition, est réputé être, pour l'application de la présente loi, un dividende versé au moment de la disposition par l'acheteur au non-résident et reçu, à ce moment, par le non-résident de l'acheteur;

b) dans le calcul du capital versé, à un moment donné après le 31 mars 1977, d'une catégorie donnée d'actions du capital-actions de l'acheteur, il faut déduire le produit de la multiplication de l'excédent éventuel du montant de l'augmentation, à la suite de la disposition, dans le capital versé, calculé compte non tenu du présent article tel qu'il s'applique à la disposition, à l'égard de toutes les actions du capital-actions de l'acheteur sur l'excédent du montant visé au sous-alinéa (i) sur le montant visé au sous-alinéa (ii):

(i) le capital versé à l'égard des actions en cause immédiatement avant la disposition,

(ii) la juste valeur marchande de la contrepartie visée à l'alinéa *a*),

par le rapport entre l'augmentation, à la suite de la disposition, dans le capital versé, calculé compte non tenu du présent article tel qu'il s'applique à la disposition, à l'égard de la catégorie donnée d'actions, et l'augmentation, à la suite de la disposition, dans le capital versé, calculé compte non tenu du présent article tel qu'il s'applique à la disposition, à l'égard de toutes les actions émises du capital-actions de l'acheteur.

…

(4) Malgré le paragraphe (1), le présent article ne s'applique pas aux dispositions, faites par une société non-résidente, d'actions de la société en cause en faveur de l'acheteur qui, immédiatement avant la disposition, contrôlait la société non-résidente.

(soulignement ajouté)

IV. Analysis

14 Part XIII of the ITA (sections 212 to 218.1) imposes a tax on certain types of income paid or credited by a person resident in Canada to a non-resident person. In particular subsection 212(2) imposes a tax on any dividends that are paid or credited (or that are deemed to be paid or credited) by a corporation resident in Canada to a non-resident person. Capital gains realized by a non-resident person on the disposition of shares of a Canadian corporation may be exempt from tax as a result of a tax treaty between Canada and the country where the non-resident person resides. For example, Article XIII of the *Canada-United States Tax Convention (1980)* provides an exemption from tax in Canada on any capital gain realized by a resident of the United States on a disposition of shares of a Canadian corporation provided that the value of the shares is not derived principally from real property situated in Canada.

15 To avoid the withholding tax on dividends imposed under the ITA, residents of a country with which Canada has a tax convention that exempts capital gains from tax in Canada would prefer a capital gain rather than a dividend. Section 212.1 of the ITA was introduced to prevent a non-resident person from indirectly extracting from Canada accumulated surplus in a Canadian corporation (Targetco) in a non-arm's length transaction. Accumulated surplus in this context would mean net assets (assets minus liabilities) in excess of the PUC of the shares. Without section 212.1 of the ITA, a non-resident person could sell the shares of Targetco to another Canadian corporation (with which the vendor does not deal at arm's length) for non-share consideration and realize a capital gain that would not be taxable in Canada as a result of an applicable tax convention. Section 212.1 of the ITA would, however, convert what would otherwise have been a capital gain into a deemed dividend to the extent that the amount paid exceeds the PUC of the shares that are transferred.

16 However, section 212.1 of the ITA does not apply to all transactions. Notably, it does not apply if the shares of the Canadian corporation are sold to an arm's length purchaser. As a result, a non-resident person who owns shares of a Canadian corporation with an accumulated surplus can sell the shares to any Canadian corporation with which the vendor deals at arm's length and realize a capital gain. If there is an exemption under an applicable tax treaty for the capital gain that would arise on the sale of the shares, the vendor would not be required to pay any tax in Canada in relation to the transaction. Therefore, the vendor could indirectly extract the surplus accumulated in a Canadian corporation by selling the shares to an arm's length purchaser.

17 The taxpayer submitted that, in the context of an arm's length sale of shares, the following transactions could have been completed to achieve the same result as was realized in this case if GAAR did not apply. An American corporation owned by the purchaser (who would be dealing at arm's length with Univar NV and its subsidiaries) could have formed a Canadian corporation (AcquisitionCo) and advanced to AcquisitionCo an amount equal to the promissory note in this case ($589,262,400) and contributed capital to AcquisitionCo in an amount equal to the PUC of the shares in this case ($302,436,000). AcquisitionCo could then have used the funds that it received to purchase the shares of Univar Canada from UNAC (US). The vendor would have realized a capital gain because the shares were sold to an arm's length purchaser.

