Docket: 2005-1424(IT)G

BETWEEN:

CASCADES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on December 11, 2006, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Wilfrid Lefebvre
Counsel for the Respondent:	Marie Bélanger Natalie Goulard

JUDGMENT

The appeal from a determination of loss, the notice of which is dated January 23, 2004, made under subsections 40(3.3), 40(3.4) and 40(3.5) of the *Income Tax Act* (ITA) for the 2000 taxation year is allowed, with costs, on the basis that the appellant was entitled to claim a capital loss of $15,941,608 during its 2000 taxation year, as this loss is not deemed to be nil pursuant to subsection 40(3.4) of the ITA.

Signed at Ottawa, Canada, this 6th day of December 2007.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 22nd day of January 2008.

Erich Klein, Revisor

Citation: 2007TCC730
Date: 20071206
Docket: 2005-1424(IT)G

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CASCADES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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REASONS FOR JUDGMENT

Lamarre J.

[1] The appellant is challenging a determination of loss, the notice of which is dated January 23, 2004, whereby the Minister of National Revenue (the Minister) reduced the capital loss claimed by the appellant for the 2000 taxation year by $15,941,608. The Minister deemed that loss to be nil under subsection 40(3.4) of the *Income Tax Act* (ITA).

Agreed Statement of Facts

[2] The parties filed an Agreed Statement of Facts, which reads as follows:

> [TRANSLATION]
>
> 1. The Appellant is a company incorporated under Part 1A of the *Companies Act* and a taxable Canadian corporation within the meaning of the Income Tax Act (the Act).
>
> 2. At the end of May 2000, the Appellant held 71.1% of the common shares of Les Industries Paperboard International Inc. (PII), a corporation whose shares are traded on the Toronto Stock Exchange (TSE).
>
> 3. The adjusted cost base of the PII shares held by the Appellant was at that time $68,783,154 and their fair market value was $52,841,546.

4. In June 2000, the Appellant presented a financial restructuring plan aimed at improving its worth on the financial markets and supporting its future growth. The proposed restructuring plan included exchanging all of the common shares in PII held by minority shareholders for new common shares of the Appellant.

   List of documents showing the chronology of the transaction, Schedule A

   Appellant's communiqué dated July 10, 2000, Schedule B

5. On September 8, 2000, 3715965 Canada Inc. was incorporated.

   Certificate of Incorporation and Articles of Incorporation, Schedule C

6. On October 17, 2000, the Appellant, PII, Papiers Perkins Ltée and Rolland Inc. entered into a consolidation agreement.

   Consolidation Agreement, Schedule D

7. On October 17, 2000, PII, 3715965 Canada Inc. and the Appellant entered into a merger agreement.

   Merger Agreement, Schedule E

8. On October 17, 2000, one preferred share of 3715965 Canada Inc. was issued to the Appellant, which thereby became the sole shareholder of 3715965 Canada Inc.

9. On December 5, 2000, the Appellant sold 33,025,966 common shares, namely, all of the shares in PII that it held, to 3715965 Canada Inc. for consideration equal to the fair market value of those shares, thereby creating a capital loss of $15,941,608 (adjusted cost base of $68,783,154 minus the proceeds of disposition of $52,841,546). The consideration received by the Appellant was 33,025,966 common shares of 3715965 Canada Inc.

   Contract of sale of shares entered into on December 5, 2000, Schedule F

10. On December 5, 2000, 3715965 Canada Inc. redeemed the preferred share that it had issued to the Appellant.

Certified true copy of a resolution of the directors of 3715965 Canada Inc., adopted on December 5, 2000, Schedule G.

11. On December 31, 2000, that is, 26 days later, PII and 3715965 Canada Inc. merged. It was a three-way merger, to which subsection 87(9) of the Act applied.

    Merger Certificate and Articles of Merger, Schedule H.

12. In the merger, all of the common shares of PII, other than those held by 3715965 Canada Inc., were exchanged for common shares of the Appellant. The class A and B preferred shares of PII were converted respectively into class A and B preferred shares of the merged corporation, 384894-9 Canada Inc. (PII Fusionco). For each of the common shares it issued to the holders of common shares of PII, the Appellant received one common share of PII Fusionco.

13. Each of the common shares of 3715965 Canada Inc. held by Cascades was converted into a common share of PII Fusionco.

14. The Appellant became the sole shareholder of PII Fusionco (except for the holders of class A and B preferred shares issued at the time of the merger).

15. The Minister of National Revenue (the Minister) reduced the capital loss claimed by the Appellant for its 2000 taxation year by $15,941,608. A Notice of Determination of Loss to that effect was issued on January 23, 2004.

    Notice of Determination of Loss and Form T7W-C, Schedule I

16. The Appellant objected to this Notice of Determination of Loss by notice of objection dated January 29, 2004, and the Minister confirmed the determination by notice of confirmation dated February 21, 2005.

    Notice of objection, Schedule J
    Notice of confirmation, Schedule K

Issue

[3] The issue is whether the appellant was entitled to claim the $15,941,608 loss

immediately in its 2000 taxation year, when all of its shares in Les Industries Paperboard International Inc. (PII) were disposed of in favour of 3715965 Canada Inc. (371), a corporation affiliated with the Appellant within the meaning of section 251.1 of the ITA.

[4] The respondent relied on subsections 40(3.3), 40(3.4) and 40(3.5) of the ITA, the import of which, when they are considered as a whole, is that the stop-loss rules should apply. These rules are aimed at preventing a corporation (in this case, the appellant) from recognizing a capital loss on capital property for as long as the property or identical property (the substituted property) is held by the transferor (the appellant) or a person affiliated with the transferor. The respondent relied on paragraph 40(3.5)(*c*) to argue that the corporation formed on the merger of PII and 371, namely 384894-9 Canada Inc. (PII Fusionco), was deemed to hold the shares of PII (sold by the appellant and giving rise to the loss at issue) as long as it was affiliated with the appellant. The presumption in paragraph 40(3.5)(*c*) of the ITA is that when a transferor (the appellant) disposes of a share of the capital stock of a corporation (PII) that is then merged with one or more other corporations (371), the corporation formed on the merger (PII Fusionco) is deemed to own the share as long as it is affiliated with the transferor. If such was the case, the appellant's loss would be deemed to be nil under subsections 40(3.3) and 40(3.4) of the ITA and would be suspended until the property in question was no longer the property of the transferor (the appellant) or a person affiliated with the transferor.

