Docket: 2013-2834(IT)G

BETWEEN:

UNIVAR HOLDCO CANADA ULC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 8, 2015, at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	Matthew G. Williams Michael Colborne
Counsel for the Respondent:	Ronald MacPhee Tamara Watters

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the Appellant's 2007 taxation year is dismissed, in accordance with the attached Reasons for Judgment.

Costs are awarded to the Respondent.

Signed at Toronto, Ontario, this 22nd day of June 2016.

"V.A. Miller"

V.A. Miller J.

Citation: 2016TCC159
Date: 20160622
Docket: 2013-2834(IT)G

BETWEEN:

UNIVAR HOLDCO CANADA ULC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

INTRODUCTION

[1] This case involves the anti-avoidance rule in section 212.1 and the definition of paid-up capital ("PUC") in section 89 of the *Income Tax Act* (the "*Act*").

[2] In 2007, CVC Capital Properties ("CVC"), a United Kingdom private equity firm, acquired Univar NV, a Netherlands public corporation. With the acquisition, CVC indirectly acquired a Canadian operating subsidiary with surplus in excess of $889,000,000. CVC carried out a series of transactions so that it could indirectly strip the surplus out of the Canadian subsidiary without paying withholding tax. The Appellant was the holding company used to accomplish the outcome in that series of transactions.

[3] The transactions were arranged to circumvent the application of the anti-avoidance rule in section 212.1 and to take advantage of the relieving exemption found in subsection 212.1(4) of the *Act*.

[4] The Minister of National Revenue (the "Minister") relied on the general anti-avoidance rule (the "GAAR") in section 245 of the *Act* to assess the Appellant for its 2007 taxation year. Counsel for the Appellant acknowledged that the transactions in issue resulted in a "tax benefit" for the purposes of subsection 245(1) and there was an "avoidance transaction" as that term is defined in

subsection 245(3) of the *Act*. The sole issue before the Court was whether the transactions resulted in "abusive tax avoidance" within the meaning of subsection 245(4) of the *Act*.

[5] I have concluded that the transactions undertaken in this case circumvented the application of the anti-avoidance rule in section 212.1 in a manner that "frustrated or defeated the object, spirit or purpose" of section 212.1 in general and subsection 212.1(4) in particular: *Canada Trustco Mortgage Company v Canada*, 2005 SCC 54 at paragraph 45.

FACTS

[6] The evidence at the hearing consisted of a Statement of Partially Agreed Facts; the testimony of Mr. Alexander Fotakidis, a senior managing director in the financing team of CVC Capital Partners ("CVC"); two volumes of Joint Documents; the memorandum to the GAAR Committee of the Canada Revenue Agency ("CRA") with respect to the issue in this appeal; and, read-ins from the examinations for discovery of both parties.

[7] The Statement of Partially Agreed Facts is attached as an Appendix to these Reasons. A summary of that statement together with the evidence presented at the hearing is included below.

[8] CVC, a United Kingdom private equity and investment firm, is based in London, England. In early 2007, it identified Univar NV as a corporation it wanted to acquire.

[9] Univar NV, a Netherlands public corporation, distributes commodity and speciality chemicals to the global market. Its main business is to purchase commodities in bulk, then process, blend and repack them to meet the requirements of the industries it serves. Univar NV operates a network of distribution centres located throughout the world including the United States, Canada, Europe and China.

[10] Univar Holdco Canada ULC (the "Appellant" or at times referred to as "UHC") was one of a group of entities which were controlled, directly or indirectly, by Univar NV. It was incorporated on September 21, 2007 under the laws of Alberta in anticipation of the reorganization that was undertaken. Counsel for the Appellant, in his submissions, stated that UHC was incorporated to act as a *de facto* acquisition corporation.

[11] In either March or April 2007, as part of its due diligence for its proposed acquisition of Univar NV, CVC and its acquisition vehicle for the purchase, Ulysses Luxembourg Sarl (“Ulysses”), sought advice from Deloitte Touche Tohmatsu Limited (“Deloitte”) with respect to certain taxation services. According to Mr. Fotakidis, there were two elements to the tax due diligence. One element was the tax itself including the tax liabilities of Univar NV and its subsidiaries and the second was the tax structuring.

[12] Deloitte gave detailed advice concerning the post-acquisition restructuring of Univar NV. This advice included the transactions at issue in this appeal. Mr. Fotakidis testified that Deloitte’s advice was used by CVC in July 2007 to obtain the desired debt package for the acquisition. This allowed CVC to propose a binding cash bid to Univar NV on July 9, 2007. CVC proposed cash of €1.5 billion (equivalent to approximately US$2.1 billion or $72.76 per share) for the acquisition of the shares of Univar NV and its subsidiaries. This bid was conditional upon tender of at least 95% of the outstanding shares of Univar NV and all necessary regulatory approvals.

[13] On August 20, 2007, a formal bid for all of the shares of Univar NV was announced.

[14] By letter dated September 6, 2007, Deloitte set out the terms on which it offered to perform certain taxation services to CVC and Ulysses. The letter contained the contractual terms between the parties in respect of matters concerning the proposed acquisition of Univar NV and its subsidiaries. The advice was to be presented through a “Final Report” which was completed by Deloitte on October 11, 2007.

[15] On September 18, 2007, the European Commission approved the proposed acquisition by CVC.

[16] On October 4, 2007, 97.2% of Univar NV’s outstanding shares had been acquired by Ulysses with the result that CVC and the Univar group of companies no longer dealt at arm’s length with each other.

[17] By the end of October, 2007, 99.4% of Univar NV’s outstanding shares had been acquired by Ulysses with the result that CVC effectively acquired Univar NV in 2007. Mr. Fotakidis explained that Univar NV was the only company in the group whose shares were listed publicly and by acquiring Univar NV, CVC also acquired the Univar group. Mr. Fotakidis further stated that no real consideration

had been given to acquiring the various operating companies of the group because there were no listed shares available at the individual operating levels. In addition, if they had to acquire the various operating companies separately, it would have negatively impacted the value, speed and certainty of delivering the offer.

[18] Mr. Fotakidis explained that, in order to obtain the desired debt package, CVC had agreed with the banks in July 2007 that the reorganization giving rise to the present appeal would take place. The banks which underwrote the financing did so based on the consolidated assets and earnings of Univar. As part of the commitment package signed with the banks, it was necessary to have all the assets of the Univar group "lined up" under the U.S. borrower.

[19] On cross-examination, counsel for the Respondent asked Mr. Fotakidis if one of the global goals of the financing was to enable access to the surpluses of the Canadian subsidiary to help pay the debt. Mr. Fotakidis replied that one of the objectives was to set up the "most efficient tax structure" and "extraction structure" in terms of cash distribution and ultimately to service the debt. Mr. Fotakidis explained what he meant by the expression the "most efficient tax structure". He said the meaning was twofold. It meant the ability to regularly distribute reserves or cash to service the debt on a quarterly basis rather than semi-annually and it also meant, in terms of the cost involved, the ability to minimize withholding taxes and other expenses when extracting cash out of Canada.

[20] Deloitte submitted the Final Report of its "Tax Structure Memorandum" on October 11, 2007. Deloitte called it "Project Monaco" and the key tax objectives were listed in that report as:

- Maximize interest deductions on indebtedness related to the acquisition of the relevant entities/assets;

- Optimize lenders' security over assets and cash flow;

- Minimize withholding tax on returns to the Sponsors; and

- Allow for a flexible tax-free exit on disposal.

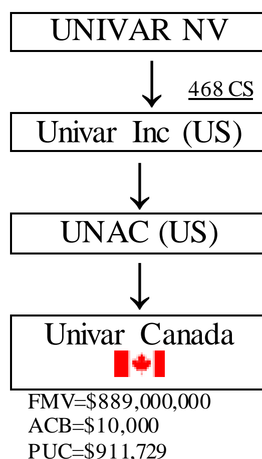
[21] The subsidiaries which were used in the reorganization transactions at issue were:

a) Univar Inc. is a corporation governed by the laws of the State of Delaware and incorporated on November 21, 1974. Prior to the reorganization, all 468 common shares of Univar Inc. were owned directly or indirectly by Univar NV.

b) Univar North American Corporation ("UNAC") was a corporation resident in the United States and governed by the laws of the state of Washington. At all relevant times the shares of UNAC were owned directly or indirectly by Univar Inc.

c) Univar Canada Ltd. ("Univar Canada" or sometimes referred to as the target corporation) is a Canadian resident corporation incorporated pursuant to the laws of the Province of British Columbia in 1950. Univar Canada was Canada's largest and most successful distributor of industrial chemicals and crop protection products. Prior to the reorganization described herein, all shares of Univar Canada were owned by UNAC and had an adjusted cost base ("ACB") of $10,000[1], PUC of approximately $911,729 and a fair market value ("FMV") of approximately $889,000,000.

[22] Prior to the reorganization transactions, the corporate structure of Univar NV and its subsidiaries was:



[23] It was admitted by the Appellant that the reorganization of Univar NV and its subsidiaries was arranged to take advantage of subsection 212.1(4) of the *Act*. Subsections 212.1(1) and (4) provide:

Non-arm's length sales of shares by non-residents

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.

…

Where section does not apply

(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.