18 AcquisitionCo could then repay the American parent the amount that it had advanced to AcquisitionCo and reduce the PUC of its shares by paying to its American parent an amount equal to the PUC of those shares without triggering any dividend for the purposes of the ITA (subs. 84(4) of the ITA). The surplus in Univar Canada could have been used to fund the repayment of the amount advanced and reduction of PUC as dividends could flow from a taxable Canadian corporation to another corporation resident in Canada without incurring any tax under Part I of the ITA (sections 82 and 112 of the ITA). Alternatively, Univar Canada could have been amalgamated with or wound up into AcquisitionCo (sections 87 and 88 of the ITA).

19 The Tax Court judge dismissed these transactions because they were not the transactions that were completed. As support for this proposition, the Tax Court judge referred to *Friedberg* . However, this was not a GAAR case. In GAAR cases the issue is whether the taxpayer has abused the provisions of the ITA. In my view, these alternative transactions are a relevant factor in determining whether or not there has been an abuse of the provisions of the ITA. If the taxpayer can illustrate that there are other transactions that could have achieved the same result without triggering any tax, then, in my view, this would be a relevant consideration in determining whether or not the avoidance transaction is abusive.

20 The response of the Crown to these alternative transactions was not that there would be any provision that would result in tax being paid. Rather the Crown submitted that the Canada Revenue Agency would have considered whether GAAR would have been applied if the alternative transactions would have been completed. However, it is difficult to determine how GAAR would have applied to the revised transactions. Since UNAC (US) would have sold the shares of Univar Canada to an arm's length purchaser, it would seem clear that this transaction would not have resulted in the application of subsection 212.1 of the ITA. Since AcquisitionCo would have been fully funded by a non-resident corporation, the amount of the outstanding promissory note and PUC of the shares held by the non-resident parent corporation would simply reflect the amounts that had been contributed to AcquisitionCo by its American parent. When the promissory note is paid or the PUC of the shares of AcquisitionCo is reduced, the parent company is simply being repaid what it invested in AcquisitionCo. In my view, the alternative means by which the same result could have been realized is a relevant consideration in determining whether or not the avoidance transaction was abusive.

21 The first step in determining whether an avoidance transaction is abusive is to determine the object, spirit and purpose of the provisions that give rise to the tax benefit (*Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.) at para. 44; *Copthorne* , at para. 69). The wording of section 212.1 and the alternative transactions described above illustrate a clear dividing line between an arm's length sale of shares and a non-arm's length sale

of shares. If shares of a Canadian corporation with an accumulated surplus are sold by a non-resident vendor to another Canadian corporation with whom that vendor is dealing at arm's length, section 212.1 of the ITA does not apply. A non-resident person could provide funds to the Canadian purchaser to fund the purchase price for the shares and following the closing use the surplus in the Canadian corporation that was acquired to repay that non-resident person the funds that were advanced. Thus, in my view, the purpose of section 212.1 of the ITA was not to prevent the removal from Canada, by an arm's length purchaser of a Canadian corporation, of any surplus that such Canadian corporation had accumulated prior to the acquisition of control.

22 In this case, the overall effect of the transactions was to allow the purchaser of Univar NV to remove from Canada the surplus that had accumulated in Univar Canada prior to the acquisition of control of that company. The transactions were completed very shortly after the closing of the purchase of the shares of Univar NV (Univar Canada's ultimate parent company). The shares of Univar NV were acquired in an arm's length transaction and, at the time that such shares were acquired, the avoidance transaction was contemplated. Therefore, the avoidance transaction would be part of the series of transactions by which control of Univar Canada was indirectly acquired in an arm's length transaction. Whether the surplus of the Canadian corporation is removed by completing the alternative transactions described in paragraph 17 above or by completing the transactions that were done in this case, the same surplus is removed from Canada. Therefore, in my view, these transactions do not frustrate the purpose of section 212.1 of the ITA.

23 The Technical Notes and Budget Supplementary Information to which the Tax Court judge referred only address non-arm's length sales of shares. They do not identify any concern arising from a removal of surplus if the shares of the Canadian corporation are sold to an arm's length purchaser.

24 The Tax Court judge in her reasons concludes that the proposed amendment to subsection 212.1(4) of the ITA is a relevant consideration in determining the purpose of section 212.1. She relied on *Duncan v. R.*, 2002 FCA 291, [2003] 2 F.C.R. 25 (Fed. C.A.) [*Water's Edge*] in deciding that the proposed amendment contained in the 2016 Budget was relevant in determining whether there was an abuse of the provisions of the ITA. In *Water's Edge* a U.S. partnership had acquired a computer in 1982 for $3.7 million (US). The computer had been fully depreciated for U.S. tax purposes by 1991. In 1991 the appellants, along with three other individuals, acquired approximately 93.5% of the U.S. partnership for $320,000. The partnership transferred the computer to another limited partnership for $50,000, claiming a terminal loss for the purposes of the ITA of $4,486,940, which was reduced to $4,441,390 as a result of income earned by the partnership. The appellants claimed their respective share of the net terminal loss.