[5] The appellant argues that the presumption in paragraph 40(3.5)(*c*) does not apply in this case, and that, as a result, one of the conditions in subsection 40(3.3)—in particular that set out in paragraph 40(3.3)(*c*)—not having been fulfilled, subsection 40(3.4), which provides for the suspension of the loss where all the conditions of subsection 40(3.3) are met, cannot apply. According to the appellant, the loss in question is not nil under paragraph 40(3.4)(*a*).

Statutory provisions

***Income Tax Act*, R.S.C. 1985, Chapter 1 (5th Supp.), as amended**	***Loi de l'impôt sur le revenu*, L.R.C. 1985, chapitre 1 (5e Suppl.), telle que modifiée**
40(3.3) When subsection (3.4) applies -- Subsection (3.4) applies when	**40(3.3) Application du par. (3.4) --** Le paragraphe (3.4) s'applique lorsque les conditions suivantes sont réunies :
(*a*) a corporation, trust or partnership	*a*) une société, une fiducie ou une

(in this subsection and subsection (3.4) referred to as the "transferor") disposes of a particular capital property (other than depreciable property of a prescribed class) otherwise than in a disposition described in any of paragraphs (*c*) to (*g*) of the definition "superficial loss" in section 54;
(*b*) during the period that begins 30 days before and ends 30 days after the disposition, the transferor or a person affiliated with the transferor acquires a property (in this subsection and subsection (3.4) referred to as the "substituted property") that is, or is identical to, the particular property; and
(*c*) at the end of the period, the transferor or a person affiliated with the transferor owns the substituted property.

société de personnes (appelées « cédant » au présent paragraphe et au paragraphe (3.4)) dispose d'une immobilisation, sauf un bien amortissable d'une catégorie prescrite, en dehors du cadre d'une disposition visée à l'un des alinéas *c*) à *g*) de la définition de « perte apparente » à l'article 54;
b) au cours de la période qui commence 30 jours avant la disposition et se termine 30 jours après cette disposition, le cédant ou une personne affiliée à celui-ci acquiert le même bien ou un bien identique (appelés « bien de remplacement » au présent paragraphe et au paragraphe (3.4));
c) à la fin de cette période, le cédant ou une personne affiliée à celui-ci est propriétaire du bien de remplacement.

(3.4) Loss on certain properties -- If this subsection applies because of subsection (3.3) to a disposition of a particular property,

(*a*) the transferor's loss, if any, from the disposition is deemed to be nil, and

(3.4) Perte sur certains biens -- Lorsque le présent paragraphe s'applique par l'effet du paragraphe (3.3) à la disposition d'un bien, les présomptions suivantes s'appliquent :

a) la perte du cédant résultant de la disposition est réputée nulle;

(*b*) the amount of the transferor's loss, if any, from the disposition (determined without reference to paragraph (2)(*g*) and this subsection) is deemed to be a loss of the transferor from a disposition of the particular property at the time that is immediately before the first time, after the disposition,

(i) at which a 30-day period begins throughout which neither the transferor nor a person

b) la perte du cédant résultant de la disposition, déterminée compte non tenu de l'alinéa (2)*g*) et du présent paragraphe, est réputée être sa perte résultant d'une disposition du bien effectuée immédiatement avant le premier en date des moments suivants qui est postérieur à la disposition :

(i) le début d'une période de 30 jours tout au long de laquelle ni le cédant, ni une personne

affiliated with the transferor owns

(A) the substituted property, or

(B) a property that is identical to the substituted property and that was acquired after the day that is 31 days before the period begins,

(ii) at which the property would, if it were owned by the transferor, be deemed by section 128.1 or subsection 149(10) to have been disposed of by the transferor,

(iii) that is immediately before control of the transferor is acquired by a person or group of persons, where the transferor is a corporation,

(iv) at which the transferor or a person affiliated with the transferor is deemed by section 50 to have disposed of the property, where the substituted property is a debt or a share of the capital stock of a corporation, or

(v) at which the winding-up of the transferor begins (other than a winding-up to which subsection 88(1) applies), where the transferor is a corporation,

and for the purpose of paragraph (3.4)(*b*), where a partnership otherwise ceases to exist at any time after the disposition, the partnership is deemed not to have ceased to exist, and each person who was a member of the partnership immediately before the partnership would, but for this subsection, have ceased to exist is deemed to remain a member of the partnership, until the time that is

affiliée à celui-ci n'est propriétaire :

(A) du bien de remplacement,

(B) d'un bien qui est identique au bien de remplacement et qui a été acquis après le jour qui précède de 31 jours le début de la période,

(ii) le moment auquel le cédant serait réputé, par l'article 128.1 ou le paragraphe 149(10), avoir disposé de l'immobilisation s'il en était propriétaire,

(iii) si le cédant est une société, le moment immédiatement avant l'acquisition du contrôle du cédant par une personne ou un groupe de personnes,

(iv) si le bien de remplacement est une dette ou une action du capital-actions d'une société, le moment auquel le cédant ou une personne affiliée à celui-ci est réputé, par l'article 50, avoir disposé du bien,

(v) si le cédant est une société, le moment auquel sa liquidation commence, sauf s'il s'agit d'une liquidation à laquelle s'applique le paragraphe 88(1);

c) pour l'application de l'alinéa *b*), la société de personnes qui cesse d'exister après la disposition est réputée ne cesser d'exister qu'au moment donné immédiatement après le premier en date des moments visés aux sous-alinéas *b*)(i) à (v), et chaque personne qui en était un associé immédiatement avant le moment où elle aurait cessé d'exister,

immediately after the first time described in subparagraphs (*b*)(i) to (v).