[24] Subsection 212.1 applies when a non-resident person sells shares of a Canadian resident corporation (the “target corporation”) to another corporation resident in Canada (the “purchaser corporation”) with which it does not deal at arm’s length at the time of the disposition. When this section applies, the paid-up capital (“PUC”) of the purchaser’s shares is limited to the historic PUC of the target corporation. If non-share consideration is received that exceeds the PUC of the target corporation, the excess is deemed to be a dividend paid to the non-resident vendor and the dividend is subject to withholding taxes.

[25] Subsection 212.1(4) is a relieving provision. It provides that subsection 212.1(1) does not apply where the non-resident corporation is controlled by the purchaser corporation (a Canadian resident corporation) immediately before the sale of the shares of the subject corporation.

[26] In this case the series of transactions was undertaken to circumvent subsection 212.1(1) and to take advantage of the exemption in subsection 212.1(4). As can be seen by the series of transactions which follow, when CVC purchased Univar NV, Univar NV and its relevant subsidiaries were in a “sandwich” so that Univar Canada was controlled by the non-resident Univar Inc. After a series of artificial contortions, the relevant subsidiaries were still in a “sandwich” relation; Univar Inc. still controlled Univar Canada but the surplus funds had been stripped out of Univar Canada.

A. The Series of Transactions

[27] The parties agreed that the corporations participating in the series of transactions were **not** dealing at arm’s length.

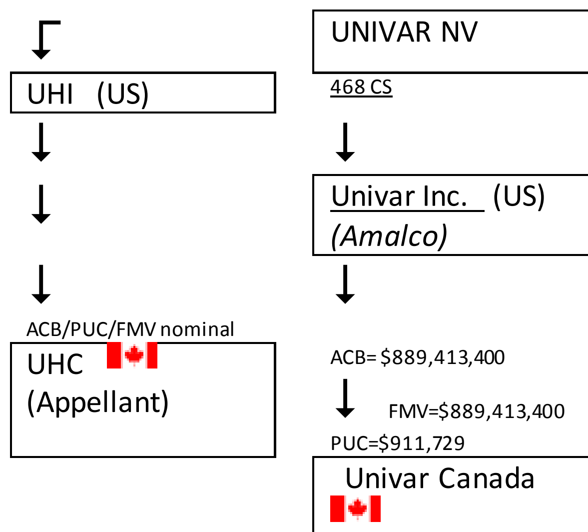
[28] In September 2007, Univar Holdco Inc. (“UHI”) was incorporated in anticipation of the reorganization that was going to be undertaken. It was incorporated as a US resident and was a wholly owned subsidiary of Univar NV with nominal share capital.

[29] In September 2007, UHI incorporated the Appellant UHC as its Canadian resident subsidiary, taking back shares which had nominal ACB. As stated earlier, it also was incorporated in anticipation of the reorganization that would be undertaken. At no time did the Appellant have any employees.

[30] On October 12, 2007, UNAC amalgamated with Univar Inc. to become **Univar Inc.** thereby acquiring all of the shares of Univar Canada, the target corporation. UNAC filed an election regarding the disposition of the shares of Univar Canada to Univar Inc. on amalgamation (Form T2062 – Request by a Non-Resident of Canada for a Certificate of Compliance Related to the Disposition of Taxable Canadian Property). Its net capital gain was reported as nil:

Proceeds of Disposition	$889,413,400
Less	
ACB	$10,000
Capital Gain	$889,403,400
Article XIII of Canada –US Convention	
Exemption	$889,403,400
Net Capital Gain	nil

[31] The resulting Univar structure was as follows:



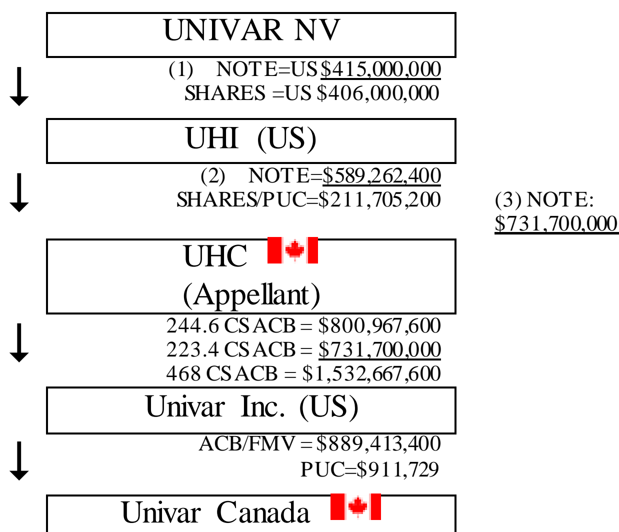
[32] On October 18, 2007, the following transactions were undertaken:

i. Univar NV sold 244.6 of its common shares of Univar Inc. to UHI in consideration for a promissory note having a principal amount of US$415,000,000 and common shares ("CS") with a FMV of US$406,000,000 for a total consideration of US$821,000,000 ($800,967,600).

ii. The Appellant, UHC, then purchased the 244.6 shares of Univar Inc. that UHI had acquired from Univar NV plus the remaining 223.4 shares of Univar Inc. held by Univar NV in exchange for promissory notes and UHC shares as follows:

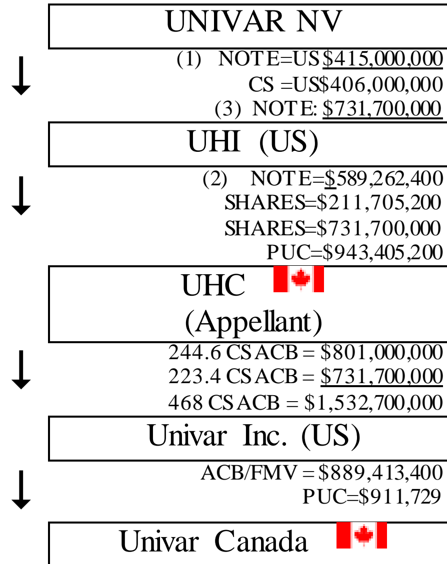
Number of shares of Univar Inc.	223.4	244.6
From:	Univar NV	UHI
In Exchange for:		
Notes Payable	$731,700,000	$589,262,400
UHC shares		$211,705,200
	$731,700,000	$800,967,600

[33] The structure was then as follows:



[34] UHI then assumed the $731,700,000 promissory note which had been issued by the Appellant UHC, to Univar NV by subscribing for additional common shares

of the Appellant valued at $731,700,000. As a result, the Appellant UHC had outstanding common shares held by UHI with PUC of $943,405,200 and a debt of $589,262,400 as follows:

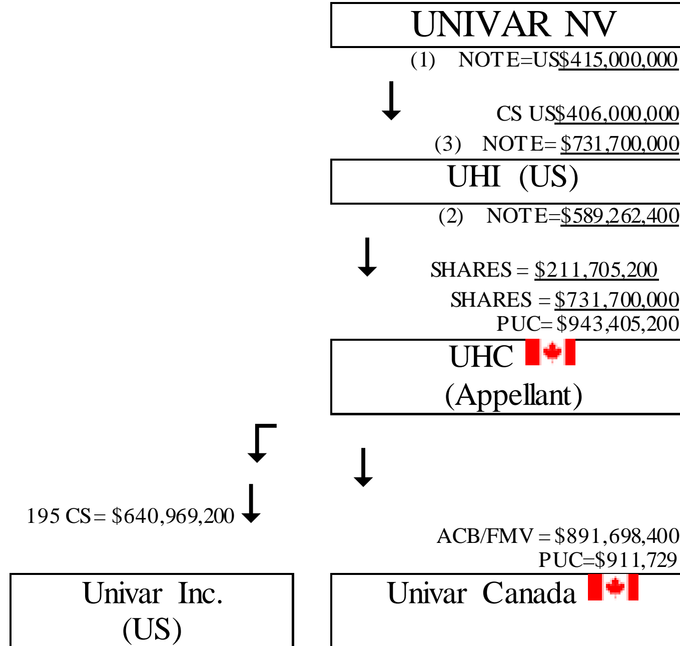


[35] Univar Inc. then redeemed 273 of its 468 total common shares held by the Appellant UHC and paid the redemption proceeds ($891,698,400) by delivering all 627 common shares of Univar Canada to the Appellant UHC at FMV. This transaction was reported on Form T2062 as follows:

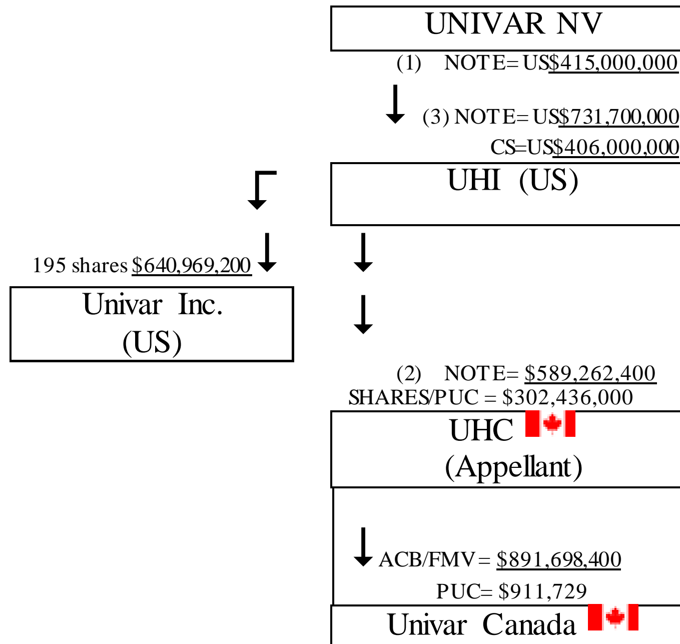
Proceeds of Disposition	$891,698,400
Adjusted Cost Base	$889,413,400
Capital Gain	$2,285,000[2]
Article XIII of Canada –US Convention	
Exemption	$2,285,000
Net Capital Gain	nil

[36] It was the Appellant's position that subsection 212.1(1) did not apply to this disposition because Univar Inc., the non-resident corporation, was controlled by the purchaser (the Appellant) immediately before the disposition. That is, the parties fit within the exception in subsection 212.1(4).