25 In paragraphs 37 to 45 of *Water's Edge* , Noël J.A. (as he then was), writing on behalf of this Court, outlined the capital cost system under the ITA. In paragraph 42, after noting that the language of the provisions of the ITA supported the claiming of the terminal loss, he noted that:

> 42 [...] This result, although it flows from the clear words of paragraph 13(21)(f) and subsection 20(16), is contrary to the scheme of the capital cost allowance provisions which limits the deduction of capital expenditures to those incurred for the purpose of earning income under the Act.

26 In paragraph 44, it was also noted that:

> 44 There can be no doubt that the object and spirit of the relevant provisions is to provide for the recognition of money spent to acquire qualifying assets to the extent that they are consumed in the income earning process under the Act.

27 These conclusions that the result was contrary to the scheme of the ITA and that “the object and spirit of the relevant provisions is to provide for the recognition of money spent to acquire qualifying assets to the extent that they are consumed in the income earning process under the Act” were reached before there was any discussion of the amendments that were made to the ITA. The amendments were discussed in paragraphs 46 and 47:

> 46 Counsel for the appellant relied on the subsequent addition of subsection 96(8) to the Act to argue that the transactions in issue do not offend any unwritten rule or policy. Subsection 96(8) was added by S.C. 1994, c. 21, and made applicable after December 21, 1992. Paragraph 96(8)(a) is of direct relevance. It specifically counters the result achieved by the appellants in this case by deeming the cost of acquisition of depreciable assets held by a foreign partnership to an incoming Canadian partner to be the lesser of its fair market value or its capital cost determined according to the ordinary rules.
>
> 47 Counsel argued that the prospective addition of subsection 96(8) demonstrates unequivocally that the transactions in issue did not offend the object and spirit of the Act at the time when they took place. I rather think that this amendment demonstrates that Parliament moved as quickly as it could to close the loophole exploited by the appellants precisely because the result achieved was anomalous having regard to the object and spirit of the relevant provisions of the Act.

28 The amendments to the ITA were not raised as support for the finding that GAAR applied. Rather they were advanced as an argument by the appellant that GAAR should not apply because the ITA was subsequently amended to close the loophole. This case does not support the proposition that subsequent amendments to the ITA will necessarily reinforce or confirm that transactions that are caught by the amendments would be considered to be abusive before the amendments are enacted.

29 In the case before us the amendments were enacted approximately 9 years after the transactions were completed. In my view, the transactions did not clearly frustrate the object, spirit and purpose of section 212.1 of the ITA as it was written in 2007 and therefore the 2016 amendments cannot be used to make a finding that the avoidance transaction was abusive.

30 The comparison between sections 84.1 and 212.1 of the ITA is also of little assistance in this matter. Both sections 84.1 and 212.1 only apply if the sale of the shares is to a non-arm's length purchaser. Therefore, neither section would apply to a transaction in which shares are sold to an arm's length purchaser. As well section 84.1 only applies to vendors who are not corporations.

31 As noted by the Supreme Court of Canada in *Copthorne* at paragraph 72, "...the Minister must clearly demonstrate that the transaction is an abuse of the Act, and the benefit of the doubt is given to the taxpayer". In this case the Minister has not clearly demonstrated that the avoidance transaction completed in this case was abusive. The transactions were completed as part of an arm's length purchase of Univar NV. The purpose of the avoidance transaction was, in effect, to allow the arm's length purchaser to extract the surplus in the Canadian corporation that had accumulated prior to the acquisition of control without triggering any tax under Part XIII. There was an alternative means by which the same result could have been achieved without triggering any Part XIII tax if the shares of Univar Canada would have been sold to an arm's length purchaser and the Minister has not clearly demonstrated that the removal of surplus in an arm's length transaction would be abusive.

32 As a result I would allow the appeal with costs here and in the Court below. I would set aside the judgment of the Tax Court and rendering the judgment that the Tax Court should have made, I would allow the taxpayer's appeal from the reassessment and refer the matter back to the Minister of National Revenue for reconsideration and reassessment on the basis that GAAR does not apply to the transactions that were implemented in this case.
***J.D. Denis Pelletier J.A.*:**

I agree
***D.G. Near J.A.*:**

I agree
Appeal allowed.

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