(3.5) Deemed identical property -- For the purposes of subsections (3.3) and (3.4),

(*a*) a right to acquire a property (other than a right, as security only, derived from a mortgage, agreement for sale or similar obligation) is deemed to be a property that is identical to the property;

(*b*) a share of the capital stock of a corporation that is acquired in exchange for another share in a transaction to which section 51, 85.1, 86 or 87 applies is deemed to be a property that is identical to the other share;

(*c*) where subsections (3.3) and (3.4) apply to the disposition by a transferor of a share of the capital stock of a corporation, and after the disposition the corporation is merged with one or more other corporations, otherwise than in a transaction in respect of which paragraph (*b*) applies to the share, or is wound up in a winding-up to which subsection 88(1) applies, the corporation formed on the merger or the parent (within the meaning assigned by subsection 88(1)), as the case may be, is deemed to own the share while it is affiliated with the transferor; and

(*d*) where subsections (3.3) and (3.4) apply to the disposition by a transferor of a share of the capital stock of a corporation, and after the disposition the share is redeemed, acquired or cancelled by the corporation, otherwise than in a

n'eût été le présent paragraphe, est réputée le demeurer jusqu'au moment donné.

(3.5) Bien identique présumé -- Les présomptions suivantes s'appliquent dans le cadre des paragraphes (3.3) et (3.4) :

a) le droit d'acquérir un bien (sauf le droit servant de garantie seulement et découlant d'une hypothèque, d'une convention de vente ou d'un titre semblable) est réputé être un bien qui est identique au bien;

b) l'action du capital-actions d'une société qui est acquise en échange d'une autre action dans le cadre d'une opération à laquelle s'appliquent les articles 51, 85.1, 86 ou 87 est réputée être un bien qui est identique à l'autre action;

c) lorsque les paragraphes (3.3) et (3.4) s'appliquent à la disposition par un cédant d'une action du capital-actions d'une société et que, après cette disposition, la société est fusionnée avec une ou plusieurs autres sociétés en dehors du cadre d'une opération relativement à laquelle l'alinéa *b*) s'applique à l'action ou fait l'objet d'une liquidation à laquelle s'applique le paragraphe 88(1), la société issue de la fusion ou la société mère, au sens de ce paragraphe, est réputée être propriétaire de l'action tant qu'elle est affiliée au cédant;

d) lorsque les paragraphes (3.3) et (3.4) s'appliquent à la disposition par un cédant d'une action du capital-actions d'une société et que, après cette disposition, l'action est rachetée, acquise ou annulée par la société en dehors du cadre d'une

transaction in respect of which paragraph (*b*) or (*c*) applies to the share, the transferor is deemed to own the share while the corporation is affiliated with the transferor.	opération relativement à laquelle les alinéas *b*) ou *c*) s'appliquent à l'action, le cédant est réputé être propriétaire de l'action tant que la société lui est affiliée.
. . .	. . .
87(2*g*.4) Superficial losses — capital property --	**87(2)*g*.4) Perte apparente — immobilisation --**
for the purpose of applying paragraph 40(3.5)(*c*) in respect of any share that was acquired by a predecessor corporation, the new corporation is deemed to be the same corporation as, and a continuation of, each predecessor corporation;	pour l'application de l'alinéa 40(3.5)*c*) relativement à une action acquise par une société remplacée, la nouvelle société est réputée être la même société que chaque société remplacée et en être la continuation;
[Emphasis added.]	[Je souligne.]

Appellant's arguments

[6] According to the appellant, the wording of the preamble to subsection 40(3.5) and of paragraph 40(3.5)(*c*) is clear enough that the presumption of ownership of the shares set out in paragraph 40(3.5)(*c*) can only be relied on if subsections 40(3.3) and 40(3.4) apply first. In this case, however, for subsection 40(3.4) to apply so that the loss is deemed nil, the three conditions set out in subsection 40(3.3) must first be met. The appellant acknowledges that paragraphs 40(3.3)(*a*) and (*b*) apply since it (as transferor) disposed of capital property (its shares in PII) (paragraph 40(3.3)(*a*)) and, during the period commencing 30 days before and ending 30 days after the disposition, a person affiliated with the transferor (371) acquired the same property or identical property (substituted property) (paragraph 40(3.3)(*b*)). However, according to the appellant, the condition set out in paragraph 40(3.3)(*c*) was not met. In order for that provision to apply, at the end of the 61-day period specified in paragraph 40(3.3)(*b*), the transferor or an affiliated person must own the substituted property. The substituted property in this case would be the shares in PII. But, at the end of the 61-day period, these shares no longer existed, since 371, which held the shares, and PII were merged, thus eliminating the shares of PII. Since these shares no longer existed at the end of the 61-day period, it can no longer be claimed that the transferor (the appellant) or an affiliated person (371) or even PII Fusionco owned the substituted property because, again, this property no longer existed. The appellant therefore contends that the conditions of subsection 40(3.3) were not all met. This being so, it cannot be argued that subsection 40(3.4) applies to deem the

loss to be nil, since subsection 40(3.4) can only apply because of subsection 40(3.3) to a disposition of a particular property ("*le présent paragraphe* [40(3.4)] *s'applique par l'effet du paragraphe (3.3) à la disposition d'un bien*", according to the French version).

[7] According to the appellant, if Parliament had intended that the presumption of ownership in paragraph 40(3.5)(*c*) be used first to determine whether subsection 40(3.3) applies, it would have so indicated more specifically, or it could have omitted any reference to the application of subsections 40(3.3) and (3.4) as it did in paragraphs 40(3.5)(*a*) and (*b*), to expand the concept of identical property. According to the appellant, paragraphs 40(3.5)(*c*) and (*d*) have to do with the rule of continuity. So if, after the 61-day period, events such as a merger or a winding up occur, the rule of continuity applies in order to preserve the loss until the property is no longer held by the transferor or a person affiliated with the transferor. The appellant argues that if the merger takes place within the 61-day period, as was the case here, Parliament allows the transferor to recognize its loss. According to the appellant, Parliament deemed it appropriate to adopt a 61-day rule. The question of whether or not it is justified from an economic standpoint is not relevant.