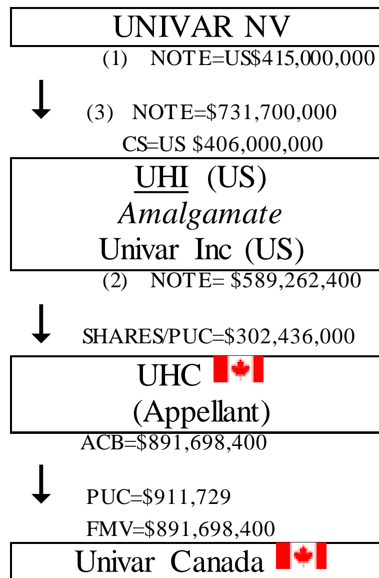
[37] The new structure became:



[38] The Appellant UHC then authorized the distribution of 195 common shares of Univar Inc. to UHI as a return of capital in the amount of $640,969,200 and effected the reduction by delivering those shares. As a result, the PUC of the common shares of the Appellant UHC held by UHI was reduced to $302,436,000. Univar Canada was isolated beneath the Appellant so that the structure became:



[39] On October 19, 2007, Univar Inc. and UHI amalgamated to form Univar Inc. The result was as follows:



[40] After the reorganization, Univar Inc. held shares in the Appellant with PUC of $302,436,000 and a note payable by the Appellant of $589,262,400. The aggregate of the PUC and the note payable equalled the FMV of the Appellant's sole asset, Univar Canada.

[41] As evidenced by the transactions and confirmed by Mr. Fotakidis, no shares of Univar Canada were sold and no money came into Canada to increase the PUC of its shares. No money was invested in Canada as a result of the purchase of Univar NV by CVC or as a result of the reorganization. The reorganization was structured to avoid a deemed dividend pursuant to subsection 212.1(1) and to take advantage of the exemption in subsection 212.1(4) of the *Act*.

THE REASSESSMENT

[42] On February 18, 2013, the Minister relied on the GAAR to reassess the Appellant's 2007 taxation year. The Appellant UHC was assessed Part XIII tax and interest on the issuance of its $589,262,400 promissory note payable to UHI. The PUC of the Appellant's shares was reduced from $302,436,000 to $911,729. The tax assessed was $29,417,533.55.

[43] The Minister relied on the GAAR on the basis that:

i. a series of transactions was undertaken that included transactions not undertaken for *bona fide* purposes other than to obtain the tax benefit of a tax free return of amounts in excess of the capital contributed to Univar Canada, a Canadian corporation, through its indirect non-arm's length transfer to another Canadian corporation; and that

ii. such transactions resulted in a circumvention of section 212.1 of the *Act* and resulted in a misuse of the provision and resulted directly or indirectly in an abuse having regard to the provisions of the *Act* as a whole.

LAW

[44] The GAAR is contained in section 245 of the *Act* and it provides:

> **245 (1)** In this section,
>
> ***tax benefit*** means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this Act but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty; (*avantage fiscal*)
>
> ***tax consequences*** to a person means the amount of income, taxable income, or taxable income earned in Canada of, tax or other amount payable by or refundable to the person under this Act, or any other amount that is relevant for the purposes of computing that amount; (*attribut fiscal*)
>
> ***transaction*** includes an arrangement or event. (*opération*)
>
> **General anti-avoidance provision**
>
> (2) Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.
>
> **Avoidance transaction**
>
> (3) An avoidance transaction means any transaction
>
> (a) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been

undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit; or

(b) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.

Application of subsection (2)

(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction

(a) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of

(i) this Act,

(ii) the *Income Tax Regulations*,

(iii) the Income Tax Applications Rules,

(iv) a tax treaty, or

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

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

[45] In *Canada Trustco*, the Supreme Court discussed the approach to be taken and the principles to be applied by the courts when there has been an assessment under section 245 of the *Act*. It summarized its discussion at paragraph 66 of the decision as follows:

66 The approach to s. 245 of the *Income Tax Act* may be summarized as follows.

1. Three requirements must be established to permit application of the GAAR:

(1)A *tax benefit resulting from a transaction* or part of a series of transactions (s. 245(1) and (2));

(2)that the transaction is an *avoidance transaction* in the sense that it cannot be said to have been reasonably undertaken or arranged primarily for a bona fide purpose other than to obtain a tax benefit; and

(3)that there was *abusive tax avoidance* in the sense that it cannot be reasonably concluded that a tax benefit would be consistent with the object, spirit or purpose of the provisions relied upon by the taxpayer.

2. The burden is on the taxpayer to refute (1) and (2), and on the Minister to establish (3).

3. If the existence of abusive tax avoidance is unclear, the benefit of the doubt goes to the taxpayer.

4. The courts proceed by conducting a unified textual, contextual and purposive analysis of the provisions giving rise to the tax benefit in order to determine why they were put in place and why the benefit was conferred. The goal is to arrive at a purposive interpretation that is harmonious with the provisions of the Act that confer the tax benefit, read in the context of the whole Act.

5. Whether the transactions were motivated by any economic, commercial, family or other non-tax purpose may form part of the factual context that the courts may consider in the analysis of abusive tax avoidance allegations under s. 245(4). However, any finding in this respect would form only one part of the underlying facts of a case, and would be insufficient by itself to establish abusive tax avoidance. The central issue is the proper interpretation of the relevant provisions in light of their context and purpose.

6. Abusive tax avoidance may be found where the relationships and transactions as expressed in the relevant documentation lack a proper basis relative to the object, spirit or purpose of the provisions that are purported to confer the tax benefit, or where they are wholly dissimilar to the relationships or transactions that are contemplated by the provisions.

7. Where the Tax Court judge has proceeded on a proper construction of the provisions of the *Income Tax Act* and on findings supported by the evidence, appellate tribunals should not interfere, absent a palpable and overriding error.

[46] In this case, the Appellant admitted that there was a "tax benefit" both through the avoidance of Part XIII tax which would have applied to the distribution of $589,262,400 and from the increase in the PUC; and that there was an "avoidance transaction" as that term is defined in subsection 245(3) of the *Act*.

[47] Therefore the only issue is whether the avoidance transactions which gave rise to the tax benefit resulted directly or indirectly in a misuse or abuse of section

212.1 and the related provisions of the *Act* read as a whole. The burden to establish misuse or abuse under subsection 245(4) is on the Respondent.

APPELLANT'S POSITION

[48] It was the Appellant's position that the GAAR does not apply in the circumstances of this appeal because the object, spirit and purpose of section 212.1 were not frustrated by the transactions at issue. The transactions were arranged to take advantage of the relieving provision contained in subsection 212.1(4) of the *Act*.

[49] Section 212.1 applies only to dispositions where the vendor and purchaser do not deal at arm's length. The concern with a shareholder accessing the undistributed income of a corporation is limited to circumstances in which the shareholder continues, directly or indirectly, to control the corporation in which the surplus was earned. Arm's length purchasers are not within the scope of section 212.1 of the *Act*.

[50] In his Trial Brief, counsel for the Appellant wrote that the legislative purpose underlying section 212.1 is to prevent "incestuous" reorganizations which extract surplus without a change in constructive ownership. The section is not concerned with the manner in which a true purchaser structures an arm's length acquisition.

[51] According to the Appellant, the reorganization of the Univar group occurred in the context of an arm's length acquisition. This was not a situation where a corporate group decided to reorganize itself to access its accumulated surplus in Canada. The purpose of the reorganization was to allow CVC, the arm's length purchaser, access to the acquired Canadian surplus.

[52] Counsel for the Appellant stated that the ideal acquisition structure would have been to have CVC acquire Univar Canada the target corporation through a Canadian holding company that was fully-capitalized to effect the purchase. This would have allowed a tax-free intercorporate dividend to be paid by Univar Canada to the holding company, which, in turn, could return capital, tax free, to CVC, the non-resident purchaser.

[53] According to the Appellant, in the circumstances of this case, it was not practical to use a Canadian acquisition company and a different route was needed to obtain the same result.

[54] It was in the context of the arm's-length sale of Univar NV to CVC that the relieving rule in subsection 212.1(4) was relied on. This subsection was considered at the planning stage of the acquisition of Univar NV as a relief against the application of subsection 212.1(1).

[55] Subsection 212.1(4) required that the purchaser corporation (the Appellant) be a Canadian resident and it had to control the non-resident vendor immediately before the disposition. This occurred in this case. It was the Appellant's position that the rule contemplates that non-arm's length transactions which meet the criteria in subsection 212.1(4) are excluded from the application of subsection 212.1(1).

<u>RESPONDENT'S POSITION</u>

[56] It was the Respondent's position that the transactions undertaken by Univar NV were designed to avoid the application of subsection 212.1(1) of the *Act* and to take advantage of the relieving provision in subsection 212.1(4).In so doing, the transactions resulted in abusive tax avoidance because they misused section 212.1 in a manner which frustrated its object, spirit and intended purpose: *Canada Trustco (supra)* at paragraph 45.

[57] Counsel for the Respondent stated that section 212.1 is an anti-avoidance provision aimed at "dividend stripping". Although there is no general anti-surplus stripping rule in the *Act*, the Supreme Court in *Copthorne Holdings Ltd v Canada*, 2011 SCC 63 (hereinafter referred to as *Copthorne* (SCC)) clearly established that there is a PUC scheme in the *Act* and section 212.1 plays an integral part in that scheme and cannot be disassociated with it.

[58] The definition of PUC is provided in section 89 of the *Act*.

[59] The Respondent provided a textual, contextual and purposive analysis of sections 212.1 and 89. She concluded that the object, spirit and purpose of section 212.1 is to prevent the tax free distribution of a corporation's retained earnings to a non-resident corporation through transactions designed to distribute funds in excess of the initial investment.

[60] The Respondent concluded her written submissions with the following:

> 94. At the commencement of the series, the amount that could be repatriated tax-free from Canada was nominal. At the end of the series, corporate surpluses of

approximately $899,000,000 were available for distribution to a non-resident with no Canadian tax consequences.

95. The non-resident taxpayer was able to access corporate surpluses with no Canadian tax consequences through a non-arm's length transfer of a Canadian corporation to, as the corporate structure suggests at the end of the series of transactions, another Canadian corporation. Clearly, the reorganization was put in place to circumvent the application of section 212.1 and defeated its purpose and the PUC scheme of the Act as established by the Supreme Court in *Copthorne*. As such, the series of transactions results in an abuse of the relevant provisions of the Act having regard to those provisions read as a whole.

ANALYSIS

[61] In *Lipson v Canada*, 2009 SCC 1, the Supreme Court summarized the principles from *Canada Trustco* with respect to "abuse and misuse" under subsection 245(4). It stated:

> 40According to the framework set out in *Canada Trustco*, a transaction can result in an abuse and misuse of the Act in one of three ways: where the 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 or purpose of those provisions (*Canada Trustco*, at para. 45). One or more of these possibilities may apply in a given case. I should reiterate that in a case like the one at bar, the individual tax benefits must be analysed separately, but always in the context of the entire series of transactions and bearing in mind that each step may have an impact on the others, in order to determine whether any of the provisions relied upon for each tax benefit was misused and abused.

[62] Subsection 245(4) requires a two-step analysis. The first step is to determine the object, spirit or purpose of the provisions of the *Act* relied on for the tax benefit. In this step, I must consider the overall scheme of the *Act*, the relevant provisions and permissible extrinsic aids. The second step is to examine the factual context of this appeal in order to determine whether the avoidance transaction defeated or frustrated the object, spirit or purpose of the provisions in issue: *Canada Trustco (supra)* at paragraph 55. The proper approach is a unified textual, contextual and purposive analysis of the sections of the *Act* which gave rise to the tax benefit: *Canada Trustco (supra)* at paragraph 66.

[63] The provisions of the *Act* which are relevant in this appeal are section 212.1 and subsection 89(1). Subsection 89(1) provides the definition of PUC, a term referenced in section 212.1.

[64] Section 84.1 is the domestic counterpart of section 212.1. These sections have been described as "anti-avoidance" sections aimed at preventing "dividend-stripping": *Collins & Aikman Products Co v R*, 2009 TCC 299 at paras.55 and 105, aff'd 2010 FCA 251.

[65] In his article, "The 1977 Amendments to the Corporate Distribution Rules"(1978) 16:1 Osgoode Hall LJ 155 at 181, Blake Murray described a dividend strip as follows:

> In theory, any transaction by a taxpayer that involves the shares of a Canadian corporation and that, directly or indirectly, effects a distribution to the taxpayer of all or part of that corporation's surplus at a tax cost that is less than the tax otherwise payable on a dividend of that surplus to the taxpayer would be regarded as a dividend strip.

[66] I am mindful that there is no 'general policy' in the *Act* that prohibits dividend stripping and the courts have held that surplus stripping does not inherently constitute abusive tax avoidance: *Gwartz v R*, 2013 TCC 86 at paragraphs 63 to 65. In *Copthorne v The Queen*, 2007 TCC 481, Campbell J. wrote at paragraph 73:

> …While the Act contains many provisions which seek to prevent surplus stripping, the analysis under subsection 245(4) must be firmly rooted in a unified textual, contextual and purposive interpretation of the relevant provisions. As such, reliance on a general policy against surplus stripping is inappropriate to establish abusive tax avoidance….

However, in this appeal, the issue does not involve a 'general policy' but a specific anti-avoidance section aimed at preventing non-residents from withdrawing dividends out of Canada on a tax-free basis. Any tax planning done for that purpose must comply with the provisions found in section 212.1 of the *Act*: *Descarries v R*, 2014 TCC 75 at paragraph 43. The question is whether the Appellant's reliance on the exemption in subsection 212.1(4) is within the object, spirit and purpose of that subsection and section 212.1.

A The Text

[67] The text of the provisions at issue is a consideration because it may shed light on the rationale for the sections: *Copthorne* (SCC) (*supra*) at paragraph 88.

(1) PUC

[68] The definition of PUC in subsection 89(1) of the *Act* provides:

> "paid-up capital"
>
> at any particular time means,
>
> (a) in respect of a share of any class of the capital stock of a corporation, an amount equal to the paid-up capital at that time, in respect of the class of shares of the capital stock of the corporation to which that share belongs, divided by the number of issued shares of that class outstanding at that time,
>
> (b) in respect of a class of shares of the capital stock of a corporation,
>
> …
>
> (iii) where the particular time is after March 31, 1977, an amount equal to the paid-up capital in respect of that class of shares at the particular time, **computed without reference to the provisions of this Act except** subsections 51(3) and 66.3(2) and (4), sections 84.1 and 84.2, subsections 85(2.1), 85.1(2.1) and (8), 86(2.1), 87(3) and (9), paragraph 128.1(1)(c.3), subsections 128.1(2) and (3), 138(11.7), 139.1(6) and (7), 192(4.1) and 194(4.1) and **sections 212.1** and 212.3, (**emphasis added**)

[69] The *Act* does not expressly define PUC. Instead, it relies on the corporate law concept of stated capital. Professor Krishna refers to PUC as the amount of capital that a corporation can return to shareholders on a tax-free basis: "The Fundamentals of Canadian Income Tax", (9th ed. 2006) p. 719. In *Copthorne* (SCC), Rothstein J. discussed the definition of PUC and its reliance on the concept of stated capital. At paragraphs 76 and 78, he made the following observations:

> 76 Stated capital is "the full amount that [a corporation] receives in respect of any shares it issues" (K. P. McGuinness, Canadian Business Corporations Law (2nd ed. 2007), at §7.231). Where an investment is made in a corporation in consideration for shares, the stated capital of the corporation increases. Professor Krishna refers to stated capital as "the amount of money a shareholder 'commits' to the corporation" (p. 610). The calculation of stated capital is set out at s. 26 of

> the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*") and at s. 28 of the Alberta *Business Corporations Act*, R.S.A. 2000, c. B-9 ("*ABCA*").
>
> …
>
> 78 Where the PUC of a corporation diverges from the stated capital it is "because of subsequent adjustments for tax purposes" (Krishna, at p. 621). The adjustments made to compute PUC are those enumerated in subparagraph (*b*)(iii) of the definition of PUC in s. 89(1). Thus, while stated capital and PUC may be the same in some cases, the two may differ substantially. The adjustment relevant in this case is found in s. 87(3).

[70] In the present case, the adjustment to PUC for tax purposes is found in section 212.1 of the *Act*.

(2) Section 212.1

[71] The application of subsection 212.1(1) prevents a non-resident person from avoiding Part XIII tax on dividends through a non-arm's length sale of shares when the following conditions are met:

a) There is a sale of shares of a corporation resident in Canada (called the subject corporation) by a non-resident person;

b) The purchaser corporation is also resident in Canada;

c) The purchaser corporation and the non-resident corporation do not deal at arm's length at the time of the disposition;

d) Immediately after the disposition, the subject corporation is connected to the purchaser corporation within the meaning assigned by subsection 186(4) of the *Act*.

[72] The text of subsection 212.1(1) ensures that in a non-arm's length disposition of a Canadian resident corporation's shares by a non-resident person to another Canadian resident corporation, the non-resident is limited to withdrawing its PUC tax free. Any distributions to the non-resident in excess of its PUC will be taxed as a deemed dividend under Part XIII of the *Act*.

[73] When subsection 212.1(1) applies, paragraph 212.1(1)(a) deems an immediate dividend to have been paid by the purchaser corporation to the non-resident to the extent that the non-share consideration given on the transfer exceeds

the PUC of the subject shares. The deemed dividend is then subject to withholding tax under subsection 212(2) of the *Act*.

[74] Where the consideration for the transfer of shares of the subject corporation consists of shares of the purchaser corporation, an immediate deemed dividend is not triggered. However, paragraph 212.1(1)(b) applies to reduce the PUC of the shares of the purchaser corporation so that the corporate group cannot make future distributions in excess of the historical PUC of the subject shares.

[75] As stated earlier, subsection 212.1(4) is a relieving provision. It provides that subsection 212.1(1) does not apply where the non-resident corporation is controlled by the purchaser corporation immediately before the sale of the shares of the subject corporation. In such a scenario, any surplus from the subject corporation would remain in Canada with the purchaser corporation which is a resident of Canada.