[8] Moreover, a parallel rule for superficial losses is found in section 54 of the ITA. A superficial loss is defined as follows:

Section 54: Definitions	**Article 54 : Définitions**
"superficial loss" of a taxpayer means the taxpayer's loss from the disposition of a particular property where	« perte apparente » Perte d'un contribuable résultant de la disposition d'un bien, dans le cas où, à la fois :
(*a*) during the period that begins 30 days before and ends 30 days after the disposition, the taxpayer or a person affiliated with the taxpayer acquires a property (in this definition referred to as the "substituted property") that is, or is identical to, the particular property, and	*a*) au cours de la période qui commence 30 jours avant la disposition et se termine 30 jours après cette disposition, le contribuable ou une personne affiliée à celui-ci acquiert le même bien ou un bien identique (appelés «bien de remplacement» à la présente définition);
(*b*) at the end of that period, the taxpayer or a person affiliated with the taxpayer owns or had a right to acquire the substituted property,	*b*) à la fin de la période visée à l'alinéa *a*), le contribuable ou une personne affiliée à celui-ci est propriétaire du bien de remplacement ou a le droit de l'acquérir.

except where the disposition was

(*c*) a disposition deemed by paragraph 33.1(11)(*a*), subsection 45(1), section 48 as it read in its application before 1993, section 50 or 70, subsection 104(4), section 128.1, paragraph 132.2(1)(*f*), subsection 138(11.3) or 142.5(2), paragraph 142.6(1)(*b*) or subsection 144(4.1) or 144(4.2) or 149(10) to have been made,

(*d*) the expiry of an option,

(*e*) a disposition to which paragraph 40(2)(*e*.1) applies,

(*f*) a disposition by a corporation the control of which was acquired by a person or group of persons within 30 days after the disposition,

(*g*) a disposition by a person that, within 30 days after the disposition, became or ceased to be exempt from tax under this Part on its taxable income, or

(*h*) a disposition to which subsection 40(3.4) or 69(5) applies,

and, for the purpose of this definition, a right to acquire a property (other than a right, as security only, derived from a mortgage, agreement for sale or similar obligation) is deemed to be a property that is identical to the property.

Toutefois, une perte n'est pas une perte apparente si la disposition qui y a donné lieu est, selon le cas :

c) une disposition réputée avoir été effectuée par l'alinéa 33.1(11)*a*), le paragraphe 45(1), l'article 48, en son état avant 1993, les articles 50 ou 70, le paragraphe 104(4), l'article 128.1, l'alinéa 132.2(1)*f*), les paragraphes 138(11.3) ou 142.5(2), l'alinéa 142.6(1)*b*) ou les paragraphes 144(4.1) ou (4.2) ou 149(10);

d) l'expiration d'une option;

e) une disposition à laquelle s'applique l'alinéa 40(2) *e*.1);

f) une disposition effectuée par une société dont le contrôle a été acquis par une personne ou un groupe de personnes dans les 30 jours suivant la disposition;

g) une disposition effectuée par une personne qui, dans les 30 jours suivant la disposition, est devenue exonérée de l'impôt prévu par la présente partie sur son revenu imposable ou a cessé de l'être;

h) une disposition à laquelle s'appliquent les paragraphes 40(3.4) ou 69(5).

Pour l'application de la présente définition, le droit d'acquérir un bien (sauf le droit servant de garantie seulement et découlant d'une hypothèque, d'une convention de vente ou d'un titre semblable) est réputé être un bien qui est identique au bien.

[9] In the case of a superficial loss, if a taxpayer disposes of property and the same or identical property (substituted property) is acquired by that taxpayer or a person affiliated with that taxpayer during the period commencing 30 days prior to the disposition and ending 30 days after the disposition, and the taxpayer or a

person affiliated with the taxpayer owns the substituted property at the end of this 61-day period, or is entitled to acquire it, the loss will be a superficial loss deemed to be nil under subparagraph 40(2)(*g*)(i) and will be carried over, increasing the cost of the newly acquired property by virtue of paragraph 53(1)(*f*) of the ITA. However, if the property is newly acquired after the 61-day period, the taxpayer will be entitled to claim the loss, as it will not be deemed to be a superficial loss.

[10] Moreover, the fact that the property remains within the group of affiliated corporations does not in itself, according to the appellant, prevent the realization of the loss (reference was made to *The Queen v. Donohue Forest Products Inc.*, 2002 FCA 422, paragraph 22, where it is stated that nothing in the ITA bars a taxpayer from realizing a loss on a corporation's securities sold to third parties, even if a significant portion of the assets to which the loss may be attributed remains within the group of corporations; for example, in the case of a winding up, under subsections 88(2) and 69(5) of the ITA).

[11] Lastly, the appellant pointed out that in *S.T.B. Holdings Ltd. v. The Queen*, 2002 DTC 1254 (TCC), conf. 2002 FCA 386, the Tax Court of Canada, at paragraph 29, in analyzing the expression “following the application of this section” found in subsection 245(7) of the ITA, analyzed the word “applied”. Judge Campbell Miller of this Court stated the following at paragraph 29:

> [29] First, to further flush out the ordinary meaning of subsection 245(7) it is necessary to describe the different interpretations put upon the phrases “following the application of this section” and “involving the application of this section”. Does the ordinary meaning of “following the application of this section” suggest the GAAR provisions have already been applied? What is meant by “applied”? The Applicant argues that “application” means just the process of contemplation by the Minister and discussion with the taxpayer prior to assessment. I fail to see how such musing and communications constitute application. The Minister may consider GAAR, may talk to the taxpayer about GAAR and then may determine not to apply GAAR. This cannot in the ordinary sense be considered the application of the section. The section, as indicated previously, is an assessing tool for the Minister; it follows that an application of the section is only complete upon assessment. That being the case, “following the application” on an ordinary construction means following an assessment involving GAAR. Tax consequences to any person, following the application of this section, must then necessarily refer to tax consequences other than those in the original application of GAAR; it must refer to a subsequent application. It precludes a taxpayer from self-assessing by applying GAAR.