[76] In this appeal, the transactions complied with the text or actual words contained in this relieving subsection. However, the question is whether the transactions were in accord with the object, spirt or purpose of section 212.1 generally and subsection 212.1(4) in particular. At paragraph 66 of *Copthorne*, Rothstein J wrote:

> The GAAR is a legal mechanism whereby Parliament has conferred on the court the unusual duty of going behind the words of the legislation to determine the object, spirit or purpose of the provision or provisions relied upon by the taxpayer. **While the taxpayer's transactions will be in strict compliance with the text of the relevant provisions relied upon, they may not necessarily be in accord with their object, spirit or purpose.** In such cases, the GAAR may be invoked by the Minister. The GAAR does create some uncertainty for taxpayers. Courts, however, must remember that s. 245 was enacted “as a provision of last resort” (*Trustco*, at para. 21). (**emphasis added**)

B. The Context

[77] A consideration of the context of the sections at issue involves an examination of other relevant sections of the *Act*. In *Copthorne*, Rothstein J. described “relevant sections” as follows:

> …However, not every other section of the Act will be relevant in understanding the context of the provision at issue. Rather, relevant provisions are related “because they are grouped together” or because they “work together to give effect

> to a plausible and coherent plan" (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 361 and 364).

[78] The context for section 212.1 must be considered in conjunction with how the *Act* treats the distributions from corporations resident in Canada, generally.

[79] The *Act* attempts to integrate corporate income tax with personal income tax. To this end, when corporate dividends are paid to individual shareholders, the gross-up and credit system in subsection 82(1) and section 121 generally allow for a full credit for individuals in respect of any corporate income tax paid. Likewise, when a corporation's income has been subject to Canadian income tax, the after-tax profit will not be subject to tax again when it is distributed as a dividend to corporations resident in Canada (section 112). However, dividends paid to non-resident corporations by corporations resident in Canada are subject to Part XIII tax pursuant to subsection 212(2) of the *Act*. The context of section 212.1 is therefore within the system that is used to impose withholding taxes on a non-resident corporation when it receives dividends from a Canadian resident corporation.

[80] Section 212.1, as part of the "PUC Scheme" within the *Act*, ensures that in non-arm's length transactions, tax-free distributions from a corporation resident in Canada to a non-resident shareholder are limited to its PUC. Any payments to the non-resident shareholder in excess of its investment are taxable.

[81] Section 212.1 is contained in Part XIII of the *Act* which is entitled "Tax on Income from Canada of Non-Resident Persons". Part XIII applies 25% withholding tax - subject to treaty exemptions. In this case, the withholding tax was 5% in accordance with Article X of the Canada–United States Tax Convention (1980). Subsection 212(2) of the *Act* requires that every non-resident person shall pay income tax on every amount that a corporation resident in Canada pays or credits, or is deemed by Part I to pay to a non-resident in satisfaction of a taxable dividend.

[82] In the present appeal, if the Appellant had not used subsection 212.1(4) of the *Act*, it would have been required by subsection 215(1) to withhold the amount of tax on the dividend deemed to UHI and to remit this tax to the Receiver General on behalf of UHI. Failing to do this, the Appellant would have been liable for the tax on the deemed dividend pursuant to subsection 215(6) of the *Act*.

[83] Subsection 212.1(4) is placed as an exception within an anti-avoidance section and it must be viewed within that context. With this in mind, it is reasonable to infer that subsection 212.1(4) cannot be used so that it would defeat the very application of section 212.1. It is my view that subsection 212.1(4) is aimed at a narrow circumstance where the purchaser corporation, which is resident in Canada, actually controls the non-resident corporation without manipulating the corporate structure to achieve that control. Such narrow circumstances do not apply to this appeal.

[84] Both sections 84.1 and 212.1 are described as "anti-avoidance" sections and they operate in a similar fashion. However, section 84.1 is more generous in its application. As with the application of section 212.1, when certain conditions are met, subsection 84.1(1) may cause an immediate deemed dividend to the transferor with respect to non-share consideration or a reduction in the PUC of the shares of the purchaser corporation where the consideration for the shares includes shares of that corporation or both. Unlike section 212.1, in certain circumstances, section 84.1 allows a step-up in PUC when calculating the deemed dividend. Angelo Nikolakakis and Alain Léonard explained it this way:

> …What is interesting in this regard is that section 84.1, the domestic counterpart of section 212.1, reflects a different standard, in that it permits PUC to be stepped up through such non-arm's length transfer to the extent of the transferor's "hard basis" in the transferred shares. That is, the combined effect of paragraphs 84.1(1)(b) and 84.1(2)(a) and (a.1) is that the transferor is permitted to take back non-share consideration up to the amount of the transferor's ACB in the transferred shares, except to the extent that the ACB arises from a prior disposition by the taxpayer or a non-arm's length person to which a capital gains exemption under section 110.6 was applicable or to the extent that such ACB resulted, in whole or in part, from transactions involving shares that had (or were substituted for shares that had) pre-1972 accrued gains ("the soft basis"). **No such latitude is permitted under section 212.1.** (**emphasis added**)
>
> (Angelo Nikolakakis and Alain Léonard, "The Acquisition of Canadian Corporations by Non-Residents: Canadian Income Tax Considerations Affecting Acquisition Strategies and Structure, Financial Issues, and Repatriation of Profits" *Report of Proceedings of Fifty-Seventh Tax Conference*, 2005 Conference Report (Toronto: Canadian Tax Foundation, 2006), 21:1-45.)

C. The Purpose

[85] This step in the analysis seeks to ascertain the outcome Parliament intended a provision or provisions to achieve: *Copthorne* (SCC) at paragraph 113. It is

accepted that extrinsic aids, including budget materials, can be used to determine the purpose of the relevant section of the *Act*.

[86] Section 212.1 came into effect in 1977 as part of the revision to the anti-dividend stripping rules. It was intended that section 212.1 would block dividend stripping by a non-resident shareholder, whether against the Valuation Day value of his shares or by virtue of a treaty exemption from Canadian tax on capital gains, through the non-arm's length sale of such shares to a Canadian corporation: "The 1977 Amendments to the Corporate Distribution Rules" (1978) (*supra*) at p. 182.

[87] The section has been amended on numerous occasions. The *Technical Notes* which accompanied the 1984 amendment to section 212.1 included the following:

> Section 212.1 ensures that non-residents cannot use non-arm's length reorganizations of their Canadian corporations to convert dividend distributions that would be subject to non-resident withholding tax under Part XIII into tax-free capital gains.

[88] Section 212.1 was again amended in 1988 to extend its application to non-resident-owned investment corporations and the *Technical Notes* released by the Department of Finance read:

> Subsection 212.1(1) is intended to prevent the conversion of a corporation's surplus – which would be subject to Canadian tax upon distribution to its non-resident shareholder – into proceeds from the disposition of the corporation's shares – which may give rise to a capital gain that is not subject to tax in Canada. Where a non-resident disposes of his shares to a Canadian corporation with which he does not deal at arm's length, subsection 212.1(1) treats a dividend as having been paid to the non-resident to the extent that any non-share consideration, including debt, received on the disposition exceeds the paid-up capital of the shares.

[89] The 1988 *Budget Supplementary Information* reads:

> Section 212.1 of the Income Tax Act contains special provisions applying to a non-resident who disposes of shares of a Canadian corporation to another Canadian corporation with which the non-resident does not deal at arm's length. **The purpose of these provisions is to prevent the conversion of a corporation's surplus - which would be subject to tax upon distribution to the non-resident shareholder - into proceeds from the disposition of the corporation's shares, thereby giving rise to a capital gain that may not be subject to tax in Canada.** **(emphasis added)**

[90] In 1998, section 212.1 was again amended so that its scope also extended to situations where the subject corporation and the purchaser corporation were corporations resident in Canada whether or not they were Canadian corporations. The purpose of section 212.1 was confirmed by the 1998 amendment.

[91] In *Copthorne*, the Supreme Court agreed that section 212.1 was an anti-avoidance section aimed at preventing "dividend stripping". Rothstein J stated:

> [95] Section 89(1) incorporates by reference provisions which reduce the PUC of the shares of a corporation. They are colloquially referred to as "grinds". For example, ss. 84.1 and 212.1 both grind PUC in non-arm's length transactions. These sections have been described as "anti-avoidance" provisions aimed at "dividend stripping" (*Collins & Aikman Products Co. v. The Queen*, 2009 TCC 299, 2009 D.T.C. 1179, at paras. 55 and 105, aff'd 2010 FCA 251, [2011] 1 C.T.C. 250) because such non-arm's length transactions may provide an opportunity for corporations to return funds in excess of the initial investment made with tax-paid funds to a shareholder as a non-taxable return of capital, rather than as a taxable dividend.

[92] In conclusion, it is well established that the purpose of section 212.1 is to prevent non-resident shareholders from reorganizing their Canadian resident corporations so that they can convert dividend distributions that would ordinarily be subject to non-resident withholding tax under Part XIII into tax-free capital gains.

[93] If the Appellant's position prevailed, any non-resident shareholder could reorganize its corporate structure to interpose layers of Canadian resident subsidiaries within its structure to ensure that subsection 212.1 (1) never applies. This cannot have been the intent of Parliament when enacting subsection 212.1(4) of the *Act*.