[12] Thus, when one reads at paragraph 40(3.5)(*c*): "where subsections (3.3) and (3.4) apply to the disposition by a transferor of a share of the capital stock of a corporation ", it is to be understood that subsections (3.3) and (3.4) already apply before paragraph 40(3.5)(*c*) can be applied. According to the appellant, this is also what is to be understood from the technical notes of December 8, 1997 regarding subsection 40(3.5), which read as follows:

Technical Notes, 40(3.5)	**Notes explicatives ---** **Loi de l'impôt sur le revenu –** **Notes explicatives, 40(3.5)**
Dec. 1997 TN (technical): New subsection 40(3.5) sets out four special rules that apply for the purposes of the loss deferral rule in new subsection 40(3.4).	**8 décembre 1997, NE**: Le nouveau paragraphe 40(3.5) contient quatre règles spéciales qui s'appliquent dans le cadre de la règle sur le report de pertes énoncée au nouveau paragraphe 40(3.4).
First, paragraph 40(3.5)(a) provides that a right to acquire a property (other than a right that is security for a debt or similar obligation) is treated as being identical to the property. Second, paragraph 40(3.5)(b) treats a share that is acquired in exchange for another share under any of sections 51, 85.1, 86 or 87 as identical to that other share.	Premièrement, l'alinéa 40(3.5)a) prévoit que le droit d'acquérir un bien (sauf le droit servant de garantie de dette ou d'un titre semblable) est réputé être identique au bien en question. Deuxièmement, l'alinéa 40(3.5)b) prévoit qu'une action acquise en échange d'une autre action en vertu de l'un des articles 51, 85.1, 86 ou 87 de la Loi est identique à cette autre action.
Third, paragraph 40(3.5)(c) clarifies the result where the property that gives rise to a deferred loss under new subsection 40(3.4) is a share of a corporation that is subsequently merged with one or more other corporations (except where the preceding paragraph already applies to the share) or is wound up into its parent corporation. In such a case, the surviving corporation -- that is, the corporation formed on the merger or the parent corporation -- is	Troisièmement, l'alinéa 40(3.5)c) porte sur ce qu'il advient lorsque le bien qui donne naissance à une perte reportée en vertu du nouveau paragraphe 40(3.4) est une action d'une société qui, par la suite, est fusionnée avec une ou plusieurs autres sociétés (sauf dans le cas où l'alinéa précédent s'applique déjà à l'action) ou fait l'objet d'une liquidation par la société mère. En pareil cas, l'action est réputée continuer d'appartenir à la société survivante, à savoir la société

treated as continuing to own the share as long as that surviving corporation is affiliated with the transferor.	issue de la fusion ou la société mère, tant que celle-ci est affiliée au cédant.
[Emphasis added.]	[Je souligne.]

[13] The appellant concluded that from a textual, contextual and tax-policy standpoint, subsections 40(3.3), (3.4) and (3.5) do not, given the circumstances of this case, prevent the loss from being allowed in the same year it was incurred, namely in 2000.

Respondent's argument

[14] The respondent, referring to the principles of interpretation enunciated in the case law, argued that subsections 40(3.3), 40(3.4) and 40(3.5) must be read together to determine their meaning. These statutory provisions deal with specific stop-loss rules. Thus, according to the respondent, subsection 40(3.3) establishes the conditions of application; subsection 40(3.4) states the actual rule that applies (suspension of the loss); and subsection 40(3.5) was adopted to define substituted property as such, as well as the concept of ownership at a given time. In the respondent's submission, subsection 40(3.5) is relevant for the purposes of determining whether the conditions laid down in subsection 40(3.3) have been met. Thus, the expression "where subsections (3.3) and (3.4) apply to the disposition by a transferor of a share of the capital stock of a corporation", found in paragraph 40(3.5)(*c*), must be read, according to the respondent, as stating: "where subsections (3.3) and (3.4) [related to or concern] the disposition by a transferor of a share". The respondent accordingly argues that this must be taken to mean that where one seeks to apply the rules set out in subsections (3.3) and (3.4) in a specific sale of shares, one must refer to paragraph (3.5)(*c*) to ascertain whether condition (*c*) of subsection (3.3) applies. Thus, according to the respondent, if there is a merger after the disposition of the shares, whether this merger took place within or outside the 61-day period set out in paragraph 40(3.3)(*b*), the corporation formed from the merger (PII Fusionco) is deemed pursuant to paragraph 40(3.3)(*c*) to own the shares disposed of at the end of the period in question. Under this presumption, even if the substituted property no longer existed at the end of the 61-day period, PII Fusionco is deemed to own it. The loss from the disposition of the PII shares will be deemed to be nil under subsection 40(3.4) as long as it remains within the group of associated corporations.

[15] According to the respondent, the introductory words of subsection 40(3.5), namely, "[f]or the purposes of subsections (3.3) and (3.4)", and in French, "[l]es présomptions suivantes [*a*) à *d*)] s'appliquent dans le cadre des paragraphes (3.3) et (3.4)", allow of the interpretation she gives paragraph 40(3.5)(*c*). All the more so, argues the respondent, as, if the conditions of subsection 40(3.3) had to be met before the presumption in paragraph 40(3.5)(*c*) could be considered, this presumption would never be relevant for the purposes of subsection 40(3.3). On the respondent's interpretation, the presumptions of subsection 40(3.5) are, in the case of paragraphs (*c*) and (*d*), an extension of the concept of ownership of identical property. If Parliament had wished to limit this presumption it would have clearly so indicated. This it did not do. Parliament uses the presumptions in subsection 40(3.5) to define the concepts of ownership and substituted property found at subsection 40(3.3). This interpretation would be consistent with the purpose of the stop-loss rules, namely, that the loss is suspended until it becomes a true economic loss caused by the disposition of property outside a group of associated corporations. According to the respondent, there would be no reason for Parliament to allow this basic rule to be circumvented through the loss being recognized where a merger takes place within the 61-day period, but refused if the merger takes place after the 61-day period. That would make it too easy to circumvent the rule.