[94] Subsection 212.1(4) was added in 1978 without any explanatory notes. However, I believe that the *1977 De Boo Budget Date Comments* regarding the proposed enactment of section 212.1 sheds light on the rationale for enactment of the relieving provision in subsection 212.1(4). That comment was:

> This proposal will introduce rules to prevent non-residents from engaging in surplus strips and thereby avoiding non-resident withholding tax by the sale of shares in non-arm's length transactions to another corporation, for example, a Canadian corporation. The full extent of this far-reaching proposal will not be known until the wording of the implementing legislation is made public. **However, there is some danger that, unless the legislation is drafted with**

> **extreme care it will inadvertently inhibit *bona fide* sale of shares by one member of a multinational corporate group to another. (emphasis added)**

[95] Seen in this light, the purpose of subsection 212.1(4) was to address the concerns raised by tax lawyers as evidenced in the *1977 De Boo Budget Date Comments*. That purpose is to allow for the *bona fide* sale of shares by one member of a multinational corporate group to another while still respecting the purpose of subsection 212.1(1) of the *Act*.

[96] The March 22, 2016 Budget has proposed an amendment to this provision which would ensure that it could not be used to circumvent the application of section 212.1. In *Tax Measures: Supplementary Information*, the Government wrote:

> The paid-up capital (PUC) of the shares of a Canadian corporation generally represents the amount of capital that has been contributed to the corporation by its shareholders. PUC is a valuable tax attribute because it can be returned to shareholders free of tax. Retained earnings in excess of PUC that are distributed to shareholders are normally treated as taxable dividends that are, for non-resident shareholders, subject to a 25-per-cent withholding tax (unless reduced under an applicable tax treaty).
>
> The *Income Tax Act* contains an “anti-surplus-stripping” rule (section 212.1) that is intended to prevent a non-resident shareholder from entering into a transaction to extract free of tax (or “strip”) a Canadian corporation’s retained earnings (or “surplus”) in excess of the PUC of its shares or to artificially increase the PUC of the shares. When applicable, the anti-surplus-stripping rule results in a deemed dividend to the non-resident or a suppression of the PUC of the shares that would otherwise have been increased as a result of the transaction.
>
> An exception to this anti-surplus-stripping rule is found in subsection 212.1(4). It applies where a Canadian corporation (the “Canadian purchaser corporation”) acquires shares of a non-resident corporation that itself owns shares of a Canadian corporation – that is, where the non-resident is “sandwiched” between the two Canadian corporations – and the non-resident disposes of shares of the lower-tier Canadian corporation to the Canadian purchaser corporation in order to unwind the sandwich structure. Some non-resident corporations with Canadian subsidiaries have misused this exception by reorganizing the group into a sandwich structure with a view to qualifying for this exception, as part of a series of transactions designed to artificially increase the PUC of shares of those Canadian subsidiaries.
>
> **Budget 2016 proposes to amend the exception in subsection 212.1(4) to ensure that it applies as intended. In particular, it will be clarified that, consistent with the policy of the anti-surplus-stripping rule, the exception**

> **does not apply where a non-resident both (i) owns, directly or indirectly, shares of the Canadian purchaser corporation, and (ii) does not deal at arm's length with the Canadian purchaser corporation. (emphasis added)**
>
> Transactions that misuse subsection 212.1(4) are currently being challenged by the Government under existing provisions of the Income Tax Act, including the general anti-avoidance rule; these challenges will continue with respect to transactions that occurred prior to Budget Day. This measure is intended to promote certainty and **clarify the intended scope of the existing exception. (emphasis added)**
>
> To address the possibility of situations where it may be uncertain whether consideration has been received by a non-resident from the Canadian purchaser corporation in respect of the disposition by the non-resident of shares of the lower-tier Canadian corporation, Budget 2016 also proposes to clarify the application of the anti-surplus-stripping rule by deeming the non-resident to receive non-share consideration from the Canadian purchaser corporation in such situations. The amount of this deemed consideration will be determined by reference to the fair market value of the shares of the lower-tier Canadian corporation received by the Canadian purchaser corporation.
>
> This measure will apply in respect of dispositions occurring on or after Budget Day.

[97] It is my view that this proposed amendment to subsection 212.1(4) is a relevant consideration in ascertaining the purpose underlying the provision at issue in this appeal. The proposed amendment does not retroactively change the law but simply amends the subsection while embodying its underlying rationale as it existed at the time of the transactions in this appeal. The *Supplementary Information* directly addresses the purpose and the intended scope of the exception as it applied in 2007. That purpose is to allow for a *bona fide* sale of shares from a non-resident corporation to a Canadian resident corporation where it is the Canadian resident corporation that controls the non-resident corporation. The exception should not apply in the situation where a non-resident owns shares of the Canadian resident purchaser corporation. The exception does not apply where a non-resident uses non-arm's length reorganizations of their Canadian resident corporations to convert dividend distributions that would otherwise be subject to non-resident withholding tax under Part XIII into tax-free capital gains: See the 1984 *Technical Notes*.

[98] As in the case of *Water's Edge Village Estates (Phase II) Ltd v The Queen*, 2002 FCA 291, I believe 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": *Water's Edge* at paragraph 47.

[99] I agree with the Respondent's view that subsection 212.1(4) allows for an internal restructuring where, ultimately, a Canadian resident parent corporation would benefit from the surplus held by one of its subsidiaries. In such a situation, the surplus remains in Canada.

CONCLUSION

[100] CVC conducted a reorganization of some of its corporations for the sole purpose of "artificially complying" with the text of subsection 212.1(4). As a result, approximately $889,000,000 surplus funds from Univar Canada were available for distribution to a non-resident without paying Part XIII tax. The transactions which were used in the reorganization were planned prior to July 9, 2007 when CVC made its binding bid to Univar NV. In September 2007, the corporation UHI and the Appellant were incorporated for the sole purpose of taking part in the planned reorganization. The transactions were carried out in 7 days. The Appellant fictionally controlled the non-resident, Univar Inc. for less than a day and at all times the Appellant was itself controlled by a non-resident, UHI.

[101] Consequently, the overall outcome that section 212.1 was intended to prevent was circumvented. In doing so, the object, spirit and purpose of section 212.1 in general and subsection 212.1(4) in particular were defeated. It is clear that the transactions at issue in this appeal were an abuse of the *Act* and section 245 applies.

[102] Before I conclude, I want to address two arguments made by Appellant's counsel at the hearing of the appeal. The Appellant agreed in the Statement of Partially Agreed Facts that the corporations participating in the series of transactions were not dealing at arm's length. However, at the hearing of the appeal, counsel argued that the transactions did not frustrate section 212.1 because they arose in the circumstances of an arm's length purchase of Univar NV by CVC.

[103] CVC and Univar NV may have been operating at arm's length when the planning and discussions for these transactions occurred. However, they were not at arm's length by October 4, 2007 and all of these transactions took place between October 12 and October 19, 2007.

[104] The second argument made by the Appellant concerned the relevance of a Canada Revenue Agency Memorandum ("the Memo") which I admitted into evidence under advisement. This Memo was from the GAAR Committee which addressed the application of the GAAR to the facts in the present appeal. Counsel on behalf of the Appellant submitted to the committee that the result obtained by CVC in this appeal could have been realized by fully capitalizing a Canadian acquisition corporation.

[105] Counsel for the Appellant wrote to the GAAR Committee that this alternative structure "would have ensured that cross border tax attributes (in the form of tax cost and PUC) would accurately reflect the economic cost to the purchaser of making its investment in a Canadian operating entity".

[106] However, the Appellant did not implement this alternative structure and in tax law, form matters: *Friedberg v The Queen*, [1992] 1 CTC 1 at paragraph 5.

[107] The appeal is dismissed. Costs are awarded to the Respondent.

Signed at Toronto, Ontario, this 22nd day of June 2016.

"V.A. Miller"

V.A. Miller J.

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[1] All amounts are in Canadian currency unless otherwise stated.

[2] This gain was attributable to a fluctuation in the foreign exchange rates.

Appendix

STATEMENT OF PARTIALLY AGREED FACTS

The parties admit the following facts only for the purposes of this appeal and any further appeals respecting them. The parties also agree to the authenticity of the attached documents listed on Schedule "A" hereto and consent to their admission into evidence only for the purposes of this appeal and any further appeals respecting them. Either party may adduce other evidence to this appeal and not inconsistent with the facts in the statement and attached documents.

The parties involved

1. CVC Capital Partners (**CVC**) is a United Kingdom private equity firm based in London, England.

2. Univar NV (**Univar NV**) is a Netherlands public corporation that distributes, around the world, commodity and specialty chemicals for market. Its main business is to purchase commodities in bulk, then process, blend and repack them to meet the diverse requirements of the industries it serves. Univar NV operates a network of distribution centres located throughout the world including the United States, Canada, Europe and China.

3. **Univar Inc.** is a corporation governed by the laws of the State of Delaware and incorporated on November 21, 1974. At the outset of the transactions as further described herein, all 468 common shares of Univar Inc. were owned directly or indirectly by Univar NV.

4. Univar North American Corporation (**UNAC**) is a corporation resident in the United States and governed by the laws of the State of Washington. At all relevant times the shares of UNAC were owned directly or indirectly by Univar Inc.