Analysis

[16] The principles of interpretation that apply to tax laws were summarized once again by the Supreme Court of Canada in *Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada*, 2006 SCC 46, [2006] 2 S.C.R. 447. LeBel J. restated them at paragraphs 24 to 29:

> D. *Principles of Interpretation Applicable to Tax Statutes*
>
> 24 This Court has produced a considerable body of case law on the interpretation of tax statutes. I neither intend nor need to fully review it. I will focus on a few key principles which appear to flow from it, and on their development.
>
> 25 The jurisprudence of this Court is grounded in the modern approach to statutory interpretation. Since *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, the Court has held that the strict approach to the interpretation of tax statutes is no longer appropriate and that the modern approach should also apply to such statutes:

> [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act…

(E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Stubart*, at p. 578, *per* Estey J.; *Ludco Enterprises Ltd. v. Canada*, [2001] 2 S.C.R. 1082, 2001 SCC 62, at para. 36, *per* Iacobucci J.)

26 Despite this endorsement of the modern approach, the particular nature of tax statutes and the peculiarities of their often complex structures explain a continuing emphasis on the need to carefully consider the actual words of the *ITA*, so that taxpayers can safely rely on them when conducting business and arranging their tax affairs. Broad considerations of statutory purpose should not be allowed to displace the specific language used by Parliament (*Ludco*, at paras. 38-39).

27 The Court recently reasserted the key principles governing the interpretation of tax statutes — although in the context of the "general anti-avoidance rule", or "GAAR" — in its judgments in *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, and *Mathew v. Canada*, [2005] 2 S.C.R. 643, 2005 SCC 55. On the one hand, the Court acknowledged the continuing relevance of a textual interpretation of such statutes. On the other hand, it emphasized the importance of reading their provisions in context, that is, within the overall scheme of the legislation, as required by the modern approach.

28 In their joint reasons in *Canada Trustco*, the Chief Justice and Major J. stated at the outset that the modern approach applies to the interpretation of tax statutes. Words are to be read in context, in light of the statute as a whole, that is, always keeping in mind the words of its other provisions:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. [para. 10]

29 The Chief Justice and Major J. then addressed the underlying tension between textual interpretation, taxpayers' expectations as to the reliability of their tax and business arrangements, the legislature's objectives and the purposes of specific provisions or of the statute as a whole:

> As a result of the Duke of Westminster principle (*Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1 (H.L.)) that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable, Canadian tax legislation received a strict interpretation in an era of more literal statutory interpretation than the present. There is no doubt today that all statutes, including the *Income Tax Act*, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers

> would rely on such provisions to achieve the result they prescribe.
> [para. 11]

(See also *Mathew*, at paras. 42-43.)

[Emphasis added.]

[17] Moreover, Binnie J., in the same decision, noted that, "[i]ssues of interpretation can be approached with a degree of confidence that in the various detailed provisions of the Act [ITA], Parliament can be taken at its word (or will quickly introduce an amendment if this turns out not to be the case)" (paragraph 73). Analyzing the purpose of the ITA, Binnie J. also referred to the observations by McLachlin J. in *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, at paragraph 43:

> . . . courts must therefore be cautious before finding within the clear provisions of the Act an unexpressed legislative intention . . . . Finding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act. [para. 43]

[18] It is also worth citing *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at paragraph 12:

> 12 The provisions of the *Income Tax Act* must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently. As stated at para. 45 of *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622:
>
>> [A]bsent a specific provision to the contrary, it is not the courts' role to prevent taxpayers from relying on the sophisticated structure of their transactions, arranged in such a way that the particular provisions of the Act are met, on the basis that it would be inequitable to those taxpayers who have not chosen to structure their transactions that way.
>
> See also *65302 British Columbia*, at para. 51, *per* Iacobucci J. citing P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (2nd ed. 1997), at pp. 475-76:
>
>> It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be

> qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.
>
> [Emphasis added.]

[19] Moreover, in *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, the Supreme Court of Canada states, at paragraph 45:

> 45 Under the presumption against tautology, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose": see R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159. To the extent that it is possible to do so, courts should avoid adopting interpretations that render any portion of a statute meaningless or redundant: *Hill v. William Hill (Park Lane) Ld.*, [1949] A.C. 530 (H.L.), at p. 546, *per* Viscount Simon.

[20] That being said, how should subsections 40(3.3), (3.4) and (3.5) of the ITA be interpreted?

[21] From the wording of these provisions, it is obvious that the conditions of subsection 40(3.3) must all be met for subsection 40(3.4) to apply. But what of subsection 40(3.5)?

[22] First of all, this provision comes after subsections 40(3.3) and (3.4). At first blush, subsection 40(3.5) is not a prerequisite for the application of subsections 40(3.3) and (3.4). However, according to the introductory words of subsection 40(3.5), the presumptions in paragraphs 40(3.5)(*a*) to (*d*) apply for the purposes of subsections (3.3) and (3.4). If we stop there, the text says that, for subsections (3.3) and (3.4) to apply, the presumptions in subsection (3.5) must be considered. The respondent would thus be correct in saying that all the presumptions in subsection (3.5) must be looked at to see whether they apply in analyzing the conditions to be met under subsection 40(3.3).

[23] However, on reading paragraphs 40(3.5)(*c*) and (*d*), one sees that there is a difference between them and paragraphs 40(3.5)(*a*) and (*b*). Indeed, Parliament specifically states, in paragraphs 40(3.5)(*c*) and (*d*), that the presumptions found in these two paragraphs take effect "where subsections (3.3) and (3.4) apply to the disposition by a transferor of a share of the capital stock of a corporation, and after the disposition the corporation is merged with one or more other corporations [or

the share is redeemed, acquired or cancelled by the corporation in the case of paragraph (3.5)(*d*)]."

[24] If, as argued by the respondent, Parliament had meant "where subsections (3.3) and (3.4) [relate to or concern] the disposition by a transferor of a share of the capital stock of a corporation," in the sense that in all sales of shares paragraphs (3.5)(*c*) and (*d*) must first be referred to in order to ascertain whether the condition set out in paragraph 40(3.3)(*c*) has been met , it should have stated this explicitly. Not only did it not use the terms suggested by the respondent, it took pains to say "where subsections (3.3) and (3.4) apply". Given that it was already stated in the introductory words to subsection (3.5) that the presumptions in that subsection apply "[for] the purposes of subsections (3.3) and (3.4)", it was, contrary to what the respondent argues, no longer necessary to repeat, in paragraphs 40(3.5)(*c*) and (*d*), "where subsections (3.3) and (3.4) apply", if it wanted the presumptions in paragraphs (3.5)(*c*) and (*d*) to apply at all times, as is the case with those in paragraphs (3.5)(*a*) and (*b*).

[25] As stated by the Supreme Court of Canada in *Placer Dome Canada, supra,* "[t]o the extent that it is possible to do so, courts should avoid adopting interpretations that render any portion of a statute meaningless or redundant" (paragraph 45). If we accept the respondent's logic, it seems to me that the expression "where subsections (3.3) and (3.4) apply" used in paragraphs (3.5) (*c*) and (*d*) would be completely redundant given the introductory words to subsection (3.5), which specifically say "[f]or the purposes of subsections (3.3) and (3.4)". Parliament is supposed never to speak in vain. Had it meant what the respondent is suggesting, why would it have been necessary to make a second reference to the application of subsections (3.3) and (3.4) in paragraphs (3.5)(*c*) and (*d*), when those two subsections were already referred to in the introductory words of subsection (3.5)?[1] In the case of the presumptions set out in paragraphs (3.5) (*a*) and (*b*), moreover, Parliament makes no such second reference to subsections (3.3) and (3.4).

[26] In my opinion, the wording of subsection (3.5) shows that Parliament intended to make a distinction in the case of the presumptions set out in paragraphs (3.5)(*c*) and (*d*). It did not mean simply that where shares are sold paragraphs (3.5)(*c*) and (*d*) have to be considered in analyzing the conditions stated

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[1] See an example of the analysis of this theory in a quite different context in *National Bank Life Insurance v. The Queen,* 2006 FCA 161, 2006 CarswellNat 3340, [2006] G.S.T.C. 135 (par. 7).

in subsection (3.3). Parliament meant what it in fact said. Where subsections (3.3) and (3.4) apply, that is, when all the conditions of subsection (3.3) are met such that subsection (3.4) applies to suspend the loss, there will be a presumption of ownership of the shares if there is a merger after disposition thereof. Since there will only be a suspension of the loss if the substituted property still exists at the end of the 61-day period, paragraph 40(3.5)(*c*) gives the transferor the possibility of claiming its loss if there is a merger after the 61-day period, otherwise the entitlement to claim the loss would be lost.

[27] It is perfectly logical, in my opinion, to say that the presumption in paragraph 40(3.5)(*c*) was established specifically to allow the eventual recognition of the loss in the case of a merger after the 61-day period, because otherwise the possibility of claiming this loss would be gone for ever since the property giving rise to the loss no longer exists. If the merger occurs within the 61-day period, there is no reason for the presumption because, since the substituted property no longer exists and is therefore no one's property, the transferor has already had entitlement to the loss. In other words, paragraph 40(3.5)(*c*) specifically addresses cases where the transferor would lose its entitlement to claim the loss if the merger could not, for any number of reasons, take place within the 61-day period.

[28] In my opinion, this may very well be the purpose sought by the legislation. There is a parallel rule for superficial losses that applies to individuals, but in converse fashion. Thus, under this rule, an individual who disposes of property and acquires the same or identical property after a 61-day period will be entitled to the loss, whereas there would be no such entitlement if the acquisition of the substituted property took place within the 61-day period. In that case, the loss would be carried forward by being added to the cost of the property.

[29] Why is it a 61-day period? That is a decision of Parliament, which fixed that period in order to allow the transferor to claim a loss immediately or claim it later, according to the provisions of the legislation. It is not for the courts to pass judgment on the legitimacy of the rule.

[30] As stated by the Supreme Court of Canada in passages quoted above, the provisions in the ITA must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe. Certainly, changing the wording of an Act, as the respondent wishes to do in this

case, involves some risk. For example, one could find oneself in the opposite situation, where a taxpayer might want to deliberately suspend recognition of a capital loss by taking advantage of subsection 40(3.4) to maximize its capital dividend account (subsection 89(1) ITA) and thus distribute tax-free capital dividends (subsection 83(2) ITA).[2] In a case where a merger occurred within the 61-day period, the taxpayer in that example could make the same argument as the respondent has made here. The respondent could then in turn argue as the appellant has argued in the instant case, namely, that paragraphs 40(3.5)(*c*) or (*d*) would not apply for the purposes of verifying whether the conditions of subsection 40(3.3) have been met; the respondent could thus possibly contend that the loss should be recognized immediately instead of being deferred. This would reduce the capital dividend account by that amount and eliminate the tax-free capital dividends by the same amount.

[31] In my opinion, this example is sufficient to show the importance to be given to legislation and the words chosen by Parliament in order to avoid any uncertainty. As McLachlin J. stated in *Shell Canada*, *supra*, "[f]inding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act" (paragraph 43).

[32] The respondent put forward the argument that the provisions in subsections 40(3.3), (3.4) and (3.5) were adopted in the context of a stop-loss rule, and that it would be too easy for the appellant to get around the rule by proceeding as it did, merging the corporations involved within the 61-day period specified in paragraph 40(3.3)(*b*) of the ITA. According to the respondent, such cannot be Parliament's intent. And if it is, then Parliament must be more explicit, in my opinion.

[33] There are authors who have written about stop-loss rules. Starr Carson and Kelly Watson[3] stated in particular the following:

> The Department of Finance has had a long standing history of enacting legislation in the Income Tax Act[1] to deny, restrict or suspend losses in numerous types of

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[2] See in this regard an example of tax planning found in the article by Vincent De ANGELIS, CA, "The Stop-Loss Rules: Pitfalls and Opportunities", *2003 Conference Report, Report of Proceedings of the Fifty-Fifth Tax Conference* (Toronto: Canadian Tax Foundation, 2004), 50:1-16, at page 50:10.