5. Univar Canada Ltd. (**UCL**) is a Canadian resident corporation incorporated pursuant to the laws of the Province of British Columbia in 1950. UCL was Canada's largest and most successful distributor of industrial chemicals and crop protection products. Prior to the reorganization as further described herein, all the shares of UCL were owned by UNAC and had an adjusted cost base (**ACB**) of $10,000 paid up capital (**PUC**) of approximately $911,729 and a fair market value (**FMV**) of approximately $889,000,000.[1]

[1] Unless other indicated, all monetary references are to Canadian funds.

6. Univar Holdco Inc. (**UHI**) is a US resident corporation incorporated in September 2007 in anticipation of the reorganization that would be undertaken as further described herein.

7. The appellant, Univar Holdco Canada ULC (**UHC**), is a Canadian corporation incorporated on September 21, 2007 pursuant to the laws of Alberta in anticipation of the reorganization that would be undertaken as further described herein.

8. On July 9, 2007, CVC proposed a cash bid of €1.5 billion (equivalent to approximately US$2.1 billion or $72.76 a share) for the acquisition of the shares of Univar NV and its subsidiaries. This bid was conditional upon tender of at least 95% of the outstanding shares of Univar NV and all necessary regulatory approvals.

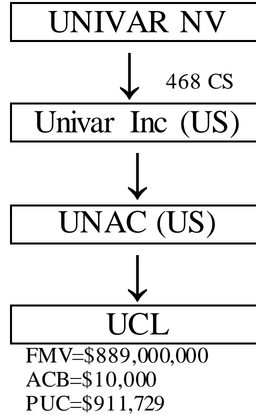
9. On August 20, 2007, a formal bid for all the shares of Univar NV was announced. On September 18, 2007, the European Commission approved the proposed acquisition by CVC.

10. On September 6, 2007, CVC and its acquisition vehicle for the purchase, Ulysses Luxembourg Sarl (**Ulysses**) engaged the services of Deloitte Touche Tohmatsu Limited (**Deloitte**) in respect of matters concerning the proposed acquisition of Univar NV and its subsidiaries. Advice was to be presented through a "Final Report" which was completed by Deloitte on October 11, 2007.

11. On October 4, 2007, 97.2% of Univar NV's outstanding shares had been acquired by Ulysses with the result that CVC and the Univar group of companies no longer dealt at arm's length.

12. By the end of October, 2007, 99.4% of Univar NV's outstanding shares had been acquired by Ulysses.

13. The corporate structure of Univar NV and its subsidiaries prior to the transactions described below, as is relevant for the issues herein was:



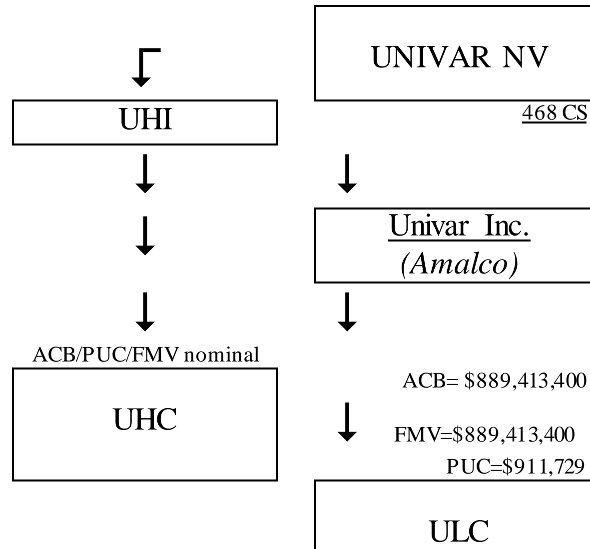
14. The entities participating in the transactions described below were not dealing at arm's length.

15. UHI was incorporated as a US resident wholly owned subsidiary of Univar NV with nominal share capital. UHI incorporated the appellant UHC, as its Canadian resident subsidiary, taking back shares which had nominal ACB, PUC and FMV. As discussed above, the incorporation of both companies occurred in September 2007.

16. On October 12, 2007, UNAC amalgamated with Univar Inc. to become **Univar Inc.** which thereby acquired all the shares of UCL. UNAC filed an election (Form T2062 – Request by a Non-Resident of Canada for a Certificate of Compliance Related to the Disposition of Taxable Canadian Property) regarding the disposition to Univar Inc. of the shares of UCL on the amalgamation as follows:

Proceeds of Disposition	$889,413,400
Less	
ACB	$10,000
Capital gain	$889,403,400
Article XIII of Canada-US Convention exemption	$889,403,400
Net capital gain	nil

17. The resulting Univar structure was as follows:



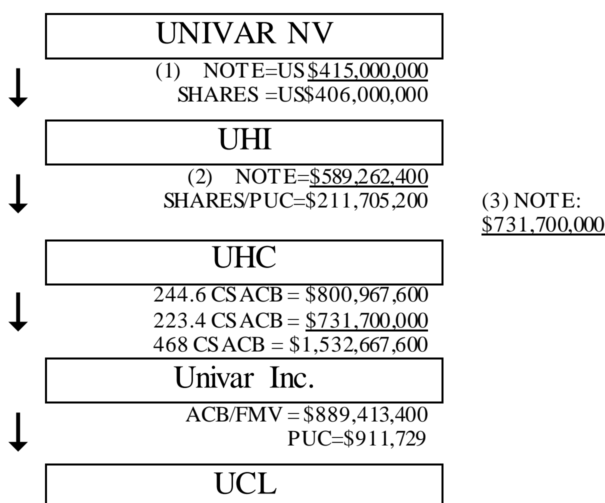
18. On October 18, 2007, the following transactions were undertaken:

   i. Univar NV sold 244.6 of the common shares of Univar Inc. to UHI in consideration for a promissory note having a principle *(sic)* amount of US$415,000,000 and common shares (**CS**) with a FMV of US$406,000,000 for a total consideration of US$821,000,000 ($800,967,600).

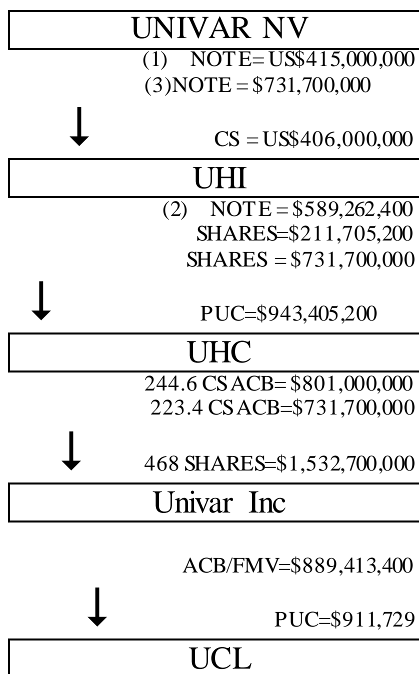
   ii. The appellant UHC then purchased the 244.6 shares of Univar Inc. that UHI had acquired from Univar NV plus the remaining 223.4 shares of Univar Inc. held by Univar NV in exchange for promissory notes and UHC shares as follows:

Number of shares of Univar Inc.	223.4	244.6
From:	Univar NV	UHI
In Exchange for:		
Notes Payable	$731,700,000	$589,262,400
UHC shares		$211,705,200
	$731,700,000	$800,967,600

The structure was then as follows:



iii. UHI assumed the $731,700,000 promissory note obligation issued by the appellant UHC to Univar NV by subscribing for $731,700,000 additional common shares of the appellant UHC. As a result the appellant UHC had outstanding common shares held by UHI with PUC of $943,405,200 ($211,705,200 + $731,700,000) and debt of $589,262,400 depicted as follows:

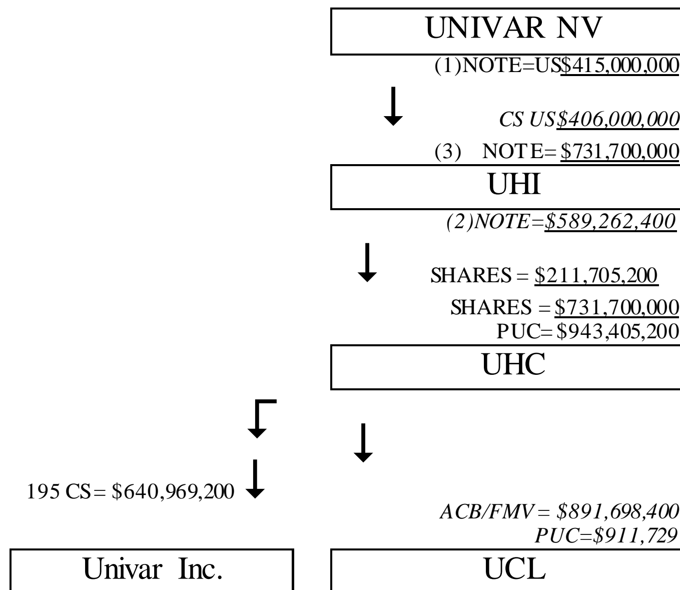


iv. Univar Inc. then redeemed 273 of its 468 total common shares held by the appellant UHC and paid the redemption proceeds ($891,698,400) by

delivering all 627 of the common shares of UCL to the appellant UHC at fair market value. The transaction was reported as follows:

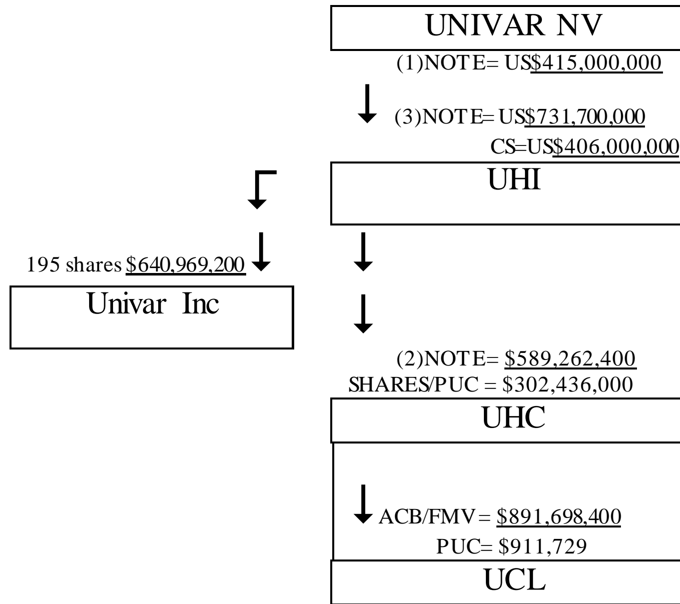
	per T2062 Form
Proceeds of disposition	$891,698,400
Adjusted cost base	$889,413,400
Capital gain	$2,285,000[2]
Article XIII of Canada-US convention	
Exemption	$2,285,000
Net capital gain	nil

The structure became:

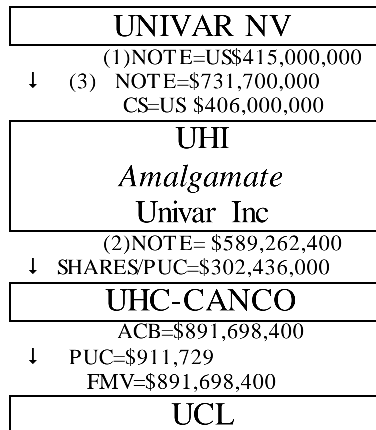


v. The appellant UHC then authorized the distribution of 195 common shares of Univar Inc. to UHI as a return of capital in the amount of $640,969,200 and effected the reduction by delivering those shares. As a result the PUC of the common shares of the appellant UHC held by UHI was reduced to $302,436,000. The structure became:

[2] This gain was attributable to a fluctuation in foreign exchange rates.



19. On October 19, 2007 Univar Inc. and UHI amalgamated to form Univar Inc. The result was as follows:



THE ASSESSMENT

20. On February 18, 2013, the Minister of National Revenue (**Minister**) assessed the appellant's 2007 taxation year, relying on the general anti-avoidance rule (**GAAR**) in section 245 of the *Income Tax Act* (Canada) (**Act**) to assess Part XIII tax on the issuance of the $589,262,400 note payable made by the appellant UHC to UHI and to decrease the PUC of the appellant's shares from $302,436,000 to $911,729.

21. The Minister relied on the GAAR on the basis that:

(i) a series of transactions was undertaken that included transactions not undertaken for *bona fide* purposes other than to obtain the tax benefit of a tax-free return of amounts in excess of the capital contributed to UCL a Canadian corporation through its indirect non-arm's length transfer to another Canadian corporation, and that

(ii) such transactions resulted in a circumvention of subsection 212.1 of the *Act* and resulted in a misuse of the provision and resulted directly or indirectly in an abuse having regard to the provisions of the Act as a whole.

22. The appellant admits that there was a "tax benefit" in this case, specifically the avoidance of Part XIII tax applicable on the distribution of $589,262,400 as well as the increase in the PUC; and that there was an "avoidance transaction" as that term is defined in subsection 245(3) of the Act.

Schedule A

No.	Description	Date
1.	Non-Residence Tax Notice of Reassessment issued to Univar Holdco Canada ULC	Feb. 28, 2013
2.	T2062 Request by a non-resident of Canada for a certificate of compliance related to the disposition of taxable Canadian property, vendor: Univar Inc., Purchaser Univar Holdco Canada ULC with attachment	Oct. 19, 2007
3.	T2062 Request by a non-resident of Canada for a certificate of compliance related to the disposition of taxable Canadian property, vendor: Univar North America Corp., Purchaser: Univar Inc.	Oct. 19, 2007
4.	"CVC Capital Partners to Absorb Univar" (July 9, 2007) Forbes. "CVC Makes $2B Play for Univar" (July 9, 2007) Newser. "CVC Capital to buy Univar for $2.1 bln" (July 9, 2007) Marketwatch.	July 9, 2007
5.	Retainer letter from Deloitte & Touche LLP to The Directors of CVC Capital Partners Limited and Ulysses Luxembourg Sarl	Sept. 6, 2007
6.	Project Monaco Tax Structure Memorandum, Final Report dated October 11, 2007	Oct. 11, 2007
7.	*Articles of Incorporation of Univar Canada Ltd.* Industrial Materials Ltd. (Aug. 10, 1950) Certificate of Name Change (Dec. 15, 1980) Certificate of Name Change (Apr. 2, 2001) Certificate of Name Change (July 2, 2002) Certificate of Name Change (Mar. 1, 1978) Certificate of Amalgamation (Sept. 1, 2007)	
8.	*Certificate of Incorporation of UI* (formerly Pakhoed Holding USA Inc) Pakhoed Holding USA Inc. (November 20, 1974) Certification State of Delaware (November 21, 1974) Pakhoed USA Inc. (January 27, 1975) Certification State of Delaware (January 29, 1975) Vopak Americas Inc. (December 23, 1999) Certification State of Delaware (March 22, 2000) Univar Americas Inc. (July 1, 2002) Certification State of Delaware (July 9, 2002) Univar Inc. (October 6, 2002) Certification State of Delaware (December 19, 2002)	Nov. 20, 1974 various
9.	Articles of Incorporation Univar Holdco Canada ULC	Sept. 21, 2007

10.	Articles of Incorporation of UNAC (formerly New Univar Corporation)	Oct. 24, 1995
11.	Special Resolution of the Shareholder of Univar Canada Ltd. (continuation to Alberta)	Oct 5, 2007
12.	Certificate of Continuance Univar Canada Ltd. from BC into Alberta	October 11, 2007
13.	Certificate of Ownership and Merger of Univar North American Corp. into Univar Inc.	Oct. 12, 2007
14.	Articles of Merger Univar North America Corp. into Univar Inc.	Oct. 12, 2007
15.	Certificate of Amendment of Amended and Restated Certificate of Incorporation of Univar Inc.	March 7, 2008
16.	Resolution of the directors of Univar Canada Ltd. between Univar North America Corp and Univar Inc. approving transfer of 627 common shares from Univar North America Corp. to Univar Inc.	Oct. 12, 2007
17.	Resolution of the Directors of Univar Canada Ltd. re: transfer of 627 common shares from Univar Inc. to Univar Holdco Canada ULC	Oct. 18, 2007
18.	Notice and Receipt of share redemption between Univar Holdco Canada ULC and Univar Inc.	Oct. 18, 2007
19.	Share Purchase Agreement between Univar NV (vendor) and Univar Holdco Canada ULC (Purchaser) Schedule A. Description of shares – 223.4 common stock of Univar Inc. Schedule B Form of Promissory Note USD $750,000,00 UHC agrees to pay Univar NV	Oct. 18, 2007
20.	Share Purchase Agreement between Univar Holdco Inc. (vendor) and Univar Holdco Canada ULC (purchaser) Schedule A, description of shares – 244.6 common stock of Univar Inc. Schedule B form of Promissory Note – CAD$589,262,400 UHC agrees to pay UHI.	Oct. 18, 2007
21.	Resolutions of the Directors of Univar Holdco Canada ULC, re: replacement share certificate issued in the name of Univar Holdco Inc. (943,405,201 common shares)	Oct. 19, 2007
22.	Resolution of the Directors of Univar Holdco Canada ULC, re: 223.4 common shares of Univar Inc. and note US$750,000,000	October 2007
23.	Resolutions of the Directors of Univar Holdco Canada ULC recognizing debt to Univar NV and allowing to issue new promissory note directly to Univar Holdco Inc. in the amount of $750,000,000	October 2007

24.	Resolutions of the Directors of Univar Holdco Canada ULC, authorizing set off agreement between Univar Holdco Canada ULC and Univar Holdco Inc.	October 2007
25.	Resolution of the Directors of Univar Holdco Canada ULC, re: 244.6 common shares of Univar Inc. and note CAD $589,262,400	October 2007
26.	Resolutions of the Directors of Univar Holdco Canada ULC, re: Univar Holdco Inc. is the sole shareholder of UHC, and PUC CAD$640,969,200	October 2007
27.	Note Purchase Agreement among Ulysses Luxembourg S.A.R.L., Ulysses Financial S.A.R.L., Ulixes Acquisition B.V., Univar Inc. and Goldman Sachs Investments Ltd.	October 11, 2007
28.	$1,100,000,000 ABL Credit Agreement	October 11, 2007
29.	Credit Agreement	October 11, 2007

Schedule B

The parties admit only to the authenticity of the following documents:

1.	Memorandum to the GAAR Committee with taxpayer representations attached	December 14, 2011

CITATION:	2016TCC159
COURT FILE NO.:	2013-2834(IT)G
STYLE OF CAUSE:	UNIVAR HOLDCO CANADA ULC AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 8, 2015
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
DATE OF JUDGMENT:	June 22nd, 2016

APPEARANCES:

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Counsel for the Respondent:	Ronald MacPhee Tamara Watters

COUNSEL OF RECORD:

For the Appellant:

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Firm:	Thorsteinssons LLP

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