[3] Starr CARSON and Kelly WATSON, "Affiliated Person Rules: A Review of Recent Technical Amendments and Practical Issues Relating to Stop-Loss Rules", *2004 British Columbia Tax Conference* (Vancouver: Canadian Tax Foundation, 2004), 13:1-41.

transactions involving taxpayers. The historical policy has been to identify persons who have "common economic interests" and restrict their ability to realize or transfer losses if they transact amongst themselves to prematurely realize a loss, or alternatively, to prevent them from transferring the tax benefit of losses to other taxpayers outside the economic unit. The recognition of the loss has often been deferred until a transaction has occurred with someone outside the group of persons having economic interests in common.

In the authors' view, the loss restriction rules may be categorized into the following groups:

1. provisions which deny losses without relief[2];
2. provisions which deny losses and suspend the loss with eventual relief to the taxpayer disposing of the property[3];
3. provisions which deny a loss to the transferor of property and effectively transfer the loss with eventual relief to the taxpayer acquiring the property[4]; and
4. provisions which prevent the utilization of losses between taxpayers who are not part of the same economic family.[5]

[Emphasis added.]

. . .

ENDNOTES

1 Income Tax Act, R.SC 1985, c.1, (5th Supp.), as amended (herein referred to as the "Act"). Unless otherwise stated, statutory references in this paper and the endnotes are to the Act.
2 See for example the provisions of subparagraph 40(2)(g)(ii).
3 See for example the provisions of subsections 13(21.2), 14(12) and 40(3.3), (3.4) where a denied loss is suspended with the transferor in an affiliated person transaction until such time as a "triggering event" occurs.
4 See for example the provisions of paragraph 40(2)(g)(i) and paragraph 53(1)(f) where the denied superficial loss is added to the cost of property acquired by an affiliated person.
5 See for example the provisions of subsection 69(11) (which technically allows a loss but deems vendor of property to have received proceeds equal to fair market value) and the loss restrictions on an acquisition of control contained in subsection 111(5).

[34] In the case at bar, the merger occurred within the context of a financial restructuring project by Groupe Cascades; the aim of this project was to improve Groupe Cascades's worth on the financial markets and to support its future growth. Through this restructuring, all common shares held by the public in three companies controlled by the appellant (including PII) were to be exchanged for common shares in the appellant, to be issued for this purpose. This was done because they realized that [TRANSLATION] "the relatively small size of the available share capital of the appellant's listed subsidiaries and their low volumes of transactions made it difficult to turn to share capital funding to finance their respective growth." This is why there was a proposal to [TRANSLATION] "bring these three subsidiaries under a single public entity that would finance the growth

of Cascades in its three main areas of activity" (see the appellant's communiqué dated July 10, 2000, at Schedule B to the Agreed Statement of Facts).

[35] Camil Vachon,[4] addressing the matter of the particular aim of the provisions of subsections 40(3.3), (3.4) and (3.5), stated:

> [TRANSLATION]
> 4. **Stop-loss rules: application of subsection 40(3.4) ITA.**
>
> In general, subsection 40(3.4) of the ITA is a specific anti-avoidance measure aimed at preventing a taxpayer (company, trust or partnership) from recognizing a latent capital loss on non-depreciable capital property as long as the property is held by that taxpayer or a person affiliated with the taxpayer.

[36] In my opinion, the stop-loss rule in subsection 40(3.4) does not necessarily apply to the present case. That rule is a specific anti-avoidance measure to prevent taxpayers from immediately recognizing a latent capital loss on non-depreciable capital property. As seen above, the restructuring proposed by Cascades was not done for this purpose. It was not done with the intent to prematurely realize a loss.

[37] Moreover, on reading the technical notes referred to above, I agree with counsel for the appellant that they do not indicate that Parliament intended that the presumption in paragraph 40(3.5)(*c*) should apply to all cases involving a disposition of shares, as the respondent is claiming. The technical notes state: " . . . paragraph 40(3.5)(*c*) clarifies the result <u>where the property that gives rise to a deferred loss under new subsection 40(3.4)</u> is a share of a corporation that is subsequently merged with one or more other corporations . . . . In such a case . . . the corporation formed on the merger . . . is treated as continuing to own the share as long as that . . . corporation is affiliated with the transferor."

[38] There is nothing to indicate that paragraph 40(3.5)(*c*) must be used to determine whether the loss is deemed to be nil under subsection 40(3.4). On the contrary, the notes seem to be saying that subsection 40(3.4) must first give rise to the deferred loss and then paragraph 40(3.5)(*c*) would apply to determine what becomes of the deferred loss in the case of a merger.

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4 Camil VACHON, CA, "Pot-pourri fiscal en matière de réorganisations d'entreprise – Pièges à éviter et nouveautés", in *Congrès 2003*, *Association de planification fiscale et financière* (2004: Montreal, APFF), p. 30:1, at p. 30:14.

[39] At the very least, it cannot be said on a reading of these technical notes that Parliament's intent was that suggested by the respondent. In this context, it is preferable to stick to the terms used in the legislation, to the extent that it is possible to do so.

[40] In view of my conclusion, I find the appellant is not subject to the terms of subsection 40(3.4) because, in my opinion, the conditions set out in subsection 40(3.3) were not all met so as to prevent the appellant from claiming its loss during the 2000 taxation year.

Decision

[41] The appeal is allowed, with costs, on the basis that that the appellant was entitled to claim a capital loss of $15,941,608 during its 2000 taxation year.

Signed at Ottawa, Canada, this 6th day of December 2007.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 22nd day of January 2008.

Erich Klein, Revisor

CITATION:	2007TCC730
COURT FILE No.:	2005-1424(IT)G
STYLE OF CAUSE:	CASCADES INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	December 11, 2006
REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	December 6, 2007

APPEARANCES:

Counsel for the Appellant:	Wilfrid Lefebvre
Counsel for the Respondent:	Marie Bélanger Natalie Goulard

COUNSEL OF RECORD:

For the Appellant:

Name:	Wilfrid Lefebvre
Firm:	Ogilvy Renault Montreal, Quebec
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada